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L. R. A. AS AUTHORITIES

INCLUDING THE CITATIONS OF EACH CASE AS A PRECEDENT: (1)
BY ANY COURT OF LAST RESORT IN ANY JURISDICTION OF
THIS COUNTRY; (2) BY THE EXTENSIVE AND THOROUGH
ANNOTATIONS OF THE LAWYERS REPORTS ANNO-
TATED, THE AMERICAN STATE REPORTS, THE
ENGLISH RULING CASES, THE BRITISH
RULING CASES, AND THE UNITED
STATES SUPREME COURT
REPORTS [LAW. ED.].

1-70 L. R. A.

IN SIX VOLUMES.

VOLUME II.

ROCHESTER, N. Y.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.

1913

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E. R. ANDREWS PRINTING COMPANY, Rochester, N. Y.

L. R. A. CASES AS AUTHORITIES.

CASES IN 8 L. R. A.

8 L. R. A. 33, ASZMAN v. STATE, 123 Ind. 347, 24 N. E. 123.

Intent as element of crime.

Cited in *Perugi v. State*, 104 Wis. 243, 76 Am. St. Rep. 865, 80 N. W. 593, holding homicide perpetrated after deliberation, however short, constitutes murder in first degree.

Cited in notes (11 L.R.A. 810) on ignorance of fact as excuse for crime; (8 Eng. Rul. Cas. 56) on criminal intent as essential to commission of crime.

— Effect of intoxication.

Cited in *Booher v. State*, 156 Ind. 440, 54 L. R. A. 393, 60 N. E. 156, holding evidence of intoxication admissible in prosecution for assault on question of intent; *Northwestern Benev. Soc. v. Dudley*, 27 Ind. App. 329, 61 N. E. 207, recognizing that intoxication may prevent formation of intent; *State v. Williams*, 122 Iowa, 123, 97 N. W. 992, holding failure to instruct that drunkenness should be considered as bearing on degree of murder, error; *Gustavenson v. State*, 10 Wyo. 323, 68 Pac. 1006, holding that intoxication may be considered in determining whether defendant is guilty of murder in first degree; *Brennan v. People*, 37 Colo. 262, 86 Pac. 79, holding evidence of intoxication admissible as affecting intent where the latter is an essential element; *State v. Trapp*, 56 Or. 592, 109 Pac. 1094, holding that under statute, drunkenness to be available as defense to crime must result in diseased condition of mind, such as delirium tremens or other form of insanity.

Cited in footnote to *State v. O'Neil*, 24 L. R. A. 555, which holds voluntary intoxication no excuse for crime.

Cited in note (36 L. R. A. 465) on what intoxication will excuse.

Improper instructions by court.

Cited in *Davidson v. State*, 135 Ind. 266, 34 N. E. 972, holding no instruction should be given attempting to discredit evidence; *McIntosh v. State*, 151 Ind. 259, 51 N. E. 354, holding improper instruction on "reasonable doubt" not error, other instructions stating law clearly; *State v. Shuff*, 9 Idaho, 132, 72 Pac. 664, 13 Am. Crim. Rep. 443; *State v. Crowe*, 39 Mont. 182, 102 Pac. 579; *State v. Barry*, 11 N. D. 453, 92 N. W. 809,—holding it error for court in its charge to jury to use disparaging language concerning insanity as a defense.

Instruction as to innocence or reasonable doubt.

Cited in *Farley v. State*, 127 Ind. 421, 26 N. E. 898, holding it error to refuse to charge that presumption of innocence prevails throughout trial; *Parker v. State*, 136 Ind. 293, 35 N. E. 1105, holding it error to refuse to instruct jury that accused is entitled to benefit of reasonable doubt.

Special instructions.

Cited in *Barker v. State*, 40 Fla. 183, 24 So. 69, holding refusal to make special charge on question of reasonable doubt not error when point fully charged before.

8 L. R. A. 39, *VROMAN v. POWERS*, 47 Ohio St. 191, 24 N. E. 267.

Competency of witnesses.

Approved in *Fisher v. Spence*, 150 Ill. 258, 41 Am. St. Rep. 360, 37 N. E. 314, holding that attesting witnesses to will must be competent at time of execution.

Cited in notes (67 Am. St. Rep. 576) on witnesses to nuncupative wills; (77 Am. St. Rep. 464, 465, 468) on competency of subscribing witnesses to wills and effect of their evidence in support of or opposition to will.

Construction of wills.

Cited in footnotes to *Ferris v. Neville*, 54 L.R.A. 464, which holds sufficient, paper executed as will, stating that it is good to specified person for specified amount from writer's estate; *Baird v. Baird*, 68 L.R.A. 627, which holds verbal will made when testator is likely to die at any time and in view of death not invalid because of prior preparation to make it nor because sufficient time to make written one thereafter occurs.

Cited in note (10 L. R. A. 93) as to wills.

Removal of disqualification of witnesses to will.

Followed in *Wass v. Guardian Trust Co.* 15 Ohio S. & C. P. Dec. 680, holding that where two witnesses to a noncupative will are incompetent because of interest under the will they do not become competent by renouncing their rights under the will after the testator's death.

8 L. R. A. 42, *FREEMAN'S NAT. BANK v. NATIONAL TUBE WORKS CO.* 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779.

Bank collections.

Approved in *Haskell v. Avery*, 181 Mass. 108, 92 Am. St. Rep. 401, 63 N. E. 15, holding that bank receiving note bearing indorsement disclosing trust may pass legal title, subject thereto, to one making collection; *Citizens' Nat. Bank v. City Nat. Bank*, 111 Iowa, 215, 82 N. W. 464, holding bank paying forged check which it indorses for collection to drawee bank liable to latter; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 534, 54 Am. St. Rep. 59, 17 So. 728, holding collecting bank receiving draft from correspondent receiving it for collection cannot apply proceeds to indebtedness from forwarding bank; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 57, 37 L. ed. 367, 13 Sup. Ct. Rep. 533, holding collections in correspondent bank's subagent's hands at time of insolvency not relieved from trust obligation; *National Exch. Bank v. Beal*, 50 Fed. 359, refusing to adjudicate right to set off collection where collecting bank not a party; *National Bank of Commerce v. Johnson*, 6 N. D. 185, 69 N. W. 49, holding indorsement for collection and for credit creates relation of creditor and debtor after collection.

Cited in *Murchison Nat. Bank v. Dunn Oil Mills Co.* 150 N. C. 722, 64 S. E. 885, holding drawer of draft transferred by restrictive endorsement entitled to stop payment thereon as against any holder with notice of the restriction.

Cited in footnotes to *Armstrong v. Boyertown Nat. Bank*, 9 L. R. A. 553, which denies right of receiver or creditors of bank crediting owner with draft received for collection to demand proceeds from collecting bank; *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment; *Tyson v. Western Nat. Bank*, 23 L. R. A. 161, which

holds that title does not pass by "indorsing for collection;" *Beal v. Somerville*, 17 L. R. A. 291, which holds that no title to check passes by depositing for collection; *St. Nicholas Bank v. State Nat. Bank*, 13 L. R. A. 241, which holds collecting bank's duty not fulfilled by delivering correspondent's draft on third person to itself; *Northwestern Nat. Bank v. Bank of Commerce*, 15 L. R. A. 102, which holds signature of drawer not guaranteed by indorsing draft "for collection."

Cited in notes (15 L. R. A. 498; 7 L. R. A. 853) as to bank collections; (32 L. R. A. 721) as to trust in proceeds of collection made by bank when insolvent; (86 Am. St. Rep. 785) on title of bank to money deposited with or collected by it; (37 L. ed. U. S. 364) on liability of bank for collections; (3 Eng. *Rul. Cas.* 779) on liability of bank for money received by correspondent bank.

— Collections for account.

Approved in *Branch v. United States Nat. Bank*, 50 Neb. 474, 70 N. W. 34, holding mere credits to remitting bank by correspondent making collection for remitter's account, no defense to action by owner of paper for proceeds; *United States Nat. Bank v. Geer*, 55 Neb. 465, 41 L. R. A. 444, 70 Am. St. Rep. 390, 75 N. W. 1088, holding indorsement "for account" vests no general property to paper in indorsee.

Distinguished in *Landa v. Traders' Bank*, 118 Mo. App. 367, 94 S. W. 770, holding customer of bank not bound by its custom as to collections, where he has a contract with the bank conflicting with such custom.

Restrictive indorsement of commercial paper.

Cited in note (4 Eng. *Rul. Cas.* 363) on restrictive indorsement of commercial paper.

8 L. R. A. 47, *COOPER v. ARMOUR*, 42 Fed. 215.

Action for malicious prosecution.

Cited in *Wade v. National Bank of Commerce*, 114 Fed. 379, holding action maintainable for injuries to reputation and business by malicious prosecution of civil action in which complaint containing false and defamatory matter filed; *Wilkinson v. Goodfellow-Brooks Shoe Co.* 141 Fed. 219, holding that action will lie for the institution of bankruptcy proceedings without probable cause though the alleged bankrupt's property was not seized; *Halberstadt v. New York L. Ins. Co.* 194 N. Y. 6, 21 L.R.A.(N.S.) 295, 86 N. E. 801, 16 A. & E. Ann. Cas. 1102, holding that action may lie where warrant was issued though it was not executed; *Mitchell v. Donanski*, 28 R. I. 96, 9 L.R.A.(N.S.) 173, 125 Am. St. Rep. 717, 65 Atl. 611, holding action not maintainable for procuring the issuance of a warrant upon a charge not actionable per se where the warrant was not served.

Cited in note (26 Am. St. Rep. 130) on malicious prosecution for criminal charge.

8 L. R. A. 48, *CASE v. SUN INS. CO.* 83 Cal. 473, 23 Pac. 534.

Limitation of action for insurance.

Approved in *Sample v. London & L. F. Ins. Co.* 46 S. C. 498, 47 L. R. A. 707, 57 Am. St. Rep. 701, 24 S. E. 334, and *German Ins. Co. v. Davis*, 40 Neb. 707, 59 N. W. 698, holding that limitation on action for fire insurance runs from accrual of action, not from fire.

Cited in *Tebbetts v. Fidelity & C. Co.* 155 Cal. 139, 99 Pac. 501, holding valid a condition in policy requiring action to be brought within certain time after loss if such time be reasonable; *Steel v. Phenix Ins. Co.* 2 C. C. A. 463, 7 U. S.

App. 325, 51 Fed. 721; *German Ins. Co. v. Davis*, 40 Neb. 707, 59 N. W. 698,—holding that limitation runs from time of proof of loss, under policy providing that action must be brought within specified time after fire, and also provides certain time to make proof of loss; *Hon Sling v. Royal Ins. Co.* 8 Utah, 141, 30 Pac. 307, holding that limitation runs from time award is made, under policy providing that action must be brought within one year after the fire, but must not be brought before award is made; *State Ins. Co. v. Meesman*, 2 Wash. 468, 26 Am. St. Rep. 870, 27 Pac. 77 (dissenting opinion), on limitation as running from the time the right of action accrued, though policy provides that it shall run from date of the fire.

Cited in footnote to *Union Central L. Ins. Co. v. Spinks*, 69 L.R.A. 264, which holds void provision that suit shall be brought on life policy within period less than that fixed by statute of limitations.

Cited in notes (8 L. R. A. 769) on limitation of action on fire policy; (47 L. R. A. 703) as to whom stipulation limiting time for suit on insurance policy begins to run; (25 Am. St. Rep. 485; 14 Eng. Rul. Cas. 21) on time within which action may be brought on insurance policy.

Distinguished in *Harrigan v. Home L. Ins. Co.* 128 Cal. 548, 58 Pac. 180, holding, under covenant to pay within sixty days after notice and proof of death, demand must be made within period of limitation; *Hart v. Citizens' Ins. Co.* 86 Wis. 80, 21 L.R.A. 745, 39 Am. St. Rep. 877, 56 N. W. 332, holding that where fire insurance policy provides that action must be brought within a certain time after the fire, the limitation runs from the date of the fire; *McFarland v. Railway Officials & E. Acci. Asso.* 5 Wyo. 142, 27 L.R.A. 54, 63 Am. St. Rep. 29, 38 Pac. 347, holding that where policy provided a time within which action thereon for injury or death should be begun, the limitation began to run thereon at the time of the death of insured; *Harrigan v. Home L. Ins. Co.* 128 Cal. 548, 58 Pac. 180, on limitation as running from accrual of right of action regardless of demand.

Disapproved in *Egan v. Oakland Ins. Co.* 29 Or. 407, 54 Am. St. Rep. 798, 42 Pac. 990, holding that limitation runs from time of loss.

8 L. R. A. 50, *WILLARD v. FINNEGAN*, 42 Minn. 476, 44 N. W. 985.

When mortgage foreclosure sale voidable.

Cited in *Clark v. Kraker*, 51 Minn. 448, 53 N. W. 706, and *Ryder v. Hulett*, 44 Minn. 354, 46 N. W. 559, holding foreclosure sale of separate parcels as one tract not void, but voidable only; *Middlesex Bkg. Co. v. Lester*, 7 S. D. 336, 64 N. W. 168, holding foreclosure sale in parcels, instead of in block, will not be set aside on motion of mortgagee bidding at sale and not shown to be injured; *Northwestern Mortg. Trust Co. v. Bradley*, 9 S. D. 496, 70 N. W. 648, holding foreclosure sale by advertisement *en masse*, instead of in parcels, voidable only, not void; *Phelps v. Western Realty Co.* 89 Minn. 324, 94 N. W. 1085, holding mortgage sale as one parcel, of separate tracts, including homestead, voidable only for good cause; *Chase v. Norse*, 189 Mass. 562, 76 N. E. 142, holding that where the notice of sale and the land sold was greater than that covered by the mortgage, the sale was merely voidable in case it prejudiced the mortgagor; *Webb v. Downes*, 93 Minn. 461, 101 N. W. 966, on the right to sell as one parcel several distinct tracts; *Thomas v. Thomas*, 44 Mont. 114, 119 Pac. 283, holding that provision in Revised Codes, section 6830, that when several lots are sold under execution, they must be sold separately is directory only, and sale in gross cannot be attacked collaterally.

Cited in note (92 Am. St. Rep. 588) on sales under powers in mortgages and trust deeds.

8 L. R. A. 52, WALLACE v. EVANS, 43 Kan. 509, 23 Pac. 596.

Liability to public for building dam.

Cited in note (59 L. R. A. 848) on liability for damming back water of stream.

8 L. R. A. 55, SKINNER v. HENDERSON, 26 Fla. 121, 7 So. 464.

Taxation for county purposes.

Approved in Duval County v. Jacksonville, 36 Fla. 217, 29 L. R. A. 419, 18 So. 339, holding appropriation of special road tax to municipal roads, not use for other than county purposes.

Cited in State *ex rel.* Milton v. Dickenson, 44 Fla. 638, 60 L. R. A. 545, 33 So. 514 (dissenting opinion), majority holding act requiring each county having state militia company to provide armory, unconstitutional; Escambia County v. Pilot, 52 Fla. 212, 42 So. 697, holding river and harbor to be public highway upon which county may expend taxes; State *ex rel.* Milton v. Dickinson, 44 Fla. 638, 60 L.R.A. 539, 33 So. 514, 1 A. & E. Ann. Cas. 122 (dissenting opinion), on same point.

8 L. R. A. 58, LOGAN v. STOGDALE, 123 Ind. 372, 24 N. E. 135.

Way of necessity; private roads.

Cited in Ritchey v. Welsh, 149 Ind. 217, 40 L. R. A. 107, 48 N. E. 1031, holding right of way of necessity does not exist over land of another when the lands have not been inherited from common ancestor; Ellis v. Bassett, 128 Ind. 120, 25 Am. St. Rep. 421, 27 N. E. 344, holding way of necessity exists in partition, where it is necessary to reach highway, is open and visible, and has been used continuously for many years; Graham v. Olson, 116 Mo. App. 277, 92 S. W. 728, holding that where upon partition some of the parcels are without access to a highway, a way of necessity is established as a matter of law; McBurney v. Glenmary Coal & Coke Co. 121 Tenn. 299, 118 S. W. 694, holding that where land is granted vendee cannot assert a way of necessity over the lands of a stranger.

Cited in footnotes to Lebus v. Boston, 47 L. R. A. 79, which holds parol evidence that grantor agreed he should have no passway over land conveyed admissible to rebut implied reservation of way of necessity; Ritchey v. Welsh, 40 L. R. A. 105, as to how way of necessity created, and who entitled to locate same; Kingsley v. Gouldsboro Land Improv. Co. 25 L. R. A. 502, which holds access by water sufficient to prevent right of way of necessity by land; Anna Arbor Fruit & V. Co. v. Ann Arbor R. Co. 66 L.R.A. 431, which holds that continued use of right of way originating in necessity, after necessity has ceased, does not become adverse until notice of adverse claim is brought home to owner of servient estate.

Cited in notes (16 L. R. A. 81, 82) on constitutionality of condemnation proceedings to establish private road; (8 L.R.A. 618) on how easement created; (122 Am. St. Rep. 215) on grant of easements by implication; (136 Am. St. Rep. 699) on rule of what is "necessity."

Right of eminent domain.

Cited in Gifford Drainage Dist. v. Shroer, 145 Ind. 574, 44 N. E. 636, holding that owner cannot compel others to pay for draining lands unless public benefited; Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 566, 66 N. E. 765, holding legislative declaration that use is public not conclusive; Billings Sugar Co. v. Fish, 40 Mont. 266, 26 L.R.A.(N.S.) 980, 106 Pac. 565; State *ex rel.* Manhattan Constr. Co. v. Barnes, 22 Okla. 198, 97 Pac. 997,—holding that legislative declaration of public use is not conclusive but will not be overturned by the court unless clearly erroneous; Clark v. Mitchell County, 69 Kan. 548, 66 L.R.A. 967, 77 Pac. 284, holding act providing for the opening of private roads

or highways unconstitutional; *Westport Stone Co. v. Thomas*, 175 Ind. 327, 35 L.R.A.(N.S.) 652, 94 N. E. 406, to the point that statute authorizing taking of private property for private road is unconstitutional.

Cited in footnote to *Clark v. Mitchell County Comrs.* 66 L.R.A. 965, which upholds statute permitting condemnation of private property for establishing private road or highway.

Cited in notes (13 L.R.A. 431) on right of eminent domain; (88 Am. St. Rep. 929, 933, 934) on existence of public use as question for courts; (102 Am. St. Rep. 827) on uses for which power of eminent domain cannot be exercised.

8 L. R. A. 61, *MERRELL v. SPRINGER*, 123 Ind. 485, 24 N. E. 258.

Replevin for chattels wrongfully detained.

Cited in *Pritchard v. Norwood*, 155 Mass. 542, 30 N. E. 80, holding replevin will lie for promissory note.

Cited in footnote to *Sinnott v. Feiock*, 53 L. R. A. 565, which holds replevin not maintainable for goods obtained by fraud, of which defendant has lost possession.

Cited in notes (46 L.R.A. 775) on rights of holder of negotiable paper transferred after maturity; (3 L.R.A.(N.S.) 139) on replevin or detinue for promissory note.

8 L. R. A. 62, *CATLIN v. WILCOX SILVER PLATE CO.* 123 Ind. 477, 18 Am. St. Rep. 338, 24 N. E. 250.

Extraterritorial power of receiver or assignee for creditors.

Cited in *Burr v. Smith*, 113 Fed. 863, upholding right of receiver to enforce in foreign jurisdiction liability of stockholders of insolvent corporation, when right of resident creditors not violated; *Rogers v. Haines*, 96 Ala. 590, 11 So. 651, and *Security Trust Co. v. Dodd*, 173 U. S. 629, 43 L. ed. 838, 19 Sup. Ct. Rep. 545, holding general rule that state insolvent laws operate upon property within jurisdiction and in foreign states, subject to rights of creditors; *Security Sav. & L. Asso. v. Moore*, 151 Ind. 177, 50 N. E. 869, holding authority of receiver coextensive with court appointing him.

Cited in note (71 Am. St. Rep. 354, 366) on extraterritorial power of receiver.

Priority of resident creditors as to funds of nonresident.

Cited in *Ward v. Connecticut Pipe Mfg. Co.* 71 Conn. 356, 42 L. R. A. 710, 71 Am. St. Rep. 207, 41 Atl. 1057, holding attachment, in foreign jurisdiction, of property of insolvent corporation ineffectual against receiver to whom it has voluntarily conveyed its property; *Schroder v. Tompkins*, 58 Fed. 675, holding voluntary assignment executed in Ohio conveys property of debtors in Indiana; *Lackmann v. Supreme Council*, O. C. F. 142 Cal. 26, 75 Pac. 583, and *Gray v. Covert*, 25 Ind. App. 564, 81 Am. St. Rep. 117, 58 N. E. 731, sustaining attachment of resident creditor against receiver of foreign insolvent corporation; *Frowert v. Blank*, 205 Pa. 302, 54 Atl. 1000, holding holders of matured certificates of foreign benefit association entitled to payment out of fund before transmission to foreign receiver; *Clark v. Chandler*, 13 C. C. A. 637, 29 U. S. App. 447, 66 Fed. 567, holding vessel sent by receiver out of jurisdiction subject to lien for supplies furnished; *Small v. Smith*, 14 S. D. 625, 86 Am. St. Rep. 807, 86 N. W. 649 (dissenting opinion), majority holding receiver appointed by foreign court may sue in South Dakota, rights of resident creditors not intervening; *Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co.* 75 Ark. 369, 87 S. W. 632, 5 A. & E. Ann. Cas. 569, holding that lien of creditors who have attached property of foreign corporation within the state has priority over rights of foreign receiver.

Cited in footnote to *Boulware v. Davis*, 9 L. R. A. 601, which holds that courts may recognize foreign receiver, if no injustice done to citizens.

Cited in notes (20 L. R. A. 392) on exclusiveness of jurisdiction by appointment of receiver; (23 L. R. A. 53) on rights of receivers beyond jurisdiction; (23 L. R. A. 37, 40) on assignment for benefit of creditors.

Distinguished in *Bloomington v. Weil*, 29 Wash. 625, 70 Pac. 94, holding foreign voluntary assignee of foreign debtor entitled to realty as against foreign attaching creditor.

Criticized in *Weil v. Bank of Burr Oak*, 76 Mo. App. 39, denying distinction between rights in foreign state of receiver of voluntary and involuntary assignor.

— Rights of foreign creditors.

Approved in *Pitman v. Marquardt & Sons*, 20 Ind. App. 444, 50 N. E. 894, holding that attaching creditor cannot question legality of assignment made in Kentucky of property in Indiana.

Cited in *Michigan Trust Co. v. Probasco*, 29 Ind. App. 114, 63 N. E. 255, holding action maintainable by nonresident to determine ownership of stock certificate and enjoin payment; *Corn Exch. Bank v. Rockwell*, 58 Ill. App. 515, holding foreign creditor obtaining judgment in Ohio afforded same remedies as resident creditor; *Nathan v. Lee*, 152 Ind. 243, 43 L. R. A. 826, 52 N. E. 987, sustaining right of foreign corporation to mortgage land in Indiana to secure preferred creditor, when not prohibited by foreign statute.

Voluntary assignment for creditors.

Cited in note (65 L.R.A. 354) on when assignment for creditors is voluntary as to property out of state.

8 L. R. A. 65, *BERKEY & G. FURNITURE CO. v. HASCALL*, 123 Ind. 502, 24 N. E. 336.

Damages for breach of contract.

Cited in *Sinker, D. & Co. v. Kidder*, 123 Ind. 531, 24 N. E. 341, holding rental value of mill while idle from explosion of steam boiler, proper element of damage for breach of warranty; *Aeme Cycle Co. v. Clarke*, 157 Ind. 277, 61 N. E. 561, holding estimated profits from sale of bicycles that could have been manufactured with aid of improved hub plant contracted for, not recoverable for failure to furnish plant at time agreed upon; *Elwood Planing Mills Co. v. Harting*, 21 Ind. App. 411, 52 N. E. 621, holding, when inferior quality of lumber furnished for house not known until after house completed, measure of damage is difference in value of house as it is and what it would have been with lumber contracted for; *Western U. Teleg. Co. v. Henley*, 23 Ind. App. 25, 54 N. E. 775, holding damages for mental distress and nervous prostration not recoverable for failure to deliver telegraph message; *Kagy v. Western U. Teleg. Co.* 37 Ind. App. 79, 117 Am. St. Rep. 278, 76 N. E. 792, holding cost of message only collectible as damages for failure to deliver telegram where telegraph company had no notice that such failure would cause damage; *American Bridge Co. v. Camden Interstate R. Co.* 68 C. C. A. 137, 135 Fed. 329, holding that damages recoverable for breach of contract to complete bridge at specified time was interest on capital invested which was kept idle until contract was fulfilled; *Kimball Bros. Co. v. Citizens' Gas & Electric Co.* 141 Iowa, 649, 118 N. W. 891, on general rule as to measure of damages for breach of contract.

Cited in notes (21 Am. St. Rep. 121; 6 Eng. Rul. Cas. 624) on damages recoverable for breach of contract.

Objections made first on appeal.

Cited in *Chicago & C. Terminal R. Co. v. Eggers*, 147 Ind. 303, 45 N. E. 786. *Hawks v. Mayor*, 144 Ind. 349, 43 N. E. 304; *Indiana Racing Asso. v. Allen*, 140

Ind. 438, 39 N. E. 669; *Allen v. Berndt*, 133 Ind. 357, 32 N. E. 1127,—holding only mode by which party can present on appeal question as to form of decree is by motion to modify; *Heal v. Niagara Oil Co.* 150 Ind. 483, 50 N. E. 482; *Midland R. Co. v. Dickason*, 130 Ind. 166, 29 N. E. 775, holding judgment cannot be assailed on appeal on account of objections not made in court below; *Cauthorn v. Bierhaus*, 44 Ind. App. 364, 88 N. E. 314, holding that objections to form of judgment should be made by motion in court below.

8 L. R. A. 68, *BANCROFT v. HOME BEN. ASSO.* 120 N. Y. 14, 23 N. E. 997.

Statements as to health of insured.

Cited in subsequent hearing in *Bancroft v. Home Benefit Asso.* 26 Jones & S. 494, 12 N. Y. Supp. 718, on validity of conditions in benefit certificate providing for forfeiture in case of misstatements or concealments in application, and making the latter a part of the contract.

Cited in *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 535, 25 S. W. 835, holding questions asked applicant for insurance refer only to illness or injuries affecting risk assumed; *Peterson v. Des Moines Life Asso.* 115 Iowa, 673, 87 N. W. 397, holding question as to spitting or coughing blood refers to such spitting or coughing as would indicate physical condition affecting the risk; *Black v. Travellers' Ins. Co.* 61 L. R. A. 501, footnote, p. 500, 58 C. C. A. 15, 121 Fed. 733, holding injury or infirmity, to constitute breach of warranty, must affect health or condition of insured.

8 L. R. A. 70, *GERMAN INS. CO. v. GRAY*, 43 Kan. 497, 19 Am. St. Rep. 150, 23 Pac. 637.

Imputation of agent's knowledge to company.

Approved in *Capitol Ins. Co. v. Bank of Pleasanton*, 50 Kan. 451, 31 Pac. 1069, holding knowledge of general agent concerning title to be knowledge of company; *Kahn v. Traders Ins. Co.* 4 Wyo. 455, 62 Am. St. Rep. 47, 34 Pac. 1059, holding company bound by knowledge of general agent as to additional insurance; *Rockford Ins. Co. v. Farmers' State Bank*, 50 Kan. 432, 31 Pac. 1063, holding defense that insured was not owner in fee not available when he made no representation, and agent had knowledge of the fact.

Cited in *McElroy v. British America Assur. Co.* 36 C. C. A. 622, 94 Fed. 998, holding parol testimony of agent's knowledge of encumbrance and additional insurance admissible; *Nichols & S. Co. v. Maxson*, 76 Kan. 610, 92 Pac. 545, holding knowledge of agent imputed to principal.

Cited in footnote to *Follett v. United States Mut. Acci. Asso.* 15 L. R. A. 668, which holds agent's knowledge of deafness of applicant for insurance imputable to company.

Distinguished in *Reed v. Equitable F. & M. Ins. Co.* 17 R. I. 788, 18 L. R. A. 497, 24 Atl. 833, holding knowledge of prior insurance by agent authorized only to receive applications not binding on company.

Estoppel by agent's knowledge or fraud.

Approved in *Phenix Ins. Co. v. Weeks*, 45 Kan. 758, 26 Pac. 410, holding inaccurate statements in application filled out by agent, who has knowledge of facts, do not render policy void; *Standard Life & Acci. Ins. Co. v. Davis*, 59 Kan. 527, 53 Pac. 856, holding policy not rendered void by fact known to agent, who failed to state it in application; *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kan. 493, 39 Am. St. Rep. 356, 35 Pac. 15, holding policy not rendered void by false answers filled in by agent without knowledge of insured.

Cited in *Hartford F. Ins. Co. v. McCarthy*, 69 Kan. 559, 77 Pac. 90, holding

condition as to title to insured property waived where general agent had knowledge at time policy was issued.

Agent's powers to waive provisions in policy or contract.

Approved in *Union Trust Co. v. Provident Washington Ins. Co.* 79 Mo. App. 365, holding general agent may waive forfeiture; *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 24, 45 Pac. 789, holding general agent may waive condition prohibiting additional insurance; *Manufacturers & M. Ins. Co. v. Armstrong*, 145 Ill. 476, 34 N. E. 553, holding agent may waive condition in policy that fire extinguishing appliances be provided within sixty days; *Burdick v. Security Life Assn.* 77 Mo. App. 635; *Burnham v. Greenwich Ins. Co.* 63 Mo. App. 88, holding stipulation for bidding agent to waive conditions of policy ineffectual; *Kahn v. Traders Ins. Co.* 4 Wyo. 464, 62 Am. St. Rep. 47, 34 Pac. 1059, holding provision prohibiting agent to waive or alter conditions of policy ineffectual; *Concordia F. Ins. Co. v. Johnson*, 4 Kan. App. 10, 45 Pac. 722, holding agent may waive conditions although policy contains general limitation upon authority of agents; *Gwaltney v. Provident Sav. Life Assur. Soc.* 132 N. C. 929, 44 S. E. 659, holding general agent may waive provision for increase of rate in insurance policy containing clause forbidding such waiver; *German Ins. Co. v. Shader*, 68 Neb. 5, 60 L.R.A. 920, 93 N. W. 972, holding agent may orally waive provision for prepayment of premium, though policy provides for waiver only by written indorsement; *Bingler v. Mutual Ben. L. Ins. Co.* 10 Kan. App. 9, 61 Pac. 673, holding general agent may waive forfeiture of policy by nonpayment of premium, although policy limits agent's power.

Cited in *Long Island Ins. Co. v. Great Western Mfg. Co.* 2 Kan. App. 382, 42 Pac. 738, as questioning rule that company is not bound by waiver of agent having limited powers, where policy states waiver cannot be made by him; *Security Mut. L. Ins. Co. v. Riley*, 157 Ala. 564, 47 So. 735, holding that general agent may waive conditions in policy by parol though policy provide otherwise; *Queen Ins. Co. v. Straughan*, 70 Kan. 188, 109 Am. St. Rep. 421, 78 Pac. 447, holding that general agent may waive by parol condition against building being left unoccupied; *Hulen v. National F. Ins. Co.* 80 Kan. 132, 102 Pac. 52, holding that general agent may waive, by parol, condition against concurrent insurance and also provision as to location of goods insured; *Richard v. Springfield F. & M. Ins. Co.* 114 La. 801, 69 L.R.A. 278, 108 Am. St. Rep. 359, 38 So. 563, holding that general agent may waive provision requiring an inventory within 30 days after policy is issued; *Aetna L. Ins. Co. v. Fallon*, 110 Tenn. 736, 77 S. W. 937, holding that general agent may waive condition requiring prepayment of premium before policy shall be in force; *German Ins. Co. v. Shader*, 68 Neb. 5, 60 L.R.A. 918, 93 N. W. 972, holding same and that such waiver may be by parol, though policy contains provision that waivers must be in writing; *Nichols & S. Co. v. Maxson*, 76 Kan. 611, 92 Pac. 545, holding that general agent of machine company has power to waive conditions in contract of sale; *Eagle Fire Co. v. Lewallen*, 56 Fla. 255, 47 So. 947, holding invalid clause in policy against waiver of conditions by general agent.

Cited in footnotes to *Hall v. Union Cent. L. Ins. Co.* 51 L. R. A. 288, which holds admissions by insurance agent after death of insured that all premiums paid, binding on company; *Cole v. Union Cent. L. Ins. Co.* 47 L. R. A. 201, which holds credit for part of first premium, extended by general agent, binding on company; *Richard v. Springfield F. & M. Ins. Co.* 69 L.R.A. 278, which holds that insurance agent having power to issue and renew policies and grant permits or privileges has apparent power to waive prior to loss breach of iron safe clause.

Cited in notes (9 L. R. A. 318) on waiver of conditions in fire insurance policy; (11 L. R. A. 599) on waiver of conditions by refusal to pay loss; (10 L. R.

A. 610) on responsibility of insurance company for acts of agent's clerk; (11 L. R.A. 344) on acts and agreements of agent binding on company; (13 L.R.A.(N.S.) 834) on effect of nonwaiver agreement on agent's power to waive provisions of policy; (107 Am. St. Rep. 117) on what general agents may waive.

Proofs of loss.

Cited in *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 208, 40 Pac. 1099, holding denial of liability by adjuster waives proof of loss; *Phenix Ins. Co. v. Munger*, 49 Kan. 194, 33 Am. St. Rep. 360, 30 Pac. 120, holding insurance contract cannot be modified by custom of other companies or their agents in dispensing with proofs of loss.

Cited in footnote to *Paltrovitch v. Phoenix Ins. Co.* 25 L. R. A. 198, which holds further certificate of notary as to loss waived by rejecting that given without giving name or address of nearer notary.

Cited in note (18 L. R. A. 85) on forfeiture of insurance by failure to furnish proofs of loss.

Authority of manager.

Cited in *Kansas City v. Cullinan*, 65 Kan. 78, 68 Pac. 1099, holding general manager of town site company authorized to sign paving petition.

Estoppel.

Cited in *Farmers' & M. Life Asso. v. Caine*, 123 Ill. App. 422, holding insurance company estopped to deny validity of verbal extension of time to pay premiums, though policy required extension to be in writing.

Cited in notes (10 L.R.A.(N.S.) 1084) on oral waiver or estoppel as to forfeitures after issuance of policy and before loss, under policies requiring written consent or waiver; (16 L.R.A.(N.S.) 1237) on parol evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies; (107 Am. St. Rep. 105, 140) on waiver of provisions of non-waiver or written waiver of conditions and forfeitures in policies.

8 L. R. A. 79, *HALPIN v. INSURANCE CO. OF N. A.* 120 N. Y. 73, 23 N. E. 989.

Construction of forfeiture clause.

Approved in *McFadden v. Bloch*, 50 App. Div. 421, 64 N. Y. Supp. 101, construing limitation of term so as not to defeat rights reserved to vendor; *Robertson v. Ongley Electric Co.* 146 N. Y. 24, 40 N. E. 390, holding provision of chattel mortgage not to permit attachment "against property," not applicable to property unmortgaged; *Gillet v. Bank of America*, 160 N. Y. 556, 55 N. E. 292, holding pledge of collateral for payment of note or any other liability contracted or existing, not inclusive of note to third party not paid by payee or charged by it to customer's account; *Wright v. Reusens*, 133 N. Y. 305, 31 N. E. 215, holding instalments on building contract, each of specified amount, and to be paid upon performance of work, due when such proportion performed as particular instalment bears to whole contract.

— In insurance policy.

Approved in *Phenix Ins. Co. v. Holcombe*, 57 Neb. 630, 73 Am. St. Rep. 532, 78 N. W. 300, holding merchandise and machinery used in manufacturing not manufacturing establishment within insurance forfeiture clause; *Caraher v. Royal Ins. Co.* 63 Hun, 93, 17 N. Y. Supp. 858, holding "occupancy" of church by purchaser, question of fact where services discontinued, but resumable; *Huber v. Manchester F. Assur. Co.* 92 Hun, 230, 36 N. Y. Supp. 873, holding, under policy covering house and contents, insurance on personalty lapsed when house unoccupied, thereby working forfeiture of "entire policy;" *Limburg v. German F. Ins. Co.* 90 Iowa, 712, 23 L. R. A. 100, footnote, p. 99, 48 Am. St. Rep. 468, 57 N. W. 626, holding

that storage use does not constitute occupancy within insurance policy on store and factory building; *St. Paul F. & M. Ins. Co. v. Kidd*, 5 C. C. A. 90, 14 U. S. App. 201, 55 Fed. 239, holding that where insurance is "as per form attached," which covers special risks to which many conditions in policy do not attach, inconsistent terms in body of policy are superseded.

Cited in *Home Ins. Co. v. North Little Rock Ice & Electric Co.* 86 Ark. 548, 23 L.R.A.(N.S.) 1205, 111 S. W. 994, holding that policy which refers to "machinery, engines and boilers, and all appurtenances thereto and used in their business" does not imply that the property insured is a manufacturing plant; *De Masson v. Liverpool & L. & G. Assur. Co.* Rap. Jud. Quebec, 35 S. C. 465, holding clause in insurance policy providing forfeiture in case factory unoccupied applies to insurance on machinery in factory.

Cited in footnotes to *Louck v. Orient Ins. Co.* 33 L. R. A. 712, which holds policy on idle distillery not void because not in operation; *Stone v. Howard Ins. Co.* 11 L. R. A. 771, which holds custom to cease operations in shoe factory in dull season does not render nugatory provision avoiding policy if operations cease; *Henderson Trust Co. v. Stuart*, 48 L. R. A. 49, which holds executor liable for loss of insurance from failure to apply for extension of vacancy permit; *Moody v. Amazon Ins. Co.* 26 L. R. A. 313, which holds nonoccupancy, without increase of risk or fraud, insufficient to avoid policy; *Hampton v. Hartford F. Ins. Co.* 52 L. R. A. 344, which holds church in which services held, and with windows boarded up, not unoccupied at matter of law; *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds house not vacant because custodian has access to only one room; *German Ins. Co. v. Russell*, 58 L. R. A. 234, which holds policy absolutely forfeited by premises allowed to remain vacant time specified in policy; *Brehm Lumber Co. v. Svea Ins. Co.* 68 L.R.A. 110, which holds policy on shingle mill and dry kiln in close proximity divisible as to amounts of indemnity and avoided in entirety by shutting down of mill without permission, though shingles are still transferred into and out of the kiln.

Cited in note (9 L. R. A. 82) as condition against vacancy and nonoccupancy in fire insurance.

Distinguished in *Couch v. Farmers' F. Ins. Co.* 64 App. Div. 370, 72 N. Y. Supp. 95, holding policy upon house and contents, void if vacant or unoccupied for ten days, void where house not entered for five months.

8 L. R. A. 82, *SMITH v. KANAWHA COUNTY CT.* 33 W. VA. 713, 11 S. E. 1.

Exclusion of evidence.

Approval in *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 394, 14 S. E. 12, holding evidence cannot be excluded as insufficient to sustain issue after movant's evidence introduced; *Ketterman v. Dry Fork R. Co.* 48 W. Va. 611, 37 S. E. 683, holding that case should not be withdrawn from jury on defendant's motion, where verdict for plaintiff would have to be set aside.

Proximate cause.

Approved in *Hungerman v. Wheeling*, 46 W. Va. 768, 34 S. E. 778, holding city not liable for absence of embankment rail, where prudent driver may make proper effort to regain control of frightened horse.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform heavy doors, blown on track by severe gale, not proximate cause of derailment of engine; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, which holds master's neglect

to furnish transportation proximate cause of injury in walking to find shelter; *McClain v. Garden Grove*, 12 L. R. A. 482, which holds narrowness of bridge and insufficiency of railings not proximate cause of injury from horse falling from disease or choking; *Gibney v. State*, 19 L. R. A. 365, which holds unsafe bridge cause of drowning father, trying to save child falling into water through defect; *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199, which holds failure to give warning approach of train not proximate cause of injury to one struck by body of other person hit by train; *Kieffer v. Hummelstown*, 17 L. R. A. 217, which holds borough not liable for injury to one thrown on stone pile on roadside by fall of horse, due to struggles of other horse frightened by shooting; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall while horse attempting to rise; *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Southwestern Teleg. & Teleph. Co. v. Robinson*, 16 L. R. A. 545, which holds telephone company liable for injury by electricity generated by thunder storm in low hanging telephone wire; *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds negligent jolting of train, hurling passenger through door on track, insensible, cause of death by train of other company; *McKenna v. Baessler*, 17 L. R. A. 310 which holds original fire cause of destruction of property by back fire; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 17 L. R. A. 38, which holds fire escaping from locomotive proximate cause of loss of buildings set on fire by other buildings first set on fire; *Mueller v. Milwaukee Street R. Co.* 21 L. R. A. 721, which holds sudden stopping of street car in front of funeral procession cause of injury to first carriage by pole of second; *Daniels v. New York, N. H. & H. R. Co.* 62 L. R. A. 751, holding person whose negligence caused injury not liable for suicide of person thereby rendered insane; *Cole v. German Sav. & Loan Soc.* 63 L.R.A. 416, which holds owner's permitting hall to be dark not proximate cause of injury due to fall in elevator well through door opened by strange boy while elevator was elsewhere; *Nelson v. Narragansett E. L. Co.* 67 L.R.A. 116, which holds placing of electric light close to trolley wire at a curve not proximate cause of injury to one struck by glass falling from globe when broken by trolley leaving wire; *Stephenson v. Corder*, 69 L.R.A. 246, which holds striking of one horse of heavily loaded team by boy in turning over hitching rail proximate cause of their breaking loose and running over person; *Cohn v. May*, 69 L.R.A. 800, which holds occupant of lower floors who block stairway liable for injury to tenant of upper floor who is thereby compelled to drop a considerable distance to escape a fire.

Cited in notes (7 L. R. A. 843) as to party placed in dilemma by another's fault; (12 L. R. A. 282) on concurrent or co-operating causes of injury; (12 L. R. A. 283) on causal connection broken by intervening agency; (13 L. R. A. 193) as to responsibility for proximate or direct consequences of negligence; (13 L. R. A. 733) as to proximate and remote cause of damage.

Distinguished in *Rohrbough v. County Court*, 39 W. Va. 473, 45 Am. St. Rep. 925, 20 S. E. 565, holding county liable for absence of guard rail from bridge approach, where horse was frightened and accident occurred simultaneously.

Action for death or injury.

Cited in *Edgar v. Rio Grande Western R. Co.* 32 Utah, 341, 11 L.R.A.(N.S.) 744, 125 Am. St. Rep. 867, 90 Pac. 745, holding that leaving switch unlocked was not the proximate cause of the death of a fireman caused by the engine running into the open switch where evidence failed to show how it came to be open; *Noe v. Rapid R. Co.* 133 Mich. 163, 94 N. W. 743 (dissenting opinion), on question of proximate cause.

Cited in notes (12 L.R.A. 339) on action for damages for personal injuries or death; (8 L.R.A.(N.S.) 81) on liability of municipality for injury to person or property of one whose horse is frightened without fault of either upon defective highway.

8 L. R. A. 89, MILLER v. MENDENHALL, 43 Minn. 95, 19 Am. St. Rep. 219, 44 N. W. 1141.

State ownership of waters and land under same.

Approved in Farm Invest. Co. v. Carpenter, 9 Wyo. 139, 50 L.R.A. 757, 87 Am. St. Rep. 918, 61 Pac. 258, holding that state ownership of navigable waters is for benefit of public.

Cited in Willow River Club v. Wade, 100 Wis. 115, 42 L.R.A. 329, 76 N. W. 273, to point that state may part with its title to bed of navigable waters so far as public interest is not interfered with; Mobile Transp. Co. v. Mobile, 153 Ala. 419, 13 L.R.A.(N.S.) 357, 127 Am. St. Rep. 34, 44 So. 976, holding state holds shores and beds of navigable streams in trust for public; Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 510, 6 L.R.A.(N.S.) 250, 54 S. E. 314, holding the navigable waters beyond low water mark and the soil beneath them within the territorial limits of a state are the property of the state and subject to its control.

Cited in footnotes to St. Louis, I. M. & S. R. Co. v. Ramsey, 8 L. R. A. 559, which holds title to land under navigable river in state; St. Paul v. Chicago, M. & St. P. R. Co. 34 L. R. A. 184, which denies power of legislature to give any part of levee as permanent site for freight warehouse.

Cited in notes (12 L.R.A. 677) on title to soil under navigable waters; (53 Am. St. Rep. 291, 294) on title to land under navigable water.

Riparian owner's right subordinate to interests of public.

Approved in Mills v. United States, 12 L. R. A. 679, 46 Fed. 743, holding right of riparian owner in tidal lands subordinate to interests of navigation; Sage v. New York, 154 N. Y. 78, 38 L.R.A. 613, 61 Am. St. Rep. 592, 47 N. E. 1096, holding city may improve tidal water front for benefit of navigation without interference from riparian owner.

Cited in San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co. 144 Cal. 137, 66 L.R.A. 245, 103 Am. St. Rep. 72, 77 Pac. 823, 1 A. & E. Ann. Cas. 182, holding littoral proprietor has right of access from his own land to the ocean as against a stranger; Grant v. Oregon R. & Nav. Co. 49 Or. 328, 90 Pac. 178, holding riparian owner had exclusive wharf rights to deep water; Jones v. Seaboard Air Line R. Co. 67 S. C. 194, 45 S. E. 188, holding owner of land on navigable stream has right to unmolested use of same to the bank; Morris v. Bean, 186 Fed. 431, holding that riparian owner on navigable river has right of possession and use of bed of stream between low water mark and navigable channel, subject only to use, control or regulations for protection of navigation.

Cited in footnotes to Allen v. Allen, 30 L. R. A. 497, which holds public right of fishery paramount to riparian right to cut grass or sedge; Slingerland v. International Contracting Co. 56 L. R. A. 494, which holds riparian owner has no right of action for interference by government, in improving navigation, with right to fish in and take ice from the water; Farist Steel Co. v. Bridgeport, 13 L. R. A. 590, which requires compensation to riparian owner on appropriation of land by city in establishing harbor lines.

Cited in notes (12 L.R.A. 636) on extent of right and title of littoral proprietors; (127 Am. St. Rep. 40, 41, 43, 52, 57) on relative rights of state and riparian owner in navigable waters.

Reclaiming submerged land.

Cited in *Gilbert v. Eldridge*, 47 Minn. 213, 13 L. R. A. 413, 49 N. W. 679, holding right to reclaim submerged land does not attach to land which becomes a shore line by encroachment of the water; *Hobart v. Hall*, 174 Fed. 449, holding that grantee from United States of land on Mississippi has right to possession of island arising from bed of river between shore line and main navigable channel.

Rights of riparian owners below high-water mark.

Cited in footnotes to *McBurney v. Young*, 29 L. R. A. 539, which defines low-water mark as ordinary low-water mark; *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river; *Carr v. Carpenter*, 53 L. R. A. 333, which sustains upland owner's right to take seaweed stranded on beach.

Cited in notes (16 L. R. A. 354) on ownership of land below high-water mark; (12 L. R. A. 617) on right of riparian owners to take below low-water mark; (45 L. R. A. 240) on title to land between high and low water mark.

Establishment of dock and harbor lines.

Cited in notes (12 L. R. A. 635) on establishment of dock and harbor lines; (14 L. R. A. 498) on effect of establishing dock line.

Right to build wharves.

Cited in footnotes to *Prior v. Swartz*, 18 L. R. A. 668, which holds riparian right to build wharves not destroyed by designating land for planting oysters; *Lewis v. Portland*, 22 L. R. A. 736, which upholds riparian owner's right to build wharves.

Cited in note (40 L. R. A. 647) on right to erect wharves.

Separation and transfer of riparian rights.

Approved in *Hanford v. St. Paul & D. R. Co.* 43 Minn. 120, 7 L. R. A. 728, 44 N. W. 1144; *Gilbert v. Eldridge*, 47 Minn. 214, 13 L. R. A. 413, 49 N. W. 679; *Bradshaw v. Duluth Imperial Mills Co.* 52 Minn. 63, 53 N. W. 1066,—holding riparian right to reclaim submerged land may be severed from shore line and transferred.

Cited in note (40 L. R. A. 394) on separation of riparian rights from upland.

Ejectment against occupant of wharf.

Cited in *Turner v. Mobile*, 135 Ala. 129, 33 So. 132, holding ejectment against occupant of wharf will not be enjoined where he has possessory right maintainable at law.

8 L. R. A. 95, *MURRAY v. MURRAY*, 90 Ky. 1, 13 S. W. 244, 11 Ky. L. Rep. 815.

Transfers in fraud of wife.

Cited in *Arnegard v. Arnegard*, 7 N. D. 493, 41 L. R. A. 265, 75 N. W. 797, holding secret transfer by father to child by former marriage, by which homestead cut off, fraudulent and void as to prospective bride; *Redmond v. Redmond*, 112 Ky. 766, 66 S. W. 745, holding widow entitled to dower in land conveyed by husband to son for purpose of defeating her right; *Smith v. Lamb*, 87 Ark. 347, 112 S. W. 884, holding conveyance of personal property by husband just before his death fraudulent as to surviving wife; *Collins v. Collins*, 98 Md. 482, 103 Am. St. Rep. 408, 57 Atl. 597, 1 A. & E. Ann. Cas. 856, holding voluntary conveyance by man on eve of his marriage of all his property without knowledge of intended wife, fraudulent as to her.

Cited in footnotes to *Walker v. Walker*, 27 L. R. A. 799, which holds fraudulent, transfer of corporate stock to defeat wife's distributive share; *Smith v. Smith*, 34 L. R. A. 49, which holds delivery by husband, just before death, of

deed of all realty, made years before, fraudulent as to wife; *Ward v. Ward*, 51 L. R. A. 858, which holds second wife's right to dower not defeated by fraudulent antenuptial conveyance to sons by former marriage.

Cited in notes (8 L.R.A. 814) on relief in equity from antenuptial fraud of husband or wife; (103 Am. St. Rep. 418, 420) on antenuptial conveyance in fraud of intended wife; (12 Eng. Rul. Cas. 765) on conveyance in fraud of intended husband or wife.

Disapproved in *Wright v. Holmes*, 100 Me. 514, 3 L.R.A.(N.S.) 773, 62 Atl. 507, 4 A. & E. Ann. Cas. 583, holding that married woman may dispose of her separate personal estate by gift or otherwise, though with intent to deprive husband of his distributive share upon her death; *Archibald v. Archibald*, 40 N. S. 411, holding valid conveyance by man of his property just prior to marriage though admittedly made for the purpose of depriving the intended wife of any right therein, and though husband retained possession until his death.

8 L. R. A. 97, *SHULTZ v. WALL*, 134 Pa. 262, 19 Am. St. Rep. 686, 19 Atl. 742.

Liability of innkeepers.

Cited in *Turner v. Stafford*, 9 Pa. Super. Ct. 88, 43 W. N. C. 376, holding innkeepers' common-law liability as insurer not changed by statute relating to safe keeping of valuable property by landlords.

Cited in footnotes to *Fay v. Pacific Improv. Co.* 16 L. R. A. 188, which holds it unnecessary to deposit with innkeeper jewelry worn daily by guest; *Rains v. Maxwell House Co.* 64 L. R. A. 471, which holds watch within statute relieving hotel keeper from liability for jewels not deposited in safe.

Cited in notes (12 L.R.A. 382) on responsibility of innkeeper as bailee: (22 L.R.A.(N.S.) 577, 580) on effect of statute limiting innkeeper's liability for goods not delivered into his custody; (99 Am. St. Rep. 579, 593) on liability of innkeepers for injury to, or loss of, guests' property.

8 L. R. A. 102, *GOSS v. FROMAN*, 89 Ky. 318, 12 S. W. 387.

Presumption of adulterous living.

Cited in footnote to *Cox v. State*, 41 L. R. A. 760, which holds bigamous cohabitation continues so long as parties live together ostensibly as husband and wife.

Cited in note (11 L. R. A. 791) as to abandonment of marriage obligations.

Presumption of legitimacy.

Cited in *Wallace v. Wallace*, 137 Iowa, 44, 14 L.R.A.(N.S.) 547, 126 Am. St. Rep. 253, 114 N. W. 527, 15 A. & E. Ann. Cas. 761, on evidence which will rebut presumption of legitimacy of child born during wedlock.

Cited in footnote to *Re Pickens*, 25 L. R. A. 477, which holds presumption of legitimacy very strong after lapse of ninety years from birth.

Cited in notes (10 L. R. A. 662) on the presumption of legitimacy of child born in wedlock; (18 L. R. A. 377) antenuptial pregnancy or in chastity as a ground of divorce or annulment of marriage; (36 L.R.A.(N.S.) 255, 260) on proof establishing bastardy of married woman's child; (126 Am. St. Rep. 269) on proof of illegitimacy of child born in wedlock; (11 Eng. Rul. Cas. 541) on admissibility of evidence tending to bastardize issue.

Limited in *Sergeant v. North Cumberland Mfg. Co.* 112 Ky. 892, 66 S. W. 1036, holding person asserting illegitimacy must show husband could not possibly have been father of child.

Right of dower.

Cited in footnotes to *Land v. Shipp*, 50 L. R. A. 560, which holds wife's right

of dower not affected by release made directly to husband in deed of separation; *Price v. Price*, 12 L. R. A. 359, which holds wife not entitled to dower on annulment of marriage because husband had former wife living.

8 L. R. A. 106, *TERRITORY ex rel. KELLY v. STEWART*, 1 Wash. 98, 23 Pac. 405.

Constitutionality of incorporation act.

Approved in *Pullman v. Hungate*, 8 Wash. 520, 36 Pac. 483; *State ex rel. Traders' Nat. Bank v. Winter*, 15 Wash. 408, 46 Pac. 644; *Ballard v. West Coast Improv. Co.* 15 Wash. 574, 46 Pac. 1055; *State ex rel. Hemen v. Ballard*, 16 Wash. 419, 47 Pac. 970; *Lewis County v. Gordon*, 20 Wash. 88, 54 Pac. 779,—holding incorporation act of 1888 unconstitutional; *State ex rel. Cole v. New Whatcom*, 3 Wash. 9, 27 Pac. 1021; *Denver v. Spokane Falls*, 7 Wash. 230, 34 Pac. 927; *Ferguson v. Snohomish*, 8 Wash. 669, 24 L. R. A. 797, 36 Pac. 970,—holding attempted incorporation under act of 1888 void; *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306, holding contracts for street improvements by town illegally incorporated under void act made binding on it by act for its reincorporation and declaring legal all contracts made under the void law.

Delegation of legislative power.

Approved in *Re North Milwaukee*, 93 Wis. 624, 33 L. R. A. 641, footnote, p. 638, 67 N. W. 1033, holding statute giving court power to enlarge or diminish boundaries of municipalities unconstitutional delegation of legislative power.

Cited in *Glaspell v. Jamestown*, 11 N. D. 91, 88 N. W. 1023, holding invalid, as delegation of legislative power, act authorizing district court to exclude territory from cities in certain cases; *New Orleans & N. W. R. Co. v. Vidalia*, 117 La. 573, 42 So. 139, on question of legislative powers as applied to authority conferred upon courts.

Distinguished in *State ex rel. Matson v. Superior Ct.* 42 Wash. 498, 85 Pac. 264, holding act requiring superior court to pass upon proposed ditch not to be a delegation of legislative power to the court.

Disapproved in *Young v. Salt Lake City*, 24 Utah, 333, 67 Pac. 1066, statute authorizing court, on petition, to disconnect land bordering on city, not a delegation of legislative power.

8 L. R. A. 110, *BARBER ASPHALT PAVING CO. v. HUNT*, 100 Mo. 22, 18 Am. St. Rep. 530, 13 S. W. 98.

Validity of ordinances.

Approved in *Aurora Water Co. v. Aurora*, 129 Mo. 578, 31 S. W. 946, holding provision for three readings before final passage does not invalidate ordinance not read three times; *Verdin v. St. Louis*, 131 Mo. 161, 33 S. W. 480, holding paving ordinance not invalid because of material specified, where statute declaring invalidity extends merely to method of letting.

Cited in *Swan v. Indianola*, 142 Iowa, 738, 121 N. W. 547, on parol evidence of council proceedings being admissible in the absence of record thereof, where matter is not governed by statute; *Bluefield v. Johnson*, 68 W. Va. 306, 69 S. E. 848, holding that city ordinance is not invalid because of omission of some details of procedure, unless charter provides such omission shall render it void.

Municipal contracts for patented or monopolized material.

Approved in *State ex rel. Dawes v. Shawnee County*, 57 Kan. 274, 45 Pac. 616, holding patents upon proposed bridge do not necessarily prevent fair competition in bidding; *Rhodes v. Public Works*, 10 Colo. App. 113, 49 Pac. 430, holding competitive bids not to be excluded because material specified in paving petition is monopolized.

Cited in *Field v. Barber Asphalt Paving Co.* 194 U. S. 622, 48 L. ed. 1154, 24 Sup. Ct. Rep. 784, holding ordinance specifying Trinidad asphalt for paving not an interference with interstate commerce; *Shoenberg v. Field*, 95 Mo. App. 250, 68 S. W. 945, raising, without deciding, power of municipality to contract for patented or monopolized material where public letting to lowest bidder required; *Verdin v. St. Louis*, 131 Mo. 100, 33 S. W. 480, holding that city may contract for purchase of monopolized pavement; *Baltimore v. Flack*, 104 Md. 141, 64 Atl. 702, holding that city may award contract for paving to lowest bidder for a specified kind of material, though it be covered by a patent, and though lower bids were received for paving with other materials; *Swift v. St. Louis*, 180 Mo. 92, 79 S. W. 172, holding that city may specify a certain brand of cement to be used in paving; *Barber Asphalt Paving Co. v. Field*, 188 Mo. 200, 86 S. W. 860, holding that municipality may designate "Trinidad Lake Asphalt" as the material to be used for paving; *Allen v. Labsap*, 188 Mo. 702, 87 S. W. 926, 3 A. & E. Ann. Cas. 306, holding contract for public work valid though providing that all stone used should be dressed within the state; *Cleveland Trinidad Paving Co. v. McLeod*, 145 Mo. App. 146, 130 S. W. 371, holding that article held in monopoly may be designated by city even though it makes competitive bidding impossible, if same article cannot be had from another source; *Dillingham v. Spartanburg*, 75 S. C. 558, 8 L.R.A.(N.S.) 417, 117 Am. St. Rep. 917, 56 S. E. 381, 9 A. & E. Ann. Cas. 829, holding that municipality may advertise for bids for paving with patented material.

Cited in note (18 L. R. A. 46) as to municipal contracts for work or articles which embody patented invention.

Distinguished in *State ex rel. Irondale Chert Paving & Improv. Co. v. New Orleans*, 48 La. Ann. 650, 19 So. 690, holding council not bound to accept bid and contract for paving with material selected by property holders; *Curtice v. Schmidt* 202 Mo. 722, 101 S. W. 61, 10 A. & E. Ann. Cas. 702, holding that municipality cannot shut off competition for paving contract by designating a specific kind of brick made by a particular company; *Taylor v. Schroeder*, 130 Mo. App. 486, 110 S. W. 26, denying right of municipality to fix a specific kind of brick for paving so as to exclude competition from use of other brick equally good.

Disapproved in *Siegel v. Chicago*, 223 Ill. 434, 79 N. E. 280, 7 A. & E. Ann. Cas. 104, holding that city cannot contract for pavement of specified patented material where paid for by special assessment; *Monaghan v. Indianapolis*, 37 Ind. App. 289, 76 N. E. 424, holding that city may not contract for pavement with patented article where in exclusive control of one party.

8 L. R. A. 112, *TOWNSHEND v. GRAY*, 62 Vt. 373, 19 Atl. 635.

Regulation of practice of medicine.

Approved in *State ex rel. Burroughs v. Webster*, 150 Ind. 617, 41 L. R. A. 217, 50 N. E. 750, sustaining requirement that licensed medical practitioners obtain new license under later act.

8 L. R. A. 113, *LAWLER v. MURPHY*, 58 Conn. 294, 20 Atl. 457.

Liability of incorporators for corporate debts.

Cited in *Wechselberg v. Flour City Nat. Bank*, 26 L. R. A. 475, 12 C. C. A. 61, 24 U. S. App. 308, 64 Fed. 94, holding signers of articles of incorporation which was not perfected liable for debts of concern until requirements complied with; *Harrill v. Davis*, 22 L.R.A.(N.S.) 1158, 94 C. C. A. 47, 168 Fed. 193, holding that parties using name of corporation in incurring liability are personally liable and cannot set up that it was a corporation de facto; *Evans v. Lilly & Co.* 95 Miss. 61, 48 So. 612, 21 Ann. Cas. 1087, holding that members of volun-

tary association, signing note given by association are individually liable, although signatures be followed by abbreviations indicating their offices; *McDermott v. St. Wilhelmina Benev. Aid Soc.* 24 R. I. 536, 54 Atl. 58, holding members of voluntary society liable upon contract entered into by the society though they were not present when the contract was made.

Incidents necessary to carrying out contract.

Cited in *Godkin v. Monahan*, 27 C. C. A. 415, 53 U. S. App. 604, 83 Fed. 120, holding banking of logs, being necessary to the complete delivery of them, became a term in contract for delivery; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 811, holding that whatever is necessary for the accomplishment of that specifically contracted for is part of the contract.

Construction of written instruments.

Cited in *New Blue Springs Mill. Co. v. De Witt*, 65 Kan. 670, 70 Pac. 647, holding whatever may be fairly implied from indorsement of note deemed contained therein; *Howard v. Adkins*, 167 Ind. 190, 78 N. E. 665, holding that matters fairly implied from contract are part thereof.

Benefit certificates.

Cited in *Dresser v. Hartford L. Ins. Co.* 80 Conn. 709, 70 Atl. 39, on mutual insurance company as undertaking to make the assessments necessary to meet its obligations.

Cited in footnote to *Thuenen v. Iowa Mut. Ben. Asso.* 37 L. R. A. 587, which sustains provision in benefit certificate for specified amount that payment of full assessment on members shall be payment in full.

Cited in notes (9 L. R. A. 189) on forfeiture of benefit certificate for nonpayment of assessment; (13 L. R. A. 625) on binding effect of judiciary decisions on mutual benefit associations; (12 L. R. A. 210) on distinction between benefit certificate and life insurance policy; (52 Am. St. Rep. 578) on assessments by mutual or membership life or accident insurance companies.

— Action at law.

Cited in *Thompson v. Piedmont Mut. Ins. Co.* 77 S. C. 492, 58 S. E. 341; *Batson v. South Carolina Mut. Ins. Co.* 78 S. C. 311, 58 S. E. 936,—holding that action at law will lie against mutual insurance company to recover on certificate where liability is denied and assessment to meet the liability is refused.

Cited in note (52 Am. St. Rep. 578) on actions against mutual or membership life or accident insurance companies.

8 L. R. A. 120, *BENEDICT v. CHASE*, 58 Conn. 196, 20 Atl. 448.

8 L. R. A. 123, *ALLOWAY v. NASHVILLE*, 88 Tenn. 510, 13 S. W. 123.

Damages in condemnation proceedings.

Cited in *San Diego Land & Town Co. v. Neale*, 88 Cal. 56, 11 L. R. A. 607, 25 Pac. 977, and *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 539, 28 Pac. 681, holding evidence of value of land for reservoir purposes admissible in condemnation proceedings; *Re Gilroy*, 85 Hun. 427, 32 N. Y. Supp. 891, holding availability of property for use in connection with city's water supply element of market value; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 265, 94 Am. St. Rep. 864, 70 Pac. 498, holding value of land as stone quarry, but not possible profits, may be considered on condemnation; *Allison v. Cocke*, 112 Ky. 228, 65 S. W. 342, holding evidence of existence of unusual demand for suburban property at time of breach of land contract admissible on question of value; *Re Brookfield*, 78 App. Div. 526, 81 N. Y. Supp. 10 (dissenting opinion), majority holding value as reservoir cannot be considered in determining value of bed of pond; *Weiser Valley Land &*

Water Co. v. Ryan, 111 C. C. A. 221, 190 Fed. 421, holding that value of land sought to be condemned for public use is what could be obtained for it, if sale was desirable and applying ordinary business methods to find purchaser; Ranek v. Cedar Rapids, 134 Iowa, 570, 111 N. W. 1027; Brown v. W. T. Weaver Power Co. 140 N. C. 346, 3 L.R.A.(N.S.) 918, 52 S. E. 954; Wray v. Knoxville, L. F. & J. R. Co. 113 Tenn. 553, 82 S. W. 471,—holding that measure is the cash value of the land considering the uses to which it might be put; Lyne v. National Home, 170 Fed. 844; Conan v. Ely, 91 Minn. 131, 97 N. W. 737,—on same point; Union R. Co. v. Raine, 114 Tenn. 573, 86 S. W. 857, holding that incidental damages should be estimated as though land taken was fully occupied by the railroad, though such full occupation may not take place for some time; Vault v. Tennessee C. R. Co. 120 Tenn. 331, 108 S. W. 1142, holding that measure of damages is the value of the land actually taken, together with damages to the residue of the tract less benefits if any; Boyer v. St. Louis, S. F. & T. R. Co. 97 Tex. 109, 76 S. W. 441, holding that diminution in market value for all purposes is the measure of damages to abutting property from street railway in street; Quarless v. Sparta, 2 Tenn. Ch. App. 727, on legislature having power to confer upon municipal corporations the right of eminent domain.

Cited in footnotes to Philadelphia Ball Club v. Philadelphia, 46 L. R. A. 724, which requires damages from taking of property in eminent domain to be estimated as of the time when injury was done, without considering future profits of business or subsequent change of circumstances; Martin v. Tyler, 25 L. R. A. 838, which holds order on drainage fund not sufficient payment for land taken for public use.

Cited in notes (13 L. R. A. 431) on compensation for taking by eminent domain; (58 L. R. A. 255) on measure of damages for taking by eminent domain in acquiring water supply; (11 L. R. A. 604) on market price as element of damages in condemnation proceedings; (61 L. R. A. 44) on establishment and regulation of municipal water supply; (3 L.R.A.(N.S.) 913) on right to consider value as part of a natural water power, in fixing compensation on condemnation; (11 L.R.A.(N.S.) 997) on special value of property for purpose as element of compensation on condemnation; (19 Am. St. Rep. 459, 460) on damages on condemnation of right of way for railroad; (124 Am. St. Rep. 537) on evidence of special value of property taken for public use.

— Interest.

Cited in St. Louis E. R. & W. R. Co. v. Oliver, 17 Okla. 600, 87 Pac. 423, 10 A. & E. Ann. Cas. 748, holding that where it clearly appears that jury in verdict in condemnation proceeding did not include interest, the court may add interest to the verdict; Chicago, St. L. & N. O. R. Co. v. Moggridge, 116 Tenn. 448, 92 S. W. 1114, holding that where possession is taken pending condemnation proceedings damages should be awarded as of the date possession is taken; Snowden v. Shelby County, 118 Tenn. 728, 102 S. W. 90, holding owner entitled to interest from date of order of condemnation; State ex rel. Donofrio v. Humes, 34 Wash. 354, 75 Pac. 348, holding that damages assessed in condemnation proceedings bear interest from the date of the judgment.

Cited in notes (25 L.R.A.(N.S.) 318) on power of court to amend verdict by adding interest; (28 L.R.A.(N.S.) 57) on interest on unliquidated damages.

Right to open and close.

Cited in McBee v. Bowman, 89 Tenn. 135, 14 S. W. 481, holding assumption of burden of proving revocation by execution of later will does not destroy proponent's right to open and close; Woodward v. Iowa L. Ins. Co. 104 Tenn. 52, 56 S. W. 1020, holding admission of plaintiff's *prima facie* right by defendant pleading avoidance gives no right to open and close; Seattle & M. R. Co. v. Murphine, 4

Wash. 453, 30 Pac. 720, holding petitioner in condemnation proceedings has right to open and close; Alabama C. R. Co. v. Musgrove, 169 Ala. 428, 53 So. 1009, holding petitioner in condemnation proceedings has right to open and close and refusal of such right is reversible error.

Power of appellate court to correct judgment.

Cited in Nighbert v. Hornsby, 100 Tenn. 88, 66 Am. St. Rep. 736, 42 S. W. 1060, holding supreme court has power to correct judgment.

Cited in notes (47 L. R. A. 52) on increase of inadequate damages by court; (47 L. R. A. 38) on inadequacy of damages as ground for setting aside verdict, in actions with relation to property.

8 L. R. A. 129, STATE *ex rel.* ATTY. GEN. v. WESTERN U. MUT. LIFE & ACCI. SOC. 47 Ohio St. 167, 24 N. E. 392.

Assessment plan.

Cited in State *ex rel.* National Life Asso. v. Matthews, 58 Ohio St. 20, 40 L. R. A. 423, 49 N. E. 1034, holding company exacting fixed sums from policy holders, payable in advance, at stated periods, not conducted on assessment plan; Manufacturers' Fire Asso. v. Lynchburg Drug Mills, 8 Ohio C. C. 116, to point that obligation of insurance association is limited to assessments made on members to meet losses; State v. Matthews, 58 Ohio St. 20, 39 Ohio L. J. 249, on the right of a foreign insurance company to do business on the assessment plan, within the state.

Amenability of foreign corporation to local law.

Approved in State *ex rel.* Atty. Gen. v. Fidelity & C. Ins. Co. 49 Ohio St. 443, 16 L. R. A. 612, 34 Am. St. Rep. 573, 31 N. E. 658, holding foreign corporation illegally exercising franchises may be ousted therefrom; State v. Standard Oil Co. 61 Neb. 33, 87 Am. St. Rep. 449, 84 N. W. 413, holding that foreign corporation may be prevented by injunction or quo warranto from transacting business contrary to law; Wright v. Lee, 4 S. D. 248, 55 N. W. 931, holding that action may be brought to annul existence within state of foreign corporation.

Cited in footnote to Fort v. State, 23 L. R. A. 86, which holds it no offense for agents to assist Accident Lloyds in transacting business without license.

Cited in notes (13 L. R. A. 585) on amenability of foreign corporations to local law; (24 L. R. A. 295) on remedy against foreign corporation exercising franchises.

Law of comity.

Cited in Mannington v. Hocking Valley R. Co. 183 Fed. 157, to the point that foreign corporations can exercise none of the franchises on powers within this state except by comity or legislative intent.

Cited in note (8 L. R. A. 236) on law of comity as affecting foreign corporations.

Retaliatory statutes.

Cited in footnote to State v. Fidelity & C. Ins. Co. 16 L.R.A. 611, which requires retaliatory legislation to be confined to cases fairly within its letter.

Cited in note (24 L. R. A. 305) on retaliatory statutes.

Right of mutual insurance companies to pay sums not based on assessments.

Cited in Manufacturers' F. Asso. v. Lynchburg Drug Mills, 8 Ohio C. C. 116, 4 Ohio S. & C. P. Dec. 352, holding by analogy, that a mutual fire insurance company cannot contract to pay any amount not raised by assessment of its members and if it does such contract is ultra vires under the statute.

Quo warranto against corporation.

Cited in *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth & Co.* 143 Mich. 103, 106 N. W. 868, holding quo warranto to be proper remedy to inquire into right of foreign corporation to do business in the state; *People ex rel. Atty. Gen. v. Michigan Sanitarium & Benev. Asso.* 151 Mich. 464, 115 N. W. 423, holding quo warranto to be proper remedy against corporation organized as a charity but alleged to be conducted for profit; *State ex rel. Cates v. Standard Oil Co.* 120 Tenn. 135, 110 S. W. 565, holding that action to oust foreign corporation may be brought under code provision for "proceedings in the name of the state against corporations;" *State v. Fidelity & C. Ins. Co.* 49 Ohio St. 443, 16 L.R.A. 611, 34 Am. St. Rep. 573, 31 N. E. 658, holding that a foreign corporation exercising the state franchises and privileges without authority of law may be ousted therefrom in proceedings in quo warranto; *Wright v. Lee*, 2 S. D. 616, 51 N. W. 706, holding that if a corporation is unlawfully exercising its franchise within the state, the proper remedy is quo warranto to oust it from the state; *Woods v. Equitable Debenture Co.* 8 Ohio N. P. 128, 11 Ohio S. & C. P. Dec. 166, holding that quo warranto would lie as well against a foreign corporation as against a domestic one; *Mannington v. Hocking Valley R. Co.* 183 Fed. 157; holding that foreign corporations cannot exercise their franchises or powers within the state, except by comity or legislative consent and may be ousted if they exercise franchises in violation of local law.

Right of foreign corporation to do business within the state.

Cited in *Fergus v. Columbus*, 6 Ohio N. P. 87, 8 Ohio S. & C. P. Dec. 297, holding that a contract with a city for a public improvement is not void because made with a foreign corporation which has not been admitted to do business in the state.

Cited in notes (24 L.R.A. 295) on recognition or exclusion of foreign corporations; (24 L.R.A. 305) on restrictions on business of foreign insurance companies.

8 L. R. A. 135, *MOSES v. SOUTHERN P. R. CO.* 18 Or. 385, 23 Pac. 498.

Liability for injury to animals on track.

Cited in notes (11 L.R.A. 461) on duty of railroad employees to look out for stock on track; (21 Am. St. Rep. 289) on duty of railroad company to animals on or near track.

— Lack of proper fence.

Approved in *Sullivan v. Oregon R. & Nav. Co.* 19 Or. 331, 24 Pac. 412, and *Currie v. Southern P. Co.* 21 Or. 572, 28 Pac. 886, holding railroad company not liable, in absence of negligence, for stock killed at place company not required to fence; *State ex rel. Hardy v. Gleason*, 19 Or. 163, 23 Pac. 817, holding railroad company not required to fence its depot; *Eaton v. McNeill*, 31 Or. 133, 49 Pac. 875, holding railroad company not liable where stock went on track from depot grounds which company not required to fence.

Cited in *Beaudin v. Oregon Short Line R. Co.* 31 Mont. 241, 78 Pac. 303, holding that statute does not require railroad to fence its track at a station; *Wilmot v. Oregon R. Co.* 48 Or. 497, 7 L.R.A. (N.S.) 202, 120 Am. St. Rep. 840, 87 Pac. 528, 11 Ann. Cas. 18, on statute requiring railroad to fence, not being applicable to station grounds.

Cited in footnotes to *St. Louis, I. M. & S. R. Co. v. Ferguson*, 18 L. R. A. 110, which holds railroad company not liable for injury by barbed-wire fence to colt frightened from track by train whistle; *Johnson v. Oregon Short Line R. Co.* 53 L. R. A. 744, which holds railroad company liable for horses killed on unfenced track.

Cited in note (12 L. R. A. 181) on duty of railroad company to fence its tracks.

Contributory negligence.

Approved in *Keeney v. Oregon R. & Nav. Co.* 19 Or. 292, 24 Pac. 234, holding owner of stock killed on railroad track not guilty of contributory negligence in letting them run at large; *Keeney v. Oregon R. & Nav. Co.* 19 Or. 294, 24 Pac. 233, holding that contributory negligence of herder, in leaving sheep unguarded by track, bars recovery.

Cited in *Hamerlynek v. Banfield*, 36 Or. 441, 59 Pac. 712, holding one driving on bridge at invitation of workman, and injured by falling in aperture which became uncovered, not chargeable with contributory negligence; *Gee v. St. Louis & G. R. Co.* 122 Mo. App. 364, 99 S. W. 506, holding that if owner of animals injured is guilty of contributory negligence, he cannot recover; *Wilmot v. Oregon R. Co.* 48 Or. 500, 7 L.R.A.(N.S.) 207, 120 Am. St. Rep. 840, 87 Pac. 528, 11 A. & E. Ann. Cas. 18, holding that question of contributory negligence of owner of stock injured is for the jury; *France v. Salt Lake & O. R. Co.* 31 Utah, 306, 88 Pac. 1, on contributory negligence as not applying where animal was not at large through wilful act of the owner.

Cited in note (55 L. R. A. 458) on doctrine of last clear chance.

8 L. R. A. 147, *CONRAD v. FISHER*, 37 Mo. App. 352.

Transfer of commercial paper.

Cited in *Wells v. Jones*, 41 Mo. App. 11, holding mere transfer of note as collateral security for antecedent indebtedness does not make transferer holder for value.

Presumption as to payment as condition precedent.

Cited in *Burke v. Dunn*, 117 Mich. 432, 75 N. W. 931, holding, unless otherwise specified, payment is presumed to be condition precedent to delivery on sale.

Estoppel in pais.

Cited in *Wind v. Fifth Nat. Bank*, 39 Mo. App. 87, holding depositor not estopped from recovery by negligent failure to notify bank of payment of paper on forged indorsement, unless bank is thereby prejudiced.

Cited in note (3 Eng. Rul. Cas. 582) on estoppel of bailee by attornment.

Delivery of personal property.

Cited in *Kaes v. St. Louis Lime Co.* 71 Mo. App. 108, holding where wood was placed on defendant's premises, but not all measured, question of acceptance was for jury; *Wachtel v. Ewing*, 82 Mo. App. 597, holding immediate turning over to vendee by officer in possession of whiskey in bond on vendor's order, sufficient change of possession; *Citizens Bkg. Co. v. Peacock*, 103 Ga. 180, 29 S. E. 752, holding delivery of warehouse receipts for cotton in pledge, constructive delivery of cotton itself; *Re Rohrer*, 186 Fed. 1000, holding that pledge of warehouse receipts symbolically passes possession to pledgee.

Cited in footnote to *Geilfuss v. Corrigan*, 37 L. R. A. 166, which holds indorsement and delivery of storage warrants not constructive delivery sustaining pledge of pig iron.

Cited in notes (16 L.R.A.(N.S.) 228; 30 L.R.A.(N.S.) 553) on issuance and delivery by warehouseman of receipt for own property as transfer of possession essential to valid pledge.

Parol evidence as to writing.

Cited in *Wheless v. Meyer-Schmid Grocer Co.* 140 Mo. App. 583, 120 S. W. 708, holding parol evidence admissible to explain ambiguity in written contract.

Cited in footnote to *Anderson v. Portland Flouring Mills Co.* 50 L. R. A. 235, which holds parol evidence of contract under which grain was delivered admissible though negotiable warehouse receipts were given therefor.

Cited in note (35 L. ed. U. S. 862) on parol evidence to vary or contradict a writing.

Pledge to secure debt.

Cited in *Storts v. Mills*, 93 Mo. App. 208, holding attempt to pledge notes not in possession of pledgor or pledgee, invalid; *Chitwood v. Lanyon Zinc Co.* 93 Mo. App. 230, holding attempt to pledge ore without change of possession, invalid; *Howell v. Caryl*, 50 Mo. App. 449, holding evidence not showing valid common-law or statutory mortgage does not show valid common-law pledge; *Dickey v. Porter*, 203 Mo. 22, 101 S. W. 586, holding that pledgee does not have title to property pledged; *Cotton v. Arnold*, 118 Mo. App. 602, 95 S. W. 280, holding possession essential to sustain pledgee's lien; *Grand Ave. Bank v. St. Louis Union Trust Co.* 135 Mo. App. 375, 115 S. W. 1071, holding that where property is turned over to creditor with power to sell in case of default in payment of a debt, it constitutes a pledge.

Owner's receipt upon goods in his own warehouse.

Cited in *Franklin Nat. Bank v. Whitehead*, 149 Ind. 576, 39 L. R. A. 731, 63 Am. St. Rep. 302, 49 N. E. 592, holding that one who is not a warehouseman, cannot give a valid warehouse receipt, upon his goods in his own possession, to secure his own debt.

Incidents of vendor's lien.

Cited in *Eads v. Kessler*, 121 Cal. 246, 53 Pac. 656, holding title must have passed to vendee to support vendor's lien; *Vogelsang v. Fisher*, 128 Mo. 392, 31 S. W. 13, holding acceptance of notes of vendee by vendor does not extinguish vendor's lien; *Wheless v. Meyer Schmid Grocer Co.* 140 Mo. App. 586, 120 S. W. 708, on vendor's lien as existing as long as he retains custody of the goods.

Cited in note (83 Am. St. Rep. 452, 453, 454, 456, 457, 458) on lien of vendor of personalty.

Unrecorded liens and secret equities.

Cited in *Napa Valley Wine Co. v. Rinehart*, 42 Mo. App. 183, holding innocent grantee to be protected from prior encumbrances must have parted with valuable consideration before notice.

Presumption as to law.

Cited in notes (21 L.R.A. 472) on presumption as to law of other states; (67 L.R.A. 49) on how case determined when proper foreign law not proved; (113 Am. St. Rep. 870) on proof of foreign laws and their effect.

Joint liability of creditors for wrongful attachments.

Cited in note (6 L.R.A.(N.S.) 600) on joint liability of creditors for wrongful levy of several attachments.

8 L. R. A. 170, *MARTIN v. JOHNSON*, 84 Ga. 481, 10 S. E. 1092.

Conflict of laws.

Distinguished in *Hager v. National German-American Bank*, 105 Ga. 119, 31 S. E. 141, holding contract by *feme covert* void at place of execution not validated by law of place of performance.

— As to loans and usury.

Cited in *National Mut. Bldg. & L. Asso. v. Brahan*, 80 Miss. 418, 57 L. R. A. 794, 31 So. 840, and *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 966, 57 L. R. A. 802, 84 Am. St. Rep. 657, 30 So. 51, holding loan by foreign corporation through established local agents governed by local usury law, though notes payable

in foreign state; *British American Mortg. Co. v. Bates*, 58 S. C. 554, 36 S. E. 917, holding loan by foreign corporation governed by local law where note and mortgage executed locally though payable in foreign state; *Hollis v. Covenant Bldg. & L. Asso.* 104 Ga. 322, 31 S. E. 215, holding loan governed by usury law of state of borrower, where note, mortgage, etc., executed there; *National Mut. Bldg. & Loan Asso. v. Burch*, 124 Mich. 64, 83 Am. St. Rep. 311, 82 N. W. 837, and *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 888, 47 Am. St. Rep. 841, 21 S. E. 924, holding loan by foreign corporation through local agent to whom payments made, governed by local law; *Bigelow v. Burnham*, 83 Iowa, 123, 32 Am. St. Rep. 294, 49 N. W. 104, holding loan contract presumptively governed by law under which stipulated interest lawful; *Building & L. Asso. v. Griffin*, 90 Tex. 489, 39 S. W. 656, holding loan by foreign corporation through local agency governed by local usury law though payable in foreign state; *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 38 Or. 342, 58 L. R. A. 824, 84 Am. St. Rep. 793, 63 Pac. 489, holding stipulation in loan contract for its construction by foreign law, where payable, not controlling where actually local.

Cited in footnote to *Dugan v. Lewis*, 12 L. R. A. 93, which authorizes fixing rate of interest of either state, on contract between citizens of different states.

Cited in notes (55 L. R. A. 934, 940) as to whether *lex rei sitæ* with respect to interest and usury necessarily controls in action to foreclose mortgage on real estate; (62 L. R. A. 63) on conflict of laws as to interest and usury.

What constitutes usury.

Cited in *Kilcrease v. Johnson*, 85 Ga. 602, 11 S. E. 870, holding reservation of \$69 by payee of note for \$300 usury.

Cited in note (46 Am. St. Rep. 202) on what transactions are usurious.

Distinguished in *Burns v. Equitable Bldg. & L. Asso.* 108 Ga. 184, 33 S. E. 856, holding misapplication by officers of building association of payments on valid loan, does not render contract usurious.

8 L. R. A. 173, *TALLMAN v. METROPOLITAN ELEV. R. CO.* 121 N. Y. 119, 23 N. E. 1134.

Time to which damages recoverable.

Approved in *Mitchell v. White Plains*, 91 Hun, 192, 36 N. Y. Supp. 204, holding that no action lies to recover prospective damages to real estate; *Kenyon v. New York C. & H. R. R. Co.* 29 App. Div. 82, 51 N. Y. Supp. 386, holding that damages to real estate cannot be recovered to date of entry of judgment; *Rumsey v. New York & N. E. R. Co.* 63 Hun, 206, 17 N. Y. Supp. 672, holding riparian owner can only recover damages to time of commencing suit, for intercepting access; *Hollenbeck v. Marion*, 116 Iowa, 80, 89 N. W. 210, holding instruction in action for past damages that pollution destroying potability of water constitutes nuisance, erroneous in absence of evidence of such use.

Measure of damages.

Approved in *Reisert v. New York*, 174 N. Y. 207, 66 N. E. 731, Reversing 69 App. Div. 310, 74 N. Y. Supp. 673, holding rental value measure for continuing injury by removal of appurtenant waters; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 11, 55 N. Y. Supp. 192, holding gas manufacturer liable for diminution of rental value of adjoining premises in owner's occupancy; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 84, 15 L. R. A. 620, 28 Am. St. Rep. 600, 30 N. E. 654; same case on subsequent appeal in 136 N. Y. 545, 32 N. E. 979, holding damage from loss of access to river, to be diminished rental value while in same general condition; *Rummel v. New York, L. & W. R. Co.* 30 N. Y. S. R. 239, 9 N. Y. Supp. 404 (concurring opinion) to point that measure of damages for authorized

obstruction of street by railroad embankment is depreciation in rental value; *Randall v. United States Leather Co.* 72 App. Div. 320, 76 N. Y. Supp. 82, holding damages from nuisance not usable value as including business profits.

Cited in *Stevens v. State*, 65 Misc. 245, 121 N. Y. Supp. 402, holding measure of damages to property from seepage of water through canal bank to be cost of repair and loss of rentals; *Re New York*, 118 App. Div. 275, 103 N. Y. Supp. 441, holding inadmissible evidence of rental value in case certain buildings were erected on vacant land taken under eminent domain.

— **Elevated street railroads.**

Cited in *American Bank Note Co. v. New York Elev. R. Co.* 27 Jones & S. 185, 13 N. Y. Supp. 626, holding elevated street railway which did not acquire right in street liable to abutter for diminished rental value though buildings erected after road constructed; *Mortimer v. Manhattan R. Co.* 129 N. Y. 85, 29 N. E. 5, and *Hine v. New York Elev. R. Co.* 37 N. Y. S. R. 608, 13 N. Y. Supp. 510, holding abutter entitled to damages for depreciation in rental value while premises in possession of tenants, for elevated railroad built without acquiring easements; *Kernochan v. New York Elev. R. Co.* 128 N. Y. 567, 29 N. E. 65, holding lessor in lease subsequent to construction of elevated railroad without obtaining easement, has action for subsequent loss of rents; *Martin v. Manhattan R. Co.* 63 Hun, 351, 18 N. Y. Supp. 238, holding rental damages while old building being pulled down and new one erected, not allowable for elevated railway; *Woolsey v. New York Elev. R. Co.* 134 N. Y. 327, 47 N. Y. S. R. 634, 31 N. E. 891, holding abutter entitled to damages from elevated railway according to the diminished rental or usable value; *Jones v. New York C. & H. R. R. Co.* 144 App. Div. 57, 128 N. Y. Supp. 741, to the point that damages to vacant lots by erection of elevated railroad must be based on actual condition of lots as they are and limited to usable value prior to suit for damages.

Distinguished in *Pappenheim v. Metropolitan Elev. R. Co.* 128 N. Y. 454, 13 L. R. A. 407, 26 Am. St. Rep. 486, 28 N. E. 518, holding that transfer of property abutting on street occupied by elevated railroad before suit for damages to apparent easements conveys all grantor's rights and remedies for such damages.

Right to damages for construction of elevated railroad.

Cited in *Paret v. New York Elev. R. Co.* 46 N. Y. S. R. 32, 18 N. Y. Supp. 580, holding alleged loss upon sale of realty, from elevated road in street, not recoverable in action for money only.

Cited in footnotes to *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, which holds abutting owner entitled to compensation for construction of elevated railroad in street.

Cited in note (36 L.R.A.(N.S.) 783) on abutter's right to compensation for railroads in streets.

Injunction against continuing trespass or nuisance.

Approved in *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475, 61 U. S. App. 13, 89 Fed. 773, holding that equity will restrain continuing trespass upon real estate to the damage of owner; *McMillian v. Lauer*, 24 N. Y. Supp. 954, holding injunction remedy for intended construction of bridge pier in mill race without owner's consent; *Carmichael v. Texarkana*, 94 Fed. 574, holding that equity has jurisdiction to restrain continuing nuisance by pollution of stream with sewage; *Dimick v. Shaw*, 36 C. C. A. 349, 94 Fed. 268, holding that equity may restrain trespasser from working a mine upon land adjudicated to belong to complainant; *Coombs v. Salt Lake & Ft. D. Co.* 9 Utah, 328, 34 Pac.

248, holding injunction against operation of railroad before damages paid for, not lost by mere silence and inactivity; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 144, 13 L. R. A. 792, 28 N. E. 479, holding remedy by restraining continuance of trespasses upon real estate, not barred and no estoppel arises by lapse of ten years from original trespass; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 23, 58 L. R. A. 508, 64 N. E. 745 (dissenting opinion), majority holding that renewal of lease after creation of nuisance does not preclude tenant's action to abate and for damages.

Distinguished in *Bernheimer v. Manhattan R. Co.* 26 Abb. N. C. 90, 13 N. Y. Supp. 913, on right to injunctive relief from operation of elevated railway in street.

8 L. R. A. 175, *THOMAS v. MUSICAL MUT. PROTECTIVE UNION*, 121 N. Y. 45, 24 N. E. 24.

Cited historically in *People v. Barondess*, 61 Hun, 588, 16 N. Y. Supp. 436, 8 N. Y. Crim. 261 (dissenting opinion), as having reversed the lower court in the same case.

Adjudication of speculative questions.

Cited in *The Minnehaha*, 114 Fed. 674, denying right of penalty to one bringing test action where no injury suffered; *Kalbfell v. Wood*, 193 Mo. 689, 92 S. W. 230, holding that court will not consider speculative question relating to an election that is past where there is nothing which would be affected by its judgment; *Huntington v. Taylor*, 156 Fed. 706, on courts as not passing on moot questions.

Equitable relief; when granted.

Cited in *Whitney v. Whitney*, 63 Hun, 73, 18 N. Y. Supp. 3, denying equitable relief when remedy at law adequate; *Wormser v. Brown*, 149 N. Y. 173, 43 N. E. 524, denying injunction against construction of bay window irreparable injury not resulting; *Kinnan v. Sullivan County Club*, 26 App. Div. 215, 50 N. Y. Supp. 95, denying injunction restraining assessments on stock where perfect defense at law for collection; *Thomas v. Grand View Beach R. Co.* 76 Hun, 603, 28 N. Y. Supp. 201, denying equitable relief when ejectment proper remedy; *New York Cement Co. v. Consolidated Rosendale Cement Co.* 178 N. Y. 187, 70 N. E. 451 (dissenting opinion) majority holding equity will enjoin owner of canal from imposing illegal tolls; *Niagara Falls v. New York C. & H. R. R. Co.* 168 N. Y. 617, 61 N. E. 185, by O'Brien, J., dissenting, who denies right to use of land for road bed preventing use for street, where title involved; *Russell v. Stampers' & Gold Leaf Local Union No. 22*, 57 Misc. 103, 107 N. Y. Supp. 303, holding that injunction will not be granted against labor unions where evidence shows acts and threats by individual members only.

Cited in notes (11 L.R.A. 68) on equitable jurisdiction where remedy at law exists; (36 L. ed. U. S. 84) on what remedy at law will prevent remedy in equity.

Injury as essential to equitable remedy.

Approved in *Sullivan v. Venner*, 45 N. Y. S. R. 688, 18 N. Y. Supp. 398, denying injunction when evils anticipated indefinite and imaginary.

Cited in *Brown v. Duane*, 60 Hun, 101, 14 N. Y. Supp. 450, denying mandamus when anticipated wrong not yet inflicted; *McWilliams v. Jewett*, 14 Misc. 496, 36 N. Y. Supp. 620, denying injunction against publication of notice for public meeting where injury uncertain; *McSorley v. Gomprecht*, 30 Abb. N. C. 416, 26 N. Y. Supp. 917, denying mandatory injunction requiring removal of wall, irreparable injury not resulting from erection.

Legal interference with affairs of societies.

Approved in *Whiteside v. Noyac Cottage Asso.* 142 N. Y. 589, 60 N. Y. S. R. 305, 37 N. E. 624, Affirming 68 Hun, 567, 23 N. Y. Supp. 63, denying legal interference till remedies afforded by association invoked; *Johansen v. Blume*, 53 App. Div. 529, 65 N. Y. Supp. 987, holding that courts will not interfere with association until all remedies provided in regulations are exhausted; *People ex rel. Wilson v. Medical Society*, 84 Hun, 450, 32 N. Y. Supp. 415, holding member expelled from county society should appeal to state society before resorting to law.

Cited in *Moyse v. New York Cotton Exch.* 143 App. Div. 268, 128 N. Y. Supp. 112, holding that member of exchange must exhaust remedies provided by by-laws before invoking court's aid, where proceedings are instituted for his expulsion; *Raych v. Hadida*, 72 Misc. 474, 130 N. Y. Supp. 346, holding that member of cigar-maker's union cannot seek relief in court of law until he has exhausted his remedies by appeal provided by constitution of union.

Cited in note (59 Am. St. Rep. 204) on necessity of pursuing remedies within association.

Distinguished in *Brown v. Supreme Court*, I. O. F. 34 Misc. 561, 70 N. Y. Supp. 397, holding right to reinstatement without exhausting association remedies, when question one of law.

Conclusiveness of by-laws.

Cited in footnotes to *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 18 L. R. A. 191, which holds illegality of stock exchange by-laws not ground for compelling their disobedience; *Northport Wesleyan Grove Camp Meeting Asso. v. Perkins*, 48 L. R. A. 272, which denies right of camp-meeting association to impose revenue tax on persons soliciting orders for provisions, etc., from lessees; *Industrial Trust Co. v. Green*, 17 L. R. A. 202, which holds illegal deposition of president not ground for subsequent dissolution of benevolent association.

Liability of union for procuring discharge of workman.

Cited in notes (5 L.R.A.(N.S.) 900) on liability for procuring discharge of workman as nonunion; (1 Brit. Rul. Cas. 521) on liability of labor union to persons with whose employment it has interfered.

Political obligations of members of union.

Cited in notes (5 L.R.A.(N.S.) 892) on obligation of members of labor union as to political matters; (1 Brit. Rul. Cas. 96) on right of labor union to impose political obligations on members.

Liability of corporations for torts.

Cited in note (25 Am. St. Rep. 369) on corporate liability for torts.

8 L. R. A. 180, *FT. WORTH & R. G. R. CO. v. JENNINGS*, 76 Tex. 373, 13 S. W. 270.

Additional servitude upon right of way.

Approved in *Blakely v. Chicago, K. & N. R. Co.* 34 Neb. 287, 51 N. W. 767, holding second railway additional burden.

Cited in *Rische v. Texas Transp. Co.* 27 Tex. Civ. App. 37, 66 S. W. 324, holding abutter entitled to compensation for construction of street railway for transporting freight.

Cited in footnotes to *Miller v. Green Bay, W. & St. P. R. Co.* 26 L. R. A. 443, which holds additional burden on street not made by allowing other companies to use tracks; *Gurney v. Minneapolis Union Elevator Co.* 30 L. R. A. 534, which holds erection of public warehouse on railroad land not abandonment of easement.

Cited in note (106 Am. St. Rep. 255, 259) on what are additional servitudes in highways.

Distinguished in *Stevens v. St. Louis Merchants Bridge Terminal R. Co.* 152 Mo. 219, 53 S. W. 1066, holding second railway jointly using ground deeded for depot purposes not additional servitude; *Gray v. Dallas Terminal R. & Union Depot Co.* 13 Tex. Civ. App. 166, 36 S. W. 352, holding question of damages not involved in action based purely upon equitable remedy to restrain construction.

8 L. R. A. 183, *FLAHERTY v. MORAN*, 81 Mich. 52, 21 Am. St. Rep. 510, 45 N. W. 381.

Malice in use of one's own property; spite-fences.

Followed in *Kirkwood v. Finegan*, 95 Mich. 544, 55 N. W. 457, enjoining maintenance of fence erected between neighbors on account of quarrel; *Peek v. Roe*, 110 Mich. 53, 67 N. W. 1080, holding board fence 10 feet 9 inches high shutting out light and rendering house damp is a nuisance.

Cited in *Horan v. Byrnes*, 72 N. H. 97, 62 L. R. A. 604, 54 Atl. 945, sustaining statute declaring fence unnecessary exceeding 5 feet in height, erected to annoy, a nuisance; *Dunshee v. Standard Oil Co.* 152 Iowa, 623, 36 L.R.A. (N.S.) 266, 132 N. W. 371, holding that wholesaler of oil who when customer in particular city begins to purchase portion of stock from rival enters into retail business solely for purpose of driving him out of trade is liable for damages; *Barger v. Barringer*, 151 N. C. 435, 25 L.R.A.(N.S.) 834, 66 S. E. 439, holding erection of "spite fence" gives injured party right of action.

Cited in footnote to *Hague v. Wheeler*, 22 L. R. A. 141, which denies liability to adjoining owner for permitting escape of gas from well.

Cited in notes (40 L. R. A. 180) on liability for malicious erection of fence; (62 L. R. A. 676, 686) on effect of bad motive to make actionable what would otherwise not be; (107 Am. St. Rep. 232) on spite-fence as public nuisance; (1 Eng. Rul. Cas. 764, on right to erect spite-fence.

Distinguished in *Kuzniak v. Kozminski*, 107 Mich. 445, 61 Am. St. Rep. 344, 67 N. W. 275, holding darkening of windows by erection of woodhouse permissible although inspired by malicious motive.

Disapproved in *Dixon v. Messer*, 136 Ill. App. 494, holding "spite fence" may be built by land owner, where no prescriptive right to unobstructed view and to light and air over adjoining premises of another owner.

8 L. R. A. 188, *TERRITORIAL INSANE ASYLUM v. WOLFLEY*, 3 Ariz. 132, 22 Pac. 383.

When mandamus lies.

Cited in notes (11 L. R. A. 763) on mandamus to control executive discretion; (58 L. R. A. 867) on original jurisdiction of court of last resort in mandamus case; (6 L.R.A.(N.S.) 770) on mandamus to governor.

Judicial control of acts of governor.

Cited in *State ex rel. Atty. Gen. v. Huston*, 27 Okla. 612, 34 L.R.A.(N.S.) 385, 113 Pac. 190 (holding that district courts have no jurisdiction to control action of governor, even in ministerial acts.

8 L. R. A. 189, *WESTERN U. TELEG. CO. v. TAYLOR*, 84 Ga. 408, 11 S. E. 396.

Jurisdiction of courts of special powers.

Cited in *Western U. Teleg. Co. v. Bright*, 90 Va. 781, 20 S. E. 146, holding circuit court without jurisdiction to decree on motion penalty for failure to deliver telegram; *Savannah, F. & W. R. Co. v. Snider*, 1 Ga. App. 14, 57 S. E. 898, holding justice of peace without jurisdiction to try suit for damages re-

sulting from defendant carrier's failure to furnish cars and receive and ship cross ties in due time.

Judgment of court without jurisdiction.

Cited in *Freer v. Davis*, 52 W. Va. 12, 59 L. R. A. 562, 94 Am. St. Rep. 895, 43 S. E. 164, holding plaintiff not estopped to deny on appeal trial court's jurisdiction of subject-matter; *Dix v. Dix*, 132 Ga. 633, 64 S. E. 790, holding where court of ordinary on hearing application for year's support refused to hear evidence of title or pass upon title, but set apart certain property as year's support, evidence as to title and as to ordinary's refusal was admissible on trial of action of trover in superior court.

Liability for nondelivery of telegram.

Cited in *Conyers v. Postal Teleg. Cable Co.* 92 Ga. 620, 44 Am. St. Rep. 100, 19 S. E. 253, holding right to recover penalty for delay in delivering message based on statute not contract; *Woodburn v. Western U. Teleg. Co.* 95 Ga. 810, 23 S. E. 116, holding penalty for failure to deliver telegrams based on public penal law, not damages for breach of contract; *Chapman v. Western U. Teleg. Co.* 88 Ga. 776, 17 L. R. A. 434, 30 Am. St. Rep. 183, 15 S. E. 901, holding delay in sending message gives no action for mental pain, but for penalty; *Mathis v. Western U. Teleg. Co.* 94 Ga. 340, 47 Am. St. Rep. 167, 21 S. E. 564, holding right to penalty, being based on public policy, not contract, company cannot defeat it by regulations; *Western U. Teleg. Co. v. Nunnally*, 86 Ga. 503, 12 S. E. 578, holding lapse of year bars action for penalty for violation of statute.

Cited in footnote to *Western U. Teleg. Co. v. Short*, 9 L. R. A. 744, which holds company prima facie liable for failure to deliver telegram.

Distinguished in *Southern R. Co. v. Meltor*, 133 Ga. 296, 65 S. E. 665, holding demurrage rule of railroad commission constitutional.

Refunding charges as bar to action for penalty.

Followed in *Western U. Teleg. Co. v. Brightwell*, 94 Ga. 434, 21 S. E. 518, holding right to penalty not abrogated by company's refunding message charges.

Cited in *Western U. Teleg. Co. v. Moss*, 93 Ga. 497, 21 S. E. 63, holding repayment of charges no bar to penalty for failure to transmit message.

8 L. R. A. 193, *PRICE v. CONWAY*, 134 Pa. 340, 19 Am. St. Rep. 704, 19 Atl. 687.

Office of innuendoes.

Cited in *Goebeler v. Wilhelm*, 17 Pa. Super. Ct. 440, holding court must instruct jury whether publication is libelous, supposing innuendoes to be true; *Naulty v. Bulletin Co.* 206 Pa. 134, 55 Atl. 862; *Walter v. Erdman*, 4 Pa. Super. Ct. 355; *Leitz v. Hohman*, 18 Lanc. L. Rev. 220, 16 Pa. Super. Ct. 282—holding court must decide whether alleged words are capable of meaning ascribed in innuendo, jury whether it was truly ascribed to them; *Weaver v. Phillips*, 231 Pa. 328, 80 Atl. 526, to the point that innuendo cannot introduce new matter or enlarge natural meaning of words.

What constitutes libel.

Cited in *Morse v. Times-Republican Printing Co.* 124 Iowa, 713, 100 N. W. 867, following in civil action definition of libel in criminal code, as malicious defamation of person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule or to deprive him of benefits of public confidence or social intercourse; *Fitzgerald v. Young*, 89 Neb. 698, 132 N. W. 127, holding that it is libelous per se to say of school teacher that, she "is crazy and not fit to teach

school;" *Holland v. Flick*, 212 Pa. 204, 61 Atl. 828, holding publication libelous which imputes cowardice to detective.

Cited in notes (16 L. R. A. 625) on libel by filing lien; (9 L. R. A. 623) on what constitutes libel of tradesmen and business men; (13 L. R. A. 98) on fair criticism of public men allowable; (116 Am. St. Rep. 816) on what words are libelous *per se*.

What constitutes slander

Cited in *Fred v. Traylor*, 115 Ky. 99, 72 S. W. 768, holding words spoken of miller whereby person was told he would not sell his wheat to miller more than once, as he would find out he could not afford to, actionable as imputation upon miller's credit and honesty.

Special damages.

Cited in *Dun v. Weintraub*, 111 Ga. 419, 50 L. R. A. 673, 36 S. E. 808, and *St. James Military Academy v. Gaiser*, 125 Mo. 525, 28 L. R. A. 674, 46 Am. St. Rep. 502, 28 S. W. 851, holding false publication injurious to one in his profession, trade, or business actionable without proof of special damages; *McIntyre v. Weinert*, 195 Pa. 57, 45 Atl. 666, holding special damage need not be averred in action for publishing merchant as delinquent debtor; *Moore v. Rolin*, 89 Va. 111, 16 L. R. A. 627, 15 S. E. 520, holding malicious premature filing of mechanic's lien actionable if special damages result.

Libelousness as question of law.

Cited in *Good v. Grit Pub. Co.* 36 Pa. Super. Ct. 258, holding jury should have been instructed that article was libelous when interpreted in given way; *Com. v. Cochran*, 22 Lanc. L. Rev. 189, holding it for jury to say whether words are used in sense ascribed to them in innuendo.

Cited in note (9 Eng. Rul. Cas. 128) on province of judge and jury in action for libel or slander.

Distinguished in *Binder v. Pottstown Daily News Pub. Co.* 33 Pa. Super. Ct. 429, holding instruction that motive of publication was to attract attention rather than give information erroneous.

8 L. R. A. 195, *COM. ex rel. BURT v. UNION LEAGUE*, 135 Pa. 301, 20 Am. St. Rep. 870, 19 Atl. 1030.

When mandamus lies.

Cited in *Lahiff v. St. Joseph's Total Abstinence & Benev. Soc.* 76 Conn. 652, 65 L.R.A. 94, 100 Am. St. Rep. 1012, 57 Atl. 692, on appropriateness of mandamus as remedy to reinstate member of incorporated benevolent or social society wrongfully expelled; *Crow v. Capital City Council*, 26 Pa. Super. Ct. 423, holding mandamus not justified when it is evident there are just grounds for expulsion and that accused has been acting in hostility to organization.

Cited in note (32 L. R. A. 575) on mandamus to enforce provision of corporate by-laws.

Assent to constitution and by-laws of organization.

Cited in *Myers v. Fritchman*, 6 Pa. Super. Ct. 582, and *Brubaker v. Denlinger*, 17 Lanc. L. Rev. 222, holding person becoming member of an incorporated beneficial association accepts and is bound by its rules; *People ex rel. Elwell v. Manhattan Chess Club*, 23 Misc. 502, 52 N. Y. Supp. 726, upholding legality of expulsion of member by club by regular proceeding, with notice, accused declining to participate; *Evans v. Chamber of Commerce*, 86 Minn. 455, 91 N. W. 8, upholding right of business association to expel member for failure to submit dispute to arbitration in violation of by-laws; *James v. Grand Fraternity*, 12 Pa. Dist. R.

476, holding member bound by charter of association and frame of government lawfully set up in accordance therewith.

Distinguished in *March v. Fairmount Creamery Asso.* 32 Pa. Super. Ct. 520, holding by-law providing for forfeiture of stock for failure to comply with by-laws invalid where corporation not authorized by charter or statute to declare forfeiture.

Right to hearing.

Cited in *Miles v. Stevenson*, 80 Md. 366, 30 Atl. 646, holding public official not removable except for causes specified in statute after opportunity to be heard; *Farmer v. Board of Trade*, 78 Mo. App. 564, holding voluntary association cannot violate its own rules and expel member without notice.

Formality of proceedings to expel member.

Cited in *United States ex rel. De Yturbide v. Metropolitan Club*, 11 App. D. C. 196, upholding judgment of expulsion expressed in the form of a resolution; *Brandenburger v. Jefferson Club Asso.* 88 Mo. App. 165, holding proceedings for expulsion are not required to be technically regular; *State ex rel. Mayfield v. St. Louis Medical Soc.* 91 Mo. App. 83, holding it sufficient, if there is substantial compliance with constitution and by-laws, and notice is given and judgment pronounced with proper motives and in good faith; *Myers v. Union League*, 17 Pa. Dist. R. 303, holding organization has right to suspend or expel members for cause shown and as provided by by-laws.

Cited in note (114 Am. St. Rep. 25, 27, 29) on right of corporation or association to expel members.

Offenses sufficient for expulsion.

Cited in *Brandenburger v. Jefferson Club Asso.* 88 Mo. App. 162, upholding expulsion of member of political club for publishing statements reflecting on it and its members.

Conclusiveness of regular trial in organization.

Cited in *Brandenburger v. Jefferson Club Asso.* 88 Mo. App. 166, holding courts powerless where expulsion is regular for offense for which member may be expelled; *Miller v. Wolf*, 18 Lanc. L. Rev. 109, holding sick benefit association member cannot recover claim after regular adverse decision of order's tribunal, with opportunity of full hearing; *Harman v. Raub*, 18 Lanc. L. Rev. 184, 25 Pa. Co. Ct. 102, holding claimant of unincorporated benefit society after being wrongfully denied a hearing in society may resort to courts; *Title Guaranty & T. Co. v. Hildebrand*, 14 Luzerne Legal Reg. Rep. 72, holding courts without jurisdiction to inquire into merits of questions passed upon by organization in regular course of business, provided questions are within scope of their powers; *Beeman v. Supreme Lodge S. of H.* 215 Pa. 630, 64 Atl. 792, holding remedies to secure reinstatement or to enforce claim to death benefits provided by association must be followed before bringing action at law, where by-laws so require.

Cited in notes (49 L.R.A. 359, 360, 362, 368) on conclusiveness of decisions of tribunals of associations or corporations; (24 Am. St. Rep. 188; 59 Am. St. Rep. 208) on effect as *res judicata* of decisions within association.

Charters of benefit societies.

Cited in *Re Casoli Mut. Relief Soc.* 19 Pa. Dist. R. 545, holding that courts may require protection of members in proposed benefit association against forfeiture before giving certificate, that society will not work injury in community.

8 L. R. A. 202, *LORD v. MEADVILLE WATER CO.* 135 Pa. 122, 20 Am. St. Rep. 864, 19 Atl. 1007.

Rights of lower riparian owners to flow of water.

Cited in *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 577, 41 W. N. C. 197, and *Clark v. Pennsylvania R. Co.* 145 Pa. 449, 29 W. N. C. 51, 27 Am. St. Rep. 710, 22 Atl. 989, holding upper riparian owner cannot divert water for purposes not relating to his land to injury of lower proprietor; *Gring v. Sinking Spring Water Co.* 7 Pa. Super. Ct. 67, and *Leavenworth v. Prospect Rock Water Co.* 8 Kulp, 314, holding that spring owner may not divert well-defined stream running therefrom to injury of lower proprietors; *Wolf v. Crothers*, 21 Pa. Co. Ct. 631, holding that no riparian proprietor can use water to prejudice of another, as a general rule; *Philadelphia & R. R. Co. v. Pottsville Water Co.* 182 Pa. 426, 38 Atl. 404, Affirming 18 Pa. Co. Ct. 511, holding riparian owners cannot divert and sell running waters to strangers for general use; *Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co.* 6 Pa. Dist. R. 303, holding that mere riparian ownership does not justify upper proprietor in carrying water to non-riparian land for consumption; *Craig v. Shippensburg*, 7 Pa. Super. Ct. 529, holding that borough cannot, without compensation, divert stream for water supply, to injury of lower owners; *Filbert v. Dechert*, 22 Pa. Super. Ct. 366, holding insane asylum may take water of stream for domestic use, to injury of lower riparian owner; *Salem Mills Co. v. Lord*, 42 Or. 98, 69 Pac. 1033, holding riparian ownership does not entitle state to water for necessary purposes of penitentiary, farm, and insane asylum; *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 577, 28 Pittsb. L. J. N. S. 166, denying right of water company as upper riparian proprietor to use water to supply inhabitants of borough; *Rudolph v. Pennsylvania & S. Valley R. Co.* 186 Pa. 551, 47 L. R. A. 786, 42 W. N. C. 380, 40 Atl. 1083, holding riparian owner entitled to compensation for pollution of stream by railroad appropriating right of way through land; *Com. v. Yost*, 197 Pa. 174, 46 Atl. 845, holding pollution of stream in which riparian owners alone have an interest is a private wrong; *Irving v. Media*, 7 Del. Co. Rep. 381, 10 Pa. Super. Ct. 145, 44 W. N. C. 134, holding riparian proprietors have property right in stream which cannot be appropriated without compensation; *Com. v. Emmers*, 221 Pa. 303, 70 Atl. 762, 33 Pa. Super. Ct. 157, on right of riparian owner to use water of stream; *Lonsdale Co. v. Woonsocket*, 25 R. I. 438, 56 Atl. 448, holding riparian owner has right to natural flow of stream undiminished and uninterrupted, and to unobstructed flow of brook tributary thereto.

Cited in notes (41 L.R.A. 740) on correlative rights of upper and lower proprietors as to use and flow of water in stream; (22 L.R.A.(N.S.) 386) on right to make use, on nonriparian, of water rights incident to riparian lands; (10 Eng. Rul. Cas. 217) on riparian owner's right to use of stream.

Extent of watercourse.

Cited in *Lehigh Coal & Nav. Co. v. Pocono Spring Water Ice Co.* 7 Northampton Co. Rep. 358, holding water begins where water comes to surface and continues to flow in a channel to the sea.

Eminent domain.

Cited in *Irving v. Media*, 7 Del. Co. Rep. 385, 10 Pa. Super. Ct. 148, holding appropriation of water without exercise of right of eminent domain a tort; *Re Centre Street*, 8 Kulp, 22, holding involuntary proceedings to take private property for public use must strictly conform to statute; *Shippensburg Water Case*, 21 Pa. Co. Ct. 89, holding under statutes borough may condemn small mountain stream not amounting to river or creek; *Re Octoraro Water Co.* 23 Lanc. L. Rev. 198, 15 Pa. Dist. R. 769, on right to natural flow and denying right to condemn

a stream so as to cut off owners in another state; *Griffiths v. Monongahela R. Co.* 20 Pa. Dist. R. 537, 58 Pittsb. L. J. 10, holding that railroad has no right to appropriate water under condemnation of land for railroad; *Nielson v. Sponer*, 46 Wash. 16, 123 Am. St. Rep. 910, 89 Pac. 155, holding wasteful irrigation not use justifying riparian owner in taking all of water to destruction of ordinary domestic uses thereof by owner below, in absence of prior, legal appropriation.

Cited in footnote to *Brosnan v. Harris*, 54 L. R. A. 628, which sustains right under statute to appropriate water of spring without natural outlet.

Cited in note (37 L.R.A.(N.S.) 313) on right of government to divert water without compensation to riparian owner.

8 L. R. A. 204, *McCLUNG v. DEARBORNE*, 134 Pa. 396, 19 Am. St. Rep. 708, 19 Atl. 698.

Liability for torts of servant or agent.

Approved in *Hower v. Ulrich*, 156 Pa. 413, 33 W. N. C. 22, 27 Atl. 37, holding parent liable for independent tort of child who converted corn of another, of which parent made use.

Cited in *Ahern v. Melvin*, 21 Pa. Super. Ct. 467, holding master liable for act of servant while discharging duties in manner contrary to instructions; *Penas v. Chicago, M. & St. P. R. Co.* 112 Minn. 218, 30 L.R.A.(N.S.) 634, 140 Am. St. Rep. 470, 127 N. W. 926, holding that master is liable for tort of servant done in scope of authority with view to furtherance of master's business, even though committed contrary to express authority; *Bedillion v. Hall & Co.* 59 Pittsb. L. J. 51, holding master liable for trespass by servant which might reasonably be anticipated as arising out of performance of master's order; *Whaley v. Citizens' Nat. Bank*, 28 Pa. Super. Ct. 537, holding master liable for injury of person caused by act of servant in turning on electricity though contrary to his positive orders; *Murphey v. Philadelphia Rapid Transit Co.* 30 Pa. Super. Ct. 92, holding whether motorman acting within scope of his employment legal question for court, whereby motorman got off car and started team injuring driver; *McDermott v. Consolidated Ice Co.* 44 Pa. Super. Ct. 451, holding that master is liable for injury to child caused by fire started by janitor in vacant lot to burn papers, although master directed that they be burned in furnace; *Moon v. Matthews*, 227 Pa. 493, 29 L.R.A.(N.S.) 856, 76 Atl. 219, holding fact that while acting for master, servant may have disobeyed his commands, does not take act out of scope of his employment; *Marcus v. Gimbel Bros.* 231 Pa. 206, 80 Atl. 75, holding that master is liable for tortious acts of servant done in course of employment and within general scope of his authority; *Shear v. Singer Sewing Mach. Co.* 171 Fed. 679, holding sewing machine company liable for assault in taking machine committed by employee sent out to take up leased machines not paid for where parties were willing to give them up.

Cited in notes (14 L. R. A. 737) on liability of master for assault by servant; (27 L.R.A. 194) on master's liability for malicious act of servant; (70 L.R.A. 732) on liability of employer for acts of servant sent to commit trespass claimed to be in excess of his authority; (6 L.R.A.(N.S.) 567, on liability of master for assault by servant sent to recover property; (18 L.R.A.(N.S.) 419) on liability for tort committed by servant with a view to furtherance of master's business, but contrary to express instructions; (54 Am. St. Rep. 82) on acts of servant for which master is not responsible; (88 Am. St. Rep. 790, 796) on liability of principal for unauthorized acts of agent; (101 Am. St. Rep. 739, 771) on exemplary damages for act of employee; (17 Eng. Rul. Cas. 279) on master's liability for acts of servant.

Distinguished in *Ellis v. Lamb*, 24 Pa. Co. Ct. 151, 9 Pa. Dist. R. 492, 31 L.R.A. Au. Vol. II.—3.

Pittsb. L. J. N. S. 44, holding landlord not liable for unauthorized assault on tenant by constable while executing distress warrant.

8 L. R. A. 207, HANLEY v. WALKER, 79 Mich. 607, 45 N. W. 57.

Performance of contract; certificate as condition precedent.

Approved in *Guthat v. Gow*, 95 Mich. 531, 55 N. W. 442, holding questions of performance and extra work not for jury when contract makes architect arbiter; *Boots v. Steinberg*, 100 Mich. 139, 58 N. W. 657, holding building contractor cannot recover for work to be performed to owner's satisfaction where owner's dissatisfaction not captious; *Brown v. Kriser*, 129 Mich. 450, 89 N. W. 51, holding evidence admissible in action on building contract, under plea of general issue, to show its noncompletion; *White v. Mitchell*, 30 Ind. App. 345, 65 N. E. 1061, holding principal claiming right to finish work at contractor's expense must show architect's certificate agreed upon as condition precedent; *Weggner v. Greenstine*, 114 Mich. 315, 72 N. W. 170, holding action premature on building contract where condition unperformed that allowances for alterations and specifications must be determined by architect or arbitrators; *Schmidt v. North Yakima*, 12 Wash. 128, 40 Pac. 790, holding engineer's certificate prerequisite to recovery where payment conditioned thereon; *Wortman v. Kleinschmidt*, 12 Mont. 329, 30 Pac. 280, holding that liability conditioned on performance of extra work only under architect's written letter, does not cover extra work at owner's request; *Vanderhoof v. Shell*, 42 Or. 585, 72 Pac. 126, holding provision for architect's certificate waived where he supervised work and owner agreed to accept building, excepting certain alterations; *McGlauffin v. Wormser*, 28 Mont. 180, 72 Pac. 428, holding complaint in action to enforce mechanic's lien must allege giving of necessary architect's certificate or explain why not given.

Cited in *Korbly v. Loomis*, 172 Ind. 355, 88 N. E. 698, holding building contract valid which makes certificate of architect or engineer condition precedent to assertion of right thereunder, and party claiming right must allege performance of condition or valid reason for noncompliance therewith or waiver thereof; *Lamson v. Marshall*, 133 Mich. 266, 95 N. W. 78, holding estimate binding if honestly made not binding if it does not accord with honest judgment of engineer making it and burden of proof on party attacking estimate; *McMillan v. Schneider*, 147 Mich. 264, 110 N. W. 961, holding that if contractor perform contract money becomes due thereon if certificate of architect is waived or improperly withheld; *Fisher v. Burroughs Adding Mach. Co.* 166 Mich. 401, 132 N. W. 101 (dissenting opinion), on necessity of builder procuring architect's certificate before suit for recovery of amount due, where contract contains stipulation to that effect; *McGavock v. Virginia-Carolina Chemical Co.* 114 Tenn. 326, 86 S. W. 380, holding by analogy parties bound by agreement to submit question of quality of rock mined to test by experts; *Steltz v. Armory Co.* 15 Idaho, 557, 20 L.R.A.(N.S.) 875, 99 Pac. 98, holding possession by owner of incomplete or defectively constructed building no bar to his right to recover for breach of contract; *Pope v. King*, 108 Md. 47, 16 L.R.A.(N.S.) 493, 69 Atl. 417, 15 A. & E. Ann. Cas. 970, holding use of building under circumstances which negative intention of owner to accept work, does not constitute acceptance of work; *Gier v. Daiber*, 148 Mich. 192, 111 N. W. 773, holding where possession of building was taken by owner under protest, after which builders remedied defects pointed out and requested that others be pointed out, that owner had not accepted building as completed or waived rights.

Cited in footnote to *Arnold v. Bournique*, 20 L. R. A. 493, which holds con-

tractor entitled to payment on delivery of architect's certificate handed back without presentation to owner.

Cited in notes (9 L.R.A. 53) as to "substantial compliance" with building contract; (6 L.R.A.(N.S.) 775) on full or substantial performance of construction contract as excusing, as a matter of law, failure to secure architect's or engineer's certificate; (16 L.R.A.(N.S.) 491) on use of building by owner as acceptance of work of construction or repair; (3 Eng. Rul. Cas. 387) on reference to arbitration where contract contains an arbitration clause.

Distinguished in *Moran v. Schmitt*, 109 Mich. 289, 67 N. W. 323, holding contractor entitled to maintain action for extras where specified arbitrator refuses to act; *National Home Bldg. & L. Asso. v. Dwelling House Ins. Co.* 106 Mich. 238, 64 N. W. 21, sustaining action without award made prima facie evidence of amount when appraisers demanded, where no appraisal is demanded for nine months after fire; *Germain v. Union School Dist.* 158 Mich. 216, 122 N. W. 524, holding failure to produce architect's final estimate immaterial, where architect was discharged several months before suit, and contract provided owner should act in place of architect, if architect discharged.

Recovery on quantum meruit where certificate condition precedent.

Cited in *Eaton v. Gladwell*, 121 Mich. 449, 80 N. W. 294, holding one taking possession of building not conforming to plans and specifications, liable on *quantum meruit*.

Distinguished in United States use of *Croll v. Jack*, 124 Mich. 214, 82 N. W. 1049, holding material man may recover on *quantum meruit* for goods seized by contractor's creditors notwithstanding condition of supervising architect's approval.

Recovery on quantum meruit for work under express contract.

Cited in *Mosaic Tile Co. v. Chiera*, 133 Mich. 502, 95 N. W. 537, holding recovery may be had upon quantum meruit subject to recoupment, though there be express contract not performed, where work is appropriated.

8 L. R. A. 211, *PHELAN v. BRADY*, 119 N. Y. 587, 23 N. E. 1109.

Possession as constructive notice of title.

Cited in *Welsh v. Schoen*, 59 Hun, 358, 13 N. Y. Supp. 71, holding possession of grantee under unrecorded deed notice of his rights to foreclosing mortgagee; *Chapman v. Chapman*, 91 Va. 402, 50 Am. St. Rep. 846, 21 S. E. 813, and *Sanders v. Riedinger*, 30 App. Div. 284, 51 N. Y. Supp. 937, holding occupation under unrecorded deed notice to subsequent grantee; *Titcomb v. Fonda, J. & G. R. Co.* 38 Misc. 632, 78 N. Y. Supp. 226, holding possession of vendee under land contract notice of his rights to foreclosing mortgagee; *Dumoix v. New York*, 37 Misc. 618, 76 N. Y. Supp. 161, holding open possession under unrecorded lease notice of lessor's rights; *Ward v. Metropolitan R. Co.* 152 N. Y. 43, 46 N. E. 319, Affirming 82 Hun, 547, 31 N. Y. Supp. 527, holding elevated railroad's operation of road notice to subsequent purchaser of abutting owner's release of easements; *Smith v. Reid*, 19 N. Y. Civ. Proc. Rep. 366, 34 N. Y. S. R. 491, 11 N. Y. Supp. 739, holding possession of grantee of purchaser under execution notice to subsequent grantee of one claiming under fraudulent conveyance; *Holland v. Brown*, 140 N. Y. 347, 35 N. E. 577, holding possession of uplands may constitute notice of title to water front designated by visible monuments at or near shore; *Cornell v. Maltby*, 165 N. Y. 560, 59 N. E. 291, holding mortgagee relying upon record title, not chargeable with notice of fraud of which possessor was then ignorant; *Terrell v. McLean*, 130 Ga. 636, 61 S. E. 485, holding scope of notice afforded by possession, and duty of inquiry as to possessor's title not

limited to part of tract claimed which is actually occupied; *International Harvester Co. v. Myers*, 86 Kan. 507, 39 L.R.A.(N.S.) 528, 121 Pac. 500, holding that equitable owners of land in possession, hold land unaffected by mortgage executed by grantor during such occupancy, where such ownership was known generally in vicinity; *American Exch. Nat. Bank v. Smith*, 61 Misc. 53, 113 N. Y. Supp. 236, holding actual possession of real estate sufficient notice to person proposing to take mortgage, of right of tenant in possession; *Vogel & B. Co. v. Montgomery*, 133 App. Div. 841, 118 N. Y. Supp. 10, on whether it is immaterial for purpose of charging every one with notice of possessor's rights, that such rights or even fact of possession were unknown to person to be charged with notice.

Cited in footnotes to *Gray v. H. M. Loud & Sons Lumber Co.* 54 L.R.A. 731, which denies priority of one having unrecorded contract for part of tract of land, as to subsequent mortgage on entire tract, over subsequent purchasers of remainder; *Rock Island & P. R. Co. v. Dimick*, 19 L. R. A. 105, which holds open and exclusive possession of passageway through railroad embankment notice of rights to purchaser of railroad; *Gibson v. Thomas*, 70 L.R.A. 768, which holds unrecorded release of portion of property covered by mortgage by holder to mortgagor not binding on subsequent assignee of mortgage without notice.

Cited in notes (11 L.R.A. 661) on possession as notice of title, sufficient to put purchaser on inquiry; (13 L.R.A.(N.S.) 52, 74, 94, 101, 112; 104 Am. St. Rep. 340, 341; 11 Eng. Rul. Cas. 548) on possession of land as notice of title.

Distinguished in *Swanstrom v. Day*, 46 Misc. 313, 93 N. Y. Supp. 192, holding fencing of pasture not possession constituting notice of purchaser's rights; *Shneider v. Mahl*, 84 App. Div. 5, 82 N. Y. Supp. 27, holding mortgagee not chargeable with knowledge of rights of equitable mortgagee in possession as tenant; *Gibson v. Thomas*, 180 N. Y. 488, 70 L.R.A. 770, 73 N. E. 484, holding subsequent assignee of mortgage protected to full security of mortgage covering tract upon which was railroad right of way, where railroad company held prior unrecorded release of mortgage to mortgagor and was in possession under deed from mortgagor.

— When occupancy shared by others.

Cited in *Kirby v. Tallmadge*, 160 U. S. 388, 40 L. ed. 467, 16 Sup. Ct. Rep. 349, holding joint occupation by husband and wife notice of wife's title to purchaser from holder of record title; *Marden v. Dorothy*, 160 N. Y. 52, 46 L. R. A. 699, 54 N. E. 726, Affirming 12 App. Div. 198, 42 N. Y. Supp. 827, holding possession by one from whom record title has been obtained by trickery, although obscured by grantee's residence, notice to mortgagee.

Distinguished in *Swanstrom v. Day*, 46 Misc. 313, 93 N. Y. Supp. 192, holding inference permissible that possession is in one having title, where possession of another is equivocal.

8 L. R. A. 214, *MOORE v. FRANCIS*, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127.

Libel and slander defined.

Cited in *Woodruff v. Woodruff*, 36 Misc. 16, 72 N. Y. Supp. 39, defining libel as written defamatory declarations; *Spurlock v. Lombard Invest. Co.* 59 Mo. App. 230, defining libel *per se* as malicious publication tending to injure business and blacken reputation; *Cady v. Brooklyn Union Pub. Co.* 23 Misc. 410, 51 N. Y. Supp. 198; *Le Massena v. Storm*, 62 App. Div. 153, 70 N. Y. Supp. 882; *Green v. Meyer*, 78 N. Y. S. R. 82, 44 N. Y. Supp. 81; *Gates v. New York Recorder Co.* 155 N. Y. 234, 49 N. E. 769,—adopting classification of slanderous words actionable *per se*.

Cited in note (9 Eng. Rul. Cas. 15) on distinction between libel and slander; (9 Eng. Rul. Cas. 38) on what constitutes a publication of libel.

Question of law and fact as to libel or slander.

Cited in *Schuyler v. Busbey*, 68 Hun, 478, 23 N. Y. Supp. 102, holding question of libel one of law when publication is admitted, and words are unambiguous; *Mattice v. Wilcox*, 71 Hun, 487, 24 N. Y. Supp. 1060; *Zinserling v. Journal Co.* 26 Misc. 593, 57 N. Y. Supp. 905; *Turton v. New York Recorder*, 3 Misc. 319, 22 N. Y. Supp. 766,—holding article capable of one construction only raises question of law; *Urban v. Helmick*, 15 Wash. 158, 45 Pac. 747; *Beecher v. Press Pub. Co.* 60 App. Div. 539, 69 N. Y. Supp. 895; *Kuster v. Press Pub. Co.* 80 App. Div. 617, 80 N. Y. Supp. 1050,—holding duty of court to determine nature of words when article unambiguous; *Jesper v. Press Pub. Co.* 76 Hun, 66, 27 N. Y. Supp. 619, holding refusal to charge publication libelous when but one meaning possible, error; *Shanks v. Stumpf*, 23 Misc. 267, 51 N. Y. Supp. 154, holding article characterizing conduct “utterly indefensible and downright criminal” libelous *per se* as matter of law; *Clark v. Anderson*, 33 N. Y. S. R. 867, 11 N. Y. Supp. 729, holding language susceptible of innocent construction question for jury; *Gallagher v. Bryant*, 44 App. Div. 529, 60 N. Y. Supp. 844, holding article susceptible of interpretation imputing moral turpitude, question for jury; *Harri-man v. New Nonparell Co.* 132 Iowa, 621, 110 N. W. 33, holding question whether words libelous *per se* for court; *Klaw v. New York Press Co.* 137 App. Div. 688, 122 N. Y. Supp. 437, holding that if article alleged to be libelous is susceptible of only one meaning, then question whether or not it is libelous is for court; *Hoey v. New York Times Co.* 138 App. Div. 156, 122 N. Y. Supp. 978, holding that whether article criticizing public officer would be understood in libelous sense is for jury where language is ambiguous; *Bodine v. Times-Journal Pub. Co.* 26 Okla. 138, 31 L.R.A.(N.S.) 147, 110 Pac. 1096, holding that question whether publication was libelous is for court where language is clear and unambiguous and facts uncontroverted.

Words actionable *per se*.

Cited in *Hussey v. New York Recorder Co.* 89 Hun, 609, 35 N. Y. Supp. 49, holding that complaint states libel; *Weston v. Weston*, 83 App. Div. 523, 82 N. Y. Supp. 351, holding words, not slanderous when spoken, may be libelous when published; *Martin v. Press Pub. Co.* 93 App. Div. 533, 87 N. Y. Supp. 859, holding newspaper article on poverty-stricken condition of former college professor libelous *per se*; *Cassavoy v. Pattison*, 93 App. Div. 372, 87 N. Y. Supp. 658, holding charge of dishonesty not slanderous *per se* unless spoken in reference to occupation.

Cited in note (116 Am. St. Rep. 804, 812, 814, 816) on what words are libelous *per se*.

— Touching vocation.

Followed in *Sawyer v. Bennett*, 49 N. Y. S. R. 774, 20 N. Y. Supp. 835, holding article in paper stating failure caused by reckless investment of agent actionable *per se*.

Cited in *Bornmann v. Star Co.* 174 N. Y. 219, 66 N. E. 723, holding article characterizing doctor “brute graduated to care for sick” touches vocation; *Gideon v. Dwyer*, 87 Hun, 249, 33 N. Y. Supp. 754, holding imputing crookedness on turf tends to injure party in business; *Cady v. Brooklyn Union Pub. Co.* 23 Misc. 412, 51 N. Y. Supp. 198, holding publication reporting suicide of dentist libelous *per se*; *Chiatovich v. Hanchett*, 88 Fed. 878, holding notice to employees to refrain from associating and dealing with merchant assails vocation; *Gibson v. Sun Printing & Pub. Asso.* 71 App. Div. 569, 76 N. Y. Supp. 197, holding pub-

lication reporting removal of attorney for inefficiency, calculated to injure practice; *Davey v. Davey*, 22 Misc. 670, 50 N. Y. Supp. 161, holding circulation of paper characterizing one as unscrupulous grocer entitled him to compensatory damages; *Woodruff v. Woodruff*, 36 Misc. 17, 72 N. Y. Supp. 39, holding words tending to injure business actionable *per se*; *Easton v. Buck*, 23 App. Div. 465, 48 N. Y. Supp. 158, and *Potter v. New York Evening Journal Pub. Co.* 68 App. Div. 98, 74 N. Y. Supp. 317, sustaining right holding words actionable touching one in business; *Daily v. De Young*, 127 Fed. 492; *Daily v. Engineering & Mining Journal*, 94 App. Div. 321, 88 N. Y. Supp. 6, holding publication of charge or extravagant management of manager of mining company libelous *per se*; *Ryan v. Burger & H. Brewing Co.* 37 N. Y. S. R. 289, 13 N. Y. Supp. 660, upholding right to damages for words destroying business; *Mattice v. Wilcox*, 147 N. Y. 632, 42 N. E. 270, holding publication charging attorney with incapacity to perform ordinary duties libelous *per se*; *Ratzel v. New York News Pub. Co.* 35 Misc. 489, 71 N. Y. Supp. 1069, upholding right of recovery without proof of special damage for words tending to injure trade; *Morey v. Morning Journal Asso.* 123 N. Y. 210, 9 L. R. A. 624, 20 Am. St. Rep. 730, 25 N. E. 161, holding publication tending to disgrace and ruin business libelous *per se*; *Stokes v. Stokes*, 76 Hun, 317, 28 N. Y. Supp. 165, upholding right to damages for words tending to diminish respectability and injure business; *Labouisse v. Evening Post Pub. Co.* 10 App. Div. 31, 41 N. Y. Supp. 688, holding publication charging one with attempt to "corner" cotton not actionable *per se*; *Triggs v. Sun Printing & Pub. Asso.* 179 N. Y. 153, 66 L.R.A. 617, 103 Am. St. Rep. 841, 71 N. E. 739, 1 A. & E. Ann. Cas. 326, holding articles ridiculing author libelous *per se*; *Flaherty v. New York Times Co.* 109 App. Div. 491, 96 N. Y. Supp. 381, holding publication charging janitress with conduct such as would tend to prevent her obtaining similar situation libelous *per se*; *MacDonald v. Sun Printing & Pub. Asso.* 111 App. Div. 467, 98 N. Y. Supp. 116, holding letter branding scientist as "patho-social humbug" and "pseudo-scientist" actionable *per se*, and plaintiff not bound to plead special damages; *Hughes v. New York Evening Post Co.* 115 App. Div. 615, 100 N. Y. Supp. 982, holding publication that lawyer complained of being thrown into jail illegally on complaint of woman from whom he had collected debt and retained legal percentage for collection not libelous; *Perley v. Morning Teleg. Co.* 131 App. Div. 601, 116 N. Y. Supp. 57, holding publication alleging plaintiff's shows were closed because unsuccessful not libelous *per se*; *Armstrong v. Sun Printing & Pub. Asso.* 137 App. Div. 831, 122 N. Y. Supp. 531, holding that words are not libelous as to trade or business unless spoken of plaintiff in relation thereto, and are of such character as would prejudice him by impeaching skill or knowledge or attacking his conduct in such business; *Lynott v. Pearson*, 138 App. Div. 308, 122 N. Y. Supp. 986 (dissenting opinion) on publication as slanderous *per se* when spoken of plaintiff in reference to business where no special damage is alleged.

Cited in note (9 L. R. A. 623) on libel and slander affecting reputation of tradesmen and business men.

Distinguished in *Keene v. Tribune Asso.* 76 Hun, 490, 27 N. Y. Supp. 1045, denying liability where publication produces no injury; *Duffy v. New York Evening Post Co.* 109 App. Div. 474, 96 N. Y. Supp. 629, where nothing was said affecting private character or business of plaintiff, outside of political relations.

—Charging moral turpitude.

Approved in *Stafford v. Morning Journal Asso.* 68 Hun, 471, 22 N. Y. Supp. 1008, holding publication defaming reputation libelous *per se*.

Cited in *Charwat v. Vopelak*, 19 Misc. 502, 44 N. Y. Supp. 26, holding statements that one failed yet has money actionable *per se*; *Lehmann v. Tribune Asso.*

37 Misc. 509, 75 N. Y. Supp. 1034, holding article charging attempt to smuggle libelous; *Butterfield v. Bennett*, 18 N. Y. Supp. 432, holding imputing in chastity to woman libelous *per se*; *Hollingsworth v. Spectator Co.* 49 App. Div. 19, 63 N. Y. Supp. 2, holding article libelous *per se* charging insurance examiner as not properly commissioned; *Johnson v. Synett*, 89 Hun, 193, 35 N. Y. Supp. 79, holding publication of arrest of minister as too much of family man libelous *per se*; *Hartman v. Morning Journal Asso.* 46 N. Y. S. R. 182, 19 N. Y. Supp. 401, holding writings imputing connection with insurance swindle libelous *per se*; *Gillan v. State Journal Printing Co.* 96 Wis. 465, 71 N. W. 892, denying that words not charging moral turpitude or touching vocation are actionable *per se*; *Gallup v. Belmont*, 41 N. Y. S. R. 234, 16 N. Y. Supp. 483, holding publication reporting discharge of club member not libelous.

Defense in action for libel or slander.

Approved in *Schuyler v. Busbey*, 68 Hun, 477, 23 N. Y. Supp. 102, holding publication in good faith no excuse.

Cited in *Cady v. Brooklyn Union Pub. Co.* 23 Misc. 410, 51 N. Y. Supp. 198, upholding right to damages for actionable statements made with good motive; *Morse v. Times-Republican Printing Co.* 124 Iowa, 718, 100 N. W. 867, holding malice and injury implied in publication of words libelous *per se*, publisher's good faith may mitigate damages but is not defense; *Byrne v. Funk*, 38 Wash. 514, 80 Pac. 772, 3 A. & E. Ann. Cas. 647, holding malice not necessary element of libel in civil action for damages.

Damages for failure to verify statements.

Cited in footnote to *Press Pub. Co. v. McDonald*, 26 L. R. A. 531, which authorizes punitive damages for failure of effort to verify truth of libelous despatch before printing in newspaper.

Damages in action for slander or libel.

Cited in *Russell v. Washington Post Co.* 31 App. D. C. 280, 14 A. & E. Ann. Cas. 820, holding plaintiff entitled to go into question of damages to him as minister, writer and author under allegations of declaration for libel in charging him with improper conduct with lady parishioners.

Separate functions of judge and jury.

Cited in *McCarty v. Natural Carbonic Gas Co.* 189 N. Y. 55, 13 L.R.A.(N.S.) 471, 81 N. E. 549, 12 A. & E. Ann. Cas. 840 (dissenting opinion), on promise of court to decide where question of law raised by establishment by undisputed evidence of direct fact in issue and decisions of case.

8 L. R. A. 216, *TERRY v. MUNGER*, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272.

Right to waive tort.

Cited in *Central Gas & Electric Fixture Co. v. Sheridan*, 1 Misc. 387, 22 N. Y. Supp. 76, upholding right to waive conversion of gas fixtures and sue on implied contract; *Anderson v. First Nat. Bank*, 5 N. D. 88, 64 N. W. 114, upholding right to waive conversion of proceeds from sale of notes, and sue in assumpsit; *Phelps v. Church of Our Lady Help of Christians*, 40 C. C. A. 74, 99 Fed. 684, upholding right to waive action for conversion of store and sue in assumpsit; *Braithwaite v. Akin*, 3 N. D. 371, 56 N. W. 133, holding that owner of property may waive tort and sue for benefits received by wrongdoer; *Sage v. Shepard & M. Lumber Co.* 4 App. Div. 297, 39 N. Y. Supp. 449, sustaining liability upon implied contract for lumber tortiously acquired; *Doherty v. Shields*, 86 Hun, 308, 33 N. Y. Supp. 497, holding that conversion may be waived, where property is still with wrongdoer, and recovery had for goods sold and delivered;

Carey v. Flack, 20 Misc. 296, 45 N. Y. Supp. 759, upholding right to waive conversion and sue on implied assumpsit; Moore v. Richardson, 68 N. J. L. 309, 53 Atl. 1032, holding value of converted property at time of conversion, recoverable in assumpsit; Crane v. Murray, 106 Mo. App. 703, 80 S. W. 280, holding tort may be waived and assumpsit brought wherever there is conversion for which action of tort would lie, regardless of whether property sold, consumed or changed in form; Kleinbohe v. Hoffman House, 50 Misc. 129, 97 N. Y. Supp. 1122, holding true owner may waive tort and sue upon implied contract of sale, in case of conversion of personalty; Walker v. Norfolk & W. R. Co. 67 W. Va. 277, 67 S. E. 722, holding that owner of property converted by another may waive tort and recover value of property taken in action of assumpsit.

Cited in note (134 Am. St. Rep. 189, 192) on right to waive tort and sue in assumpsit.

Effect of election on title.

Cited in Schoeneman v. Chamberlin, 55 App. Div. 356, 67 N. Y. Supp. 284, holding title passes to wrongdoer when tort waived and transaction treated as sale; Disbrow v. Westchester Hardwood Co. 164 N. Y. 424, 58 N. E. 519, holding recovery in assumpsit for timber tortiously cut precludes enjoining removal; Deitz v. Field, 10 App. Div. 427, note, 41 N. Y. Supp. 1087, Affirming 17 Misc. 27, 39 N. Y. Supp. 257, holding action for conversion of bonds precludes claim for their recovery; Merritt v. American Steel-Barge Co. 24 C. C. A. 537, 49 U. S. App. 85, 79 Fed. 234, holding action in assumpsit for value of stock, election to abandon title thereto; Lytle v. Bank of Dothan, 121 Ala. 221, 26 So. 6, holding action for purchase price of cotton on election to treat transaction as a sale; Campbell v. Kauffman Mill Co. 42 Fla. 343, 29 So. 435, holding principal taking judgment against agent for proceeds of sales cannot claim uncollected accounts.

Cited in footnote to Crompton v. Beach, 18 L. R. A. 187, which holds that conditional vendor's exercise of option to enforce payment of note for purchase price, defeats right to retake property.

Election of remedies and rights.

Cited in Sweetser v. Davis, 26 App. Div. 398, 49 N. Y. Supp. 874, holding that creditors waive fraudulent assignment and ratify same by motion to remove assignee, substituting another; O'Bryan Bros. v. Glenn Bros. 91 Tenn. 110, 30 Am. St. Rep. 862, 17 S. W. 1030, holding election to repudiate assignment precludes benefits thereunder; Seeley v. Seeley-Howe-Le Van Co. 130 Iowa, 631, 114 Am. St. Rep. 452, 105 N. W. 380, holding right to claim in receivership proceedings proceeds of goods purchased through fraudulent representations as to credit, barred by election to confirm sale; Henry v. Herrington, 193 N. Y. 222, 20 L.R.A. (N.S.) 251, 86 N. E. 29, holding right to make election must actually exist, if it did not, bringing of previous action, immaterial in its bearing on subsequent action; Clarke v. Mercantile Trust Co. 110 App. Div. 903, 95 N. Y. Supp. 1118 (dissenting opinion), on election of remedies; Seymour v. Du Bois, 145 Fed. 1006, holding party not allowed to assert relation between himself and counsel not terminated where he has elected to discharge them; Thomas v. Sugarman, 15 L.R.A. (N.S.) 1269, 84 C. C. A. 337, 157 Fed. 672, holding trustee in bankruptcy was prevented from having fraudulent transfer by bankrupt set aside, by his own acts in charging bankrupt with money received from such transfer; Herbert v. Wagg, 27 Okla. 682, 117 Pac. 209, holding that election of one of several means of redress, with knowledge, operates as bar to subsequent change to, or adoption of any other.

Cited in footnote to Walden Nat. Bank v. Birch, 14 L. R. A. 211, which holds recovery of judgment against bank cashier on note secured by bank stock not bar to action on bond for misappropriating stock.

Cited in notes (13 L.R.A. 92, 473) on election of remedy; (34 L.R.A.(N.S.) 314) on bringing suit not prosecuted to judgment as election of remedies.

Distinguished in *Woodworth v. Gorsline*, 30 Colo. 190, 58 L. R. A. 424, 69 Pac. 705, holding unaccepted tender of property in replevin no bar to action on indemnity bond of sheriff; *Patterson v. Youngs*, 72 Misc. 93, 129 N. Y. Supp. 673, holding that former suit against firm did not constitute election of remedies or prevent suit against special partners to hold them liable as general partners because of defective organization proceedings.

— Action ex delicto.

Cited in *Lee v. Burnham*, 82 Wis. 212, 52 N. W. 255, holding that action on contract brought by agent without authority when discontinued does not preclude replevin; *Emerald & P. Brewing Co. v. Leonard*, 22 Misc. 122, 48 N. Y. Supp. 706, holding that action by bailor for goods sold and delivered precludes suit for conversion; *Rochester Distilling Co. v. Devendorf*, 72 Hun, 431, 25 N. Y. Supp. 200, holding recovery on contract without knowledge of fraud no bar to replevin action after its discovery; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 126 Mo. 351, 26 L. R. A. 842, footnote, p. 840, 47 Am. St. Rep. 675, 28 S. W. 870, Reversing 52 Mo. App. 415, holding suit in attachment afterwards dismissed no bar to replevin, no rights intervening; *A. C. Nellis Co. v. Nellis*, 62 Hun, 68, 16 N. Y. Supp. 545, holding sale of collaterals no ratification of unauthorized loan, estopping suit for conversion; *Russell v. McCall*, 141 N. Y. 449, 38 Am. St. Rep. 807, 36 N. E. 498, holding action against partner for misappropriation no bar to suit against rest as trustees *de son tort*; *Weaver v. Lawyers' Surety Co.* 36 Misc. 637, 74 N. Y. Supp. 462, holding replevin barred by assignment of action on contract by one having action *ex contractu* or *ex delicto*; *Seeman v. Bandler*, 26 Misc. 373, 56 N. Y. Supp. 210, holding replevin against transferee of fraudulent vendee bars action *ex contractu* against vendee; *Kearney Mill. & Elevator Co. v. Union P. R. Co.* 97 Iowa, 724, 59 Am. St. Rep. 434, 66 N. W. 1059, upholding right of stoppage *in transitu*, buyer obtaining goods by fraud; *National Commercial Bank v. Lackawanna Transp. Co.* 59 App. Div. 274, 69 N. Y. Supp. 396, holding one bringing suit for conversion cannot recover on different cause of action; *Mutual Auto Accessories Co. v. Beard*, 59 Misc. 177, 110 N. Y. Supp. 416, on election of remedies.

Cited in footnote to *Miller v. Hyde*, 25 L. R. A. 42, which holds replevin of horse not defeated by prior attachment suit for troyer.

Cited in notes (58 L. R. A. 430) on effect of judgment against one tortfeasor upon other in proceedings before entry; (13 L. R. A. 92, 473) on election of remedy.

— Action ex contractu.

Cited in *Droege v. Ahrens & O. Mfg. Co.* 163 N. Y. 470, 57 N. E. 747, holding filing proof of claim with assignee affirms sale and precludes action to rescind for fraud; *Re Hildebrant*, 120 Fed. 996, holding vendor of goods fraudulently purchased cannot file claims for goods sold and also for return of goods in bankrupt's possession; *Starr Cash Car Co. v. Reinhart*, 2 Misc. 119, 20 N. Y. Supp. 874, holding counterclaim for conversion proper in action *ex contractu* when tort waived; *Crook v. First Nat. Bank*, 83 Wis. 43, 35 Am. St. Rep. 17, 52 N. W. 1131, holding action *ex contractu* ratifies unauthorized payment made by bank; *Ladew v. Hart*, 8 App. Div. 154, 40 N. Y. Supp. 509, sustaining right of action *ex contractu* against sheriff for wrongful levy, where property is undisposed of; *Hess v. Smith*, 16 Misc. 55, 37 N. Y. Supp. 635, holding recovery *ex contractu* bar to subsequent action *ex delicto*; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 126 Mo. 351, 26 L. R. A. 842, footnote, p. 840, 47 Am. St. Rep.

675, 28 S. W. 870, holding suit for purchase price of wheat precludes subsequent action in replevin; Birdsell Mfg. Co. v. Oglevee, 187 Ill. 152, 58 N. E. 231, holding election to treat unauthorized disposition of machinery as sale waives action for conversion; McNutt v. Hilkins, 80 Hun, 238, 29 N. Y. Supp. 1047, holding party unsuccessful in action *ex delicto* not precluded from suit *ex contractu* upon same facts; Crown Cycle Co. v. Brown, 39 Or. 289, 64 Pac. 451, holding that vendor, induced to part with goods by fraud on time payment, may sue in assumpsit at once, waiving tort; Schoeneman v. Chamberlin, 55 App. Div. 354, 67 N. Y. Supp. 284, holding vendor may replevin part of goods from fraudulent vendee's assignee and waiving fraud sue vendee on contract for remainder; Crossman v. Universal Rubber Co. 127 N. Y. 37, 13 L. R. A. 94, 27 N. E. 400, holding former unsuccessful proceedings *in rem* no bar to collection of purchase-money notes; Brady v. Cassidy, 9 Misc. 114, 29 N. Y. Supp. 45, holding right to complete delivery waived by vendee using part of goods claiming damages for nondelivery of balance; Roberge v. Winne, 144 N. Y. 712, 39 N. E. 631, holding action compelling performance of contract maintainable in absence of proof of election; Houston v. Curran, 101 Ill. App. 207, denying waiver of forfeiture clause in mortgage by accepting payments, while prior payments are in default; National Granite Bank v. Tyndale, 179 Mass. 394, 60 N. E. 927, holding discontinuance of suit against indorser of void note no bar to action against maker for money loaned; Maders v. Whallon, 46 N. Y. S. R. 218, 19 N. Y. Supp. 638, holding that judgment cannot be granted in foreclosure when different action litigated; Washburn v. Benedict, 46 App. Div. 490, 61 N. Y. Supp. 387, holding assailing assignments of mortgage election to ratify sale of premises and mortgage; *Re Linforth*, 87 Fed. 390, holding mortgage claim against bankrupt not barred by foreclosure in state court subsequently discontinued; Colvin v. Shaw, 79 Hun, 60, 29 N. Y. Supp. 644, denying that claim against mortgagor exceeding amount due for board is election to relinquish equitable interest in mortgage; Henderson v. Bartlett, 32 App. Div. 440, 53 N. Y. Supp. 149, denying that suit against firm upon obligation precludes action against member upon obligation substituted therefor; Cook v. Adams, 32 App. Div. 388, 53 N. Y. Supp. 120, holding right to foreclose mortgage consistent with suit for breach of contract to pay taxes; Genet v. Delaware & H. Canal Co. 170 N. Y. 296, 63 N. E. 350, dissenting opinion (same case on former appeal in 28 App. Div. 332, 51 N. Y. Supp. 377) to point that party to contract waives right to terminate same by receiving royalties and bringing suits thereunder; Paris v. Sheppard, 125 Iowa, 258, 101 N. W. 114, holding purchaser of stock of goods from debtor cannot sue for value of goods, after intervening in attachment suit instituted by creditor; Bramhall, Deane & Co. v. International Mercantile Marine Co. 145 Fed. 682; Stokes v. Stokes, 128 App. Div. 848, 113 N. Y. Supp. 142 (dissenting opinion); *Re Ablowich*, 118 App. Div. 632, 103 N. Y. Supp. 699 (dissenting opinion), —on election of remedies; Furculi v. Bittner, 69 Misc. 119, 125 N. Y. Supp. 36, holding that prosecution of action on contract under seal to judgment against agent, precluded subsequent recovery against principal, where it appeared before judgment that agent was acting for undisclosed principal; Houston Mercantile Co. v. Powell, 72 Misc. 359, 130 N. Y. Supp. 274, holding that bringing of action in equity by tenant for annulment of lease for fraud and for damages, is not election of remedies precluding tenants from setting up counterclaim for damages for false representations in defense to summary proceeding by landlord; Smeesters v. Schroeder, 123 Wis. 119, 101 N. W. 363, holding right to damages for breach of warranty in sale of horse barred by election to rescind.

Cited in footnote to Barchard v. Kohn, 29 L. R. A. 803, which holds enforce-

ment of chattel mortgage on exempt property not defeated by prior judgment and attempted levy on exempt property.

Cited in notes (13 L. R. A. 92, 473) on election of remedy.

Record in former suit as evidence.

Cited in *Carroll v. Fethers*, 102 Wis. 443, 78 N. W. 604, holding record of action *ex contractu* admissible to show tort waived; *Davis v. Butters Lumber Co.* 132 N. C. 238, 43 S. E. 650, holding defense to action to disaffirm discount of drafts by insolvent bank, that action has been brought for proceeds, need not be pleaded.

Distinguished in *Mandeville v. Avery*, 44 N. Y. S. R. 4, 17 N. Y. Supp. 429, holding judgment in replevin establishing title under valid mortgage not admissible against claim to surplus money.

8 L. R. A. 221, *TALAMO v. SPITZMILLER*, 120 N. Y. 37, 17 Am. St. Rep. 607, 23 N. E. 980.

Tenancy from year to year; how created.

Cited in *Phelan v. Anderson*, 118 Cal. 506, 50 Pac. 685, holding payments of annual rent under void lease creates presumption of yearly tenancy; *Arbenz v. Exley*, 52 W. Va. 482, 61 L. R. A. 959, footnote p. 957, 44 S. E. 149, holding one entering under void lease, paying annual rent in monthly instalments, tenant from year to year; *Earle v. McGoldrick*, 15 Misc. 136, 36 N. Y. Supp. 803, holding tenant occupying premises for nearly year under void lease at most yearly tenant; *Gilfoyle v. Cahill*, 18 Misc. 70, 41 N. Y. Supp. 29, holding period of occupation and mode of payment may determine nature of tenancy under void lease; *Adams v. Cohoes*, 127 N. Y. 181, 28 N. E. 25, holding parol lease for three years void and no yearly tenancy created unless occupied so long; *Johnson v. Albertson*, 51 Minn. 335, 53 N. W. 642, holding monthly payments under void lease not alone sufficient to prove yearly tenancy; *Hellams v. Patton*, 44 S. C. 459, 22 S. E. 608, holding acts of tenant under void lease may convert tenancy at will into yearly tenancy; *Wilder v. Stace*, 61 Hun. 235, 15 N. Y. Supp. 870, holding void lease makes new contract necessary to create yearly tenancy, and payment to "bind bargain" ineffectual; *Matthews v. Hipp*, 66 S. C. 170, 44 S. E. 577, holding tenant holding over after termination of oral lease for a year may be tenant at will or tenant from year to year; *Williams v. Apothecaries Hall Co.* 80 Conn. 506, 69 Atl. 12, holding tenancy from year to year created by entrance and occupancy under lease for indefinite time, reserving annual rent which is paid; *Falek v. Barlow*, 110 Md. 164, 72 Atl. 678, 17 A. & E. Ann. Cas. 538, holding entrance, occupancy and periodical payment of yearly rent, which is accepted, under color of void or defective lease, creates tenancy from year to year; *Karsch v. Kalabza*, 144 App. Div. 307, 128 N. Y. Supp. 1027, holding that tenancy from year to year is to be inferred where entry of tenant under lease, void because not in writing, is with consent of landlord.

Occupation under void lease.

Cited in *Lawrence v. Hasbrouck*, 21 Misc. 40, 46 N. Y. Supp. 868, holding tenant under unexecuted lease for thirteen months liable for use from month to month; *Borderre v. Den*, 106 Cal. 600, 39 Pac. 946, holding lease exceeding one year executed by agent, not authorized in writing, void; *Fink v. Standard Bread Co.* 61 Misc. 626, 113 N. Y. Supp. 1036, holding lessee taking possession, with consent of lessor, under lease invalid under statute of frauds, becomes tenant at will, liable to pay rent at stipulated rate for use and occupation.

Cited in notes (26 L.R.A. 800) on rent for use of premises under invalid lease; (16 Am. St. Rep. 765; 17 Am. St. Rep. 754, 755) on effect of occupation under parol lease for more than a year.

Agreement as to reducing rent.

Cited in footnote to *Goldsbrough v. Gable*, 15 L. R. A. 294, which holds agreement to reduce rent of tenant holding over, without consideration.

8 L. R. A. 224, *DWINELLE v. NEW YORK C. & H. R. R. CO.* 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319.

Liability of carrier for act of other carrier.

Cited in *Murray v. Lehigh Valley R. Co.* 66 Conn. 518, 32 L. R. A. 539, 34 Atl. 506, holding carrier operating train on road of another answerable to one jumping to avoid collision with latter's train; *Barron S. S. Co. v. Kane*, 31 C. C. A. 454, 59 U. S. App. 574, 88 Fed. 199, holding steamship company answerable for assault upon passenger by subordinate carrier.

Cited in note (130 Am. St. Rep. 41) on liability of railroad company for injuries or losses due to operation of cars not owned by it.

— For acts of sleeping car porters.

Cited in *Denver & R. G. R. Co. v. Derry* (*Denver & R. G. R. Co. v. Berry*) 47 Colo. 592, 27 L.R.A.(N.S.) 764, 108 Pac. 172, holding railroad company liable for negligence of employee of sleeping-car company in caring for blind passenger changing cars; *Gannon v. Chicago, R. I. & P. R. Co.* 141 Iowa, 41, 23 L.R.A.(N.S.) 1062, 117 N. W. 966, holding porter of Pullman car is employee of railway company carrying passengers riding in such car in same sense as brakeman of train is such employee; *Nashville, C. & St. L. R. Co. v. Lillie*, 112 Tenn. 343, 105 Am. St. Rep. 947, 78 S. W. 1055, holding railroad company liable for loss of suit case placed under berth by passenger in sleeping car before retiring; *Campbell v. Seaboard Air Line R. Co.* 83 S. C. 453, 23 L.R.A.(N.S.) 1060, 65 S. E. 628, holding railroad company liable for damages due to mistake of Pullman porter in assuring passenger she had reached destination.

Cited in notes (26 Am. St. Rep. 334) on obligations and liabilities of sleeping car companies; (23 L.R.A.(N.S.) 1057) on liability of railroad for acts of employee of sleeping or Pullman car company toward passengers.

Distinguished in *Blake v. Kansas City S. R. Co.* 38 Tex. Civ. App. 340, 85 S. W. 430, holding relation of master and servant exists between railroad company and persons in charge of sleeping car as regards passenger, but not as regards trespasser.

Duty to protect passengers.

Cited in *Baltimore & O. S. W. R. Co. v. Davis*, 44 Ind. App. 379, 89 N. E. 403, holding that carrier is bound to use every reasonable means to protect passengers insult, indignity and bodily harm; *Robinson v. Chicago & A. R. Co.* 135 Mich. 259, 97 N. W. 689, holding railroad company bound to provide passengers with safe passage to and from dining car at rear of train; *McDonough v. Third Ave. R. Co.* 95 App. Div. 320, 88 N. Y. Supp. 609 (dissenting opinion), on distinction between cause of action based solely on negligence of carrier in relation to these with whom it has no contractual relation and one based on violation of carrier's obligation to its passengers; *Daniel v. Petersburg R. Co.* 117 N. C. 610, 4 L.R.A.(N.S.) 499, 23 S. E. 327, on liability of railroad company for injury sustained at hands of its servant by person on its premises by its invitation and time of commencement of contract of carriage; *Illinois C. R. Co. v. Warren*, 79 C. C. A. 350, 149 Fed. 665 (dissenting opinion), on duty of carrier to protect passengers from wrongful acts of carrier's servants and strangers.

Cited in note (32 Am. St. Rep. 100) on carrier's duty to protect passengers from assault.

Questions for jury.

Cited in *McLeod v. New York, C. & St. L. R. Co.* 72 App. Div. 120, 76 N. Y. Supp. 347, holding question for jury whether arrest and removal of passenger by detective and conductor violated contract of carriage; *P. Cox Mfg. Co. v. Gorsline*, 63 App. Div. 520, 71 N. Y. Supp. 619, holding it for jury to determine responsibility of master for removal of plug from pipe by laborers repairing sewer; *Wright v. Glens Falls, S. H. & Ft. E. Street R. Co.* 24 App. Div. 619, 48 N. Y. Supp. 1026; *Guinney v. Hand*, 153 Pa. 410, 32 W. N. C. 29, 26 Atl. 20; *Tinker v. New York, O. & W. R. Co.* 71 Hun, 433, 24 N. Y. Supp. 977—holding existence of relation of master and servant question for jury; *Rand v. Butte Electric R. Co.* 40 Mont. 415, 107 Pac. 87, holding question in what capacity public officer acts in performance of duty in connection with carrier's business for jury; *Collins v. Butler*, 179 N. Y. 161, 71 N. E. 746, holding in action for assault and battery committed by clerk in ejecting customer from store, whether act of clerk was assault, whether clerk acted within scope of employment, and amount of damages, were all three questions for jury.

Distinguished in *Collins v. Butler*, 83 App. Div. 18, 81 N. Y. Supp. 1074, holding storekeeper liable, as matter of law, for clerk's assault on customer.

Respondent superior.

Cited in *Culberson v. Empire Coal Co.* 156 Ala. 421, 47 So. 237, holding carrier answerable as for breach of duty, if carrier's servants knowing passenger in danger of assault from co-passenger, knowingly or wilfully fail to intervene and protect him when in their power to do so; *Pelot v. Atlantic Coast Line R. Co.* 60 Fla. 163, 53 So. 937, holding that carrier is liable to passenger for improper act of servant, and its natural and legitimate consequence; *Hayne v. Union Street R. Co.* 189 Mass. 552, 3 L.R.A.(N.S.) 607, 109 Am. St. Rep. 655, 76 N. E. 219, holding rule holding carrier to very high degree of care to prevent injury to passenger by misconduct of others, applies when servant causing injury is employed on car other than that upon which injury occurs; *Taillon v. Mears*, 29 Mont. 174, 74 Pac. 421, 1 A. & E. Ann. Cas. 613, holding restriction of liability to scope of employment is not applicable where master bears an exceptional duty of care by reason of contract; *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 358, 66 L.R.A. 623, 102 Am. St. Rep. 503, 70 N. E. 857, holding carrier liable for money wrongfully retained by conductor, and for injury suffered from insulting and abusive language and treatment at his hands; *Busch v. Interborough Rapid Transit Co.* 110 App. Div. 708, 96 N. Y. Supp. 747, holding carrier liable for assault inflicted upon passenger by one of carrier's servants, and for injury to passenger's feelings by use of insulting language.

Cited in notes (21 L. R. A. 297) on liabilities as to passengers on sleeping cars; (37 L. R. A. 83) on constructive service predicated from duties of railroad companies as carriers; (66 L.R.A. 142) on liability for acts of independent contractor where injuries result from nonperformance of absolute duties of employer; (4 L.R.A.(N.S.) 500) on liability for malicious act of servant when master owes special duty to party injured; (54 Am. St. Rep. 89) on acts of servant for which master is not responsible; (35 L. ed. U. S. 921) on liability of railroad companies for wrongs by employees to passengers; (40 L.R.A.(N.S.) 1033, 1052, 1056, 1060) on liability of carrier for wilful torts of servants to passengers.

— For ejecting passenger.

Cited in *Lyons v. Broadway & S. Ave. R. Co.* 32 N. Y. S. R. 233, 10 N. Y. Supp. 237, holding company answerable for driver wilfully throwing passenger from platform; *Monnier v. New York C. & H. R. R. Co.* 70 App. Div. 408, 75 N. Y. Supp. 521, holding company answerable for ejection of passenger refusing to pay extra for lack of ticket; *Wright v. Glens Falls, S. E. & Ft. E. Street R. Co.* 24

App. Div. 619, 48 N. Y. Supp. 1026, sustaining responsibility of carrier for tortious ejection of passenger refusing to pay higher fare; *Hines v. Dry Dock*, E. B. & B. R. Co. 75 App. Div. 392, 78 N. Y. Supp. 170, holding carrier answerable for breach of contract by refusal of conductor to accept fare, followed by ejection; *Miller v. Manhattan R. Co.* 73 Hun, 513, 26 N. Y. Supp. 162, upholding liability of carrier for injuries inflicted by guard pushing passenger from platform.

— **For unlawful detention.**

Followed in *Woodhull v. New York*, 76 Hun, 396, 28 N. Y. Supp. 120, holding carrier responsible for unlawful arrest and injury of passenger.

Cited in *Gillingham v. Ohio River R. Co.* 35 W. Va. 92, 14 L. R. A. 800, 29 Am. St. Rep. 827, 14 S. E. 243, holding carrier liable for arrest of passenger by mistake; *Athison, T. & S. F. R. Co. v. Henry*, 55 Kan. 723, 29 L. R. A. 467, 41 Pac. 952, holding carrier answerable for unlawful arrest and assault upon passenger by servants; *Palmeri v. Manhattan R. Co.* 133 N. Y. 266, 16 L. R. A. 137, 28 Am. St. Rep. 632, 30 N. E. 1001, Affirming 39 N. Y. S. R. 23, 14 N. Y. Supp. 468, upholding liability of company for act of agent in detaining passenger regardless of motive; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 515, 14 L. R. A. 797, 26 Am. St. Rep. 539, 29 N. E. 952 (dissenting opinion), majority denying liability of company for arrest of passenger by agent for passing counterfeit bill; *Mayfield v. St. Louis, I. M. & S. R. Co.* 97 Ark. 28, 32 L.R.A.(N.S.) 528, 133 S. W. 168, holding that railroad is not liable to one arrested by police officer while a passenger, because conductor pointed him out, where officer had apparent authority to make arrest; *Zeccardi v. Yonkers R. Co.* 190 N. Y. 393, 17 L.R.A.(N.S.) 773, 83 N. E. 31 (dissenting opinion), on liability of carrier to passenger for battery and improper detention by carrier's servants; *Texas Midland R. Co. v. Dean*, 98 Tex. 521, 70 L.R.A. 945, 85 S. W. 1135, holding railway company responsible for act of baggage master in assisting at unlawful arrest of passenger.

— **For acts beyond scope of employment.**

Cited in *Flinn v. World's Dispensary Medical Asso.* 64 App. Div. 493, 72 N. Y. Supp. 243, denying liability of master for injury caused by starting printing press by one repairing rheostat; *Birmingham R. & Electric Co. v. Baird*, 130 Ala. 345, 54 L. R. A. 753, 89 Am. St. Rep. 43, 30 So. 456, and *Haver v. Central R. Co.* 62 N. J. L. 285, 43 L. R. A. 85, 72 Am. St. Rep. 648, 41 Atl. 916, holding carrier liable for malicious assault by employee on passenger; *Johnson v. Detroit R. Co.* 130 Mich. 455, 90 N. W. 274, holding railroad liable for assault by conductor on passenger, even when outside of scope of employment; *Willis v. Metropolitan Street R. Co.* 76 App. Div. 345, 78 N. Y. Supp. 478, holding street car company liable for conductor's assault on one boarding car contrary to his directions; *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 358, 70 N. E. 857, holding street railroad liable for abusive language used by conductor to passenger; *Gabrielson v. Waydell*, 36 N. Y. S. R. 675, 14 N. Y. Supp. 125, holding owners liable for assault of captain upon member of crew, unless unconnected with command; *Wyllie v. Palmer*, 137 N. Y. 257, 19 L. R. A. 288, 33 N. E. 381, holding relation of master and servant necessary to charge master for tort; *Donivan v. Manhattan R. Co.* 1 Misc. 369, 21 N. Y. Supp. 457, holding master not answerable in punitive damage for tort of servant unless authorized; *Kennedy v. White*, 91 App. Div. 478, 86 N. Y. Supp. 852, denying master's liability for injury inflicted on passerby by janitor chasing away noisy boys; *Cain v. Syracuse, B. & N. Y. R. Co.* 20 Misc. 461, 45 N. Y. Supp. 538, denying liability of master not selecting servant; *Daniel v. Petersburg R. Co.* 117 N. C. 608, 23 S. E. 327 (concurring opinion), majority denying liability of carrier for violent conduct of servant

outside line of duty; *Morey v. Chicago*, R. I. & P. R. Co. 86 Kan. 76, 119 Pac. 544, holding that carrier is liable for assault upon passenger by brakeman, while acting in line of his employment; *Clancy v. Barker*, 71 Neb. 89, 69 L.R.A. 656, 115 Am. St. Rep. 559, 98 N. W. 440, 8 A. & E. Ann. Cas. 682, holding whether servant was actively engaged in discharge of his duty immaterial where hotel servant pointed revolver at infant guest and same was, by some means, discharged; *Rand v. Butte Electric R. Co.* 40 Mont. 415, 107 Pac. 87, holding public officer cannot engage as such to guard property of private individual or corporation and latter not free from liability for his wrongful acts while engaged as its trainman or in other like capacity, on ground he is public officer.

Cited in footnotes to *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servants hand while pretending to throw at boys playing on cotton bales.

Cited in notes (14 L. R. A. 740, 37 L. R. A. 83) on liability of master for assaults by servants; (17 L.R.A.(N.S.) 764) on liability of carrier for assault by employee on passenger outside of car or train.

Distinguished in *Jones v. St. Louis S. W. R. Co.* 125 Mo. 674, 26 L. R. A. 720, 46 Am. St. Rep. 514, 28 S. W. 883, denying liability of railroad company for injury to Pullman porter by negligence of engineer; *New York, N. H. & H. R. Co. v. Baker*, 50 L. R. A. 203, 39 C. C. A. 240, 98 Fed. 697, denying liability of carrier for injury to passenger by swinging of derrick controlled by municipal board; *Barry v. Union R. Co.* 105 App. Div. 524, 94 N. Y. Supp. 449, holding as matter of law carrier is responsible for any malicious or wilful injury inflicted on passenger by employee of carrier in course of business of transporting passenger, but rule is not applicable in case of person not passenger; *Reilly v. New York City R. Co.* 46 Misc. 74, 91 N. Y. Supp. 319, holding in order to render carrier liable for wrongful act of servant toward passenger, regardless of servant's motive, relation of carrier and passenger must continue to exist; *Clancy v. Barker*, 69 L.R.A. 647, 66 C. C. A. 469, 131 Fed. 166, 173, holding hotel keeper not responsible for act of bell boy who pointed revolver at infant guest, which was accidentally discharged, injuring guest.

Directions for guidance of passengers.

Cited in *Appleby v. St. Paul City R. Co.* 54 Minn. 171, 40 Am. St. Rep. 308, 55 N. W. 1117, holding carrier liable for failure to furnish directions thereby causing injury to passenger by ejection; *Jackson v. Grand Ave. R. Co.* 118 Mo. 227, 24 S. W. 192, holding duty of passengers to read directions adopted by carrier; *Bugge v. Seattle Electric Co.* 54 Wash. 491, 103 Pac. 824, holding relation of carrier and passenger continued where passenger walked across trestle to take car beyond washout, relying on information by conductor that no car would cross trestle at night.

Relation of carrier and passenger.

Cited in *Chudnovski v. Eckels*, 232 Ill. 318, 83 N. E. 846, holding receipt of passenger to carry for hire by carrier gives rise to legal presumption that contract exists.

8 L. R. A. 228, *STATE ex rel. WORRELL v. PEELE*, 124 Ind. 515, 24 N. E. 440.

Writ of mandate against state auditor to compel payment of salary alleged to be due, in *State ex rel. Worrell v. Carr*, 129 Ind. 49, 13 L. R. A. 179, 28 Am. St. Rep. 163, 28 N. E. 88.

Eligibility to office.

Cited in footnotes to *Steusoff v. State*, 12 L. R. A. 364, which holds citizen of

state not eligible to office in county of residence into which he had removed so recently as not to be entitled to vote; State *ex rel.* Taylor v. Sullivan, 11 L. R. A. 272, which holds alien not entitled to hold office, notwithstanding declaration of intention to become citizen after election.

Officers de facto.

Cited in footnote to State *ex rel.* Van Amringe v. Taylor, 12 L. R. A. 202, which holds mere intruder not officer *de facto*.

Cited in notes (11 L. R. A. 105) on officers *de facto*; (13 L. R. A. 178) on officers *de facto* and *de jure* distinguished; (13 L. R. A. 670) on tenure of public office; incompatibility of offices.

Removal from and abandonment of office.

Cited in Maddox v. York, 21 Tex. Civ. App. 625, 54 S. W. 24, holding that sheriff voluntarily surrendering office to appointed successor, abandons office; Cameron v. Parker, 2 Okla. 342, 38 Pac. 14, upholding power of governor to remove officer for cause without trial in court of law.

Inconsistent defenses.

Cited in note (48 L. R. A. 203) on right to plead inconsistent defenses.

Commission as evidence of appointment to office.

Cited in note (63 Am. St. Rep. 192) on commission as evidence of appointment to office.

8 L. R. A. 236, PENNYPACKER v. CAPITAL INS. CO. 80 Iowa, 56, 20 Am. St. Rep. 395, 45 N. W. 408.

What law governs insurance contracts.

Cited in footnote to Union Cent. L. Ins. Co. v. Pollard, 36 L. R. A. 271, as to law governing effect of answers in application for policy and their use in evidence.

Cited in note (63 L. R. A. 835) on conflict of laws as to contracts of insurance.

Want of authority to do business.

Approved in Vermont Loan & T. Co. v. Hoffman, 5 Idaho, 384, 37 L. R. A. 511, 95 Am. St. Rep. 186, 49 Pac. 314, holding that creditor may recover money loaned although he had not procured license prescribed by penal statute.

— Foreign corporations.

Cited in Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co. 149 Mo. 178, 50 S. W. 281, sustaining suit by foreign insurer not authorized to do business within state upon foreign contract; Seamans v. Zimmerman, 91 Iowa, 367, 59 N. W. 290, raising without determining question of rights under policy unenforceable because of insurer's incapacity to transact any business.

Cited in notes (8 L. R. A. 129) on foreign insurance companies; conditions imposed by statute; (12 L. R. A. 366) on foreign corporations; law of comity; (20 L. R. A. 406) as to effect on insurance where the statutes regulating the business of foreign insurance companies has not been complied with.

Evidence as to proofs of loss.

Approved in Ruthven Bros. v. American F. Ins. Co. 92 Iowa, 323, 60 N. W. 663, holding proof that agent mailed notice of loss to company sufficient notice to bind company.

Presumption of receipt of mail.

Cited in Watson v. Richardson, 110 Iowa, 677, 80 N. W. 407, holding that letter handed to mail agent will be presumed to have reached destination where no showing to contrary.

Cited in footnote to Ross v. Hawkeye Ins. Co. 34 L. R. A. 466, which holds notice by registered letter completed by due registration at office from which sent.

Distinguished in *Bostain v. De Laval Separator Co.* 92 Md. 487, 48 Atl. 75, holding time of reasonable notice runs from receipt, and not from sending of letter, where time of transit not shown.

— **Jury questions.**

Cited in *Miller v. Wehrman*, 81 Neb. 391, 115 N. Y. 1078, holding though addressee testify positively he did not receive letter, weight of evidence must be submitted to jury, and decision upon one side or other will be supported by the evidence; *Manitoba Mortg. & Invest. Co. v. Weiss*, 18 S. D. 465, 112 Am. St. Rep. 799, 101 N. W. 37, 5 A. & E. Ann. Cas. 858, holding time of receipt of check inclosed in letter mailed question of fact for jury and court.

Contracts against statutory prohibition.

Cited in *French v. Northwestern Laundry Co.* 132 Iowa, 87, 107 N. W. 430, holding statute requiring indorsement of amount and manner of payment for stock on certificate, does not render contract regarding stock and certificate issued in fulfillment thereof void if such indorsement be not made; *Toovey v. Ayrhart*, 136 Iowa, 697, 114 N. W. 181, holding renewal certificate of deposit issued by bank when insolvent, though prohibited by statute, is valid; *Laun v. Pacific Mut. L. Ins. Co.* 131 Wis. 563, 9 L.R.A.(N.S.) 1207, 111 N. W. 660, holding insurance contract allowing rebate valid though statute prohibited granting of rebates to policyholders by insurance companies and imposed penalty of loss of license for so doing.

Cited in note (4 L.R.A.(N.S.) 691) on imposition of penalty as affecting validity of contract by foreign corporation without complying with statutory conditions of doing business.

8 L. R. A. 243, *CURRAN v. BOSTON*, 151 Mass. 505, 21 Am. St. Rep. 465, 24 N. E. 781.

Nonliability of state, municipality, etc., for acts of officers.

Cited in *Murdock Parlor Grate Co. v. Com.* 152 Mass. 32, 8 L. R. A. 402, 24 N. E. 854, holding state not liable for negligence of servant overloading floor in leased apartment; *Moynihan v. Todd*, 188 Mass. 304, 108 Am. St. Rep. 473, 74 N. E. 367, holding public officers liable for personal acts of misfeasance, but not for non-feasance or for misfeasances of servant or agents, except that where work is not entirely public but is in part for profit, or where element of profit enters into it, there is liability for negligent acts of servants.

Cited in notes (25 L.R.A.(N.S.) 182) on liability of municipality for tort of keeper or inmate of prison; (108 Am. St. Rep. 144, 159, 162) as to what municipal corporations are answerable for injuries due to defects in streets and other public places; (23 Eng. Rul. Cas. 51) on liability of municipality for negligence of its officers in workhouse causing personal injuries to inmates.

— **Counties.**

Cited in *Hughes v. Monroe County*, 147 N. Y. 58, 39 L. R. A. 44, 41 N. E. 407, Affirming 79 Hun, 126, 29 N. Y. Supp. 495, holding county charged with care of insane deriving incidental revenue from paying patients, not liable to employee in asylum for negligence; *McAndrews v. Hamilton County*, 105 Tenn. 406, 58 S. W. 483, holding county not liable for negligence of employee in house of correction voluntarily maintained, regardless of income derived.

— **Cities and villages.**

Cited in *Mahoney v. Boston*, 171 Mass. 431, 50 N. E. 939, holding city deriving incidental revenue from subway not liable to employee injured in construction; *Taggart v. Fall River*, 170 Mass. 327, 49 N. E. 622, holding city deriving incidental advantage from increased value of farm by construction of highway not

liable to injured employee; *McCann v. Waltham*, 163 Mass. 345, 40 N. E. 20, holding city incidentally benefited by repair of street not liable to employee for negligence of superintendent under independent board; *Russell v. Tacoma*, 8 Wash. 159, 40 Am. St. Rep. 893, 35 Pac. 605, holding city not liable for negligence of officers engaged in improving public park; *Ulrich v. St. Louis*, 112 Mo. 146, 34 Am. St. Rep. 372, 20 S. W. 466, holding city not liable to prisoner in workhouse for superintendent's negligence; *Howard v. Worcester*, 153 Mass. 428, 12 L. R. A. 161, 25 Am. St. Rep. 651, 27 N. E. 11, holding city constructing public schoolhouse not liable for servant's negligence; *Royce v. Salt Lake City*, 15 Utah, 407, 49 Pac. 290, holding city not liable for injury to prisoner wrongfully required to work by chief of police; *Doty v. Port Jervis*, 23 Misc. 315, 52 N. Y. Supp. 57, holding village not liable for death of one killed by incompetent special policeman; *Kelley v. Boston*, 186 Mass. 166, 66 L.R.A. 431, 71 N. E. 299, holding city not liable for injury done to awning by throwing of snow and ice thereon from roof of city hall; *Gates v. Milan*, 76 N. H. 138, 35 L.R.A. (N.S.) 601, 80 Atl. 39, holding that town which accepts state aid for road improvements and undertake the work, does not become liable for injury to servant caused by negligent method of doing work; *Bisbing v. Asbury Park*, 80 N. J. L. 424, 33 L.R.A.(N.S.) 529, 78 Atl. 196, holding city not liable for injury to person caused by dangerous condition of a parkway; *Bell v. Cincinnati*, 80 Ohio St. 24, 23 L.R.A.(N.S.) 916, 88 N. E. 128, holding city, in carrying out sentences to workhouse of convicted persons, acts in governmental capacity, and is not liable for injury to guard by explosion of box of percussion caps intended for use in blasting at quarry used in conducting workhouse as penal institution; *Blair v. Granger*, 24 R. I. 21, 51 Atl. 1042, holding city not liable to person injured by reason of negligent operation of steamroller in use in park; *Cunningham v. Seattle*, 42 Wash. 140, 4 L.R.A.(N.S.) 636, 84 Pac. 641, 7 A. & E. Ann. Cas. 805, on nonliability of city for negligence in discharge of governmental functions.

Cited in footnote to *Wilson v. Mitchell*, 65 L.R.A. 158, which holds that municipality cannot ratify act of waterworks superintendent in wrongfully connecting well with city water mains so as to become liable for water taken from the well.

Cited in notes (44 L. R. A. 796, 800, 801) on liability of municipal corporations for false imprisonment and unlawful arrest; (30 Am. St. Rep. 383, 402) on liability of cities for negligence and other misconduct of officers and agents.

Distinguished in *Coan v. Marlborough*, 164 Mass. 208, 41 N. E. 238, and *Norton v. New Bedford*, 166 Mass. 51, 43 N. E. 1034, holding city responsible for negligence of servants in work of constructing sewer.

When city agency of state.

Cited in *Mt. Hope Cemetery v. Boston*, 158 Mass. 513, 35 Am. St. Rep. 515, 33 N. E. 695, holding city not agency of state in ownership of cemetery, hence title not subject to legislative control.

8 L. R. A. 245, *MORA LEDON v. HAVEMEYER*, 121 N. Y. 179, 24 N. E. 297.

Construction of word "shipment."

Approved in *Clark v. Lindsay*, 19 Mont. 4, 61 Am. St. Rep. 479, 47 Pac. 102, holding "shipment" means delivery to carrier but not commencement of transportation; *Browne v. Paterson*, 165 N. Y. 466, 59 N. E. 296, Reversing 36 App. Div. 172, 55 N. Y. Supp. 404, holding words "bought to be a March or April shipment" not a warranty or condition precedent that shipment was to be made in those months; *Schwann v. Clark*, 9 Misc. 120, 29 N. Y. Supp. 289, Affirming

7 Misc. 243, 27 N. Y. Supp. 262, holding delivery of goods on board vessel during month constituted "shipment within the month."

Cited in *Hoffman v. Gosline*, 96 C. C. A. 318, 172 Fed. 116, holding contract to ship to person named does not require consignment exclusively in such person's name; *State v. Carson*, 147 Iowa, 563, 140 Am. St. Rep. 330, 126 N. W. 698, to the point that contract calling for "shipment within 30 days" did not require clearance of vessel within that period, but that placing goods on board vessel within that time would be compliance with contract.

Distinguished in *Garfield & P. Coal Co. v. Pennsylvania Coal & Coke Co.* 199 Mass. 39, 84 N. E. 1020, holding coal shipped when vessels loaded and ready to sail, where contract was to place certain amount per month on vessels.

Burden of proof.

Approved in *Eppens, S. & W. Co. v. Littlejohn*, 27 App. Div. 25, 50 N. Y. Supp. 251, holding that plaintiff must prove performance of executory contract for sale and delivery of merchandise.

8 L. R. A. 248, *CALHOUN v. DELHI & M. R. CO.* 121 N. Y. 69, 24 N. E. 27.

Conditional signing of petition for issuance of bonds.

Cited in *Andes v. Ely*, 158 U. S. 317, 39 L. ed. 1000, 15 Sup. Ct. Rep. 954, holding petition for issuance of railroad aid bonds by town not void because conditional as to some of signers.

Cancellation of bonds or stock.

Approved in *Cherry Creek v. Becker*, 123 N. Y. 172, 25 N. E. 369, holding that equity will not cancel town bonds when not questioned until after interest had been paid thereon many years.

Cited in *Reno Oil Co. v. Culver*, 33 Misc. 719, 68 N. Y. Supp. 303, upholding right to cancellation of spurious stock collusively issued but valid on face.

Laches.

Approved in *Belden v. Burke*, 147 N. Y. 559, 42 N. E. 261, holding that long acquiescence will defeat review of transactions between former owners of bonds of which purchaser had knowledge; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 157, 13 L. R. A. 796, 28 N. E. 479, holding laches depends on circumstances and is addressed to discretion of court; *Patterson v. Hewitt*, 11 N. M. 24, 55 L.R.A. 664, footnote p. 658, 66 Pac. 552, holding that laches depends, not upon lapse of definite time, but upon want of due diligence under all the circumstances; *Woodbridge v. Bockes*, 59 App. Div. 521, 69 N. Y. Supp. 417, holding beneficiary approving breach of trust and deriving benefit therefrom cannot after twenty-five years compel trustee to restore principal to estate; *Stephens v. Hockemeyer*, 46 N. Y. S. R. 331, 19 N. Y. Supp. 666, holding that equity will not prevent maintenance of stable contrary to covenant after delay of twenty-two years; *Wolf v. Great Falls Water Power & Townsite Co.* 15 Mont. 63, 38 Pac. 115, holding suit for specific performance of contract barred by delay for three years; *Kennedy v. Montgomery County*, 98 Tenn. 181, 38 S. W. 1075, holding collection of taxes will not be enjoined where complainant did not file bill for a year and until greater part of tax was collected.

Cited in *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 168, 22 N. Y. Supp. 321, holding laches limited to equitable actions and no defense where equity court called on to sustain legal right; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 33, 56 Am. St. Rep. 828, 23 S. E. 681, holding action to recover money paid for invalid county order accrues at once and need not be deferred until order is due; *Kessler Co. v. Ensley Co.* 123 Fed. 562, holding stockholders' action to set aside corporation's conveyances for fraud, barred by laches though not by

limitations; *Conkling v. Weatherwax*, 181 N. Y. 267, 73 N. E. 1028, 2 A. & E. Ann. Cas. 740, holding proof of nonpayment of legacy required from party seeking to establish it as lien as on real estate in action brought thirty years after legacy became payable; *Schmitz v. Zeh*, 91 Minn. 295, 97 N. W. 1049, 1 A. & E. Ann. Cas. 322, holding action by taxpayer to restrain payment of bonds defeated by long delay and laches where taxes levied and collected and interest paid for thirteen years prior to action, bonds issued, delivered to railway company, sold to good faith purchasers, and owned by bona fide holders; *Stokes v. Phelps Mission*, 59 Misc. 258, 112 N. Y. Supp. 237, dismissing action to prevent consolidation of two religious organizations where case was marked on calendar "reserved generally" and not prosecuted by plaintiff for seventeen years; *Salvation Army v. American Salvation Army*, 62 Misc. 363, 114 N. Y. Supp. 1039, holding action to restrain use of name "The American Salvation Army" barred by plaintiff's long acquiescence in use of name by defendant; *Beaver Valley Brewing Co. v. Wyss-Thalman*, 57 Pittsb. L. J. 423, holding that contract by president of brewing company and his brother for construction of brewery will not be set aside after brewery has been used for two years; *Patterson v. Hewitt*, 195 U. S. 319, 49 L. ed. 218, 25 Sup. Ct. Rep. 35, holding even if statute of limitations be made applicable in general terms to suits in equity and not to any particular defense, defense of laches is available, though time fixed by statute not expired.

Cited in notes (10 L.R.A. 127) as to when doctrine of laches cannot be invoked; (36 L. ed. U. S. 721) on laches as defense.

Distinguished in *Simpkins v. Taylor*, 81 Hun, 471, 31 N. Y. Supp. 169, holding that obligee's failure to notice for several years that guaranty was one of collection instead of payment as agreed, due to failure of his agent to notify him of kind of guaranty, does not deprive him of right to have it reformed; *Slayback v. Raymond*, 40 Misc. 609, 83 N. Y. Supp. 15, holding right of action to set aside transfer procured by fraud, barred only by running of statute of limitations from time of discovery.

Estoppel.

Approved in *Andes v. Ely*, 158 U. S. 321, 39 L. ed. 1001, 15 Sup. Ct. Rep. 954, holding town estopped to deny as against bona fide holder, recital in its bond that necessary steps were taken; *Oswego County Sav. Bank v. Genoa*, 66 App. Div. 336, 72 N. Y. Supp. 786, holding town cannot by subsequent acts ratify issue of void bonds or estop itself from questioning their validity.

Injunctive relief.

Approved in *Hughes v. Bingham*, 135 N. Y. 352, 17 L. R. A. 455, 48 N. Y. S. R. 391, 32 N. E. 78, holding injunctive relief to restrain acts done in pursuance of invalid deed discretionary; *Hygeia Water Ice Co. v. New York Hygeia Ice Co.* 140 N. Y. 97, 35 N. E. 417, refusing to enjoin use of corporate name in favor of corporation never engaged in business and without property except its franchises; *Meyers v. Pennsylvania Steel Co.* 77 App. Div. 309, 79 N. Y. Supp. 199, denying injunction against further execution of public contract containing provisions required by law subsequently declared unconstitutional.

Res judicata.

Cited in *Wells v. Salina*, 71 Hun, 572, 25 N. Y. Supp. 134, holding judgment at law for money advanced not a bar to action as equitable assignee for money expended and services rendered.

Defect of parties.

Cited in *Herkimer County Light & P. Co. v. Johnson*, 37 App. Div. 265, 55 N. Y. Supp. 924, by Follett, J., dissenting, who holds judgment should not be ren-

dered on submission when it appears there are interested parties not before the court.

Equitable relief.

Cited in *Johnson v. Swanke*, 128 Wis. 75, 5 L.R.A.(N.S.) 1057, 107 N. W. 481, 8 A. & E. Ann. Cas. 544, holding where precedents are not sufficiently clear to furnish court certain guide, decision of trial court as to affording equity jurisdiction will not be disturbed unless manifestly wrong.

8 L. R. A. 253, *METROPOLITAN ELEV. R. CO. v. KNEELAND*, 120 N. Y. 134, 17 Am. St. Rep. 619, 24 N. E. 381.

Liability for fraud.

Cited in *Conley v. Blinebry*, 29 Misc. 373, 60 N. Y. Supp. 531, holding mortgagee may recover from mortgagor before maturing of mortgage bond, where before mortgage was recorded, mortgagor's grantee records deed.

— Issuance of negotiable paper.

Cited in *Nashville Lumber Co. v. Fourth Nat. Bank*, 94 Tenn. 378, 27 L. R. A. 522, 45 Am. St. Rep. 727, 29 S. W. 368, holding party transferring negotiable note after notice of *ultra vires* of corporate accommodation indorsement, liable to corporation before maturity; *Ontario v. Union Bank*, 21 Misc. 777, 47 N. Y. Supp. 927, holding town official transferring apparently valid municipal bonds to bank as collateral, liable to town where issued by him in excess of authority; *Petrie v. Williams*, 68 Hun. 595, 23 N. Y. Supp. 237, holding attorney and third party procuring negotiation and retaining portion of proceeds of notes given to infant, guilty of conversion; *Jones v. Crawford*, 107 Ga. 322, 45 L. R. A. 107, 33 S. E. 51, holding payee liable to party induced to sign negotiable note as coprincipal by assurance of nonliability; *Davison v. Farr*, 18 Misc. 126, 41 N. Y. Supp. 170, holding party fraudulently induced to indorse, may before maturity pay bona fide holder, and sue maker; *White v. Moran*, 134 Ill. App. 492, holding evidence of worthlessness of notes because of maker's inability to pay competent to mitigate damages in suit to recover for damages through deceit and fraud whereby notes were given; *Medina Gas & Electric Light Co. v. Buffalo Loan, Trust & S. D. Co.* 119 App. Div. 260, 104 N. Y. Supp. 625 (dissenting opinion), on liability in conversion of person aware of all material facts of conversion of bonds by another aiding such other, and having custody of such bonds; *Rogers v. Morton*, 46 Misc. 500, 95 N. Y. Supp. 49, holding right to maintain conversion of note indorsed and delivered for special purpose arises upon transfer before maturity to bona fide holder for value.

Cited in note (27 L. R. A. 520) on liability for transferring negotiable note to bona fide holder so as to cut off defenses.

Who is a bona fide holder.

Cited in *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 150, 17 Am. St. Rep. 625, 24 N. E. 384, holding party receiving corporate note in discharge of director's personal debt, bona fide holder, where issue authorized by resolution; *Wile & B. Co. v. Rochester & K. F. Land Co.* 4 Misc. 574, 25 N. Y. Supp. 794, holding party purchasing corporate notes payable to director, after inquiring of secretary as to authorization, bona fide holder.

Liability of directors for unauthorized acts.

Cited in *Bassett v. Fairchild*, 132 Cal. 653, 52 L. R. A. 619, 64 Pac. 1082 (dissenting opinion) majority holding directors not liable for unauthorized bona fide compensation to party performing active services as director and vice president.

Cited in notes (9 L. R. A. 653) on liability of corporate directors; (55 L. R. A. 772) on liability of directors to corporation; (12 L. R. A. 366) on individual

liability on contracts by corporations; (40 L.R.A.(N.S.) 1103) on liability of officers or directors to corporation for amount paid because of their tort.

Stockholders' interest as property.

Cited in *Re Fitch*, 160 N. Y. 95, 54 N. E. 701, holding stock in domestic corporation left by nonresident dying out of state taxable as personal property in county where corporate property is located.

Action of directors paying salaries to themselves.

Cited in *Armstrong v. Heide*, 47 Misc. 617, 94 N. Y. Supp. 434 (dissenting opinion), on invalidity of note for salary executed by officers not authorized by board of directors at meeting to do so; *Miller v. Crown Perfumery Co.* 57 Misc. 393, 109 N. Y. Supp. 760, holding resolution of directors providing for payment of back salaries to themselves invalid; *Pacific Improv. Co. v. Chattanooga Southern R. Co.* 189 Fed. 163, holding that president of corporation cannot be voted salary for his services as such after rendition of services, where no provision was made for salary before performance.

8 L. R. A. 257, *McKENZIE v. HARRISON*, 120 N. Y. 260, 17 Am. St. Rep. 638, 24 N. E. 458.

Modification of written agreement by parol.

Cited in *Romaine v. Beacon Lithographic Co.* 13 Misc. 123, 34 N. Y. Supp. 124, holding acceptance of less salary under parol agreement bars recovery of balance; *Hurley v. Sehring*, 43 N. Y. S. R. 242, 17 N. Y. Supp. 1, holding accepted surrender of premises terminates tenancy though lease provides against same; *Lewis v. Donohue*, 27 Misc. 517, 58 N. Y. Supp. 319, holding lease abrogated by acceptance of tenant's surrender and abandonment of defense of untenability; *San Remo Hotel Co. v. Brennan*, 64 Hun, 611, 19 N. Y. Supp. 276, enforcing in equity parol reduction of rent in ten-year lease, where supported by consideration and several payments at such rate accepted; *Bowman v. Wright*, 65 Neb. 663, 91 N. W. 580, holding amount of parol reduction cannot be recovered after acceptance of reduced rent; *Butler v. Mail & Exp. Pub. Co.* 54 App. Div. 385, 66 N. Y. Supp. 788, holding executed contract to pay for judgment by securing advertisements binding although not supported by consideration; *Snow v. Griesheimer*, 220 Ill. 109, 77 N. E. 110, holding parol agreement modifying lease may be shown in defense of suit upon lease if lease fully performed on both sides as modified; *Interrante v. Levinson*, 129 App. Div. 496, 113 N. Y. Supp. 495, holding parol modification as to payments of written contract under seal void so far as unexecuted; *Zindler v. Levitt*, 132 App. Div. 398, 116 N. Y. Supp. 726, holding landlord bound by oral agreement reducing rent as to payments made in pursuance of such agreement; *Napier v. Spielmann*, 54 Misc. 102, 103 N. Y. Supp. 982, holding executed parol modification of contract as to consignment of entire manufactured product of mills binding, but subject, during existence of contract, to repudiation so far as future consignments concerned; *Lutz v. Goldfine*, 72 Misc. 28, 129 N. Y. Supp. 63, holding that evidence of alleged executed parol agreement made after sealed lease, modifying lease and providing for suspension of rent until repairs were made, was inadmissible, where agreement was not pleaded.

Distinguished in *Voegel v. Ronalds*, 83 Hun, 116, 31 N. Y. Supp. 353, holding lease for term not modified by unexecuted oral agreement for shorter period; *Howie v. Kasnowitz*, 83 App. Div. 297, 82 N. Y. Supp. 42, holding contract under seal cannot be modified by parol unexecuted agreement; *Sanford v. Story*, 15 Misc. 544, 38 N. Y. Supp. 104, holding acceptance of reduced rate of interest by mortgagee under parol agreement does not prevent demand for stipulated rate in future; *Hayne v. Sealy*, 71 App. Div. 419, 75 N. Y. Supp. 907, holding executed parol agreement not to take interest on funds invested in partnership bind-

ing only to time of repudiation; *Munson v. Magee*, 22 App. Div. 341, 47 N. Y. Supp. 942, holding obligor in contract released by executed novation rendering third party liable thereon.

Gift.

Cited in *Merriitt v. Youmans*, 21 App. Div. 258, 47 N. Y. Supp. 664, suggesting that mortgagee cannot recover of intermediate grantee of mortgagor interest remitted to subsequent grantee by receipt therefor; *Ross v. Walker*, 44 Fla. 712, 32 So. 934, holding valid gift of debt due from donor to donee not affected where no receipt given, no credit entered, and evidence of debt not canceled, destroyed, delivered to donee or otherwise placed beyond control of donor; *McNevins v. Prudential Ins. Co.* 57 Misc. 610, 108 N. Y. Supp. 745, holding gift is voluntary transfer from one to another without consideration, and difference between gift of insurance policy and any other assignment is merely in method of proof; *Re Howard*, 1 Gibbons, Sur. Rep. 224, holding gift of debt due from donee to donor not effective where no receipt or instrument equivalent thereto given.

Cited in notes (11 L.R.A. 711) on payment of part of debt as satisfaction without new consideration; (12 Eng. Rul. Cas. 437) on necessity of delivering gift *inter vivos*.

Distinguished in *Re Gregg*, 11 Misc. 156, 32 N. Y. Supp. 1103, holding gift of rent under lease not shown by oral statements of lessor that nothing was due; *Kaye v. Hoage*, 63 Misc. 333, 117 N. Y. Supp. 122, holding mere promise of landlord to make gift of rent not enforceable.

Payment.

Cited in *Serat v. Smith*, 61 Hun, 45, 15 N. Y. Supp. 330, holding receipt of statement of account and draft for balance due thereby, not conclusive, though draft indorsed; *Dreyfus v. Roberts*, 75 Ark. 360, 69 L.R.A. 825, 112 Am. St. Rep. 67, 87 S. W. 641, 5 A. & E. Ann. Cas. 521, holding written receipt and satisfaction of judgment for given sum upon payment of smaller sum, in pursuance of agreement, binding.

8 L. R. A. 259, *STATE v. EAVES*, 106 N. C. 752, 11 S. E. 370.

Selling liquor within prescribed area.

Cited in *State v. Barringer*, 110 N. C. 527, 14 S. E. 781, sustaining legislature's power to restrict sale of liquor within prescribed area though already carried on there; *Jones v. Moore County*, 106 N. C. 438, 11 S. E. 514, holding liquors cannot be sold within statutory limit of building recognized as church when act passed.

Cited in note (21 L. R. A. 589) on discretion in granting of liquor licenses.

Statutory construction.

Cited in *Randall v. Richmond & D. R. Co.* 107 N. C. 755, 11 L. R. A. 462, 12 S. E. 605, holding spirit of act must be gathered from statute itself; *Randall v. Richmond & D. R. Co.* 107 N. C. 752, 11 L. R. A. 462, 12 S. E. 605, holding language cannot be interpolated into a plain, unambiguous statute to obtain a meaning not disclosed by it; *Sherrill v. Conner*, 107 N. C. 545, 12 S. E. 588, holding "may" cannot be construed as "shall" in statute amended by substituting former word for latter; *State ex rel. Harris v. Scarborough*, 110 N. C. 236, 14 S. E. 737, holding that every presumption is in favor of validity of statute and of good faith of legislature in enacting it; *State ex rel. Battle v. Rocky Mount*, 156 N. C. 334, 72 S. E. 354, holding that intention of statute must be gathered from words employed when meaning is clear or there is no ambiguity.

Regularity of indictment.

Cited in *State v. Downs*, 116 N. C. 1066, 21 S. E. 689, holding word added to title of church in indictment for selling liquor harmless.

8 L. R. A. 261, DAVIS v. STRANGE, 86 Va. 793, 11 S. E. 406.

Undue influence.

Approved in Thomas v. Turner, 87 Va. 15, 12 S. E. 149, holding transactions between persons occupying confidential relations must be fair, voluntary, and well understood.

Cited in Jones v. McGruder, 87 Va. 378, 12 S. E. 792, setting aside conveyance without consideration by drunkard to trusted friends made about three months before grantor's death; Sims v. Sims, 101 Mo. App. 418, 74 S. W. 449, holding woman constrained by husband and father-in-law to execute deed of trust to father-in-law for greater amount than advanced, entitled to equitable relief; Sims v. Sims, 101 Mo. App. 418, 74 S. W. 449, holding wife entitled to relief from deed of trust executed by her in fear of loss of money if she did not and in fear of causing discord between herself and husband, who acted in concert with his father to obtain unjust advantage over her; Bowen v. Kutzner, 93 C. C. A. 33, 167 Fed. 287, on contracts between relatives.

Cited in footnotes to Re Shell, 53 L.R.A. 387, which holds undue influence in procuring will not inferable from motive and opportunity alone; Kennedy v. Dickey, 68 L.R.A. 317, which holds will not annulled for undue influence by honest and moderate intercession or persuasion unaccompanied with fraud, deceit, threats, or putting in fear.

Cited in note (16 L.R.A.(N.S.) 1094) on independent advice as condition of a valid gift inter vivos between parties in confidential relation.

Distinguished in Coleman's Estate, 193 Pa. 612, 44 Atl. 1085, sustaining deed from spendthrift son to mother in consideration of large annual income to himself.

8 L. R. A. 268, McMULLEN v. RITCHIE, 41 Fed. 502.

Effect of foreign judgment on merits.

Affirmed in 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171.

Cited in MacDonald v. Grand Trunk R. Co. 71 N. H. 455, 59 L. R. A. 454, 93 Am. St. Rep. 550, 52 Atl. 982, sustaining foreign judgment on merits when it resulted from failure to prove law of state where cause of action arose; Ritchie v. Burke, 109 Fed. 17, holding Federal court not ousted of jurisdiction between citizens of different states based on judgment between one of the parties and other parties all of same state; Fisher v. Fielding, 67 Conn. 137, 32 L. R. A. 250, 52 Am. St. Rep. 270, 34 Atl. 714, holding English judgment when jurisdiction obtained by service of process in England conclusive on merits between parties; American Mut. L. Ins. Co. v. Mason, 159 Ind. 18, 64 N. E. 525, holding judgment of courts of another state having jurisdiction of parties and subject-matter, conclusive on merits.

Cited in notes (20 L.R.A. 675, 676) on conclusiveness of judgment rendered in foreign country; (5 Eng. Rul. Cas. 746) on conclusiveness and enforceability of judgment of foreign court having jurisdiction.

Sufficiency of pleading.

Cited in Meeker v. Lehigh Valley R. Co. 162 Fed. 363, holding complaint in action to recover damages from carrier due to excessive, unjust or unreasonable charges must state facts showing rate unlawful.

8 L. R. A. 270, SAVANNAH v. WEED, 84 Ga. 683, 11 S. E. 235.

Uniform taxation.

Cited in Weaver v. State, 89 Ga. 642, 15 S. E. 840, holding tax upon business or occupation not tax upon property within *ad valorem* and uniformity clause of Constitution; Singer Mfg. Co. v. Wright, 97 Ga. 116, 35 L. R. A. 499, 25 S. E.

249, upholding power of legislature to classify subjects of taxation; *Wells v. Savannah*, 181 U. S. 546, 45 L. ed. 994, 21 Sup. Ct. Rep. 697, affirming 87 Ga. 400, 13 S. E. 442, holding purchaser properly taxed although city retained title to real estate sold as security; *Georgia State Bldg. & L. Asso. v. Savannah*, 109 Ga. 67, 35 S. E. 67, holding proviso in taxing act that taxes thereby imposed were to be in lieu of all other taxes, void; *Mutual Reserve Fund Life Asso. v. Augusta*, 109 Ga. 79, 35 S. E. 71, holding tax on nonresident insurance companies, resident companies being exempted, void; *Indianapolis v. Bieler*, 138 Ind. 38, 36 N. E. 857, holding provision in ordinance to license breweries, but exempting wholesale bottlers, void; *State v. Bixman*, 162 Mo. 70, 62 S. W. 828 (dissenting opinion), majority holding that legislature may put exporters and domestic dealers in separate classes in assessing fees for sale of beer; *Beckett v. Savannah*, 118 Ga. 59, 44 S. E. 819, holding attorney who lends money cannot be taxed when other money lenders are not; *Wright v. Southern Bell Teleph. & Teleg. Co.* 127 Ga. 229, 56 S. E. 116, holding occupation tax on express, telephone and telegraph business, which provides for ascertainment of amount by taking franchise and ad valorem tax, comparing same with amount represented by percentage of gross receipts, and if other taxes less than such percentage, charging difference, invalid.

Cited in note (60 L. R. A. 349) on constitutional equality in the United States in relation to corporate taxation.

8 L. R. A. 273, *WROUGHT IRON RANGE CO. v. JOHNSON*, 84 Ga. 754, 3 Inters. Com. Rep. 146, 11 S. E. 233.

Followed without comment in *McClelland v. Marietta*, 96 Ga. 749, 22 S. E. 329.

Meaning of term "peddler."

Cited in *Kimmel v. Americus*, 105 Ga. 695, 31 S. E. 623, construing local municipal ordinance to license peddlers; *Stone v. State*, 117 Ga. 293, 43 S. E. 740, holding person engaged in selling clocks by house-to-house canvass, soliciting orders to be filled by shipment from office of concern he represents located in foreign state, is peddler.

Cited in footnotes to *Emmons v. Lewistown*, 8 L. R. A. 328, which holds book canvassers not peddlers; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood Twp.* 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered and taking other orders not a peddler; *State v. Wells*, 48 L. R. A. 99, which holds one soliciting orders for goods and carrying goods to fill previous sales, not a peddler.

Cited in note (12 Eng. Rul. Cas. 504) on who are peddlers.

Distinguished in *Potts v. State*, 45 Tex. Crim. Rep. 50, 74 S. W. 31, 2 A. & E. Ann. Cas. 827, holding "sample man" selling ranges for foreign concern by sample, taking orders for future delivery, not peddler under statute taxing persons peddling out ranges.

Who must obtain license.

Cited in *Troy v. Harris*, 102 Mo. App. 60, 76 S. W. 662, denying agent's liability for nonpayment of ad valorem tax on merchants' wares on payment of which license issues; *Racine Iron Co. v. McCommons*, 111 Ga. 551, 51 L. R. A. 141, 36 S. E. 866, holding property of foreign principal not subject to levy and sale under execution against agent for nonpayment of license tax; *Bohannon v. Wrought Iron Range Co.* 111 Ga. 860, 36 S. E. 907, holding execution not enforceable against corporation for peddler's license tax.

Cited in footnotes to *Brownback v. North Wales*, 49 L. R. A. 446, which holds valid as to residents, ordinance requiring license for sale of goods on street or by soliciting orders from house to house; *Rosenbloom v. State*, 57 L. R. A. 923, which

sustains license tax on peddlers, though vendors of their own products are exempt.

Cited in note (19 L.R.A.(N.S.) 306) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

Interference with interstate commerce.

Cited in *McLaughlin v. South Bend*, 126 Ind. 472, 10 L. R. A. 358, footnote p. 357, 26 N. E. 185, holding peddler's licensing ordinance unenforceable against one negotiating for sale of property situated without state; *Re Tinsman*, 95 Fed. 651, and *Overton v. Vicksburg*, 70 Miss. 560, 13 So. 226, holding peddler's licensing ordinance void as to nonresident travelers selling goods of foreign corporation by sample; *Miller v. Goodman*, 91 Tex. 43, 40 S. W. 718, holding foreign corporation not required to file articles of incorporation in state and receive permit before selling goods manufactured elsewhere as such selling is interstate commerce; *Lee v. La Fayette*, 153 Ala. 679, 45 So. 294, holding person delivering range from local warehouse of foreign concern in pursuance of order taken by traveling agent selling by sample not required to pay license under municipal ordinance.

Cited in notes (7 L. R. A. 667) on hawkers and peddlers subject to state license; (11 L. R. A. 219) on state authority to impose licenses; (12 L. R. A. 624) on supreme power of Congress to regulate interstate commerce; (14 L. R. A. 98) on peddlers and drummers as relating to interstate commerce; (60 L. R.A. 690) on corporate taxation and the commerce clause; (27 Am. St. Rep. 563) on state regulation of interstate commerce; (39 L. ed. U. S. 540) on state taxation and licenses as affecting interstate commerce.

Distinguished in *Price Co. v. Atlanta*, 105 Ga. 365, 31 S. E. 619, upholding tax where goods were shipped to warehouse within state and from there distributed; *Racine Iron Co. v. McCommons*, 111 Ga. 547, 51 L. R. A. 139, 36 S. E. 866, upholding peddlers' tax where traveling agents for foreign principals received goods in bulk and broke original packages for distribution.

8 L. R. A. 275, *FIRST NAT. BANK v. CARROLL*, 80 Iowa, 11, 45 N. W. 304.

Gaming contracts.

Cited in *People's Sav. Bank v. Gifford*, 108 Iowa, 279, 79 N. W. 63, holding note given in settlement of balance growing out of dealings in options, void.

Cited in note (119 Am. St. Rep. 177) on defenses to obligations given for gambling debts.

8 L. R. A. 277, *VANNEST v. FLEMING*, 79 Iowa, 638, 18 Am. St. Rep. 387, 44 N. W. 906.

Discharging water upon adjoining land.

Cited in *Collins v. Keokuk*, 91 Iowa, 295, 59 N. W. 202, refusing to enjoin discharge of water on adjoining land coming from tile 10 feet from said land; *Williamson v. Oleson*, 91 Iowa, 291, 59 N. W. 267, refusing to enjoin flow of water upon adjoining proprietor's land through drain tile; *Stinson v. Fishel*, 93 Iowa, 661, 61 N. W. 1063, holding that owner cannot dig ditches to gather water in one channel so as to increase natural flow over adjoining land; *Holmes v. Calhoun County*, 97 Iowa, 364, 66 N. W. 145, holding discharge of water upon another's land except in the natural course of drainage, actionable; *Wharton v. Stevens*, 84 Iowa, 110, 15 L. R. A. 633, 35 Am. St. Rep. 296, 50 N. W. 562, upholding adjoining proprietor's right to drain into natural drainage way flowing over another's land; *Schofield v. Cooper*, 126 Iowa, 337, 102 N. W. 110, holding county without right to collect surface water, either on public highway or from lands of another, and discharge it on lands of one where it was not wont to go; *Dorr v. Simmerson*, 127 Iowa, 553, 103 N. W. 806, holding higher proprietor has

right by drains, open or closed to conduct water on his land into natural and usual channels provided by nature or established by agreement or acquiescence of parties; *Hull v. Harker*, 130 Iowa, 193, 106 N. W. 629, holding upper proprietor may construct tile drains in swale constituting natural channel for drainage of his lands, if water not cast upon land below in greater quantity or different manner than before; *Matteson v. Tucker*, 131 Iowa, 516, 107 N. W. 600, holding no cause of action afforded by levee not operating to obstruct natural drainage of land; *Sheker v. Machovec*, 139 Iowa, 4, 116 N. W. 1042, holding where, by title drains, owner of higher land discharges upon lower land water from area otherwise not drained across lower land, or at point where water from higher land not naturally discharged upon lower to material injury of latter, owner of upper land liable in damages; *Walker v. Gorman*, 150 Iowa, 459, 130 N. W. 393, holding that landowner cannot substitute title drain for open ditch in such manner that outlet for drainage from adjoining land is rendered less efficient; *Obe v. Pattot*, 151 Iowa, 727, 130 N. W. 903, holding that landowner cannot complain of increased flowing of surface water from adjacent land, result of artificial drainage, unless quantity is so great as to cause substantial injury; *Perry v. Clark*, 89 Neb. 815, 132 N. W. 388, holding that upper proprietor has right to drain surface water from land through drains in natural course of drainage into natural channels and onto lands of lower proprietor.

Cited in notes (8 L. R. A. 575) on element of servitude in flowage of water; (10 L. R. A. 484) on right by prescription to use of lands of another; (10 L. R. A. 487) on right to use of flowing water; (19 L.R.A.(N.S.) 168) on right to hasten flow of surface water along natural ways; (85 Am. St. Rep. 736, 731, 735) on right of land owner to accelerate or diminish flow of water to or from lands of another; (41 L. ed. U. S. 838) on drainage of surface waters.

Distinguished in *Keek v. Venghause*, 127 Iowa, 533, 103 N. W. 773, 4 A. & E. Ann. Cas. 716, holding riparian proprietor may not embank against natural overflow from inland stream, when effect may be to cast increased volume of water upon land of other proprietors, to their injury.

License to flow; revocation.

Cited in *Hansen v. Farmers Co-Operative Creamery*, 106 Iowa, 170, 76 N. W. 652, holding license on part of lessee to use other land, of lessor for flowage during lease-hold period, exists where money and labor have been expended with lessors consent; *Spink v. Corning*, 61 App. Div. 91, 70 N. Y. Supp. 143, holding improved watercourse cannot be closed after acquiescence for long period merely because artificially deepened and enlarged; *Brown v. Armstrong*, 127 Iowa, 177, 102 N. W. 1047, holding where land owner and predecessors have long acquiesced in scheme for drainage of land and adjoining tract, which scheme includes dike and ditches, such owner cannot insist on change and that owner of adjoining tract take care of water in pond on land of former or its overflow; *Neuhring v. Schmidt*, 130 Iowa, 404, 106 N. W. 630, holding land owner cannot complain of existence of open ditch on his land along natural drain consented to by former owner and long maintained; *Wirds v. Vier Kandt*, 131 Iowa, 128, 108 N. W. 108, holding owner of servient estate cannot enjoin laying of tile by owner of dominant estate in bottom of old ditches which have existed without objection for from twelve of fifteen years and discharged practically same amount of water as proposed tiling would carry off; *Brown v. Honeyfield*, 139 Iowa, 417, 116 N. W. 731, holding assent of owner's predecessors in title to construction of ditch is in nature of license which cannot be disregarded after having been accepted and acted upon; *Ruthven v. Farmers' Co-op. Creamery Co.* 140 Iowa, 575, 118 N. W. 915, holding parol license to construct tile drain based upon consideration valid and not revocable at pleasure;

Arbaugh v. Alexander, 151 Iowa, 554, 132 N. W. 179, holding that oral agreement for right of way over another's land which has been acted upon and way constructed is valid; Munsch v. Stelter, 109 Minn. 407, 25 L.R.A.(N.S.) 731, 134 Am. St. Rep. 785, 124 N. W. 14, holding equity will restrain attempt to exercise right to revoke license to construct ditch where licensor joins in enterprise and accepts benefits of licensee's labor and expense in completing system of drainage; Riverside Cotton Mills v. Lanier, 102 Va. 163, 45 S. E. 875, holding lower land owner liable for damage caused to property of upper landowner by obstructing flow of water through culvert long existing.

Cited in footnote to Rodefer v. Pittsburg O. V. & C. R. Co. 70 L.R.A. 844, which holds siding or switch constructed by railroad company to manufactory at expense of and over land of manufacturer for sole purpose of affording facilities for receiving and shipping freight and silent as to period it is to remain not maintainable by railroad company against manufacturer's objection.

Cited in notes (49 L.R.A. 513) on revocability of license to maintain a burden on land after licensee has incurred expense and created burden; (16 Eng. Rul. Cas. 80) on revocability of license.

Distinguished in Robinson v. Luther, 140 Iowa, 727, 119 N. W. 146, holding oral agreement between owners of adjoining tracts whereby one is to lay tile drain in part on land of other, partly performed, not enforceable, unless part performance with knowledge and consent of party giving permission, prior agreement between former owners of tracts, not connected with later agreement, immaterial.

8 L. R. A. 280, PALMER v. STATE, 88 Tenn. 553, 13 S. W. 233.

Effect of licensing unlawful business.

Cited in Blaufield v. State, 103 Tenn. 598, 53 S. W. 1090, holding imposition of privilege tax does not authorize unlawful sale of cigarettes; Atkins v. State, 95 Tenn. 476, 32 S. W. 391, holding unauthorized license no protection to participator in unlawful gaming; Foster v. Speed, 120 Tenn. 473, 22 L.R.A.(N.S.) 950, 111 S. W. 925, 15 A. & E. Ann. Cas. 1066, holding tax on persons retailing liquors covers sales made in prohibited territory but imposition of tax no authorization of sales in such territory.

Cited in note (14 L. R. A. 846) on implied sanction of evil by statutory regulations.

Gambling, what is.

Cited in Guarantee Co. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 417, 46 L. ed. 261, 22 Sup. Ct. Rep. 124, holding dealing in futures gambling, under Tennessee laws.

Cited in footnotes to People *ex rel.* Lawrence v. Fallon, 37 L. R. A. 227, which holds test of speed or endurance of horses for prizes not a lottery or gambling; State *ex rel.* Matthews v. Forsyth, 33 L. R. A. 221, which holds successive race meetings on neighboring tracks with same horses, judges, etc., violation of law regulating duration and frequency.

8 L. R. A. 283, STATE *ex rel.* GOODWIN v. NELSON COUNTY, 1 N. D. 88, 26 Am. St. Rep. 609, 45 N. W. 33.

Taxation for relief and charitable purposes.

Cited in Yeatman v. King, 2 N. D. 426, 33 Am. St. Rep. 797, 51 N. W. 721, holding obligation of person supplied with grain to repay county for same, a mere debt, and not a tax; Lund v. Chippewa County, 93 Wis. 652, 34 L. R. A. 136, 67 N. W. 927, upholding constitutionality of act for establishment of state home for feeble minded.

Cited in notes (14 L.R.A. 475), on public purposes for which money may be appropriated, or raised by taxation; (7 L.R.A.(N.S.) 1197) on validity of statute providing for assistance of individual members of certain classes of unfortunate or afflicted persons.

Distinguished in *Re Relief Bills*, 21 Colo. 65, 39 Pac. 1089, holding relief bill to enable settlers in certain district to obtain seed and grain unconstitutional; *William Deering & Co. v. Peterson*, 75 Minn. 124, 77 N. W. 568, holding seed-grain loan act unconstitutional.

Original jurisdiction of supreme court.

Cited in *State ex rel. Moore v. Archibald*, 5 N. D. 360, 66 N. W. 234, upholding original jurisdiction of supreme court in mandamus proceedings relating to removal of superintendent of state hospital; *State ex rel. Fosser v. Lavik*, 9 N. D. 462, 83 N. W. 914, upholding original jurisdiction in mandamus to compel county auditor to receive certificates of nomination; *Anderson v. Gordon*, 9 N. D. 482, 52 L. R. A. 135, footnote p. 134, 83 N. W. 993, holding that prerogative writ must be procured on information filed by state law officer, or upon his authority in name of state; *State ex rel. Byrne v. Wilcox*, 11 N. D. 335, 91 N. W. 955, holding prerogative writs may issue out of supreme court against advice of attorney general; *State ex rel. Walker v. McLean County*, 11 N. D. 361, 92 N. W. 385, holding supreme court will not assume jurisdiction of quo warranto proceedings where proper effort to obtain hearing in district court not made on behalf of private relator; *Duluth Elevator Co. v. White*, 11 N. D. 538, 90 N. W. 12, holding certiorari will not issue out of supreme court to state board of equalization at instance of taxpayer seeking relief from burden of unlawful tax; *State ex rel. McDonald v. Holmes*, 16 N. D. 460, 114 N. W. 367, holding supreme court without original jurisdiction to issue writ of mandamus to compel state auditor to deliver to county treasurer warrants for amount of rewards paid by latter for securing arrest and conviction of violators of liquor law; *State ex rel. Erickson v. Burr*, 16 N. D. 585, 113 N. W. 705, holding supreme court will assume jurisdiction of proceeding in nature of quo warranto against person charged with unlawfully acting as judge though it is at suit of private relator and attorney general declines to appear for State; *State ex rel. Steel v. Fabrick*, 17 N. D. 537, 117 N. W. 860, holding writ of mandamus will not issue out of supreme court to compel county auditor to give notice of submission of question of dividing county at certain election on ground state at large proximately affected.

Cited in notes (51 L. R. A. 63, 107) on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal; (58 L. R. A. 864) on original jurisdiction of court of last resort in mandamus case.

Distinguished in *State ex rel. Brett v. Kenner*, 21 Okla. 819, 97 Pac. 258, holding supreme court without original jurisdiction to issue writs of injunction where relief asked is purely injunctive, specific mention of writ of injunction not being made in clause of constitution conferring original jurisdiction.

8 L. R. A. 289, *KILLMER v. WUCHNER*, 79 Iowa, 722, 18 Am. St. Rep. 392, 45 N. W. 299.

Allowance for improvements.

Cited in *Bergman v. Kammlade*, 109 Iowa, 308, 80 N. W. 418, denying tenant in possession allowance for improvements on partition where rent withheld by him exceeded their value; *Leake v. Hayes*, 13 Wash. 222, 52 Am. St. Rep. 34, 43 Pac. 48, holding tenant in common making estate productive by improvements entitled on partition to all the profits without deducting increase of value.

Cited in notes (52 Am. St. Rep. 939) on paying for improvements out of proceeds of sales in partition; (81 Am. St. Rep. 169, 187), on what are betterments,

and allowance therefor; (13 L.R.A.(N.S.) 515) on right of life tenant, or one claiming under him, to recover for improvements.

Distinguished in *Porter v. Osmun*, 135 Mich. 363, 98 N. W. 859, 3 A. & E. Ann. Cas. 687, holding one making improvements while in possession as tenant of life estate of another, at same time owning undivided half of remainder, not entitled to allowance for improvements on partition.

8 L. R. A. 291, *MAULDIN v. GREENVILLE*, 33 S. C. 1, 11 S. E. 434.

Taxpayers' action.

Cited in *Butler v. Ellerbe*, 44 S. C. 259, 22 S. E. 425, holding state not indispensable party to action by taxpayer to restrain comptroller general from drawing warrants; *Jordan v. Logansport*, 171 Ind. 283, 86 N. E. 47, holding taxpayer justified in resorting to court of equity for relief where assessment for sewer threatened on account of debt in excess of constitutional limitation and action not premature, though no lien is created on his property by making of assessment; *Lamar v. Croft*, 73 S. E. 411, 53 S. E. 540, holding complaint for injunction to restrain commissioners from contracting with surveyors in discharge of duties in proceedings to form new county not demurrable on ground action maintainable only by counties affected through their officers or agents.

Cited in footnotes to *Zuelly v. Casper*, 63 L.R.A. 133, which upholds right of taxpayer of county to bring suit for restoration to treasury of money illegally appropriated as fees of officers; *Johnson v. Black*, 68 L.R.A. 264, which sustains jurisdiction of equity over suit by taxpayer to compel restoration of county funds illegally withdrawn by order of board of supervisors.

Cited in note (36 L.R.A.(N.S.) 21) on taxpayer's right to enjoin unlawful municipal expenditures.

Power to maintain public-service plants.

Cited in *Mayo v. Washington*, 122 N. C. 9, 40 L. R. A. 165, 29 S. E. 343, holding debt for purchase of electric light plant not necessary expense of town which does not need sanction of voters; *Fawcett v. Mt. Airy*, 134 N. C. 129, 63 L. R. A. 872, 45 S. E. 1029, holding expenditure for water and lighting plants within town's power to incur necessary expenses; *Wadsworth v. Concord*, 133 N. C. 593, 45 S. E. 948, by Clark, C. J., concurring in result, who holds furnishing light for streets "a necessary purpose;" *Crawfordsville v. Broden*, 130 Ind. 159, 14 L. R. A. 272, 30 Am. St. Rep. 214, 28 N. E. 849, holding that city may establish electric light plant for private as well as public use; *Ellinwood v. Reedsburg*, 91 Wis. 134, 64 N. W. 885, holding that city can build waterworks and electric lighting plant under police power; *Christensen v. Fremont*, 45 Neb. 164, 63 N. W. 364, holding that city may use general fund to pay for electric light system to be used for lighting streets; *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 265, 30 L. R. A. 543, 51 Am. St. Rep. 24, 18 So. 677, holding that city under its charter can maintain electric plant to furnish light to citizens; *Jones v. Camden*, 44 S. C. 322, 51 Am. St. Rep. 819, 23 S. E. 141, holding validity of bonds for which building erected not affected by fact that small portions of building used for other than public purposes; *Re Charles Town Light & Power Co.* 133 Fed. 164, to the point that city with express power to own property and implied power to light city has power to own electric light plant to light streets; *Baker v. Cartersville*, 127 Ga. 225, 56 S. E. 249, on power of municipal corporation to supply private consumers with light and water; *Jack v. Grangeville*, 9 Idaho, 316, 74 Pac. 969, upholding contract of village with individuals to supply village with water for fire and other purposes; *Overall v. Madisonville*, 125 Ky. 690, 12 L.R.A.(N.S.) 436, 102 S. W. 278, holding city has power to install light plant to furnish public lighting and incidentally, to furnish light to in-

habitants; *Wadsworth v. Concord*, 133 N. C. 593, 45 S. E. 948, on furnishing light and water for purposes a "necessary purpose"; *Elliott v. Monongahela City*, 57 Pittsb. L. J. 296, holding that city with power to light streets with gas has implied power to use electricity for lighting them; *Irvine v. Greenwood*, 89 S. C. 515, 36 L.R.A.(N.S.) 365, 72 S. E. 228, to the point that express bestowal by legislature on city of power to construct and maintain electric light plant is necessary and will not be implied from general powers.

Cited in notes (64 L. R. A. 41) on definitions of manufacturing; (64 L. R. A. 60) on taxation of electric plants as manufacturing corporations; (15 L.R.A. (N.S.) 711) on power of municipality to own electric light plant.

Power of state to engage in trade.

Cited in *McCullough v. Brown*, 41 S. C. 252, 23 L. R. A. 423, 19 S. E. 458, holding dispensary act whereby state attempts monopoly of liquor traffic invalid.

Distinguished in *State ex rel. George v. Aiken*, 42 S. C. 247, 26 L. R. A. 357, 20 S. E. 221, holding dispensary act giving state monopoly of liquor traffic valid as a police measure.

Construction of municipal charters.

Cited in *Holmes v. Weinheimer*, 66 S. C. 21, 44 S. E. 82, refusing to construe municipal charter as impliedly giving purchaser at municipal tax sale rights superior to purchaser at state tax sale.

8 L. R. A. 297, *STATE v. DOWELL*, 106 N. C. 722, 19 Am. St. Rep. 568, 11 S. E. 525.

Tort or crime by husband on wife.

Cited in *State v. Fulton*, 149 N. C. 496, 63 S. E. 145 (dissenting opinion), on chastisement of wife by husband as actionable wrong.

8 L. R. A. 299, *BAIN v. RICHMOND & D. R. CO.* 105 N. C. 363, 3 Inters. Com. Rep. 149, 18 Am. St. Rep. 912, 11 S. E. 311.

Right of state treasurer to sue for unpaid taxes.

Cited in *Worth v. Wright*, 122 N. C. 337, 29 S. E. 361, upholding right of state treasurer to sue to recover unpaid license tax.

Tax on foreign carriers.

Cited in footnotes to *Union Refrigerator Transit Co. v. Lynch*, 48 L. R. A. 790, which authorizes taxation of cars within state under lease from foreign corporation; *Cumberland & P. R. Co. v. State*, 52 L. R. A. 764, which sustains state tax on proportionate part of gross receipts of interstate railroad; *Hall v. American Refrigerator Transit Co.* 56 L. R. A. 89, which sustains tax on average number of refrigerator cars coming into state in course of interstate business; *Grigsby Constr. Co. v. Freeman*, 58 L. R. A. 349, which holds contractor's outfit brought into state for use several months in constructing railroad taxable in state.

Cited in note (60 L.R.A. 656) on corporate taxation and the commerce clause.

Disapproved in *Union Refrigerator Transit Co. v. Lynch*, 18 Utah, 392, 48 L. R. A. 793, 55 Pac. 639, upholding tax on leased cars of foreign corporation, passing through or within state.

Situs of personality for taxation.

Cited in notes (62 Am. St. Rep. 470, 474), on situs of personal property for purposes of taxation; (69 L.R.A. 443) on situs for taxing purposes of tangible personality of domestic corporations.

8 L. R. A. 301, *COM. v. CLEARY*, 135 Pa. 64, 19 Atl. 1017.

Report of later appeal in 148 Pa. 26, 23 Atl. 1110.

Good character as defense in criminal action.

Cited in *State v. Porter*, 32 Or. 159, 49 Pac. 964; *Com. v. Gibbons*, 3 Pa. Super. Ct. 413, 39 W. N. C. 568, holding evidence of good reputation of defendant in criminal action admissible; *Seymour v. State*, 102 Ga. 806, 30 S. E. 263, holding evidence of good character to be considered on question of defendant's guilt; *Com. v. Sayars*, 21 Pa. Super. Ct. 79, holding instruction that "good character should be considered in doubtful case," erroneous; *State v. Van Kuran*, 25 Utah, 16, 69 Pac. 60, holding instruction limiting consideration of evidence as to defendant's good character to determination of truth of evidence for prosecution, erroneous; *Humes v. United States*, 105 C. C. A. 158, 182 Fed. 489, to the point that evidence of good character is always admissible for defendant in criminal case; *Com. v. Howe*, 42 Pa. Super. Ct. 144, holding that evidence of good character is to be regarded as a fact like any other tending to establish defendant's innocence; *Com. v. Le Flem*, 33 Pa. Co. Ct. 462, 16 Pa. Dist. R. 14, holding evidence admissible as to general reputation for skill and care in operating automobile of defendant charged with involuntary manslaughter in negligently running automobile over boy.

Cited in note (38 Am. St. Rep. 94) on evidence of good character of one accused of homicide.

Reasonable doubt.

Cited in *Com. v. Yost*, 11 Pa. Super. Ct. 344, holding reasonable doubt as to guilt must arise out of evidence; *Com. v. Cate*, 220 Pa. 140, 123 Am. St. Rep. 683, 69 Atl. 322, holding it error to charge that where jury is satisfied beyond reasonable doubt of defendant's guilt under all the evidence, evidence of previous good character is not to overcome conclusion which follows from that view of case.

Cited in notes (20 L.R.A. 617) on evidence of character creating doubt; (103 Am. St. Rep. 893) on evidence of good character to create doubt of guilt.

Comments of prosecuting counsel.

Cited in note (12 L. R. A. 449) on criminal practice, comments of prosecuting counsel on absence of witnesses, and testimony.

Intoxication as defense.

Cited in *Com. v. Detweiler*, 229 Pa. 308, 78 Atl. 271, holding that intoxication of person charged with murder will not palliate his offense unless he was in such state as to be incapable of conceiving intent.

8 L. R. A. 304, *BRANNON v. COUNTY COURT*, 33 W. Va. 789, 11 S. E. 34.

Delegation of taxing power.

Cited in *Neale v. County Court*, 43 W. Va. 96, 27 S. E. 370, holding power of levying taxes limited to states, counties, school districts, and municipal corporations.

County taxes for road purposes.

Cited in footnotes to *Gilson v. Rush County*, 11 L. R. A. 835, which holds personal property liable to taxation for price of toll road, purchased to make it a free road; *Duval County v. Jacksonville*, 29 L. R. A. 416, which upholds statute requiring half of funds raised for county roads and bridges to be turned over to city authorities for city streets.

Constitutional limitations upon county taxation.

Cited in *Spilman v. Parkersburg*, 35 W. Va. 613, 14 S. E. 279; *Davis v. County Court*, 38 W. Va. 107, 18 S. E. 373, holding county court prohibited by constitution from incurring indebtedness other than for current fiscal year, unless authorized by three-fifths vote of people; *Neale v. County Court*, 43 W. Va.

100, 27 S. E. 370, holding magisterial district subscription to work of internal improvement regarded as county indebtedness in determining whether constitutional limit reached.

Distinguished in *White v. Wirt County Ct.* 63 W. Va. 233, 59 S. E. 884, holding statute providing that levy of taxes for general county purposes shall not exceed certain per cent on one hundred dollars valuation of property, does not limit county court as to levy for road purposes.

8 L. R. A. 309, *WILSON v. MARTIN-WILSON AUTOMATIC FIRE ALARM CO.* 151 Mass. 515, 24 N. E. 784.

Letters patent; how reached by creditors.

Cited in *Vail v. Hammond*, 60 Conn. 383, 25 Am. St. Rep. 330, 22 Atl. 954, holding that letters patent may be reached in equitable proceeding for payment of debts.

Cited in note (20 Eng. Rul. Cas. 9) on attachment of patent by creditors.

Distinguished in effect in *Wolf v. Bonta Plate Glass Co.* 5 Lack. L. News, 54, 6 Northampton Co. Rep. 399, holding that patent right cannot be sold *fi. fa.*; *Hildreth v. Thibodeau*, 186 Mass. 84, 104 Am. St. Rep. 560, 71 N. E. 111, holding state court cannot take jurisdiction over letters patent of United States where owner non-resident and no jurisdiction acquired over him.

Creditor's bills; what may be reached by.

Cited in *Wemyss v. White*, 159 Mass. 486, 34 N. E. 718, holding beneficiary's interest, where trustees have discretionary power to discontinue payments, cannot be reached by creditor's bill; *Conant v. Boston Chamber of Commerce*, 201 Mass. 484, 87 N. E. 906, holding vested equitable right to possession of money may be reached in equity to satisfy debt.

Cited in footnote to *Harper v. Clayton*, 35 L. R. A. 211, which denies power to reach unassigned right of dower by creditor's bill.

Right of equity to transfer title.

Cited in *Wilson v. Welch*, 157 Mass. 80, 31 N. E. 712, holding that equity cannot, unless authorized by statute, transfer title by decree; *Snyder v. Smith*, 185 Mass. 62, 69 N. E. 1089, holding right to assets of bankrupt established by decree of court of equity good as against trustee in bankruptcy; *P. H. & F. M. Roots Co. v. Decker*, 111 Minn. 462, 127 N. W. 417, holding that court has no power to determine validity of prior transfer of patent in absence of jurisdiction over person of owner of patent.

Cited in note (20 Eng. Rul. Cas. 771) on assignment of patent by judicial sale.

Distinguished in *Russell v. Burke*, 180 Mass. 544, 62 N. E. 963, holding that decree in equity should order conveyance by resident defendant upon master's sale.

Statutory bill to reach assets.

Cited in *Mathews State Co. v. Mathews*, 148 Fed. 495, holding proceedings under Massachusetts statute giving certain courts jurisdiction in equity over suits to reach property of debtor which cannot be reached by attachment or execution in suit at law are equitable in nature.

8 L. R. A. 315, *RICE v. SANDERS*, 152 Mass. 108, 23 Am. St. Rep. 804, 24 N. E. 1079.

Covenant to assume mortgage; effect of.

Cited in *Wamesit Power Co. v. Sterling Mills*, 158 Mass. 444, 33 N. E. 503, holding duty of grantee assuming mortgage subsequently assigned to him to
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discharge it; *Stites v. Thompson*, 98 Wis. 331, 73 N. W. 774, holding purchaser assuming mortgage debt liable thereon as principal; *Goodenough v. Labrie*, 206 Mass. 601, 138 Am. St. Rep. 411, 92 N. E. 807, to the point that the effect of agreement to assume mortgage is to make mortgage primarily charge upon purchase money reserved by grantee to pay it.

— **Recovery of damages for breach.**

Cited in *Baldwin v. Emery*, 89 Me. 499, 36 Atl. 994, and *Walton v. Ruggles*, 180 Mass. 26, 61 N. E. 267, holding right to recover for grantee's breach of covenant to pay mortgage not affected by plaintiff's nonpayment; *Paro v. St. Martin*, 180 Mass. 31, 61 N. E. 268, holding grantor in consideration of annuity entitled to recover value thereof upon foreclosure of mortgage assumed by grantee; *Pearson v. Bailey*, 180 Mass. 232, 62 N. E. 265, holding grantor to parties assuming mortgage not damnified by failure to pay, where mortgagee covenants to look wholly to land; *Bray v. Booker*, 8 N. D. 355, 79 N. W. 293, holding damages recoverable for grantee's promise to pay vendor's notes; *Perry v. Ward*, 82 Vt. 4, 71 Atl. 721, holding party assuming mortgage becomes primarily liable therefore and for interest in exoneration of original mortgagor.

8 L. R. A. 320, *AMERICAN ORDER OF S. C. v. MERRILL*, 151 Mass. 558, 24 N. E. 918.

Right to use name similar to one already in use.

Cited in *Armington v. Palmer*, 21 R. I. 112, 43 L. R. A. 99, footnote p. 95, 79 Am. St. Rep. 786, 42 Atl. 308, holding wrongful assumption of corporate name enjoined, in absence of contrary statute; *Perham v. Richman*, 158 Fed. 548, denying injunction to restrain use of name of order where there is no intention to deceive and no such similarity of names as would mislead ordinary citizen of average intelligence.

Cited in footnotes to *International Committee, Y. W. C. Asso. v. Young Women's Christian Asso.* 56 L. R. A. 888, which sustains right of local Y. W. C. A. to enjoin deceptive use of similar name by organization subsequently incorporated; *Peck Bros. & Co. v. Peck, Bros. Co.* 62 L. R. A. 81, which holds purchasers of name and goodwill of corporation may enjoin use of similar name by purchasers of branch thereof; *Illinois Watch Case Co. v. Pearson*, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name; *Supreme Lodge K. of P. v. Improved Order, K. of P.* 38 L. R. A. 658, which authorizes seceding Knights of Pythias to use name "Improved Order Knights of Pythias."

Distinguished in effect in *Paulino v. Portuguese Beneficial Asso.* 18 R. I. 163, 20 L. R. A. 273, 26 Atl. 36, holding use of corporate name conferred by legislative charter not enjoined by association having same name.

Name of patented article; when open to general use.

Cited in *Dover Stamping Co. v. Fellows*, 163 Mass. 198, 28 L. R. A. 450, 47 Am. St. Rep. 448, 40 N. E. 105, holding name of patented article open to general use upon expiration of patent.

8 L. R. A. 321, *MISSOURI P. R. CO. v. WHIPKER*, 77 Tex. 14, 19 Am. St. Rep. 734, 13 S. W. 639.

Garnishment; defense of principal defendant.

Cited in *Ball v. Bennett*, 21 Tex. Civ. App. 399, 52 S. W. 618, holding principal debtor entitled to intervene in garnishment proceeding, after answer of garnishee, to question sufficiency of proceeding; *Laurel v. Turner*, 80 Miss. 534, 31 So. 965, holding garnishee failing to plead exemption of judgment debtor's wages garnished remains liable to him therefor.

Cited in notes (8 L. R. A. 413, 19 L. R. A. 580) on duty of garnishee to set up exemption of principal debtor.

8 L. R. A. 323, *GULF, C. & S. F. R. CO. v. LEVI*, 76 Tex. 337, 18 Am. St. Rep. 45, 13 S. W. 191.

Liability for delay in delivery of freight; uncontrollable causes.

Cited in *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 95, 10 L. R. A. 423, 14 S. W. 913, holding strike of railway employees causing obstruction to traffic good defense to action on special contract; *International & G. N. R. Co. v. Hynes*, 3 Tex. Civ. App. 21, 21 S. W. 622, holding carrier not liable for delay on delivery of goods resulting from causes beyond its control, if due care was exercised for their preservation of property; *Empire Transp. Co. v. Philadelphia, & R. Coal & I. Co.* 35 L. R. A. 632, 23 C. C. A. 571, 40 U. S. App. 157, 77 Fed. 926, holding under charter party without stipulation for time of unloading, reasonable time therefor to be determined from existing circumstances; *Burnham v. Alabama & V. R. Co.* 81 Miss. 54, 32 So. 912, denying railroad's liability for deterioration of perishable goods, delayed in transportation by unprecedented flood; *Rodgers v. Missouri P. R. Co.* 75 Kan. 234, 10 L.R.A.(N.S.) 663, 121 Am. St. Rep. 416, 88 Pac. 885, 12 A. & E. Ann. Cas. 441, holding negligent delay of carrier in moving goods, not so unreasonable as to amount to conversion, will not render it liable for loss of goods after they have been carried to destination, if there destroyed by act of God before delivery.

Cited in notes (9 L. R. A. 836) on excuse of carrier for delay in transportation; (35 L. R. A. 627, 628) on effect of violence and intimidation upon liability for delay in transportation; (35 L. R. A. 624) on delay in transportation in general; (22 Am. St. Rep. 407) on act of God excusing carrier from liability; (5 Eng. Rul. Cas. 265) on exemption of carrier from liability for act of God or public enemies; (5 Eng. Rul. Cas. 349) on liability of carrier for deterioration of perishable freight.

8 L. R. A. 326, *Re TIPTON*, 28 Tex. App. 438, 13 S. W. 610.

Statutes; regularity of passage.

Cited in *Williams v. Taylor*, 83 Tex. 674, 19 S. W. 156, holding legislative journals will not be examined to determine whether procedure prescribed by Constitution has been followed; *McLane v. Paschal*, 8 Tex. Civ. App. 401, 28 S. W. 711, holding court will not look beyond enrolled bill, signed by proper officers, for purpose of determining whether statute duly enacted; *Narregang v. Brown County*, 14 S. D. 365, 85 N. W. 602, holding properly authenticated enrolled bill not subject to impeachment by entries in legislative journals; *State ex rel. Reed v. Jones*, 6 Wash. 476, 23 L. R. A. 353, 34 Pac. 201, holding enrolled bill, if fair on its face, and signed by proper officers, is conclusive evidence of regularity of legislative procedure; *Re Duncan*, 139 U. S. 459, 35 L. ed. 224, 11 Sup. Ct. Rep. 573, holding judgment of state court in favor of validity of adoption of state statute not reviewable in Federal court; *Lee v. Tucker*, 130 Ga. 49, 60 S. E. 164, holding unless journals of two houses of legislature show affirmatively legislature acted contrary to constitutional prohibition, it will be conclusively presumed it did not so act; *Home Teleg. Co. v. Nashville*, 118 Tenn. 10, 101 S. W. 770, 11 A. & S. Ann. Cas. 824, holding statute not unconstitutional because no entry on journal of house of representatives shows it was signed by speaker of house in open session; *El Paso & S. W. R. Co. v. Foth*, 101 Tex. 142, 105 S. W. 322 (reversing 45 Tex. Civ. App. 284, 100 S. W. 171), on not looking to journals of legislature in order to invalidate statute signed by president of senate and speaker of house and approved by governor; *Stockard v. Reid*, 57 Tex. Civ.

App. 130, 121 S. W. 1144, holding that act passed by both houses, signed by presiding officers and approved by governor affords conclusive evidence that it was passed in accordance with constitution.

Cited in notes (23 L. R. A. 345) on admissibility of evidence to contradict enrolled bill; (11 L. R. A. 491, 492) on passage of bills through legislature in general.

Violation of unconstitutional statute.

Cited in note (39 L. R. A. 456) on conviction for violating unconstitutional statute.

8 L. R. A. 328, *EMMONS v. LEWISTOWN*, 132 Ill. 380, 22 Am. St. Rep. 540, 24 N. E. 58.

Who are hawkers or peddlers.

Cited in *Kennedy v. People*, 9 Colo. App. 493, 49 Pac. 373; *State v. Hoffman*, 50 Mo. App. 588; *Cerro Gordo v. Rawlings*, 135 Ill. 40, 25 N. E. 1006,—holding traveling salesman selling goods by sample, for future delivery, not peddler; *Olney v. Todd*, 47 Ill. App. 440, holding neither traveling salesman taking orders for goods from sample, nor person subsequently making deliveries and collecting money therefor, are peddlers; *Twining v. Elgin*, 38 Ill. App. 359, holding person going from place to place, and soliciting orders for enlargement and framing of pictures not itinerant merchant nor transient vender of merchandise; *Hewson v. Englewood Twp.* 55 N. J. L. 524, 21 L. R. A. 737, 27 Atl. 904, holding person soliciting orders for groceries, for future delivery, not “hawker, peddler, or itinerant vendor;” *State v. Bristow*, 131 Iowa, 666, 109 N. W. 199, holding solicitor of orders by sample to be filled by shipment after approval was not peddler though the statute included transient and itinerant vendors by sample; *Potts v. State*, 45 Tex. Crim. Rep. 49, 74 S. W. 31, 2 A. & E. Ann. Cas. 827, holding “sample man” taking orders for future delivery not peddler under statute imposing tax on persons peddling out various articles enumerated; *Needham v. State*, 51 Tex. Crim. Rep. 252, 103 S. W. 857 (dissenting opinion), on meaning of term peddler; *Wausau v. Heideman*, 119 Wis. 248, 96 N. W. 549, holding person taking orders by sample in city to be filled by his principal at another place not transient merchant, trader or dealer.

Cited in footnote to *State v. Wells*, 48 L. R. A. 99, which holds one soliciting orders for goods and carrying goods to fill previous sales, not a peddler.

Cited in note (12 Eng. Rul. Cas. 504) on who are peddlers.

Distinguished in *Allport v. Murphy*, 153 Mich. 490, 116 N. W. 1070, where by terms of ordinance peddler was enlarged to include one who kept a store and who also sold goods itinerantly from his wagons.

Municipal corporations; powers strictly construed.

Cited in *Cairo v. Coleman*, 53 Ill. App. 688, and *Savanna v. Robinson*, 81 Ill. App. 478, holding any doubt as to power of municipal corporation is to be resolved against corporation; *Savanna v. Robinson*, 81 Ill. App. 481, holding power to regulate inspection and weighing of coal not to include power to appoint weighmasters, and to require that all coal sold be weighed by such officers; *Kennedy v. People*, 9 Colo. App. 493, 49 Pac. 373, holding under power to exact license of “peddlers,” city cannot enlarge term to include persons not properly within such description; *Delisle v. Danville*, 36 Ill. App. 662, holding city ordinance requiring license of peddlers, and providing person going from place to place and selling goods by sample for future delivery, at retail, shall be deemed peddler, in excess of power; *Burke v. Chicago*, 127 Ill. App. 171, holding ordinance void in so far as in material conflict with statute on same subject; *Re*

Unger, 22 Okla. 757, 1 Okla. Crim. Rep. 224, 98 Pac. 999, holding city authorized to tax contractors not authorized to tax "persons doing contract work."

Distinguished in *Laugel v. Bushnell*, 197 Ill. 27, 58 L. R. A. 269, 63 N. E. 1086, holding under power to declare what shall be deemed nuisance, determination of municipal corporation that thing of doubtful character is nuisance is conclusive.

Statutes; construction of things enumerated.

Cited in *Gundling v. Chicago*, 176 Ill. 346, 48 L. R. A. 232, 52 N. E. 44, holding general words following enumeration of particular things include only such things as are of same kind as those enumerated.

8 L. R. A. 330, *LAKE ERIE & W. R. CO. v. SCOTT*, 132 Ill. 429, 24 N. E. 78.

Cited without discussion in *Louisville, E. & St. L. R. Co. v. Lanter*, 47 Ill. App. 341.

Damage to adjoining property by railroad.

Cited in *Metropolitan West Side Elevated R. Co. v. Goll*, 100 Ill. App. 334, and *Illinois C. R. Co. v. Kuehle*, 95 Ill. App. 186, holding right of redress not taken away because act authorized by law, where interference with enjoyment such as would, in absence of legislative authority, constitute actionable nuisance; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 234, 35 N. E. 750, holding depreciation in value of land by reason of noise of trains is proper element of damage; *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 405, 63 N. E. 165, holding injury from noise, soot, and cinders proper element of damage, although necessary incidents to operation of railway; *Illinois C. R. Co. v. Turner*, 194 Ill. 578, 62 N. E. 798, and *Illinois C. R. Co. v. Schmidgall*, 91 Ill. App. 27, holding inconveniences occasioned by operation of railroad, and such damage as is reasonably probable to ensue, may be considered in determining depreciation in value of property; *Wisconsin C. R. Co. v. Wiczorek*, 51 Ill. App. 502, holding noise and vibration of ground causing ceilings and walls of houses near right of way to crack, and consequent depreciation in value of premises, proper elements of damage; *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 252, 38 N. E. 556, holding special disadvantages and annoyances, which interfere with full enjoyment of property, resulting from construction of railway on narrow street, may be considered in estimating damage; *Davenport R. I. & N. W. R. Co. v. Sinnet*, 111 Ill. App. 81, holding depreciation in market value resulting from construction and operation of railroad, measure of adjoining owner's damages; *Illinois C. R. Co. v. Davis*, 71 Ill. App. 102, holding railroad relocating switch tracks, whether as owner of fee or by authority of ordinance of city, liable for consequential damages to private property; *Metropolitan West Side Elev. R. Co. v. Goll*, 100 Ill. App. 336, holding that recovery can be had for injury from public use of railroad, as distinguished from such private use as railroad may lawfully make of its own land; *Atchison, T. & S. F. R. Co. v. Maegerlein*, 114 Ill. App. 227, holding remedy at law for damage to property in elevating railway tracks perfect and complete; *Neilson v. Chicago*, 2 Ill. C. C. 363, holding property owner whose property damaged by elevation of railway tracks pursuant to ordinance has cause of action against city; *Kayser v. Chicago, B. & Q. R. Co.* 88 Neb. 346, 129 N. W. 554, holding that owner may recover damages to his property resulting from construction of railroad on opposite side of highway.

Cited in notes (85 Am. St. Rep. 312) on depreciation in value of property not taken as element of damages allowable in eminent domain proceedings; (10 L.R.A.(N.S.) 1004) on danger of injury to owner or his family or live stock, as element of damages for railroad right of way; (22 Am. St. Rep. 52; 36 L.R.A. (N.S.) 748) on abutter's right to compensation for railroads in streets.

Damage distinct from that of public.

Cited in *Chicago v. Spoor*, 190 Ill. 348, 60 N. E. 540, holding recovery for erection of public improvement in street must be based upon special damage, in excess of that to public, from direct physical disturbance to right connected with property; *Pennsylvania Co. v. Chicago*, 181 Ill. 303, 53 L. R. A. 228, 54 N. E. 825, holding remedy of abutting-property owner for injury from use of street for hack stand is distinct from that of public for which he may have compensation in damages.

When damage accrues.

Cited in *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 622, 42 Am. Rep. 149, 37 Pac. 750, holding in action for damages from change of grade, plaintiff entitled to recover entire damage done to lot by permanent change in street; *Chicago, P. & St. L. R. Co. v. Leah*, 41 Ill. App. 588, holding recovery for depreciation in value of property from construction of railway in highway covers all damages that may accrue from future maintenance and operation of railroad in proper manner; *Star & C. Mill. Co. v. Chicago Sanitary Dist.* 120 Ill. App. 561, holding wrongful act done and injury suffered when access to and egress from property adjoining street first obstructed and destroyed by work of constructing bridge.

Condemnation of land for railroad purposes.

Cited in footnotes to *Jacksonville, T. & K. W. R. Co. v. Adams*, 14 L. R. A. 533, which authorizes condemnation of land irregularly entered upon; *Becker v. Philadelphia & R. Terminal R. Co.* 35 L. R. A. 583, which holds diminution in profits and value of merchandise by removal of business from condemnation of land not element of damages.

Cited in note (9 L. R. A. 299) on elements of damage from condemnation of land for railroad purposes.

8 L. R. A. 333, *STANLEY v. STANLEY*, 47 Ohio St. 225, 21 Am. St. Rep. 806, 24 N. E. 493.

Statute of limitations; interruption by absence from state.

Cited in *Lindsay v. Maxwell*, 4 Ohio N. P. 354, holding debtor's temporary absence from state for several months does not suspend running of statute; *Webster v. Citizens Bank*, 2 Neb. (Unof.) 358, 96 N. W. 118, holding statute continues to run in favor of nonresident coming into state each business day; *Jamieson v. Potts*, 55 Or. 292, 25 L.R.A.(N.S.) 31, 105 Pac. 93, holding where cause of action accrues while defendant out of state, statute does not begin to run until defendant returns and if he again departs soon after and remains out of state, being thereafter in state, not to exceed one year from time cause of action arose until commencement of action it is not barred; *Lawson v. Tripp*, 34 Utah, 32, 95 Pac. 520, holding words "return to state" in statute equivalent to "come into state" and statute applicable to nonresidents as well as citizens; *Gibson v. Simmons*, 77 Kan. 464, 94 Pac. 1013, holding debtor only entitled to claim credit for aggregate time he has actually been present within state in computing period; *Lindsay v. Maxwell*, 4 Ohio N. P. 354, 7 Ohio S. & C. P. Dec. 274, as to the temporary absence of the debtor from the state as extending the statute of limitations; *Jamieson v. Potts*, 55 Or. 302, 25 L.R.A.(N.S.) 24, 105 Pac. 93, holding statute of limitations was not put in operation by occasional visits of non-resident maker of notes sued on where such maker was absent from state when action accrued and had since remained absent except for such visits.

Cited in footnotes to *George v. Butler*, 57 L. R. A. 396, which sustains right of grantee of mortgaged premises to plead limitations against foreclosure, though debt not barred as to mortgagor because of absence from state; *Hogg v. Hartley*,

54 L. R. A. 215, which holds personal judgment against one previously leaving state not excused by absence from statute of limitations.

Explained in *Baxter v. Krause*, 79 Kan. 853, 23 L.R.A.(N.S.) 549, 101 Pac. 467, holding one may have benefit of all time he spends in state regardless of whether intervals long enough to give reasonable opportunity for service, so that he does not conceal himself.

8 L. R. A. 337, *FRIESZLEBEN v. SHALLCROSS*, 9 Houst. (Del.) 1, 19 Atl. 576.

Power of taxation; extent of.

Cited in *English v. Wilmington*, 2 Marv. (Del.) 85, 37 Atl. 158, holding front-foot assessment for sewer constitutional.

Right to vote.

Cited in *Solon v. State*, 54 Tex. Crim. Rep. 274, 114 S. W. 349, holding voting an exercise of political power and no one entitled to vote, unless people in their sovereign capacity have conferred on him right to do so; *State ex rel. McGrael v. Phelps*, 144 Wis. 12, 35 L.R.A.(N.S.) 358, 128 N. W. 1041, to the point that right to vote is no more than mere privilege.

Cited in footnotes to *Morris v. Powell*, 9 L. R. A. 326, which holds law requiring registration of only part of voters, void; *Brewer v. McClelland*, 17 L. R. A. 845, which holds statute requiring notice of claim to be legal voter, from persons residing less than six months in county, void.

Cited in notes (14 L. R. A. 580) on constitutional equality of privileges, immunities, and protection; (25 L. R. A. 482) on how far right to vote absolute; tax or property qualification; (29 L. R. A. 414) on payment of poll taxes as qualification of electors.

8 L. R. A. 358, *LYON v. DENISON*, 80 Mich. 371, 45 N. W. 358.

Property not subject to execution.

Cited in footnotes to *Lowenberg v. Greenebaum*, 21 L. R. A. 399, which holds levy on and sale of stock exchange seat ineffectual to pass title; *Cleveland Nat. Bank v. Morrow*, 38 L. R. A. 758, which holds perpetual scholarship in college, in consideration of donation, not property subject to payment of debts.

8 L. R. A. 362, *SMITH v. SMITH*, 84 Ga. 440, 11 S. E. 496.

Marriage; conflict of laws.

Cited in note (57 L. R. A. 173) on conflict of laws as to validity of marriage.

Grounds for divorce.

Cited in *Ring v. Ring*, 118 Ga. 185, 62 L.R.A. 879, 44 S. E. 861, holding morphine habit will not justify divorce on ground of cruelty.

Validity of marriage.

Cited in *Crapps v. Smith*, 9 Ga. App. 401, 71 S. E. 501, holding that female under fourteen years cannot contract marriage.

Cited in note (79 Am. St. Rep. 374, 375) on what marriages are void.

Marriage after illicit relation.

Cited in *Drawdy v. Hesters*, 130 Ga. 169, 15 L.R.A.(N.S.) 195, 60 S. E. 451, holding that in order to prove marriage between persons whose relations were illicit at first affirmative agreement not only to discontinue illicit cohabitation, but to become thenceforward man and wife, must be shown; *Com. v. Stevens*, 196 Mass. 283, 124 Am. St. Rep. 555, 82 N. E. 33, on effect of cohabitation after relation illicit in its inception.

8 L. R. A. 365, WITTY v. MICHIGAN MUT. L. INS. CO. 123 Ind. 411, 18 Am. St. Rep. 327, 24 N. E. 141.

Promissory note; what constitutes.

Cited in Kraft v. Thomas, 123 Ind. 515, 18 Am. St. Rep. 345, 24 N. E. 346, holding following instrument promissory note; "For value received of C. P. Coleman three hundred dollars in full, with use or bearer, waivin valuation and appraisement laws. Paid when kald for. Edward Kraft;" Kimball v. Costa, 76 Vt. 294, 104 Am. St. Rep. 937, 56 Atl. 1009, 1 A. & E. Ann. Cas. 610, holding marginal figures should be read into note not showing promise to pay definite sum on its face.

Cited in note (2 L.R.A.(N.S.) 879) on effect of marginal letters or figures in bill or note otherwise blank as to amount.

Intention of parties to instrument.

Cited in Shenk v. Stahl, 35 Ind. App. 497, 74 N. E. 538, holding intention of parties to contract, as to terms and obligations imposed, will be inforced by courts but in arriving at intention courts are limited to language used therein, in absence of proper averments of mistake; Morey v. Terre Haute Traction & Light Co. 47 Ind. App. 23, 93 N. E. 710, holding that in absence of any averment of mistake in language of contract, intent, as gathered from such contract, will be enforced.

8 L. R. A. 366, COOPER v. RICHMOND & D. R. CO. 42 Fed. 697.

Removal of action to Federal court for prejudice or local influence.

Followed in Brodhead, v. Shoemaker, 11 L. R. A. 572, 44 Fed. 526, holding petition for removal, accompanied by affidavit by authorized person, stating of his own knowledge existence of prejudice and local influence, sufficient.

Cited in Walcott v. Watson, 46 Fed. 531, raising, without deciding, question whether cause may be removed for prejudice and local influence upon petition and affidavit; Reeves v. Corning, 51 Fed. 778, holding motion to remove for prejudice or local influence may be made *ex parte*; Bonner v. Meikle, 77 Fed. 488, holding motion to remove for prejudice or local influence should be made upon notice.

Cited in notes (11 L. R. A. 568) on removal of cause for prejudice or local influence; (9 L. R. A. 232, 11 L. R. A. 571) on removal of cause for prejudice or local influence; sufficiency of petition and affidavit.

Disapproved in Niblock v. Alexander, 44 Fed. 306, holding affidavit of defendant's attorney, averring knowledge of prejudice or local influence, insufficient for removal of cause.

8 L. R. A. 369, BIRMINGHAM v. KLEIN, 89 Ala. 461, 7 So. 386.

Cited in Bacon v. Savannah, 86 Ga. 305, 12 S. E. 580, without special discussion.

Taxation; constitutional restriction of rate.

Cited in Elyton Land Co. v. Birmingham, 89 Ala. 481, 7 So. 901, holding amount of state assessment for preceding year, not enhanced value of property, basis for ascertaining limit of taxation; State v. Southern R. Co. 115 Ala. 257, 22 So. 589, holding state cannot collect school tax not leviable by municipality directly because exceeding constitutional limit.

Constitutional requirement that tax be according to value.

Distinguished in Smith v. County Court, 117 Ala. 198, 23 So. 141, holding special vehicle tax for improvement of roads, unconstitutional.

Taxation for local improvements.

Approved in *Birmingham v. Lewis*, 92 Ala. 356, 9 So. 243, holding lack of funds no defense to city for injury by uncovered ditch crossing sidewalk where corporate powers for raising funds are not exhausted; *Montgomery v. Birdsong*, 126 Ala. 651, 28 So. 522, upholding enforcement of paving tax against abutting owner for one quarter of the cost of the improvement; *Austin v. Seattle*, 2 Wash. 669, 27 Pac. 557, sustaining assessment for street improvement upon lands benefited, according to frontage.

Cited in *Atlanta v. First Presby. Church*, 86 Ga. 737, 12 L. R. A. 854, 13 S. E. 252, holding church exemption from general taxation does not include assessments for local improvements; *Montgomery v. Moore*, 140 Ala. 649, 37 So. 291, holding statute authorizing imposition of entire cost of street, or sidewalk, paving upon abutting property according to frontage of such property constitutional and valid; *Billings Sugar Co. v. Fish*, 40 Mont. 279, 26 L.R.A.(N.S.) 986, 106 Pac. 565, holding assessments for local improvements not prohibited by constitution of Montana.

Cited in footnotes to *Gilson v. Rush County*, 11 L. R. A. 835, which holds personal property liable to taxation for price of toll road purchased to make it a free road; *Re Orkney Street*, 48 L. R. A. 274, which denies right to assess property abutting on *cul-de-sac* for extension converting same into open street.

Cited in notes (28 L. R. A. 499) on charging expense of grading for sidewalk upon abutting owner; (12 L. R. A. 852) on nonexemption of church property from special assessment; (28 L.R.A.(N.S.) 1126) on assessments for improvements by front-foot rule.

Distinguished in *Harton v. Avondale*, 147 Ala. 466, 41 So. 934, holding constitutional prohibition against assessments in excess of increased value of property by reason of special benefits derived from improvements intended to fix limit beyond which any assessment is void, and to authorize courts to examine into matter and determining whether constitutional limit was transcended; *Wheatland v. Boston*, 202 Mass. 261, 88 N. E. 769, holding assessment for construction of street is tax within statute requiring action to recover tax paid under protest to be brought within three months after payment.

Legislative power limited only by constitutional restriction.

Cited in *Southern R. Co. v. St. Clair County*, 124 Ala. 494, 27 So. 23, holding legislation not prohibited by Constitution, valid; *Nierosi v. Phillipi*, 91 Ala. 307, 8 So. 561, holding constitutional provision as to rights of resident foreigners limitation, not grant, of legislative power; *Southern R. Co. v. Ables*, 153 Ala. 536, 45 So. 234, holding legislature may invest municipality with power to vacate and abandon streets where there are no special constitutional restrictions.

8 L. R. A. 375, *WHEAT v. DINGLE*, 32 S. C. 473, 11 S. E. 394.

Insolvent estates; dividends on secured claims.

Cited in *Jamison v. Adler-Goldman Commission Co.* 59 Ark. 557, 28 S. W. 35, and *Erle v. Lane*, 22 Colo. 278, 44 Pac. 591, holding dividend should be computed on balance after crediting security; *Ex parte Felder*, 61 S. C. 537, 39 S. E. 737 (dissenting opinion), to point that dividend should not be computed on balance after applying proceeds of foreclosure.

Distinguished in *Ragsdale v. Winnsboro Bank*, 45 S. C. 582, 23 S. E. 947, holding secured creditors entitled to dividend from sureties' estates upon face of claim, regardless of amount received from principal's estate; *Chemical Nat. Bank v. Armstrong*, 28 L. R. A. 235, 8 C. C. A. 160, 16 U. S. App. 465, 59 Fed. 377, holding that claims of creditors of insolvent national bank cannot be reduced by credit for collections from collaterals after bank's insolvency; *Merrill v. National*

Bank, 173 U. S. 169, 43 L. ed. 654, 19 Sup. Ct. Rep. 360 (dissenting opinion), majority holding secured creditor of insolvent national bank entitled to dividends upon face of claim without crediting security.

Assignment; acceptance by secured creditor.

Distinguished in *Atlantic Phosphate Co. v. Law*, 45 S. C. 609, 23 S. E. 955, holding creditor does not waive security by accepting under assignment.

8 L. R. A. 378, *ABRAHAMSON v. CALIFORNIA POWDER WORKS*, 5 N. M. 479, 23 Pac. 785.

Negligence as to explosives.

Cited in note (29 L. R. A. 727) on negligence in storage of explosives.

8 L. R. A. 380, *COLEMAN v. FULLER*, 105 N. C. 328, 11 S. E. 175.

Guaranty.

Cited in *Northern State Bank v. Bellamy*, 19 N. D. 514, 31 L.R.A.(N.S.) 152, 125 N. W. 888, to the point that guarantor's promise is always to pay debt of another, while surety's promise is to pay debt, which becomes his own when principal fails to pay.

Cited in footnotes to *Staver v. Locke*, 17 L. R. A. 652, which holds payment of notes taken by agent for goods sold, not covered by guaranty of full performance of agent's engagements; *Blyth v. Pinkerton*, 57 L. R. A. 468, which holds guaranty of detective's salary and expenses in working up murder case ceases on conviction of suspect and settlement of bill.

Suretyship.

Cited in *Rouse v. Wooten*, 140 N. C. 559, 111 Am. St. Rep. 875, 53 S. E. 430, 6 A. & E. Ann. Cas. 280, holding surety bound to pay note, though not given notice of dishonor.

8 L. R. A. 383, *GARDINER v. GARDINER*, 65 N. H. 230, 19 Atl. 651.

Revocation of wills; by subsequent additions or mutilations.

Cited in *Barnewall v. Murrell*, 108 Ala. 389, 18 So. 831, holding additions not made as required by statute do not affect validity of will as executed; *Re Shelton*, 143 N. C. 220, 55 S. E. 705, 10 A. & E. Ann. Cas. 53, on cancellation, obliteration, or erasure made after execution of will and not destroying some portion of material substance of will, not a revocation thereof; *McIntyre v. McIntyre*, 120 Ga. 72, 102 Am. St. Rep. 71, 47 S. E. 501, 1 A. & E. Ann. Cas. 606, on doctrine of "dependent relative revocation."

Cited footnotes to *Billington v. Jones*, 56 L. R. A. 654, which holds will revoked by writing on it statement that it is void, stating that it is killed, and filing it away; *Miles's Appeal*, 36 L. R. A. 176, which holds erasure of specific legacy from will not revocation of legacy; *Cutler v. Cutler*, 57 L. R. A. 209, which holds will revoked by adopting mutilations by vermin.

Cited in notes (28 Am. St. Rep. 345) on revocation of wills; (114 Am. St. Rep. 211, 212) on attestation and witnessing of wills in cases of interlineations, corrections and alterations; (6 L.R.A.(N.S.) 1108) on cancellation or mutilation of will as affected by invalidity of second will; (38 L.R.A.(N.S.) 802) on attempt to revoke portions of a will by burning, tearing, canceling, obliterating, or destroying.

8 L. R. A. 385, *MISSOURI P. R. CO. v. SHARITT*, 43 Kan. 375, 19 Am. St. Rep. 143, 23 Pac. 430.

Garnishment in another state as defense.

Followed, in *Chicago, R. I. & P. R. Co. v. Sturn*, 5 Kan. App. 428, 49 Pac. 337,

holding judgment for wages against employer as garnishee in state where wages are not exempt, no bar to action for wages in state where they are exempt.

Cited in *Chicago, R. I. & P. R. Co. v. Campbell*, 5 Kan. App. 425, 49 Pac. 321, holding garnishment proceedings pending in another state where wages not exempt no defense to employee's action; *National Bank v. Furtick*, 2 Marv. (Del.) 60, 44 L. R. A. 121, 69 Am. St. Rep. 99, 42 Atl. 479, holding garnishment of debt in another state without personal jurisdiction of creditor no defense to action; *Willard v. Sturm*, 96 Iowa, 556, 65 N. W. 847, holding garnishee proceedings against employer for wages due employee not abated by latter commencing suit for wages in other state against former, and recovering judgment on same.

Cited in footnote to *O'Connor v. Walter*, 23 L. R. A. 650, which holds garnishment of wages in other state by assignee of claim against employee not conclusive as between assignor and employee.

Cited in note (19 Am. St. Rep. 737) on defenses available to garnishee.

Disapproved in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 713, 43 L. ed. 1145, 19 Sup. Ct. Rep. 797, holding garnishment proceedings pending in another state defense to employee's action for wages; *Harvey v. Great Northern R. Co.* 50 Minn. 408, 17 L. R. A. 89, 52 N. W. 905, holding prior attachment in another state bars action on debt.

Successive garnishments.

Cited in footnotes to *Siever v. Union P. R. Co.* 61 L. R. A. 319, which sustains right to injunction against prosecuting multiplicity of garnishment proceedings for exempt wages; *Rustad v. Bishop*, 50 L. R. A. 168, which denies right to hold back successive exempt wages by successive garnishments, and reach same by new garnishment after exemption period expires.

Situs of debts.

Cited in *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 689, holding situs of debt follows creditor's domicile; *Gibbins v. Adamson*, 5 Kan. App. 93, 48 Pac. 871, holding situs of mortgage for purposes of taxation is owner's residence; *Illinois C. R. Co. v. Smith*, 70 Miss. 347, 19 L. R. A. 580, 35 Am. St. Rep. 651, 12 So. 461, holding domicile of debtor and creditor, where debt is payable, situs of debt.

Cited in note (1 Eng. Rul. Cas. 546) on situs of debts.

— For purposes of garnishment.

Cited in *Louisville & N. R. Co. v. Nash*, 118 Ala. 487, 41 L. R. A. 333, 72 Am. St. Rep. 181, 23 So. 825, holding debt garnishable only at creditor's domicile; *Athinson, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 96, 39 Pac. 985, holding wages can be garnished only in state where employee resides and renders services; *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 514, 36 Pac. 616, holding debt owing nonresident creditor cannot be garnished by service of process on agent of nonresident debtor; *Reimers v. Seateo Mfg. Co.* 30 L. R. A. 367, 17 C. C. A. 231, 37 U. S. App. 426, 70 Fed. 577, holding debt cannot be garnished in state where plaintiff, defendant, and garnishee nonresidents, by service on garnishee's agent; *National Bank v. Furtick*, 2 Marv. (Del.) 53, 44 L. R. A. 118, 69 Am. St. Rep. 99, 42 Atl. 479, holding debt due nonresident for loss of property insured in another state, from foreign insurance company, not garnishable.

Cited in footnotes to *Strause Bros. v. Aetna Ins. Co.* 48 L. R. A. 452, which holds debt of insurance company for loss in other state without situs for garnishment purposes in third state where company has agent; *Lancashire Ins. Co. v. Corbetts*, 36 L. R. A. 640, which authorizes garnishment of foreign corporation for debt due nonresident; *Tootle v. Coleman*, 57 L. R. A. 120, which holds right to garnish debtor not limited to situs of chose in action; *Louisville & N. R. Co.*

v. Nash, 41 L. R. A. 331, which holds garnishment of debt due nonresident not personally served in state, invalid; National Broadway Bank v. Sampson, 66 L.R.A. 606, which holds liability of nonresident to nonresident corporation not subject to attachment within state when debtor is temporarily within jurisdiction as situs of debt is at place of residence either of debtor or of creditor.

Cited in notes (69 Am. St. Rep. 117) on situs of debts for purposes of garnishment and of property in transitu in hands of carriers; (67 L.R.A. 210) as to where debt garnishable.

Distinguished in McBee v. Purcell Nat. Bank, 1 Ind. Terr. 292, 37 S. W. 55, holding deposit in bank garnishable there regardless of depositor's residence; Pennsylvania R. Co. v. Rogers, 52 W. Va. 459, 62 L. R. A. 184, 44 S. E. 300, holding debt owing by foreign railroad corporation having agency, but operating no line, within state, not garnishable.

Disapproved in Tootle v. Coleman, 57 L. R. A. 123, 46 C. C. A. 135, 107 Fed. 43, holding debt due nonresident creditor from resident debtor may be attached; Baltimore & O. R. Co. v. Allen, 58 W. Va. 392, 3 L.R.A.(N.S.) 612, 112 Am. St. Rep. 975, 52 S. E. 465, holding debt follows person of debtor for garnishment purposes.

Conclusiveness of judgments of other states.

Cited in Wyeth Hardware & Mfg. Co. v. Lang, 54 Mo. App. 150, holding constitutional requirement that faith and credit be given judicial proceedings of other states does not preclude inquiry into jurisdiction.

Statutes of other states.

Cited in Baltimore & O. S. W. R. Co. v. McDonald, 112 Ill. App. 399, holding statutes of another state will not be judicially noticed.

Cited in notes (102 Am. St. Rep. 83) on extraterritorial effect of laws as to exemption of wages, salaries and earnings; (67 L.R.A. 46) on how case determined when proper foreign law not proved; (1 L.R.A.(N.S.) 195) on enforcing exemption of laws of other state.

Disapproved in Harvey v. Thompson, 2 Ga. App. 574, 60 S. E. 11, holding exemption privilege of Florida not enforced in Georgia.

8 L. R. A. 393, HEGELER v. COMSTOCK, 1 S. D. 138, 45 N. W. 331.

Negotiability of note.

Cited in National Bank of Commerce v. Feeney, 12 S. D. 161, 46 L. R. A. 737, 76 Am. St. Rep. 594, 80 N. W. 186, Reversing 9 S. D. 559, 46 L. R. A. 736, 70 N. W. 874, holding stipulation on margin of note for discount if paid before maturity destroys negotiability; Randolph v. Hudson, 12 Okla. 526, 74 Pac. 946, holding provision for interest at certain rate from date if not paid at maturity renders note non-negotiable; Second Nat. Bank v. Basuier, 12 C. C. A. 520, 27 U. S. App. 541, 65 Fed. 61, holding stipulation to pay "exchange and costs of collection" destroys negotiability; Stadler v. First Nat. Bank, 22 Mont. 203, 74 Am. St. Rep. 582, 56 Pac. 111, and Stebbins v. Lardner, 2 S. D. 137, 48 N. W. 847, holding note including promise to pay attorney's fees and costs in case of suit non-negotiable; Brooke v. Struthers, 110 Mich. 576, 35 L. R. A. 543, 68 N. W. 272, holding provision in mortgage accompanying note, that whole sum shall become due on failure to pay taxes, destroys negotiability of both; Davis v. Brady, 17 S. D. 513, 97 N. W. 719, holding note for certain sum with interest at ten per cent until paid, payable annually on principal and all overdue unpaid interest, if interest not paid when due to become part of principal and draw interest at twelve per cent until paid, not negotiable.

Cited in footnotes to Gordon v. Anderson, 12 L. R. A. 483, which holds note payable to certain person "*et al.*, or order," non-negotiable; Stevens v. Phila-

delphia Ball Club, 11 L. R. A. 860, which holds negotiability of note of firm having no seal not affected by purported seal; *Smith v. Willing*, 68 L.R.A. 940, which holds non-negotiable note containing no name of payee nor space to insert it.

Cited in note (125 Am. St. Rep. 204) on agreements and conditions destroying negotiability.

Distinguished in *Merrill v. Hurley*, 6 S. D. 598, 55 Am. St. Rep. 859, 62 N. W. 958, holding negotiability of note not affected by provision for increased interest after maturity; *Chandler v. Kennedy*, 8 S. D. 64, 65 N. W. 439, holding illegal stipulation for attorney's fee does not destroy negotiability of note.

Cited as overruled in *Cornish v. Woolverton*, 32 Mont. 468, 108 Am. St. Rep. 598, 81 Pac. 4, holding under statute note non-negotiable which contains clause stating note and coupons draw increased rate of interest after maturity and are secured by mortgage of even date.

Non-negotiable notes; rights of assignee.

Cited in *Searles v. Seipp*, 6 S. D. 477, 61 N. W. 804, holding assignee of non-negotiable note takes subject to equities between original parties.

8 L. R. A. 398, *Re ROBINSON*, 29 Neb. 135, 26 Am. St. Rep. 378, 45 N. W. 267.

Liability of extradited persons to civil or criminal prosecution.

Distinguished in *State ex rel. Petry v. Leidigh*, 47 Neb. 132, 66 N. W. 308, holding extradited person may be prosecuted for other extraditable offenses; *Re Walker*, 61 Neb. 814, 86 N. W. 510, holding one extradited in good faith not entitled to reasonable time to return before service of process.

Distinguished and criticized in *Re Moyer*, 12 Idaho, 263, 12 L.R.A. (N.S.) 232, 118 Am. St. Rep. 214, 85 Pac. 897, holding unlawfulness of means employed to bring criminal into state wherein he is charged with crime will not warrant his release on habeas corpus in such state.

8 L. R. A. 399, *MURDOCK PARLOR GRATE CO. v. COM.* 152 Mass. 28, 24 N. E. 854.

Liability of state or governmental agency to suit.

Cited in *Nash v. Com.* 174 Mass. 338, 54 N. E. 865, holding commonwealth may be party to action to subject moneys due to contractor on public works to payment of material man; *Locke v. State*, 140 N. Y. 482, 35 N. E. 1076, holding state cannot be sued in case where it has not consented to liability; *Moody v. State Prison*, 128 N. C. 14, 53 L. R. A. 855, 38 S. E. 131, holding act establishing liability of state to suit does not extend to actions for negligence; *Houston v. State*, 98 Wis. 487, 42 L. R. A. 50, 74 N. W. 111, holding statute permitting action against state does not extend to action for wrongful destruction of supposedly diseased cattle; *Pickwick v. McCauliff*, 193 Mass. 75, 78 N. E. 730, 8 A. & E. Ann. Cas. 1041, holding action not maintainable against commonwealth for personal injury sustained by person while at work as civil engineer and inspector for metropolitan water and sewerage commissioners of commonwealth; *McArthur Bros. Co. v. Com.* 197 Mass. 138, 83 N. E. 334, on nature of claims for which commonwealth is subject to suit; *George H. Sampson Co. v. Com.* 202 Mass. 332, 88 N. E. 911, on liability of commonwealth to suit in its own courts.

Cited in footnote to *Gross v. Kentucky Board of Managers*, 43 L. R. A. 703, which sustains right to sue state board of managers of World's Fair Exposition without consent of state.

Cited in notes (11 L. R. A. 370) on state immunity from suit in its own courts (42 L. R. A. 35); on what claims constitute valid demands against state.

— **Governmental agency.**

Cited in *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, holding towns not liable for defective highways in absence of statutory provision.

8 L. R. A. 403, *STATE ex rel. ROTWITT v. HICKMAN*, 9 Mont. 370, 23 Pac. 740.

Appropriations; necessity and sufficiency.

Cited in *State ex rel. Wade v. Kenney*, 10 Mont. 486, 26 Pac. 197, holding statute providing definite salary for definite service sufficient appropriation to authorize payment; *State ex rel. Buck v. Hickman*, 10 Mont. 499, 26 Pac. 387, holding constitutional provision for judge's salary sufficient appropriation of same; *Weston v. Herdman*, 64 Neb. 29, 89 N. W. 384, holding legislative appropriation unnecessary where Constitution provides officer's salary "shall be fixed by law, not to exceed" certain sum; *State ex rel. Hawes v. Mason*, 153 Mo. 59, 54 S. W. 524, holding appropriation by municipal council not necessary where statute provides for police salary and its auditing; *State ex rel. Henderson v. Burdick*, 4 Wyo. 280, 24 L. R. A. 268, footnote p. 266, 33 Pac. 125, holding special appropriation to meet state examiner's salary provided for by statute creating office, unnecessary; *Carr v. State*, 127 Ind. 210, 11 L. R. A. 372, 22 Am. St. Rep. 624, 26 N. E. 778, holding sinking fund created expressly for payment of state indebtedness sufficient appropriation of designated funds; *State ex rel. Wiles v. Albright*, 11 N. D. 28, 88 N. W. 729, holding writ of mandamus will issue as general rule to compel payment of salaries of public officers, when fixed by law, and when due and payable; *Menefree v. Askew*, 25 Okla. 626, 27 L.R.A.(N.S.) 538, 107 Pac. 159, holding that payment of officer's salary fixed by constitution may be made when due without further appropriation.

Cited in notes (13 L.R.A. 222) on preliminaries necessary to withdrawal of public funds; (16 L.R.A.(N.S.) 631) on requisites of appropriation for official salary or expenses; (22 Am. St. Rep. 638, 646) on what are appropriations.

Distinguished in *State ex rel. Journal Pub. Co. v. Kenney*, 9 Mont. 394, 24 Pac. 97, holding public printer not entitled to mandamus to compel state auditor to draw warrant, in absence of legislative appropriation for payment; *Shattuck v. Kincaid*, 31 Or. 388, 49 Pac. 758, holding statutory determination of amount and time of payment of salary not continuing appropriation obviating necessity of renewal; *Pickle v. Finley*, 91 Tex. 486, 44 S. W. 480, holding statute fixing salary indefinitely not valid as appropriation for more than constitutional period of two years; *State ex rel. Buchanan v. State Treasurer*, 68 S. C. 418, 47 S. E. 683, holding constitution providing judges shall receive compensation fixed by law, but providing no amount makes no constitutional appropriation of any particular sum to be paid.

8 L. R. A. 406, *MILLER v. SHIELDS*, 124 Ind. 166, 24 N. E. 670.

Rights and disabilities of married women.

Cited in *Haynes v. Nowlin*, 129 Ind. 585, 14 L. R. A. 790, 28 Am. St. Rep. 213, 29 N. E. 389, holding that wife may maintain action for alienation of husband's affections.

Cited in footnote to *Hunt v. Reilly*, 59 L. R. A. 206, which holds that wife's failure to notify purchaser of rights after learning of forgery of her name to husband's deed does not estop her to claim dower.

— **As to contracts.**

Cited in *Dailey v. Dailey*, 26 Ind. App. 18, 58 N. E. 1065, enforcing wife's contract to join in conveyance of husband's separate realty, in consideration or promise to pay her portion of proceeds; *Crisman v. Leonard*, 126 Ind. 203, 25 N. E. 1101, holding liability of wife on lease and rent notes not affected by fact

that she did not occupy premises; *Young v. McFadden*, 125 Ind. 256, 25 N. E. 284, holding wife bound on note executed jointly with husband to attorney for services in defense of husband; *Kedy v. Kramer*, 129 Ind. 479, 28 N. E. 1121, holding wife liable on purchase-money notes for land, executed jointly with husband, where she acquires beneficial interest; *Magel v. Milligan*, 150 Ind. 588, 65 Am. St. Rep. 382, 50 N. E. 564, holding husband and wife presumptively joint principals on note secured by property held as tenants by entireties; *Cummings v. Martin*, 128 Ind. 22, 27 N. E. 173, holding secret agreement by which husband had benefit of loan secured by wife by mortgage of separate property does not affect her liability; *Lackey v. Boruff*, 152 Ind. 374, 53 N. E. 412, holding coverture personal defense on suretyship contracts, not available to third parties in order to defeat wife's mortgage; *Morningstar v. Hardwick*, 3 Ind. App. 435, 29 N. E. 929, holding wife's note in payment for transcript on appeal in action against husband not surety contract, where benefit accrues to her by reversal; *Bowles v. Trapp*, 139 Ind. 56, 38 N. E. 406, holding married woman not bound by recitals in note as against payee aware of application of proceeds; *Voreis v. Nussbaum*, 131 Ind. 275, 16 L. R. A. 48, 31 N. E. 70 (dissenting opinion), majority holding married woman not liable to innocent purchaser in due course, of note not showing her suretyship on face.

Cited in footnotes to *National Granite Bank v. Tyndale*, 51 L. R. A. 447, which authorizes action at law against estate of married woman for loan made to her on her credit, though notes given by her void; *Kitchen v. Chapin*, 57 L. R. A. 914, which holds married woman liable on her guaranty of note owned by her and payable to her order.

Burden of proving and pleading exception.

Cited in *Potter v. Sheets*, 5 Ind. App. 510, 32 N. E. 811, holding burden on plaintiff to prove that wife is principal in note executed jointly with husband, where answer shows marital relation; *Field v. Noblett*, 154 Ind. 360, 56 N. E. 841, holding exception sufficiently pleaded by statement of coverture, execution of note for husband's debt, and nonreceipt of proceeds; *Guy v. Liberenz*, 160 Ind. 529, 65 N. E. 186, holding burden on wife to prove she executed with husband note and mortgage on land held by entireties, as surety; *Cook v. Buhrlage*, 159 Ind. 165, 64 N. E. 603, holding complaint showing obligation sued on was executed by married woman alone or with husband, not alleging facts showing her principalship, sufficient; *Jackson County v. State*, 147 Ind. 496, 46 N. E. 908, holding nonexistence of exception under statute ordering erection of municipal building need not be pleaded, being matter of defense in proceeding to enforce compliance.

8 L. R. A. 410, *STANDARD OIL CO. v. GILBERT*, 84 Ga. 714, 11 S. E. 491.

Tact continuance of contract after time thereof expired.

Cited in *Bell v. Peper Tobacco Warehouse Co.* 205 Mo. 489, 103 S. W. 1014, holding where resolution of board of directors of corporation having reference only to past services fixed salary of manager at certain sum for his third year of service, his continuation in service after its passage raised no presumption services thereafter rendered were on same terms as for such third year; *Ice v. Maxwell*, 61 W. Va. 16, 55 S. E. 899, holding if contract to furnish purchaser for lands continued, presumption of law arises that compensation is to be same as provided by contract originally made; *Appleton Waterworks Co. v. Appleton*, 132 Wis. 572, 113 N. W. 44, holding written contract to furnish water for city continued in force for and during each annual renewal thereof by acts of one party in furnishing and of other in receiving service.

8 L. R. A. 412, *CARSON v. MEMPHIS & C. R. CO.* 88 Tenn. 646, 17 Am. St. Rep. 921, 13 S. W. 588.

Duty of garnishee to plead exemption.

Cited in footnote to *Missouri P. R. Co. v. Whipker*, 8 L. R. A. 321, which holds garnishee unprotected who does not set out facts showing exemption.

Cited in note (19 L. R. A. 580) on duty of garnishee to set up exemption of principal debtor.

Extraterritorial effect of exemption laws.

Cited in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 718, 43 L. ed. 1147, 19 Sup. Ct. Rep. 797, holding exemption laws do not follow debt into another jurisdiction; *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 697, raising, without deciding, whether exemption laws of one state have effect in another; *Graham v. Stull*, 92 Tenn. 680, 21 L. R. A. 247, 22 S. W. 738, holding nonresident's widow not entitled to year's support out of estate.

Cited in note (1 L.R.A.(N.S.) 195) on enforcing exemption laws of other state.

8 L. R. A. 414, *POND v. SHEEAN*, 132 Ill. 312, 23 N. E. 1018.

Statute of frauds.

Cited in *Dicken v. McKinley*, 163 Ill. 322, 54 Am. St. Rep. 471, 45 N. E. 134, holding oral promise to devise land to adopted child, based upon consent of child and parents, not binding as against other devisees, in absence of possession by child.

Cited in notes (14 L. R. A. 862) on effect of statute of frauds; (9 L. R. A. 129), on promises not to be performed within one year.

Distinguished in *Quinn v. Quinn*, 5 S. D. 333, 49 Am. St. Rep. 875, 58 N. W. 808, holding oral contract with another that child should inherit adopting parent's property, enforceable against fraudulent donees and devisees thereof; *Whiton v. Whiton*, 76 Ill. App. 568, holding parol agreement not to disinherit, based upon payment of money, binding against donee, where gift operates only as testamentary disposal.

— Entire contracts.

Cited in *Swash v. Sharpstein*, 14 Wash. 436, 32 L. R. A. 799, 44 Pac. 862, holding parol agreement to devise portion of estate, including both personality and realty, void as to both where void as to realty; *Hamilton v. Thirston*, 93 Md. 218, 48 Atl. 709, holding performance by plaintiff does not take parol entire contract to devise share of both real and personal estate out of statute; *Grant v. Grant*, 63 Conn. 538, 38 Am. St. Rep. 379, 29 Atl. 15, refusing specific performance of oral contract to devise estate, both real and personal, where void as to realty, although promisee's obligation performed; *Michigan City v. Leeds*, 24 Ind. App. 275, 55 N. E. 799, holding written lease altered orally as to premises occupied, though in other respect unchanged, void where term exceeds length of valid parol lease; *Todd v. Bettingen*, 98 Minn. 174, 107 N. W. 1049, 8 A. & E. Ann. Cas. 960, holding contract whereby elevator and its site and certain stock were given in exchange for other stock entire and void in whole.

— Effect of part performance of oral contract.

Cited in *Swash v. Sharpstein*, 14 Wash. 436, 32 L. R. A. 799, 44 Pac. 862, holding transfer of possession essential to validity of oral contract to convey realty; *Wright v. Raftree*, 181 Ill. 473, 54 N. E. 998, holding oral contract for transfer of land taken out of statute only by payment of purchase money, possession, and valuable improvements; *Koenig v. Dohm*, 209 Ill. 479, 70 N. E. 1061, holding parol payment of purchase money will not take oral contract to sell land out of statute.

Cited in notes (14 L.R.A. 863) on effect of part performance; (22 Am. St. Rep. 777) on effect of part performance of oral contract of sale.

Proof of oral contract.

Cited in *Wright v. Raftree*, 181 Ill. 470, 54 N. E. 998, holding party seeking to enforce, has burden of establishing contract clear and unambiguous in terms.

8 L. R. A. 419, *JOHNSON v. ST. PAUL & D. R. CO.* 43 Minn. 222, 45 N. W. 156.

Statutory liability of railroads to employees for fellow servant's negligence.

Cited in *Schus v. Powers-Simpson Co.* 85 Minn. 450, 69 L.R.A. 889, 89 N. W. 68, holding owner of private logging railroad liable to employee for fellow servant's negligence; *Helms v. Northern P. R. Co.* 120 Fed. 398, holding, where railroad's liability is wholly statutory, joint action for negligence is not maintainable by employee against it and coemployee; *Sams v. St. Louis & M. River R. Co.* 174 Mo. 78, 61 L.R.A. 482, 73 S. W. 686, holding statute making railroads liable to employees for fellow servants' negligence inapplicable to street railways; *Kibbe v. Stevenson Iron Min. Co.* 69 C. C. A. 145, 136 Fed. 149; *Kline v. Minnesota Iron Co.* 93 Minn. 66, 100 N. W. 681,—holding that statute applies to private mining railway.

Cited in note (23 Am. St. Rep. 165) on master's liability for negligence of fellow servants.

— Hazards peculiar to railroading.

Cited in *Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 57, 75 N. W. 676, holding railroad liable to employee engaged in filling tenders with coal, for fellow servant's negligence; *Steffenson v. Chicago, M. & St. P. R. Co.* 45 Minn. 356, 11 L. R. A. 272, 47 N. W. 1068, holding railroad liable to section hand for negligence of fellow servant in operating hand car; *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 155, 55 Pac. 875, holding railroad not liable to stone mason setting curbing around depot for fellow servant's negligence; *O'Niel v. Great Northern R. Co.* 80 Minn. 31, 51 L. R. A. 539, 82 N. W. 1086, holding railroad not liable to section hand engaged in tearing down bridge, for fellow servant's negligence; *Weisel v. Eastern R. Co.* 79 Minn. 249, 82 N. W. 576, holding railroad not liable to employee in gravel pit, injured by coal falling from tender standing still; *Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 10, 49 N. W. 302, holding railroad not liable for negligence of plaintiff's fellow section men in unloading rails; *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 616, 23 L.R.A.(N.S.) 714, 85 N. E. 954, holding that member of street railroad repair gang in unloading rails is not exposed to hazards peculiar to railroading; *Reddington v. Chicago, M. & St. P. R. Co.* 108 Iowa, 102, 78 N. W. 800, holding brakeman who in assisting to coal an engine was hurt by the coal heaver's negligence was not hurt in "operation or use" of railroad; *Mace v. H. A. Boedker & Co.* 127 Iowa, 727, 104 N. W. 475, holding corporation constructing temporary track for operating thereon locomotives and cars for hauling earth in grading road is "operating a railway" within act; *Johnson v. Great Northern R. Co.* 104 Minn. 446, 18 L.R.A.(N.S.) 480, 116 N. W. 936, holding men driving piles for building trestle with pile driver on flat car within act; *Hanson v. Northern P. R. Co.* 108 Minn. 96, 22 L.R.A.(N.S.) 970, 121 N. W. 607, holding that removal of merchandise from wrecked cars at night to clear tracks is hazard peculiar to railroading; *Hallums v. Southern R. Co.* 82 S. C. 303, 64 S. E. 147, 17 A. & E. Ann. Cas. 511, holding railroad liable for injury to section hand carrying rails, caused by confusion arising from opposite calls of callers directing his movements; *State Trust Co. v. Kansas City, P. & G. R. Co.* 120 Fed. 398; *Reinke*

v. Northern P. R. Co. 145 Fed. 991; *Jemming v. Great Northern R. Co.* 96 Minn. 307, 1 L.R.A.(N.S.) 701, 104 N. W. 1079,—holding that statute includes only the class of servants exposed to injury by dangers peculiar to use and operation of railroads; *Swartz v. Great Northern R. Co.* 93 Minn. 342, 101 N. W. 504, holding act of sorting and discarding waste material by fireman while engaged in feeding engine is work in connection with operation of railroad.

Distinguished in *Smith v. St. Paul & D. R. Co.* 44 Minn. 19, 46 N. W. 149, holding railroad liable to section hand working on road, for engineer's negligence.

Disapproved in effect in *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 490, 60 L. R. A. 254, 94 Am. St. Rep. 746, 71 S. W. 208, holding railroad liable for negligence of fellow section hands repairing track.

Validity of "fellow servant act."

Cited in *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 224, 119 N. W. 309; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 463, 78 N. E. 1033,—holding act constitutional; *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 385, 33 L.R.A.(N.S.) 727, 108 N. W. 902 (dissenting opinion), as to validity of fellow servant act; *Chicago, M. & St. P. R. Co. v. Westby*, — L.R.A.(N.S.) —, 102 C. C. A. 65, 178 Fed. 625, holding void, act applicable only to carriers.

Cited in footnote to *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 69 L.R.A. 875, which sustains statute making void a contract by a corporation for release or relief from liability to employee for negligence of fellow servant.

Distinguished in *Bedford Quarries Co. v. Bough*, 168 Ind. 675, 14 L.R.A.(N.S.) 420, 80 N. E. 529, holding statute applying to all servants without regard of occupation unconstitutional.

Class and special legislation.

Cited in *State ex rel. Courthouse & City Hall Comrs. v. Cooley*, 56 Minn. 550, 58 N. W. 150, holding act authorizing bonds to provide means for building courthouse in Minneapolis not special; *State ex rel. McCue v. Ramsey County*, 48 Minn. 239, 31 Am. St. Rep. 650, 51 N. W. 112, holding statute declaring emission of dense smoke in city of St. Paul under certain conditions, nuisance, unconstitutional; *State v. Garbroski*, 111 Iowa, 498, 56 L. R. A. 571, 82 Am. St. Rep. 524, 82 N. W. 959, holding act imposing peddler's tax, but exempting Union soldiers, unconstitutional; *Low v. Rees Printing Co.* 41 Neb. 142, 24 L. R. A. 708, 43 Am. St. Rep. 670, 59 N. W. 362, holding eight-hour law excepting from its operation farm and domestic laborers, invalid; *State ex rel. Dawson County v. Farmers & M. Irrig. Co.* 59 Neb. 6, 80 N. W. 52, holding act exempting irrigation companies from operation of law requiring maintenance of bridges over ditches crossing highways, invalid; *Seaboard Air Line R. Co. v. Simon*, 56 Fla. 553, 20 L.R.A.(N.S.) 131, 47 So. 1001, 16 A. & E. Ann. Cas. 1234, holding void, act as to payment for goods lost in transit, applicable to railroads alone; *Carr v. State*, 175 Ind. 265, 32 L.R.A.(N.S.) 1200, 93 N. E. 1071 (dissenting opinion), on unconstitutionality of statute exempting professional baseball players from operation of Sunday laws; *Louisville & N. R. Co. v. Melton*, 127 Ky. 300, 112 S. W. 618 (dissenting opinion), on validity of act applying to carpenters only in employ of railroad; *State ex rel. Bd. of Education v. Brown*, 97 Minn. 406, 5 L.R.A.(N.S.) 333, 106 N. W. 477, holding act legalizing school bonds voted by cities for high school and graded school houses not special legislation; *State ex rel. Corrison v. Rogers*, 93 Minn. 58, 100 N. W. 659, holding to whatever class a law applies, it must apply to every member of that class.

Cited in footnote to *Ballard v. Mississippi Cotton Oil Co.* 62 L. R. A. 407, which holds statute making corporations, but not individuals, liable for defective appliances of which employees knew, unconstitutional.

8 L. R. A. 420, *DUFFIES v. DUFFIES*, 76 Wis. 374, 20 Am. St. Rep. 79, 45 N. W. 522.

Action for alienating affections.

Cited in note (11 L. R. A. 549) on inducements to violate obligations, not actionable.

— Of wife.

Cited in footnote to *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery; known to husband, to deny same.

— Of husband.

Discussed at length and reaffirmed in *Lonstorf v. Lonstorf*, 118 Wis. 160, 95 N. W. 961, denying wife's right of action for alienation of husband's affections.

Cited in *Hodge v. Wetzler*, 69 N. J. L. 492, 55 Atl. 49, as to existence of right of wife to action for alienation of husband's affections at common law; *Sims v. Sims*, 79 N. J. L. 581, 29 L.R.A.(N.S.) 845, 76 Atl. 1063, holding that wife can maintain action in her own name and without joining her husband therein.

Cited in footnotes to *Doe v. Roe*, 8 L. R. A. 833, which holds action for alienating husband's affections by debauching and carnally knowing him, not maintainable; *Houghton v. Rice*, 47 L. R. A. 311, which denies right of action against other woman for alienating husband's affections, unaccompanied by adultery; *Hodgkinson v. Hodgkinson*, 27 L. R. A. 120, which holds one bringing about husband's desertion liable to suit by wife; *Dietzman v. Mullin*, 50 L. R. A. 808, and *Betser v. Betser*, 52 L. R. A. 630, which sustain wife's right of action for alienating her husband's affections.

Cited in notes (10 L. R. A. 468) on liability for interrupting marital relations; (32 L.R.A. 623) on right of wife to maintain action; (28 Am. St. Rep. 218; 46 Am. St. Rep. 473) on wife's action for alienation of husband's affections.

Distinguished in *King v. Hanson*, 13 N. D. 98, 99 N. W. 1085, holding common-law disability of wife to maintain action for alienation of husband's affections removed by statutes; *Randall v. Lonstorf*, 126 Wis. 151, 3 L.R.A.(N.S.) 472, 105 N. W. 663, 5 A. & E. Ann. Cas. 371, holding guardian of insane wife may maintain action for conspiracy to bring about breach of marriage contract by husband and desertion of wife.

Disapproved in *Warren v. Warren*, 89 Mich. 125, 14 L. R. A. 546, footnote p. 545, 50 N. W. 842; *Humphrey v. Pope*, 122 Cal. 257, 54 Pac. 847; *Wolf v. Frank*, 92 Md. 140, 52 L. R. A. 104, footnote p. 102, 48 Atl. 132,—holding that wife may maintain action for alienation of husband's affections; *Smith v. Smith*, 98 Tenn. 107, 60 Am. St. Rep. 838, 38 S. W. 439, holding that wife cannot, without enabling statute, enforce right of action for alienating husband's affections; *Price v. Price*, 91 Iowa, 696, 29 L. R. A. 151, 51 Am. St. Rep. 360, 60 N. W. 202; *Gerner v. Gerner*, 185 Pa. 237, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884; *Haynes v. Nowlin*, 129 Ind. 586, 14 L. R. A. 790, 28 Am. St. Rep. 213, 29 N. E. 389; *Clow v. Chapman*, 125 Mo. 103, 26 L. R. A. 413, footnote p. 412, 46 Am. St. Rep. 468, 28 S. W. 328; *Beach v. Brown*, 20 Wash. 267, 43 L. R. A. 115, 72 Am. St. Rep. 98, 55 Pac. 46,—holding under enabling acts wife may sue for alienation of husband's affections; *Nolin v. Pearson*, 191 Mass. 290, 4 L.R.A.(N.S.) 648, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding wife may maintain action for persuading husband to commit adultery, refuse performance of marital obligations and abandon home and wife; *Quick v. Church*, 23 Ont. Rep. 272, holding wife may maintain action for alienation of affections of husband.

Wife's action for crim. con.

Cited in *Kroessin v. Keller*, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, holding wife cannot maintain action for *crim. con.* against another woman.

Loss of consortium as element of husband's damages.

Cited in *Selleck v. Janesville*, 104 Wis. 577, 47 L. R. A. 694, 76 Am. St. Rep. 892, 80 N. W. 946, holding husband may recover for loss of conjugal society and assistance, as well as money value of wife's services.

Actions for damage to person; what are.

Cited in *Murray v. Buell*, 76 Wis. 662, 20 Am. St. Rep. 92, 45 N. W. 667, holding cause of action for conspiracy not assignable as being for "damage to person."

Damages for mental suffering.

Cited in *Rueping v. Chicago & N. W. R. Co.* 116 Wis. 632, 96 Am. St. Rep. 1013, 93 N. W. 843, holding compensatory damages allowable for sense of wrong arising from wilful act.

Actions without precedent.

Cited in *Koerber v. Patek*, 123 Wis. 460, 68 L.R.A. 959, 102 N. W. 40, holding relative whose right as to burial of body of deceased relative is violated by removal of portion of such body before burial may maintain action in damages, though English courts silent as to existence of such right.

8 L. R. A. 425, *STONE v. HAMMELL*, 83 Cal. 547, 17 Am. St. Rep. 272, 23 Pac. 703.

Surety's right of action against principal.

Approved in *Yule v. Bishop*, 133 Cal. 579, 65 Pac. 1094, holding corporation's surety paying obligation has action for money paid against stockholders at time of payment; *Barth v. Graf*, 101 Wis. 38, 76 N. W. 1100, holding sureties have no action upon principal's implied promise to indemnify, without first making payment.

Cited in *Sandoval v. United States Fidelity & G. Co.* 12 Ariz. 357, 100 Pac. 816, holding that surety is only entitled to recover from principal amount sufficient to reimburse him for money expended; *Crystal v. Hutton*, 1 Cal. App. 254, 81 Pac. 1115, holding payment by surety of obligation evidenced by promissory note extinguishes obligation and remedy given surety is upon implied obligation of principal debtor to reimburse surety.

Cited in note (134 Am. St. Rep. 557, 562) as to when surety's cause of action against principal becomes perfect and enforceable.

Limitation of action as to surety.

Approved in *Northwestern Nat. Bank v. Greatfalls Opera House Co.* 23 Mont. 7, 57 Pac. 440, holding surety's statutory action for contribution from cosurety not "ordinary action" barred by lapse of three years; *Zuellig v. Hemerlie*, 60 Ohio St. 35, 71 Am. St. Rep. 707, 53 N. E. 447, holding action by surety to be subrogated to mortgage paid for principal, barred in ten years.

Cited in *Burrus v. Cook*, 215 Mo. 509, 114 S. W. 1065, on certification approving dissenting opinion in 117 Mo. App. 385, 93 S. W. 888, which holds period of limitation of action whether against principal or cosurety begins to run from day of surety's payment.

Cited in note (60 Am. St. Rep. 209) on effect of bar of limitations by which some of the parties of an obligation are protected and liability to contribution in such case.

Payment by commercial paper.

Cited in note (35 L.R.A.(N.S.) 65) on payment by commercial paper.

8 L. R. A. 427, *SULLIVAN v. MAINE C. R. CO.* 82 Me. 196, 19 Atl. 169.

Violation of Sunday laws.

Cited in *Donovan v. McCarty*, 155 Mass. 547, 30 N. E. 221, upholding assignment of property in trust, by severely injured woman, in nature of will, on Sunday.

Cited in footnote to *Com. v. Waldman*, 11 L. R. A. 563, which holds keeping barber shop open on Sunday not work of necessity.

Cited in notes (11 L.R.A. 63) on legality of contract made on Sunday; (30 L.R.A.(N.S.) 469) on amusements prohibited by Sunday laws; (30 Am. St. Rep. 28) on work which may be done on Sunday.

— As defense to negligence action.

Cited in *Cleveland v. Bangor*, 87 Me. 266, 47 Am. St. Rep. 326, 32 Atl. 892, holding driving for air and exercise no violation; *Eaton v. Atlas Acci. Ins. Co.* 89 Me. 573, 36 Atl. 1048, holding riding bicycle to funeral no violation; *Beacham v. Portsmouth Bridge*, 68 N. H. 383, 73 Am. St. Rep. 607, 40 Atl. 1066, holding traveling for pleasure on Sunday violation of statute.

Cited in footnote to *Gloss v. Miller*, 26 L. R. A. 605, which holds violation of Sunday law by hunting no defense to action for negligent injury.

8 L. R. A. 428, *MILLER v. OTTAWAY*, 81 Mich. 196, 21 Am. St. Rep. 513, 45 N. W. 665.

Rights of bona fide holders.

Approved in *Rublee v. Davis*, 33 Neb. 784, 29 Am. St. Rep. 512, 51 N. W. 135, holding bona fide purchaser before maturity of note given for purchase price of jack not affected by breach of warranty of which he did not know.

Cited in *Jennings v. Todd*, 118 Mo. 305, 40 Am. St. Rep. 373, 24 S. W. 148; *United States Nat. Bank v. Floss*, 38 Or. 72, 84 Am. St. Rep. 752, 62 Pac. 751; *Kinkel v. Harper*, 7 Colo. App. 54, 42 Pac. 173,—holding knowledge of existence of executory agreement for which note given does not defeat bona fide transferee's right to recover; *Williams v. Neely*, 69 L.R.A. 245, 67 C. C. A. 171, 134 Fed. 17 (dissenting opinion), as to knowledge of conditions surrounding consideration of promissory note, without knowledge of breach, affecting rights of purchaser; *Moyses v. Bell*, 62 Wash. 541, 114 Pac. 193; *Hakes v. Thayer*, 165 Mich. 487, 131 N. W. 174,—holding that notice that note was made in consideration of executory contract, is not ground of defense against holder in due course, unless he had also notice of breach of contract.

Presumption of indorsee's good faith.

Cited in *Voorhees v. Fisher*, 9 Utah, 308, 34 Pac. 64, holding possession of note before maturity presumptively lawful and bona fide.

8 L. R. A. 429, *WESTERN U. TELEG. CO. v. WILLIAMS*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 106.

Ownership of fee in highway.

Cited in *Page v. Belvin*, 88 Va. 989, 14 S. E. 843, and *Hodges v. Seaboard & R. R. Co.* 88 Va. 654, 14 S. E. 380, holding fee of highway remains in abutting owner.

Cited in note (101 Am. St. Rep. 104) on title and fee to soil of highway.

What is additional servitude.

Cited in *Jaynes v. Omaha Street R. Co.* 53 Neb. 649, 39 L. R. A. 757, 74 N. W.

67, holding poles and wires of electric railway additional servitude; *Reid Bros. v. Norfolk City R. Co.* 94 Va. 121, 36 L. R. A. 275, 64 Am. St. Rep. 708, 26 S. E. 428, holding conversion of single track horse-car railway into double track electric not additional servitude; *Meyer v. Richmond*, 172 U. S. 95, 43 L. ed. 379, 19 Sup. Ct. Rep. 106, holding obstruction of street under municipal ordinance by railroad not in front of plaintiff's property, not additional taking; *Home Bldg. & Conveyance Co. v. Roanoke*, 91 Va. 61, 27 L. R. A. 554, 20 S. E. 895, holding approach to bridge over tracks in city street not additional servitude.

Cited in note (106 Am. St. Rep. 262, 263) on what are additional servitudes in highways.

— Telegraph and telephone lines.

Approved in *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 108, 50 L. R. A. 304, 81 N. W. 1041; *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 779, 91 N. W. 441; *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 47, 28 Am. St. Rep. 219, 21 Atl. 690; *East Tennessee Teleph. Co. v. Russellville*, 106 Ky. 670, 51 S. W. 308; *Bronson v. Albion Teleph. Co.* 67 Neb. 111, 60 L.R.A. 428, 93 N. W. 201,—holding telephone poles and wires additional servitude; *Hodges v. Western U. Teleg. Co.* 133 N. C. 235, 45 S. E. 572, holding telegraph line on railroad's right of way, additional servitude; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 550, 28 L. R. A. 315, 51 Am. St. Rep. 543, 63 N. W. 111 (dissenting opinion), majority holding telephone poles and wires not additional servitude.

Cited in *McCann v. Johnson County Teleph. Co.* 69 Kan. 225, 66 L.R.A. 180, 76 Pac. 870, 2 A. & E. Ann. Cas. 156 (dissenting opinion), on telephone as additional burden on country road.

Cited in notes (17 L. R. A. 480, 24 L. R. A. 721) on telegraph and telephone lines as additional burden on highway; (28 Am. St. Rep. 233) on telegraph and telephone poles and wires in streets and highways across private property as additional servitude.

Distinguished in *Magee v. Overshiner*, 150 Ind. 139, 40 L. R. A. 374, 65 Am. St. Rep. 358, 49 N. E. 951, holding reasonable use of city streets for telephone system not additional servitude.

Disapproved in *Frazier v. East Tennessee Teleph. Co.* 115 Tenn. 419, 3 L.R.A. (N.S.) 325, 112 Am. St. Rep. 856, 90 S. W. 620, 5 A. & E. Ann. Cas. 838, holding telephone not new burden upon fee of abutting owner.

Eminent domain statutes.

Cited in *Sisson v. Buena Vista County*, 128 Iowa, 463, 70 L.R.A. 449, 104 N. W. 454, holding provisions of statute having reference to compensation, how and when to be made, etc., in common with provisions relating to subject of use are to be construed as valid where possible.

8 L. R. A. 438, *STATE v. ROBBINS*, 124 Ind. 308, 24 N. E. 978.

Right to seize articles connected with criminal act.

Cited in *Newman v. People*, 23 Colo. 311, 47 Pac. 278, holding it sheriff's duty, independent of statute, to seize gambling devices, and *Mutual Commission & Stock Co. v. Moore*, 13 App. D. C. 86, holding articles supplying evidence of guilt may be seized by officer making arrest; *Mullen v. Moseley*, 13 Idaho, 465, 12 L.R.A.(N.S.) 398, 121 Am. St. Rep. 277, 90 Pac. 986, 13 A. & E. Ann. Cas. 450, holding action in replevin or claim and delivery not maintainable to recover slot machines devised and constructed for gambling purposes and only capable of use in violating laws of state; *State v. Derry*, 171 Ind. 21, 131 Am. St. Rep. 237, 85 N. E. 765, holding as to articles inherently evil, courts have authority outside statute, under their police powers, to destroy them, otherwise as to

articles capable of both lawful and unlawful use, as slot-machines, tables and chips; *Berry v. De Maris*, 76 N. J. L. 309, 70 Atl. 337, on summary destruction of articles used in violation of police statutes but also usable for other purposes.

Cited in note (18 L.R.A.(N.S.) 255) on right of officer, in executing criminal process, to take possession of evidentiary articles.

Due process in seizure or destruction of property.

Cited in *Newman v. People*, 23 Colo. 307, 47 Pac. 278, considering, without deciding, question whether act providing for destruction of gambling devices without notice to owner constitutional; *Loesch v. Koehler*, 144 Ind. 281, 35 L. R. A. 683, 41 N. E. 326, holding statute permitting killing by humane society of injured, abandoned, or diseased animals without notice to owner, unconstitutional; *Modern Loan Co. v. Police Ct.* 12 Cal. App. 592, 108 Pac. 56, holding sections of penal code void in so far as purporting to authorize magistrate to pass upon and adjudicate right to possession of personal property without notice to person from whom taken, or who claims title to it; *Daniels v. Homer*, 139 N. C. 253, 3 L.R.A.(N.S.) 1012, 51 S. E. 992 (dissenting opinion), on forfeiture and sale of property without due process.

Cited in footnotes to *Police Comrs. v. Wagner*, 52 L. R. A. 775, which holds police officers may be empowered to seize property to prevent crime; *Branson v. Gee*, 24 L. R. A. 355, which upholds act authorizing taking of gravel from private lands without notice for highway repairs.

Disapproved in *Lawton v. Steele*, 152 U. S. 143, 38 L. ed. 391, 14 Sup. Ct. Rep. 499, upholding act authorizing summary destruction of nets unlawfully set.

Necessity of making order at time of sentence.

Cited in *State v. Smith*, 173 Ind. 390, 90 S. E. 607, holding that order suspending sentence which court has power to make as part of judgment cannot be made one year after judgment.

8 L. R. A. 440, *NEWELL v. MEYENDORFF*, 9 Mont. 254, 18 Am. St. Rep. 738, 23 Pac. 333.

Formulation of record.

Approved in *Becker v. Yellowstone County*, 10 Mont. 87, 24 Pac. 700, refusing to consider record where material in disordered mass; *Barger v. Halford*, 10 Mont. 60, 24 Pac. 699, refusing to consider statement on appeal containing transcript of stenographer's notes by question and answer; *Authier v. Bennett Bros. Co.* 16 Mont. 116, 40 Pac. 182, holding statements on appeal must appear in orderly and chronological order.

Contracts in restraint of trade.

Cited in *Superior Coal Co. v. Darlington Lumber Co.* 143 Ill. App. 201, holding contract of dealer to buy out dealer at certain place and buy from miner at wholesale, latter not to sell at wholesale to any other dealer in such place not contrary to public policy; *Schwaneckamp v. Modern Woodmen*, 44 Mont. 533, 120 Pac. 806, holding that provision in certificate of insurance of fraternal order that certificate will be void if insured engages in liquor traffic is not violative of section 5057 of Revised Codes.

Cited in notes (9 L.R.A.(N.S.) 502) on validity of contract giving exclusive local right to handle goods; (6 Eng. Rul. Cas. 452) on validity of contracts in restraint of trade.

Distinguished in *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 35, 55 L. R. A. 649, 91 Am. St. Rep. 386, 66 Pac. 496, holding public contract made after advertisement limiting right to bid to employers of union labor, void.

Estoppel — By obtaining ruling.

Approved in *State v. Lucey*, 24 Mont. 304, 61 Pac. 994, holding party cannot complain of instructions submitted by counsel; *Ervin v. Milne*, 17 Mont. 501, 43 Pac. 706, holding party unable to complain of ruling which he obtained; *Reynolds v. Fitzpatrick*, 28 Mont. 177, 72 Pac. 510, holding party cannot question decision obtained upon his prior appeal; *State ex rel. Congdon v. Second Judicial Dist. Court*, 10 Mont. 460, 26 Pac. 183, holding party obtaining continuance cannot decline to pay costs and offer to proceed without withdrawing motion.

Cited in *Murray v. Butte*, 31 Mont. 182, 77 Pac. 527, holding party bound by ruling on evidence obtained by party himself.

Distinguished in *Fisher v. Briscoe*, 10 Mont. 132, 25 Pac. 30, holding ruling upon motion to strike not conclusive on court, upon motion for judgment on pleadings after amendment.

— By pleading.

Approved in *Maul v. Schultz*, 19 Mont. 341, 48 Pac. 626, holding plaintiff suing for reasonable value who proves written lease, estopped from objection to proof of modification of lease; *Newell v. Nicholson*, 17 Mont. 394, 43 Pac. 180, holding plaintiff in action for entire purchase price cannot recover for goods sold by defendants; *Gettings v. Buchanan*, 17 Mont. 585, 44 Pac. 77, holding original complaint *functus officio* by filing amended complaint.

Distinguished in *State ex rel. Leech v. Choteau County*, 13 Mont. 34, 31 Pac. 879, holding canvassing board in answer to mandate to canvass, not confined to reasons in official record.

New trial for change in ruling.

Cited in *Porter v. Industrial Printing Co.* 26 Mont. 180, 66 Pac. 839, holding change in ruling of court, before and after trial, as to sufficiency of pleading of counterclaims, ground for new trial.

8 L. R. A. 443, *GORE v. TOWNSEND*, 105 N. C. 228, 11 S. E. 160.

Inchoate dower as property.

Cited in *Crosby v. Farmers' Bank*, 107 Mo. 444, 17 S. W. 1004, holding wife's inchoate dower entitles her to have mortgaged land sold in parcels; *Lackett v. Rumbaugh*, 45 Fed. 36, holding wife's inchoate dower right valuable consideration for transfer; *Southern Loan & T. Co. v. Benbow*, 135 N. C. 312, 47 S. E. 435, holding wife's joining in mortgage of husband's lands valuable consideration for his note to her; *Linebarger v. Linebarger*, 143 N. C. 231, 55 S. E. 709, 10 A. & E. Ann. Cas. 596, holding wife's inchoate right of dower renders her incompetent to testify to declarations of deceased testator in contest over will, by setting aside of which her husband would become owner of undivided interest in testator's realty; *Fishel v. Browning*, 145 N. C. 79, 58 S. E. 759, holding right of dower encumbrance constituting breach of covenant against encumbrances.

Cited in notes (13 L.R.A. 442) on dower; bar of inchoate right; (39 Am. St. Rep. 35) on assignment of dower.

Wife as husband's surety.

Cited in *Hedrick v. Byerly*, 119 N. C. 421, 25 S. E. 1020, holding wife joining in conveyance of separate property to secure husband's debt, becomes surety; *Smith v. Old Dominion Bldg. & L. Asso.* 119 N. C. 259, 26 S. E. 40, holding tender releases wife's property mortgaged as security for husband's debt; *Shew v. Call*, 119 N. C. 455, 56 Am. St. Rep. 678, 26 S. E. 33, holding husband's land should be sold first under mortgage of lands of husband and wife to secure his debt; *Hinton v. Greenleaf*, 113 N. C. 7, 18 S. E. 56, holding agreement to postpone sale of husband's security discharges property of wife mortgaged to secure

husband's debt; *Southern Loan & T. Co. v. Benbow*, 135 N. C. 312, 47 S. E. 435, holding wife becomes creditor of husband's estate to amount of value of her dower in land, where wife joins husband in conveyance of land in trust to pay his debt, in which land she has vested right of dower, and whole is sold after husband's death to pay debt under trust deed; *Gordon v. Deavitt*, 84 Vt. 66, 78 Atl. 113, to the point that equity will treat wife as surety for husband where she releases her dower to secure husband's debt.

8 L. R. A. 446, *CARLETON MILLS CO. v. SILVER*, 82 Me. 215, 19 Atl. 154.

Grant of water power.

Cited in *Hall v. Sterling Iron & R. Co.* 148 N. Y. 440, 42 N. E. 1056, construing grant of water power sufficient to operate designated establishment, where intention doubtful, as indicating quantity, not restricting use; *Oakland Woolen Co. v. Union Gas & Electric Co.* 101 Me. 216, 63 Atl. 915, holding under a grant of the use of water, unlimited as to number of hours use the grantee may use the water as many hours in the day as he pleases.

Cited in notes (9 L.R.A. 195) on franchises of water companies; (67 L.R.A. 390, 393, 397) on grant of water power.

8 L. R. A. 448, *JAMES v. WOOD*, 82 Me. 173, 19 Atl. 160.

Property in animals *ferae naturae*.

Cited in *State v. Parker*, 89 Me. 85, 35 L. R. A. 280, footnote p. 279, 35 Atl. 1021, holding deer in park not "possessed" within exception of statute prohibiting killing during close season; *Smith v. State*, 155 Ind. 623, 51 L. R. A. 409, 58 N. E. 1044 (dissenting opinion), majority holding possession during close season, though commenced in open, unlawful.

Cited in footnote to *L. Realty Co. v. Johnson*, 66 L.R.A. 349, which sustains exclusive right of owner of soil to hunt thereon including right to control and protect wild game.

Game laws.

Cited in *Harper v. Galloway*, 58 Fla. 261, 26 L.R.A.(N.S.) 797, 51 So. 226, holding that in the absence of restriction in state constitution legislature may regulate the taking of animals *ferae naturae* as it sees fit so long as it does not violate the constitutional guarantee of due process of law; *Com. v. Patson*, 231 Pa. 49, 79 Atl. 928, holding that restrictions may be placed upon nonresidents, which differ from those imposed on residents in regard to license charges and other regulations; *Com. v. Papsone*, 44 Pa. Super. Ct. 132, holding that statute prohibiting unnaturalized foreign born residents from killing certain birds is constitutional.

Cited in footnote in *State v. Mallory*, 67 L.R.A. 773, denying right of state to forbid nonresident landowner to take fish and game on his property within the state.

Trover.

Cited in *Stevens v. Gordon*, 87 Me. 567, 33 Atl. 27, holding mere possession of land sufficient to support trover for grass cut therefrom.

Trespass.

Cited in *Corthell v. Holmes*, 88 Me. 380, 34 Atl. 173, holding act done in removal of obstruction to public way, not invasion of property right.

8 L. R. A. 450, *HARE v. MCINTYRE*, 82 Me. 240, 17 Am. St. Rep. 476, 19 Atl. 453.

Fellow servant's liability for negligence.

Cited in note (28 L. R. A. 440) on liability of servant to fellow servant for negligence.

Correspondence between pleading and proof.

Cited in *Glover v. Jones*, 95 Me. 307, 49 Atl. 1104, holding facts proved but not alleged will not justify decree.

Assumption of risk.

Cited in *Adolff v. Columbia Pretzel & Baking Co.* 100 Mo. App. 207, 73 S. W. 321, holding assumption of risk by employee ordered to do work other than that for which hired, question for jury; *Tucker v. Northern Terminal Co.* 41 Or. 89, 68 Pac. 426, holding employee's assumption of risks ordinarily incident to business need not be averred.

Fellow servants.

Cited in *Anderson v. Pittsburgh Coal Co.* 108 Minn. 468, 26 L.R.A.(N.S.) 641, 122 N. W. 794, holding person charged by master with duty to warn servant vice principal.

8 L. R. A. 453, *FOBES v. ROME*, W. & O. R. CO. 121 N. Y. 505, 24 N. E. 919.

Actionable invasion of abutter's right.

Approved in *Mangam v. Sing Sing*, 11 App. Div. 216, 42 N. Y. Supp. 950, holding abutter's right to recover abandoned highway not affected by use for other public purposes; *Brown v. San Francisco*, 124 Cal. 281, 57 Pac. 82, holding mere inconvenience to abutter upon street diminished in width by city authorities, not damage to be compensated.

Cited in *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 281, 24 L. R. A. 397, 29 Atl. 830, holding construction of stone abutment reducing street 10 feet and interfering with light and air, no taking of abutter's property; *Bennett v. Long Island R. Co.* 89 App. Div. 385, 85 N. Y. Supp. 938, holding abutter, not owning fee in highway, cannot recover damages for construction of incline by adjoining railroad; *Reining v. New York, L. & W. R. Co.* 35 N. Y. S. R. 735, 13 N. Y. Supp. 238, holding abutter to be compensated for loss of access by embankment not constituting change of grade; *Castle v. Bell Teleph. Co.* 49 App. Div. 445, 63 N. Y. Supp. 482 (dissenting opinion), majority holding conduit in street to accommodate wires on poles therein, not additional servitude to abutter; *Sauer v. New York*, 206 U. S. 552, 51 L. ed. 1184, 1186, 27 Sup. Ct. Rep. 686, holding an abutting owner is not deprived of his property without due process of law by the erection by a municipality under authority of a statute making his provision for compensation, of an elevated iron viaduct for general public use; *Warner v. State*, 132 App. Div. 614, 117 N. Y. Supp. 108 (dissenting opinion), as to right of abutting owner to recover consequential damages caused by change in grade; *American Bank Note Co. v. New York Elev. R. Co.* 27 Jones & S. 184, 13 N. Y. Supp. 626, holding the right of an abutting owner to equitable relief against an elevated railroad arises not solely from an unlawful appropriation of the street to the construction and maintenance of its structure, but as well from any operation thereof which involves an abridgment of abutting owners' easement in street; *Smith v. St. Paul, M. & M. R. Co.* 39 Wash. 372, 70 L.R.A. 1026, 109 Am. St. Rep. 889, 81 Pac. 840, holding under constitution providing that no private property shall be taken or "damaged" for public use without just compensation an owner of property near railroad cannot recover for damages caused by reason of obstruction of cross streets caused by excavations made by railroad company.

Distinguished in *Palmer v. Larchmont Electric Co.* 6 App. Div. 18, 39 N. Y. Supp. 522; *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 140, 25 L. R. A. 644, 38 N. E. 202, holding electric wire line upon country road, infringement of abutter's rights; *Muhlker v. New York & H. R. Co.* 197 U. S. 570, 49 L. ed. 877, 25 Sup. Ct. Rep. 522, holding an owner of real property abutting on a

street in New York City who derived his title from the grantor to the city, in trust for a public highway, of a strip of land constituting the street, and acquired such title when the state courts had decided that one so situated had a contract right to easements of light, air and access which could not be taken away from him without compensation by the construction of an elevated railroad in adjoining street, is protected against impairment of his easements of light and air by substitution by railway company, at the command of the state, of elevated for surface road; *Re Rapid Transit R. Comrs.* 197 N. Y. 102, 36 L.R.A.(N.S.) 649, 90 N. E. 456, holding an abutting owner who owns no part of the street has a right to the lateral support of the land in the street and has a right or easement covered by statute, which entitles him to compensation for all the damages inflicted upon his property by interference with the lateral support thereof through proper construction and operation of an underground railroad.

— Railway in street.

Approved in *Case v. Cayuga County*, 88 Hun, 61, 34 N. Y. Supp. 595; *Trelford v. Coney Island & B. R. Co.* 5 App. Div. 468, 39 N. Y. Supp. 20, holding mere use of highway for surface railroad not infringement of rights of abutter without fee to street; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 11 App. Div. 564, 42 N. Y. Supp. 590, holding abutter bounded by exterior line of street cannot recover for consequential damages from reasonable use of street for railroad; *Kennedy v. Mineola, H. & F. Traction Co.* 178 N. Y. 515, 71 N. E. 102, Affirming 77 App. Div. 492, 78 N. Y. Supp. 937, holding abutter not owning fee in highway, cannot enjoin construction of street railroad; *Peck v. Schenectady R. Co.* 170 N. Y. 305, 63 N. E. 357, holding electric surface railroad added burden upon highway; *Taylor v. New York & H. R. Co.* 27 App. Div. 202, 50 N. Y. Supp. 697, holding railway liable for use of temporary structure outside of embankment being altered by city; *Fries v. New York & H. R. Co.* 169 N. Y. 285, 62 N. E. 358, holding abutter not damaged by change for public convenience of grade of railway rightfully in street; *Peck v. Schenectady R. Co.* 67 App. Div. 360, 73 N. Y. Supp. 794, sustaining right of abutter with fee in street, to injunction against street railway; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 43 App. Div. 206, 60 N. Y. Supp. 40, holding abutter with title in street to be compensated for damage to business from dirt and dust from railway in street; *Lamm v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 78, 10 L. R. A. 271, 47 N. W. 455, holding that abutter has easements of access, light, and air in whole width of street irrespective of ownership of fee; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 487, 51 N. E. 402, holding that deed conveying right to operate and maintain railway in street includes consequential damages from operation; *McCruden v. Rochester R. Co.* 5 Misc. 61, 25 N. Y. Supp. 114, holding right to lay tracks without compensation to owner of fee, not within common council's authorization; *Bucholz v. New York, L. E. & W. R. Co.* 66 Hun, 380, 21 N. Y. Supp. 503, holding railway not liable for cutting off travel upon premises by authorized change of crossing; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 675, 12 C. C. A. 373, 22 U. S. App. 570, 64 Fed. 637, raising without deciding question whether general power to regulate use of streets authorizes consent to use for street railway purposes for term or in perpetuity; *Kane v. New York Elev. R. Co.* 125 N. Y. 176, 11 L. R. A. 642, 26 N. E. 278; *Duyckinek v. New York Elev. R. Co.* 3 Silv. Ct. App. 319, 26 N. E. 278, holding abutter on street belonging to other individuals, entitled to compensation from elevated railway; *De Geofroy v. Merchants Bridge Terminal R. Co.* 179 Mo. 718, 64 L. R. A. 967, 79 S. W. 386, holding elevated street railroad an additional servitude; *Sperb v. Metropolitan Elev. R. Co.* 61 Hun, 541, 16 N. Y. Supp. 392, holding elevated railway acquiring right to main-

tain structure not bound to compensate for injuries incidental to operation; *Hindley v. Metropolitan Elev. R. Co.* 42 Misc. 63, 85 N. Y. Supp. 561, holding elevated railroad does not acquire easement in certain premises by prescription where recognizing right of other abutting owners to compensation; *Sun Printing & Pub. Asso. v. New York*, 8 App. Div. 285, 40 N. Y. Supp. 607 (dissenting opinion), majority holding construction of rapid transit railroad within city, legitimate city purpose.

Cited in *Re Rapids Transit R. Comrs.* 197 N. Y. 102, 36 L.R.A.(N.S.) 657, 90 N. E. 456, 18 Ann. Cas. 366, holding that abutting owner is entitled to compensation from municipality for constructing subway in street for rapid transit purposes, for injury done to buildings by forcible driving of tunnel so as to interfere with lateral support; *Coatsworth v. Lehigh Valley R. Co.* 73 Misc. 653, 131 N. Y. Supp. 300, to the point that railroad is not proper street use as regards fee owner, but is perfectly so as to mere abutter.

Cited in notes (14 L.R.A. 382) on injury to abutter's easements by railroad in street; (1 L.R.A.(N.S.) 119, 120) on effect of legislative authority upon right of abutters to damages for elevated railroad; (36 L.R.A.(N.S.) 703, 707) on abutter's right to compensation for railroads in streets; (31 Am. St. Rep. 733) on occupation of city streets by railroads.

Distinguished in *Abendroth v. Manhattan R. Co.* 122 N. Y. 17, 11 L. R. A. 640, 19 Am. St. Rep. 461, 25 N. E. 496, holding elevated railroad liable for obstructing lights and for smoke and cinders, to abutter without interest in street; *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 158, 20 L. R. A. 756, 32 N. E. 1050, holding future damages to abutter's easements to be included in alternative damages given in lieu of injunction; *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 116, 14 L. R. A. 385, 29 N. E. 95, holding railroad liable for embankment cutting off access to abutting premises and damaging light and air, although street had been abandoned where no compensation had been made; *Reining v. New York, L. & W. R. Co.* 128 N. Y. 162, 14 L. R. A. 135, 28 N. E. 640, holding abutter without fee in street entitled to compensation for authorized railway embankment substantially stopping ordinary street usage; *Merriman v. Utica Belt Line Street R. Co.* 18 Misc. 275, 41 N. Y. Supp. 1049, holding abutter without fee in street may restrain construction of trolley railroad without requisite consents; *Emigrant Mission Committee v. Brooklyn Elev. R. Co.* 20 App. Div. 598, 47 N. Y. Supp. 344, holding elevated railroad locating its yard and dumping ground without specific legislative authority, liable for consequential damage to adjoining property; *Jeaume v. New York, L. & W. R. Co.* 35 N. Y. S. R. 677, 13 N. Y. Supp. 249, holding railroad constructing embankment in street without formal change of grade, liable for deprivation of abutter's access; *Dolan v. New York & H. R. Co.* 74 App. Div. 435, 77 Am. St. Rep. 815, holding exemption from liability to abutter under statute requiring surface railroad changed to viaduct, does not cover special damages from maintenance of stations not required thereby.

8 L. R. A. 458, *PEOPLE v. E. REMINGTON & SONS*, 121 N. Y. 328, 24 N. E. 793.

Action for interest on withheld dividends in *People v. E. Remington & Sons*, 59 Hun, 308, 12 N. Y. Supp. 829.

Obligation of creditor to resort primarily to collateral.

Cited in *Benecke v. Haebler*, 38 App. Div. 348, 58 N. Y. Supp. 16, holding bank need not sell collateral before proceeding against acceptor of draft; *Jones v. Bristow*, 51 App. Div. 304, 64 N. Y. Supp. 892, holding accommodation indorser not bound to resort to collateral given by payee, before enforcing note against maker; *Jenkins v. Smith*, 21 Misc. 752, 48 N. Y. Supp. 126, holding mortgagee need not enforce remedies against indorser of mortgage note and worthless col-

lateral stock before foreclosing, though thereby injuring security of junior mechanic's lien.

Cited in note (18 Eng. Rul. Cas. 213) on marshalling assets of mortgagor.

Secured creditor's right to share in insolvent debtor's assets.

Cited in *Ragsdale v. Winnsboro Bank*, 45 S. C. 583, 23 S. E. 947; *Re Bicknell*, 31 Misc. 304, 64 N. Y. Supp. 360; *Williams v. Overholt*, 46 W. Va. 340, 33 S. E. 226,—holding creditor entitled to share *pro rata* on face of claim before realizing on credit assigned as collateral; *Third Nat. Bank v. Haug*, 82 Mich. 613, 11 L. R. A. 330, 47 N. W. 33, holding mortgagee entitled to dividend on whole claim on equality with unsecured creditors; *Winston v. Biggs*, 117 N. C. 210, 23 S. E. 316, holding creditor entitled to share in proportion to face of claim without first realizing on mortgage collateral; *Re Levin Bros.* 139 Cal. 352, 73 Pac. 159, holding firm creditor secured by mortgage on partner's homestead entitled to dividends on entire claim; *Re Simpson*, 36 App. Div. 564, 55 N. Y. Supp. 697, holding mortgagee entitled to prove entire claim against mortgagor's insolvent grantee, in spite of subsequent foreclosure of mortgage; *People v. Granite State Provident Asso.* 41 App. Div. 265, 58 N. Y. Supp. 510, holding resident creditors of foreign insolvent corporation need not prove against special security fund before proving against general assets; *Re Snyder*, 29 Misc. 6, 59 N. Y. Supp. 993, holding creditor entitled to share *pro rata* on face of claim as well as in special security fund; *Re Meyer*, 78 Wis. 622, 11 L. R. A. 842, footnote p. 841, 23 Am. St. Rep. 435, 48 N. W. 55, holding due-course holder of note entitled to share *pro rata* for face of note in assets of both maker and indorser; *Re Hayes*, 37 Misc. 277, 75 N. Y. Supp. 312, holding stock-exchange creditor entitled to prove entire claim against general assets, in addition to sharing in proceeds of sale of debtor's exchange seat; *Davidson v. John Good Cordage & Mach. Co.* 63 App. Div. 368, 71 N. Y. Supp. 565, holding court has no power to enjoin foreclosure of mortgage by creditor pending sequestration proceedings; *People v. Granite State Provident Asso.* 161 N. Y. 496, 55 N. E. 1053, upholding judgment requiring bond of foreign receiver of foreign insolvent, against discrimination against domestic creditors by reason of domestic trust fund transmitted; *Re Binghamton General Electric Co.* 143 N. Y. 264, 38 N. E. 297, refusing to enjoin sale of corporate bonds by creditors on voluntary dissolution of corporation; *Chemical Nat. Bank v. Armstrong*, 28 L. R. A. 235, 8 C. C. A. 161, 16 U. S. App. 465, 59 Fed. 378, Reversing 50 Fed. 805, holding amount realized in collaterals after insolvency, but before proof of claim, need not be deducted from face of claim; *New York Security & T. Co. v. Lombard Invest. Co.* 73 Fed. 554, holding realization on collateral since appointment of receiver, does not deprive creditor of right to dividend on face of claim; *Tod v. Kentucky Union Land Co.* 57 Fed. 64, holding creditor entitled to share in proportion to face of claim where amount realized on collateral does not cover debt; *Wheeler v. Walton & W. Co.* 72 Fed. 968, holding creditor entitled to share in dividends without surrendering or realizing on collateral; *Merrill v. National Bank*, 173 U. S. 141, 43 L. ed. 644, 19 Sup. Ct. Rep. 360 (Distinguished in dissenting opinion, *Merrill v. National Bank*, 173 U. S. 170, 43 L. ed. 654, 19 Sup. Ct. Rep. 375) holding creditor of insolvent national bank may receive dividends on face of claim without deducting realizations on collateral; *High v. Fifth Nat. Bank*, 97 Mich. 507, 21 L. R. A. 825, 56 N. W. 927 (distinguished in dissenting opinion) holding trustee in certain mortgages for creditors entitled to share in debtor's assets to full-face value of claims; *Re Beaver Knitting Mills*, 83 C. C. A. 240, 154 Fed. 322, as to rights of secured creditor; *Detroit Trust Co. v. State Bank*, 150 Mich. 533, 114 N. W. 327, as to right of secured creditor to share in insolvent debtor's assets; *Re E. Bements Sons*, 150 Mich. 533, 114 N. W. 327, holding the effect on the creditor of the

taking over by a receiver of the general assets of debtor is to substitute for the right of action, in personam, then existing, a right to a proportional share of the impounded assets, a right to recover such a part thereof as his total proved demand has to total of all demands, unaffected by fact that he holds security for part or all of his debts; *Re Burke*, 25 R. I. 302, 55 Atl. 825; *Harrigan v. Gilchrist*, 121 Wis. 345, 99 N. W. 909; *Virginia-Carolina Chemical Co. v. Edwards*, 136 N. C. 77, 48 S. E. 568,—holding creditor has right to proceed both against the security he may hold of the debtor and his general estate; *Buttler v. Commonwealth Tobacco Co.* 73 N. J. Eq. 208, 67 Atl. 514, holding creditor entitled to a dividend on his whole debt notwithstanding he may be holding collateral as an additional security therefor; *International Trust Co. v. Union Cattle Co.* 3 Wyo. 806, 19 L.R.A. 640, 31 Pac. 408, holding creditor of insolvent corporation not entitled to allowance by reason of his holding as collateral negotiable bonds of the corporation representing no indebtedness.

Cited in footnote to *High v. American Wheel Co.* 21 L. R. A. 822, which holds secured creditor entitled to dividend on full claim.

Cited in notes (11 L.R.A. 328) on creditor's right to dividends; (29 Am. St. Rep. 621; 71 Am. St. Rep. 384) on secured creditor's claim against insolvent's estate.

Distinguished in *Re Atwood*, 3 App. Div. 581, 38 N. Y. Supp. 338, holding consignee cannot prove full amount of claim at time of consignor's assignment where goods held and sales made subsequently; *Doolittle v. Smith*, 104 Iowa, 406, 73 N. W. 867, and *Sullivan v. Erle*, 8 Colo. App. 6, 44 Pac. 948, holding creditor realizing on collateral after allowance of full claim against insolvent's assets, may share in final settlement, only on basis of balance; *Levy v. Chicago Nat. Bank*, 158 Ill. 96, 30 L. R. A. 382, 42 N. E. 129, Reversing 57 Ill. App. 149, holding creditor may share only in proportion to amount of claim at time of proof as reduced by realization on collateral after insolvency; *Jamison v. Adler-Goldman Commission Co.* 59 Ark. 556, 28 S. W. 35, holding amount realized on collateral by secured creditors should be deducted before ratable distribution of insolvent decedent's estate; *Re Waddell-Entz Co.* 67 Conn. 337, 35 Atl. 257, holding creditor entitled under statute to share only in proportion to amount of claim, less value of security not surrendered.

Disapproved in *Re Frasch*, 5 Wash. 346, 31 Pac. 755, and *Philadelphia Warehouse Co. v. Anniston Pipe Works*, 106 Ala. 362, 18 So. 43, holding creditor entitled to dividend only in proportion to amount of claim as reduced by collateral realized on.

8 L. R. A. 461, *MONTGOMERY COUNTY v. RISTINE*, 124 Ind. 242, 24 N. E. 990.

Right of county to reimbursement for charitable expenditures.

Cited in *Marshall County v. Burkey*, 1 Ind. App. 571, 27 N. E. 1108, holding county cannot recover from husband's estate for wife's clothing and expense of inquest of insanity; *Kaiser v. State*, 80 Kan. 371, 24 L.R.A.(N.S.) 295, 102 Pac. 454, holding estate of insane person committed to asylum liable under statute for his maintenance.

Disapproved in *McNairy County v. McCain*, 101 Tenn. 81, 41 L. R. A. 864, 45 S. W. 1070, holding county providing for lunatic as supposed pauper entitled to indemnity out of estate.

8 L. R. A. 464, *PITTSBURGH, C. & ST. L. R. CO. v. SHIELDS*, 47 Ohio St. 387, 21 Am. St. Rep. 840, 24 N. E. 658.

Care as to dangerous agencies.

Approved in *Alsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 344, 56 L. R. A.

751, 88 N. W. 841, holding employer liable for act of engineer in operating blow-off cock to frighten children; *Rush v. Spokane Falls & N. R. Co.* 23 Wash. 514, 63 Pac. 500, holding railway required to exercise highest degree of care and diligence in custody of dynamite; *Euting v. Chicago & N. W. R. Co.* 116 Wis. 18, 60 L. R. A. 160, 96 Am. St. Rep. 936, 92 N. W. 358, holding railroad liable for injury to bystander from torpedo exploded by engineer for own amusement; *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 252, 52 L. R. A. 148, 58 N. E. 821 (dissenting opinion) majority holding railroad not liable for torpedo on right of way where not open to public travel.

Cited in *Black v. Rock Island, A. & L. R. Co.* 125 La. 111, 26 L.R.A.(N.S.) 171, 51 So. 82, holding the right to operate a steam locomotive on or across a street in a town involves the use of an agency highly dangerous to life, limb and property, and the responsibility cannot be shifted by the corporation in which it is vested to the person who by its authority actually exercises it; *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 485, 70 L.R.A. 508, 111 Am. St. Rep. 483, 104 N. W. 443, 5 A. & E. Ann. Cas. 498, holding the degree of care required of persons having the possession and control of dangerous explosions, such as firearms or dynamite, is of the highest; *Lewis v. Mammoth Min. Co.* 33 Utah, 278, 15 L.R.A.(N.S.) 443, 93 Pac. 732; *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 449, 70 L.R.A. 631, 38 So. 210, 3 A. & E. Ann. Cas. 594,—holding if master intrusts the custody of dangerous agencies to the servants, the proper custody as well as use of them becomes a part of servant's employment by master and his negligence in any regard is imputed to the master; *Citizens Electric R. Light & P. Co. v. Bell*, 5 Ohio C. C. N. S. 331, 26 Ohio C. C. 701, holding that the doctrine of *res ipsa loquitur* applies to the use of streets for the transmission of dangerous currents of electricity and the person using the streets for such purpose must use a high degree of care to prevent injury to persons on the street; *Cleveland Terminal & Valley Ry. v. Marsh*, 63 Ohio-St. 252, 58 N. E. 821 (dissenting opinion), on the liability of the railroad company for injuries to a boy who found a torpedo upon the railroad track, he being employed to care for switch lights.

Cited in footnotes to *St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773, which holds master's duty to protect repair track not fulfilled by adopting rule sufficient if faithfully observed by employees; *Nelson v. McLellan*, 60 L. R. A. 793, which holds storing dynamite in partially buried box on vacant lot frequented by children, negligence.

Cited in notes (14 L. R. A. 675) as to negligence in respect to guns and similar dangerous agencies; (27 L. R. A. 163, 200) as to master's civil responsibility for the wrongful or negligent act of his servant or agent toward one who has no claim upon the master by reason of a contract incipient or perfected; (3 L.R.A.(N.S.) 760) on liability for injury caused by placing or exploding bomb or fireworks in highway; (14 L.R.A.(N.S.) 587) on liability for injury to children from explosives left accessible; (10 L.R.A.(N.S.) 369, 370, 373, 379, 394, 398, 402) on liability for injury by servant to third person in use of dangerous agency; (49 Am. St. Rep. 431) on negligence in dealing with children; (133 Am. St. Rep. 870) on liability of railroad company for injuries due to frightening of animals by emission of steam.

Distinguished in *Galveston, H. & S. A. R. Co. v. Currie*, 100 Tex. 148, 10 L.R.A.(N.S.) 393, 96 S. W. 1073, holding master not liable for death caused by practical joke of fellow servant; *Jones v. Hoge*, 47 Wash. 667, 14 L.R.A.(N.S.) 219, 125 Am. St. Rep. 915, 92 Pac. 433, holding automobile not per se dangerous, so as to render the owner responsible for injuries to a traveler on highway when chauffeur took machine out without owner's knowledge or consent; *Har-*

mon v. Cincinnati, H. & D. R. Co. 6 Ohio N. P. N. S. 604, 18 Ohio S. & C. P. Dec. 862, holding that a railroad locomotive at rest in its own yards under the circumstances of the case was not a dangerous instrumentality that the master is necessarily liable for the negligent use of the same by the servant outside the scope of his authority.

Disapproved in *Sullivan v. Louisville & N. R. Co.* 115 Ky. 452, 103 Am. St. Rep. 330, 74 S. W. 171, holding railroad company not liable to servant for injuries sustained by reason of torpedo being placed on track by another servant as a joke; *Obertoni v. Boston & M. R. Co.* 186 Mass. 482, 67 L.R.A. 423, 71 N. E. 980, holding where brakeman threw a torpedo to flagman at crossing, who threw it back and it fell on the ground where it was picked up by a child who was injured by it in the absence of any evidence that the throwing of the torpedo was in course of brakeman's or flagman's employment, the company was not liable.

Liability of master for the servant's torts.

Cited in *Harbison v. Iliff*, 8 Ohio N. P. 394, 10 Ohio S. & C. P. Dec. 62, holding that the master was not liable to his tenant for larceny by a servant employed to paint the house occupied by the tenant unless the master ratified such acts; *Holland v. Columbus R. Co.* 12 Ohio S. & C. P. Dec. 693, holding sufficient against demurrer a petition alleging that the defendant's conductor wrongfully ejected the plaintiff from a street car while acting as conductor; *Penas v. Chicago, M. & St. P. R. Co.* 112 Minn. 214, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926, on liability of master for servant's tort as attaching where master puts it within servant's power to do damage by means of dangerous instrumentality.

Cited in notes (54 Am. St. Rep. 78, 82) on acts of servant for which master is not responsible; (17 Eng. Rul. Cas. 282) on master's liability for acts of servant.

Inference from injury by track torpedo.

Cited in *Brown v. Minneapolis, St. P. & S. Ste. M. R. Co.* 108 Minn. 2, 121 N. W. 123, holding jury might have inferred from evidence that injury was caused by torpedo being negligently left on track.

8 L. R. A. 467, *BELOW v. ROBBINS*, 76 Wis. 600, 20 Am. St. Rep. 89, 45 N. W. 416.

Exemption laws, what covered by.

Cited in *Cleveland v. McCanna*, 7 N. D. 459, 41 L. R. A. 854, 66 Am. St. Rep. 670, 75 N. W. 908, holding mutual judgments cannot be set off so as to defeat exemption laws; *Wabash R. Co. v. Bowring*, 103 Mo. App. 163, 77 S. W. 106, holding judgment for exempt property is exempt; *Kestler v. Kern*, 2 Ind. App. 494, 28 N. E. 726, holding debtor may recover from creditor exempt wages garnished in another state; *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 473, 27 L. R. A. 811, 48 Am. St. Rep. 885, 39 Pac. 962, holding exemption of property attaches to proceeds of insurance thereon; *Rowlands v. Voechting*, 115 Wis. 355, 91 N. W. 990, holding landlord cannot defeat tenant's right to crops by asserting claim for rent; *Millington v. Laurer*, 89 Iowa, 326, 48 Am. St. Rep. 385, 56 N. W. 533, holding exemption of debtor's personal earnings passes to assignee; *Long v. Collins*, 16 S. D. 626, 102 Am. St. Rep. 724, 94 N. W. 700, holding judgment for costs incurred in protecting exempt property from seizure, exempt; *Snow v. West*, 37 Utah, 535, 110 Pac. 52, holding that judgment for value for exempt property wrongfully sold under execution is exempt.

Cited in notes (19 L.R.A. 34) on setting off judgments affecting exempt property; (66 Am. St. Rep. 383, 385) on exemption of proceeds of exempt personalty.

8 L. R. A. 469, *HERRESHOFF v. BOUTINEAU*, 17 R. I. 3, 33 Am. St. Rep. 850, 19 Atl. 712.

Contracts in restraint of trade.

Approved in *Oakdale Mfg. Co. v. Garst*, 18 R. I. 489, 23 L. R. A. 641, footnote p. 639, 49 Am. St. Rep. 784, 28 Atl. 973, holding contract that manufacturer of oleomargarine will not again engage in business for five years, not unreasonable; *Swigert v. Tilden*, 121 Iowa, 656, 63 L. R. A. 611, 100 Am. St. Rep. 374, 97 N. W. 82, holding contract of custom-shirt maker, not to compete within state for ten years with purchaser of business, valid; *Cowan v. Fairbrother*, 118 N. C. 412, 32 L. R. A. 835, 54 Am. St. Rep. 733, 24 S. E. 212, holding agreement not to do newspaper work in county in which is published a newspaper goodwill of which is transferred, not void; *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 919, 53 C. C. A. 489, 116 Fed. 309, holding employee's contract not to become interested in rival concern within 1,500 miles of plant, not unreasonable; *Tillinghast v. Boothby*, 20 R. I. 60, 37 Atl. 344, holding stipulation by contract not to practise in county after termination of contract, not unreasonable; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 24 (dissenting opinion) majority holding stipulation not to engage in business sold, for ten years in United States, unreasonable.

Cited in *Freudenthal v. Espey*, 45 Colo. 493, 26 L.R.A.(N.S.) 964, 102 Pac. 280, holding covenant of inexperienced physician employed to assist physician with experience that at the termination of the employment he would not practise in city for five years, valid; *Swigert v. Tilden*, 121 Iowa, 657, 63 L.R.A. 608, 100 Am. St. Rep. 374, 97 N. W. 82, holding contract in partial restraint of trade valid.

Cited in footnotes to *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, which holds combination to fix prices of cotton seed and seed cotton void; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful; *Nester v. Continental Brewing Co.* 24 L. R. A. 247, which holds combination of brewers to stifle competition within specified place void; *Chaplin v. Brown*, 12 L. R. A. 428, which holds grocer's agreement not to buy butter from maker's for two years if firm opens butter store, void; *Kramer v. Old*, 34 L. R. A. 389, which sustains contract restricting seller from engaging in milling business in vicinity of certain city; *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; *Drown v. Forrest*, 14 L. R. A. 80, which holds contract not to re-engage in same business in same town not discharged by forming partnership with purchaser; *Dills v. Doebler*, 20 L. R. A. 432, which denies injunction to prevent resumption of dentistry practice without paying sum agreed on; *Wilkinson v. Colley*, 26 L. R. A. 114, which holds injunction against violating agreement not to practise medicine in certain district, not prevented by naming penalty.

Cited in notes (11 L. R. A. 504) on contracts in restraint of trade; (13 L. R. A. 771) on nature of monopolies; price fixed by illegal combination is void; (6 L.R.A.(N.S.) 894) on validity of agreement by employee not to compete with employer; (16 L.R.A.(N.S.) 392) on injunction against breach by employee of agreement not to compete; (24 L.R.A.(N.S.) 941) on validity of agreement by employee not to engage in competing business, as affected by scope in time and territorial extent; (49 Am. St. Rep. 789; 117 Am. St. Rep. 525; 6 Eng. Rul. Cas. 453) on validity of contracts in restraint of trade.

Distinguished in *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 131, 29 C. C. A. 151, 54 U. S. App. 723, 85 Fed. 282, holding contract solely to restrain

competition and enhance or maintain process, void; Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 57, 22 L. R. A. 677, 39 Am. St. Rep. 458, 35 N. E. 98, holding manufacturer's stipulation not to engage in manufacturing or selling of apparatus nor compete with purchaser for ten years, void.

8 L. R. A. 472, PEOPLE v. FOSS, 80 Mich. 559, 20 Am. St. Rep. 532, 45 N. W. 480.

Rights of abutting owner in highway.

Cited in Huffman v. State, 21 Ind. App. 453, 69 Am. St. Rep. 371, 52 N. E. 713, holding pipe-line company unlawfully upon highway liable in trespass to abutting owner; Stretch v. Cassopolis, 125 Mich. 168, 51 L. R. A. 346, 84 Am. St. Rep. 567, 84 N. W. 51, holding village liable to abutting owner for cutting trees within highway; Ulmer v. Seelman, 159 Mich. 258, 123 N. W. 1124; Collins v. Lundquist, 154 Mich. 660, 118 N. W. 596,—as to his rights of abutting owner in highway.

Cited in notes (33 L.R.A.(N.S.) 1053, 1054, 1055) on right to vegetation growing in highway; (101 Am. St. Rep. 106, 112, 113; 12 Eng. Rul. Cas. 602) on abutting owner's title to soil in highway.

Defending right in highway.

Cited in People v. Sayers, 105 Mich. 716, 63 N. W. 1002 (dissenting opinion) majority holding one unjustified in committing assault, evidence failing to show it necessary to prevent removal of drain.

Acts constituting assault.

Cited in footnote to People v. Lee Kong, 17 L. R. A. 626, which holds firing pistol at hole in roof where policeman believed to be watching, an assault.

8 L. R. A. 476, KNIGHT v. LINZEY, 80 Mich. 396, 45 N. W. 337.

Transfer of negotiable paper to cut off defenses.

Cited in Leland v. Goodfellow, 84 Mich. 362, 47 N. W. 591, holding person procuring Bohemian oats note through fraudulent representations as to character of transaction, liable in damages to maker compelled to pay same to innocent purchaser.

Cited in note (27 L. R. A. 520, 521) on liability for transferring note to bona fide holder so as to cut off defenses.

Who are bona fide purchasers.

Cited in footnote to Griffith v. Shipley, 14 L. R. A. 405, which holds purchaser of note known to have been given for "hulless oats" not a bona fide purchaser.

Relief of parties to illegal contract.

Cited in Levy v. Kansas City, 22 L.R.A.(N.S.) 870, 93 C. C. A. 523, 168 Fed. 526, holding maintenance of actions to recover moneys or property lost or damages sustained, through transactions or contracts wherein plaintiffs were guilty of moral turpitude or violation of a general law passed to effectuate a public policy prohibited; Stewart v. Wright, 77 C. C. A. 499, 147 Fed. 339 (dissenting opinion), as to right of action on illegal contracts.

Cited in footnote to Wassermann v. Sloss, 38 L. R. A. 176, which holds illegality of transfer of stock to president for corrupting government officials will not prevent recovery where taken by president for own use instead.

Distinguished in Wright v. Stewart, 130 Fed. 926, holding money lent to stakeholder to make showing recoverable by one induced to bet money furnished by conspirators on fake race.

8 L. R. A. 480, *HUGHES v. BROWN*, 88 Tenn. 578, 13 S. W. 286.

Statute of limitations.

Cited in *Ballard v. Scruggs*, 90 Tenn. 589, 25 Am. St. Rep. 703, 18 S. W. 259 holding ten-year statute bars suit to enforce lien of levy on land; *Poindexter v. Rawlings*, 106 Tenn. 101, 82 Am. St. Rep. 869, 59 S. W. 766, holding renewal of purchase-money note or new promise saves vendor's lien from bar of statute; *Cooper v. Hill*, 36 C. C. A. 410, 94 Fed. 590, holding nonoperation of limitations during coverture does not disqualify married woman from suing, joining husband as nominal plaintiff.

— Against person in fiduciary relation.

Cited in *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 650, 24 Am. St. Rep. 625, 15 S. W. 448, holding statute of limitations applicable to action against directors for loss to corporation caused by negligence; *Eames v. Manly*, 54 C. C. A. 564, 117 Fed. 390, holding relief against allowance in excess of claims fraudulently procured by confidential adviser, barred by twelve years delay after discovering fraud; *Boyd v. Mutual Fire Assn.* 116 Wis. 181, 61 L. R. A. 929, 96 Am. St. Rep. 948, 94 N. W. 171, holding statute of limitations runs against director's liability for misfeasance or malfeasance in office; *Fink v. Campbell*, 17 C. C. A. 329, 37 U. S. App. 462, 70 Fed. 668, holding laches bars bill to set aside sale for fraud and abuse of confidence; *Central Bank v. Thayer*, 184 Mo. 94, 82 S. W. 142, holding where cashier of bank was guilty of fraud in concealing transactions so that bank did not discover it until after receiver had been appointed, the statute of limitations did not begin to run till discovery of the facts by receiver; *Hamblen County v. Cain*, 115 Tenn. 282, 89 S. W. 103, as to statute of limitations in regard to claims against persons in a fiduciary capacity.

Cited in note (96 Am. St. Rep. 996) on statute of limitations in actions against corporate officers and stockholders.

Liability of sureties on representative's bond.

Cited in footnote to *Abshire v. Salyer*, 56 L. R. A. 936, which holds sureties on guardian's bond given to obtain silence from future liabilities of surety on prior bond, liable for past defalcations.

Relation back of disclaimer.

Cited in *Bradford v. Calhoun*, 120 Tenn. 58, 19 L.R.A.(N.S.) 598, 109 S. W. 502, holding renunciation by a devisee of a devise for life, made on the day of the probate of the will, related back to date of gift.

8 L. R. A. 484, *NEWPORT v. NEWPORT & C. BRIDGE CO.* 90 Ky. 193, 13 S. W. 720.

Injunction against enforcing ordinance.

Cited in *South Covington & C. Street R. Co. v. Berry*, 93 Ky. 46, 15 L. R. A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026, holding injunction lies to prevent multiplicity of prosecutions under void ordinance; *Boyd v. Frankfort*, 117 Ky. 213, 111 Am. St. Rep. 240, 77 S. W. 669, holding if a city ordinance is invalid, one who is affected by it has the right, in order to prevent irreparable injury and a multiplicity of prosecutions, to go into a court of equity for relief; *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 237, 87 N. E. 47, as to suits to enjoin enforcement of void city ordinance being in nature of bills of peace.

Cited in notes (21 L.R.A. 88) on injunction against prosecutions under city ordinances affecting property or franchises; (2 L.R.A.(N.S.) 634) on injunction against prosecution of criminal or quasi criminal nature; (49 L. ed. U. S. 170) on injunction against criminal prosecutions under void municipal ordinances affecting property rights or franchises.

8 L. R. A. 486, GOODYEAR DENTAL VULCANITE CO. v. BACON, 151 Mass. 460, 24 N. E. 404.

Effect of principal's failure to sign bond or note.

Cited in *State v. Hill*, 47 Neb. 498, 66 N. W. 541, and *Novak v. Pittick*, 120 Iowa, 291, 98 Am. St. Rep. 360, 94 N. W. 916, holding bond unsigned by principal invalid; *Gay v. Murphy*, 134 Mo. 104, 56 Am. St. Rep. 496, 34 S. W. 1091, holding principal's failure to sign joint and several bond, excuses sureties; *Dole Bros. Co. v. Cosmopolitan Preserving Co.* 167 Mass. 482, 57 Am. St. Rep. 477, 46 N. E. 105, holding agent's want of authority to sign bond for principal unless known, releases sureties; *Fuller v. Dupont*, 183 Mass. 598, 67 N. E. 662, holding surety signing on representation that certain person would be other surety liable on bond; *Horton v. Stone*, 32 R. I. 509, 80 Atl. 1, holding that bond is not binding on sureties, if it is not executed by person whose name is stated as principal therein.

Cited in footnotes to *Hurt v. Ford*, 41 L. R. A. 823, which denies right to make subsequent signature of another person essential to validity of note delivered to payee or his agent; *Belden v. Hurlbut*, 37 L. R. A. 853, which holds delivery of probate bond without getting other sureties as promised no defense to surety.

Cited in note (12 L.R.A.(N.S.) 1107, 1117, 1120, 1121) on effect of delivery of bond unsigned by principal obligor.

Failure of all parties to sign instrument.

Cited in *Naylor v. Stone*, 96 Minn. 60, 104 N. W. 685, holding party who signs and delivers an instrument is bound by the obligation he therein assumes although it is not executed by all the parties for whose signatures it was prepared.

8 L. R. A. 487, OPINION OF JUSTICES, 150 Mass. 592, 24 N. E. 1084.

What constitutes a taking.

Cited in *Gulf Coast Ice & Mfg. Co. v. Bowers*, 80 Miss. 582, 32 So. 113, holding erection of poles and wires for lighting street not a taking requiring additional compensation.

Public enterprises by municipality — Furnishing electricity or gas to citizens.

Approved in *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 269, 30 L. R. A. 544, 51 Am. St. Rep. 24, 18 So. 677, and *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 439, 31 L. R. A. 461, 37 N. E. 444, sustaining power of legislature to authorize town to purchase and maintain gas or electric plant to furnish light to inhabitants.

Cited in *Mealey v. Hagerstown*, 92 Md. 754, 48 Atl. 746, holding legislature may authorize municipality owning plant for street lighting to supply light to citizens; *Mitchell v. Negaunee*, 113 Mich. 366, 38 L. R. A. 160, 67 Am. St. Rep. 468, 71 N. W. 646, holding municipalities may be authorized to instal electric lighting plants and furnish light to citizens; *State ex rel. Atty. Gen. v. Toledo*, 48 Ohio St. 137, 11 L.R.A. 738, 26 N. E. 1061, holding legislature may authorize municipality to acquire natural-gas supply for public use; *Spaulding v. Peabody*, 153 Mass. 130, 10 L. R. A. 398, 26 N. E. 421, holding power of city to maintain gas or electric works to light streets not to be implied from authority to maintain street lamps; *Wadsworth v. Concord*, 133 N. C. 593, 45 S. E. 948, by Clark, C. J. concurring in result, who holds furnishing light for streets "a necessary purpose;" *Re Charles Town Light & Power Co.* 183 Fed. 164, to the point that city which is engaged in generating and applying electricity is engaged in "manufacturing;" *Hodgins v. Bay City*, 156 Mich. 690, 132 Am. St. Rep. 546, 121

N. W. 274; *Capron v. Taunton*, 196 Mass. 42, 81 N. E. 873,—as to power to furnish gas and electricity under statute; *Swanton v. Highgate*, 81 Vt. 157, 16 L.R.A. (N.S.) 869, 69 Atl. 667, holding electric light plant operated by city under statutory authority property devoted to public use within statute exempting such property from taxation; *Smith v. London*, 20 Ont. L. Rep. 159, holding that municipality may be authorized to engage in business of acquiring and distributing electric energy as incident to municipal government.

Cited in notes (14 L.R.A. 268) on power of municipal corporations to own and operate electric light plants; (15 L.R.A. (N.S.) 711) on power of municipality to own electric light plant; (30 Am. St. Rep. 225) on power of municipality to furnish light.

—Furnishing water or fuel.

Cited in *Watson v. Needham*, 161 Mass. 410, 24 L. R. A. 288, 37 N. E. 204, holding municipality may legally contract to supply water for boiler heating greenhouse; *Sutherland-Innes Co. v. Evart*, 30 C. C. A. 310, 58 U. S. App. 335, 86 Fed. 603, holding legislature cannot authorize contract by municipality to maintain hydrants to encourage establishment of private manufactory; *Opinions of the Justices*, 155 Mass. 601, 15 L. R. A. 810, 30 N. E. 1142, holding purchase of fuel by city or town and resale to inhabitants cannot be authorized by legislature; *Cary v. Blodgett*, 10 Cal. App. 467, 102 Pac. 668; *Scott v. Laporte*, 162 Ind. 48, 68 N. E. 278,—holding city having statutory authority to construct works for furnishing city water may construct works for purpose of furnishing it to inhabitants also.

Transportation of gas.

Cited in footnotes to *Indianapolis v. Consumers' Gas Trust Co.* 27 L. R. A. 514, which holds gas company's right to repair pipes laid in streets protected against subsequent ordinance against digging in street without consent; *Kincaid v. Indianapolis Natural Gas Co.* 8 L. R. A. 602, which requires payment to owner of fee before laying gas pipes in highway.

Cited in notes (10 L. R. A. 194) on power of gas company to contract; (10 L. R. A. 193) on supplying natural gas as business of public character.

Electric plants.

Cited in *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 537, 58 Atl. 46, sustaining right of electric light and power company to exercise eminent domain.

Cited in note (64 L. R. A. 41) on definitions of manufacturing corporations; (64 L. R. A. 60) on taxation of manufacturing corporations in the United States.

8 L. R. A. 490, **HINCKLEY v. HORAZDOWSKI**, 133 Ill. 359, 23 Am. St. Rep. 618, 24 N. E. 421.

Master's liability to young employee.

Cited in *Morris v. Stanfield*, 81 Ill. App. 273, holding jury is to determine degree of care required of master in employing young and inexperienced employee; *Chicago, B. & Q. R. Co. v. Eggman*, 59 Ill. App. 682, holding master not liable for injury to sixteen-year-old boy going under cars, which was forbidden experienced and fully aware of character of service; *Nelson Mfg. Co. v. Stoltzenburg*, 59 Ill. App. 633, holding master liable for loss of hand of servant putting belt on pulley close to revolving saws at master's direction; *Illinois C. R. Co. v. Reardon*, 56 Ill. App. 544, holding jury should consider age of boy killed by being squeezed between car and lumber on another car faultily loaded; *Chicago Drop Forge & Foundry Co. v. Van Dam*, 149 Ill. 342, 36 N. E. 1024, holding jury may consider age and discretion of boy continuing to work with defective tools upon promise to furnish better, on question of contributory negligence.

Cited in note (31 Am. St. Rep. 349) on master's duty to provide safe appliances and competent collaborators.

Duty to warn employee.

Cited in *National Enameling & Stamping Co. v. Brady*, 93 Md. 650, 49 Atl. 845, holding master must instruct young employee of hazard of machine especially when contract of employment required that he shall not be employed on machines; *Lynchburg Cotton Mills Co. v. Stanley*, 102 Va. 596, 46 S. E. 908, holding master employing children must warn them against dangers to which they are exposed in such language that the warning will be understood by them.

Cited in notes (8 L. R. A. 819) on master's duty to instruct servant in use of dangerous machinery; (44 L. R. A. 47, 63, 72) on master's duty to instruct and warn servants as to perils of employment.

Assumption of risk by employee.

Cited in *Force v. Standard Silk Co.* 160 Fed. 1009, as to effect of minority on assumption or risk; *Evans v. Josephine Mills*, 119 Ga. 453, 46 S. E. 674, holding no presumption that risk of negligence of fellow servant was assumed by infant of tender years.

Cited in footnotes to *Cudahy Packing Co. v. Marcam*, 54 L. R. A. 258, which holds risk of block on which minor employee works slipping on greasy floor assumed; *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed as matter of law by servant operating mangle in laundry; *Marino v. Lehmaier*, 61 L. R. A. 812, which holds risk of employment not assumed *per se*, by child whose employment is illegal because of immature age.

Instructions.

Cited in *Corcoran v. Lehigh & F. Coal Co.* 37 Ill. App. 579, holding party cannot insist on appeal that court erred in instructing that admission had been made if no objection was made at the time; *Bradley v. Sattler*, 54 Ill. App. 505, refusing to consider complaints to instructions which do not recognize difference between adults and children engaged in dangerous service; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 337, 33 Am. St. Rep. 249, 29 N. E. 1106, holding instruction proper that boy of proper age and discretion with information of danger of service cannot recover for injury resulting from ordinary peril and danger of employment.

8 L. R. A. 494, *CHICAGO CITY R. CO. v. WILCOX* (111.) 24 N. E. 419.

Imputing negligence.

Cited in *Louisville, N. A. & C. R. Co. v. Schmidt*, 126 Ind. 293, 26 N. E. 45, holding evidence showed no negligence on part of parents which could be imputed to child.

Cited in notes (17 L. R. A. 79) on imputing parent's negligence to child; (10 L. R. A. 654) on imputing negligence of another to child; (9 L. R. A. 157) on imputing driver's negligence to passenger.

Distinguished in *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 28, 28 L. R. A. 490, 49 Am. St. Rep. 909, 31 S. W. 163, holding negligence of custodian of three-year-old child defeats administrator's action for benefit of next of kin.

Contributory negligence of minor.

Cited in footnote to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground.

Cited in note (12 L. R. A. 217) on contributory negligence of infant of tender age.

8 L. R. A. 497, *PEOPLE ex rel. PEABODY v. CHICAGO GAS TRUST CO.* 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798.

Corporate ownership of stocks.

Cited in *Knowles v. Sandercock*, 107 Cal. 643, 40 Pac. 1047, holding that furniture manufacturing company cannot own stock in hotel company; *Peshtigo Co. v. Great Western Teleg. Co.* 50 Ill. App. 625, holding lumber company cannot be assessed for shares in telegraph company to which it subscribed; *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 159, 64 L. R. A. 374, 51 N. E. 664, holding manufacturing corporation has no implied power to hold stock in another corporation; *Martin v. Ohio Stove Co.* 78 Ill. App. 108, holding corporation cannot acquire stock of other companies through the medium of third persons; *Northern Securities Co. v. United States*, 193 U. S. 341, 48 L. ed. 701, 24 Sup. Ct. Rep. 436, Affirming 120 Fed. 726, holding corporation formed to hold stock of competing railroads, obtained in exchange for its own, an unlawful combination; *Robotham v. Prudential Ins. Co.* 64 N. J. Eq. 696, 53 Atl. 842, holding corporations may be formed to purchase and deal in stocks of others; *Marshall & B. Co. v. Nashville*, 109 Tenn. 510, 71 S. W. 815, holding ordinance requiring union label on city printing invalid; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 36, 62 L. R. A. 647, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion) majority holding plan of druggists' association, adopted by manufacturers, for rebate to concerns maintaining selling price, valid; *Louisville & N. R. Co. v. Coulter*, 131 Fed. 308, as to control of one corporation by another by means of ownership of its stock; *Converse v. Emerson, T. & Co.* 242 Ill. 627, 90 N. E. 269; *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.* 29 Mont. 459, 75 Pac. 89,—holding one corporation cannot hold stock in another unless expressly authorized by terms of its charter or by statute; *Converse v. Emerson T. & Co.* 148 Ill. App. 608, holding the act of an Illinois corporation organized for purely manufacturing purposes in becoming an incorporator and in subscribing for stock of a corporation, even though the final object sought to be accomplished may be liquidation of a debt, is *ultra vires* and void.

Cited in notes (36 Am. St. Rep. 137, 138, 141) on right to acquire stock in another corporation; (44 L. ed. U. S. 65) on power of corporation to purchase stock of other corporation for purpose of controlling their management.

Distinguished in *Whalen v. Stephens*, 193 Ill. 141, 61 N. E. 921, Affirming, 92 Ill. App. 254, holding that donation of corporate stock can be made to other corporation; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 637, 65 N. E. 470, holding corporation cannot obtain control of another corporation by having latter's stock turned over to trust company for its benefit; *McCoy v. World's Columbian Exposition*, 186 Ill. 360, 78 Am. St. Rep. 288, 57 N. E. 1043, Affirming 87 Ill. App. 607, holding subscriber to stock cannot defend against assessments because other subscribers are corporations unless their obligations have not been fulfilled; *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.* 175 U. S. 55, 44 L. ed. 70, 20 Sup. Ct. Rep. 20, holding statute permitting manufacturing companies to purchase other property necessary for their business does not authorize purchase of stock of other corporations; *Parsons v. Tacoma Smelting & Ref. Co.* 25 Wash. 508, 65 Pac. 765, holding corporation cannot acquire stock of another corporation by expression of such power in its articles of incorporation; *Tourtlot v. Whithed*, 9 N. D. 478, 84 N. W. 8, holding bank can receive stock of milling company in payment of debt, believing it can more quickly realize; *Willoughby v. Chicago Junction R. & United Stock-Yards Co.* 50 N. J. Eq. 676, 25 Atl. 277, holding questions relating to invalidity of corporation controlling stock of another company should be presented by attorney general in behalf of state; *Edmunds v. Illinois C. R. Co.* 2 Ill. C. C. 465, holding foreign

corporation may hold stock in a domestic corporation, which it had express right by its charter to acquire; *Townsend v. Chicago Union Traction Co.* 1 Ill. C. C. 360, holding it is not against the public policy of Illinois for one street railway company to hold stock in another under certain circumstances, and where a lessee company is required to make a deposit in money or securities to secure the performance of the lease, the lessee corporation had implied power to invest its funds in shares of stock of the lessor company, as incident to express power of acquiring a street railroad by lease, such purchase not being for purpose of securing control of lessor company.

Liability on subscription to stock.

Cited in *Bent v. Underdown*, 156 Ind. 519, 60 N. E. 307, holding stockholder cannot be compelled to pay more of subscription than he agreed to in articles of incorporation; *Loverin v. McLaughlin*, 161 Ill. 432, 44 N. E. 99, holding articles of incorporation not conclusive evidence that all subscriptions are bona fide.

Scope of corporate powers.

Cited in *Pond v. Royal League*, 127 Ill. App. 483, holding a fraternal benefit society has no power to fix terms of officers beyond that prescribed by statute; *Cerny v. Jednota Cesky Dam*, 146 Ill. App. 522, holding a corporation is limited to the purposes or object expressed in its charter, regardless of whether the incorporation is by special act of legislature or under general law.

Cited in notes (33 Am. St. Rep. 248) on powers of corporation; (35 Am. St. Rep. 395) on right to transfer public franchises; (70 Am. St. Rep. 157) on ultra vires contracts of private corporation.

Power of corporations to combine.

Cited in *United States v. Addyston, Pipe & Steel Co.* 46 L. R. A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291, holding ruinous competition threatening business suicide no excuse for combination in restraint of trade under United States statute; *Levin v. Chicago Gaslight & Coke Co.* 64 Ill. App. 397, holding stockholder in illegal trust, who has taken stock in successor corporation, cannot tear down that corporation; *Bishop v. American Preservers' Co.* 157 Ill. 310, 48 Am. St. Rep. 317, 41 N. E. 765, holding company formed to purchase preserving companies, illegal combination; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 489, 47 Am. St. Rep. 200, 41 N. E. 188, holding combination to control manufacture and sale of distillery products, illegal; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 257, 21 Am. St. Rep. 448, 27 N. E. 831, holding purely private corporation may sell its plant and retire from business with consent of all stockholders; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.* 85 Me. 539, 35 Am. St. Rep. 385, 27 Atl. 525, holding gas company cannot sell, lease, or assign its corporate rights to another gas company; *National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 270, holding combination illegal under anti-trust law cannot be operated as corporation by its constituent members; *Queen Ins. Co. v. State*, 86 Tex. 266, 22 L. R. A. 492, 24 S. W. 397, holding combination of insurance companies fixing rates not unreasonable restraint of trade aimed at by statute; *McCutcheon v. Merz Capsule Co.* 31 L. R. A. 419, 19 C. C. A. 113, 37 U. S. App. 586, 71 Fed. 792, holding corporation cannot sell its entire plant to another corporation to be organized to carry on same business; *Chevre Bnai Israel v. Chevre Bikur Cholim*, 24 Misc. 190, 52 N. Y. Supp. 712, holding a benevolent and a religious corporation cannot consolidate without legislative sanction; *Stockton v. Central R. Co.* 50 N. J. Eq. 76, 17 L. R. A. 107, 24 Atl. 964, holding railroad cannot be leased to foreign corporation by device of a nominal lessee; *State v. Nebraska Distilling Co.* 29 Neb. 715, 46 N. W. 155, annulling

franchise of a distilling company which has sold to trust all of its property and rights; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 488, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding gas company owed duty to public and may be deprived of franchise for combining with rival company to fix prices; *Harding v. American Glucose Co.* 182 Ill. 617, 64 L. R. A. 764, 74 Am. St. Rep. 189, 55 N. E. 577, holding glucose company, formed to take all properties of competing companies, a trust; *South Chicago City R. Co. v. Calumet Electric Street R. Co.* 171 Ill. 397, 49 N. E. 576, holding contract by competing street car lines virtually agreeing not to cross each other's tracks illegal; *United States v. E. C. Knight Co.* 156 U. S. 29, 39 L. ed. 335, 15 Sup. Ct. Rep. 249 (dissenting opinion) majority holding combination of sugar refineries cannot be suppressed under act to protect trade and commerce against monopolies; *Dunbar v. American Teleph. & Teleg. Co.* 224 Ill. 23, 115 Am. St. Rep. 132, 79 N. E. 423, 8 A. & E. Ann. Cas. 57; *Dunbar v. American Teleg. & Teleph. Co.* 3 Ill. C. C. 10; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 327, 116 S. W. 902; *Dunbar v. American Teleph. & Teleg. Co.* 238 Ill. 486, 87 N. E. 521,—holding a purchase by a corporation of the majority of the stock in a competing corporation to stifle competition is void; *Territory v. Long Bell Lumber Co.* 22 Okla. 913, 99 Pac. 911, holding combination between several parties to create a monopoly in business of buying and selling lumber, unlawful.

Cited in footnotes to *San Diego Water Co. v. San Diego Flume Co.* 29 L. R. A. 839, which upholds, appointment of other corporation to act as sole agent for sale of water within city by plants of both corporations; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 12 L. R. A. 563, which holds agreement to prevent competition between corporations in manufacture of glue under patent, valid.

Cited in notes (52 L.R.A. 380, 381, 391) on right of corporations to consolidate; 8 Am. St. Rep. 193; 74 Am. St. Rep. 238, 245, 260, 268) on combinations constituting unlawful trusts.

What included in implied and incidental powers.

Cited in *Fritze v. Equitable Bldg. & L. Soc.* 186 Ill. 196, 57 N. E. 873, holding building and loan society cannot adopt amendment to by-laws; *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 42, 64 L. R. A. 402, 72 Am. St. Rep. 245, 54 N. E. 619, holding building association not liable for deficiency in foreclosure of mortgage it had assumed to pay outside of its powers; *Chicago v. Wilkie*, 88 Ill. App. 321, holding requirement that plumbers must be licensed within implied power of city; *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 137, 64 L. R. A. 374, 51 N. E. 664, holding manufacturing corporation has implied power to build office building sufficient for future needs but not to own whole city; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 41, 36 L. R. A. 670, 45 N. E. 390, holding corporation has not implied power to lease all its property for quarter of century; *State ex rel. Jackson v. Newman*, 51 La. Ann. 837, 72 Am. St. Rep. 476, 25 So. 408, holding incidental power of corporation is one directly and immediately appropriate to specific power granted; *Gundling v. Chicago*, 176 Ill. 347, 48 L. R. A. 232, 52 N. E. 44, holding ordinance prohibiting sale of cigarettes to minors under sixteen valid as implied power; *Burke v. Mead*, 159 Ind. 261, 64 N. E. 880, holding manufacture of electrical apparatus not incidental to purpose of electric light and power company; *Allen v. Chicago Undertakers' Asso.* 232 Ill. 462, 83 N. E. 952, holding corporation could make by-laws providing for expulsion of members whether such power was expressly given it by charter or not; *Alton Mfg. Co. v. Garrett Biblical Inst.* 243 Ill. 301, 90 N. E. 704, holding an implied power must be directly appropriate to the execution of an express power and not merely remotely related to it; *Scott v. Bankers' Union*,

73 Kan. 585, 85 Pac. 604, holding an incorporated fraternal insurance association, organized under a charter which does not expressly confer the power to issue promissory notes, has no implied power to do so, when such authority is unnecessary to enable the association to exercise the powers expressly given or to accomplish the purpose of its creation.

Cited in footnote to *Newell v. Meyendorff*, 8 L. R. A. 440, which holds valid, contract giving exclusive agency in certain territory for sale of brand of cigars.

Cited in note (111 Am. St. Rep. 310, 311) on implied power of corporations to borrow money and give evidence of indebtedness and security therefor.

How charter affected by statute of incorporation.

Cited in *Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 581, holding city must take water from company with which it has contracted for long period of years and at reasonable price until subsequently changed; *Woodson v. State*, 69 Ark. 530, 65 S. W. 465, holding state can alter or revoke part of powers of corporation if not deprived of property rights already acquired; *Danville v. Danville Water Co.* 178 Ill. 306, 69 Am. St. Rep. 304, 53 N. E. 118, holding provisions of general act were incorporated into charter of water company and subject to alteration by legislature; *Nelson v. Gibson*, 92 Ill. App. 600, holding act under which benefit association incorporated is part of contract between corporation and member; *Bixler v. Summerfield*, 195 Ill. 153, 62 N. E. 849, holding charter of corporation included act under which organized; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 540, 59 L. R. A. 650, 65 N. E. 451, holding provisions of general incorporation act regarded as part of charter of traction company formed to lease and operate street railroads; *State ex rel. Ross v. Anderson*, 31 Ind. App. 44, 67 N. E. 207, holding provisions in articles of incorporation, in contravention of statute providing for annual election of officers, void; *Ozan Lumber Co. v. Biddie*, 87 Ark. 591, 113 S. W. 796, holding where corporation is formed under general laws, such laws constitute its charter; *Wood v. Supreme Ruling*, F. M. C. 212 Ill. 537, 72 N. E. 783, as to statute of incorporation being part of charter.

Cited in note (21 Am. St. Rep. 148) on corporate charters.

Contracts against public policy.

Cited in *Jay County v. Taylor*, 123 Ind. 153, 7 L. R. A. 162, 23 N. E. 752, holding contract by county board to employ counsel for a term of years void as against public policy; *Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 331, 43 Am. St. Rep. 105, 37 Pac. 1042, holding lease by electric light company of its whole plant is against public policy; *People v. Lake Street Elev. R. Co.* 54 Ill. App. 362, holding public policy did not require the validity of ordinance affecting elevated railroad to be tested; *Wittenberg v. Mollyneaux*, 60 Neb. 587, 83 N. W. 842, holding right to run hotel not a franchise, and an innkeeper owes no duty to public except as his guests; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 568, 51 Am. St. Rep. 193, 41 N. E. 1048, holding agreement not to sell oil or gasoline anywhere in state outside of one city for five years void as in restraint of trade; *Hannah v. People*, 198 Ill. 96, 64 N. E. 776, holding right to change public policy based on Constitution does not belong to general assembly; *Fishburn v. Chicago*, 171 Ill. 340, 39 L. R. A. 482, 63 Am. St. Rep. 236, 49 N. E. 532, holding contract under ordinance requiring pavement to be of a certain kind controlled by monopoly, void; *Wakefield v. Van Tassell*, 202 Ill. 47, 65 L. R. A. 515, 95 Am. St. Rep. 207, 63 N. E. 830, holding restriction in deed against grain elevators, not against public policy; *Robson v. Hamilton*, 41 Or. 245, 69 Pac. 651, setting aside transfer of property in fraud of creditor whose judgment was for price of land sold to take husband and son out of state to

avoid prosecution; *Chicago Open Bd. of Trade v. Imperial Bldg. Co.* 136 Ill. App. 614, holding it duty of judiciary to refuse to sustain that which is against public policy; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 532, 14 N. Y. Supp. 277; *Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 111,—holding combination to diminish production and increase price of article unlawful; *Christensen v. People*, 114 Ill. App. 70, holding agreements tending to create a monopoly in favor of members of different labor unions to exclusion of workmen not members of such unions, unlawful.

Cited in notes (13 L.R.A. 384) on power of municipality to create monopoly; (41 L. ed. U. S. 1010) on validity of contracts in restraint of trade.

Distinguished in *State v. Duluth Bd. of Trade*, 107 Minn. 537, 23 L.R.A. (N.S.) 1276, 121 N. W. 395, holding a combination formed by dealers in articles of a similar nature in a particular locality for the purposes of fairly regulating the methods of conducting business and providing for fair dealing among members, but which exercises no improper control over nonmembers and does not control price or production, lawful.

Public policy.

Cited in *Guyer v. Auers*, 132 Ill. App. 527, holding public policy is that principal of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.

Quasi-public corporations.

Cited in *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 545, 41 N. E. 1033, holding gas company owes duty to public and cannot charge consumer more than maximum rate; *Woodberry v. McClurg*, 78 Miss. 836, 29 So. 514, refusing to grant charter to company with power to dig gravel pits, own mills, electric light plants, hotels, and stock of other corporations.

Cited in footnote to *People v. Buffalo Stone & Cement Co.* 15 L. R. A. 240, which requires dissolution of corporation on failure to pay in capital stock within two years.

Cited in note (13 L. R. A. 384) on power of municipality to create monopoly.

Quo warranto.

Cited in *People ex rel. Atty. Gen. v. Michigan Sanitarium & Benev. Asso.* 151 Mich. 464, 115 N. W. 423; *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth & Co.* 143 Mich. 103, 106 N. W. 868,—holding quo warranto may be resorted to for the purpose of inquiry into the right of a foreign corporation to do business within the state.

8 L. R. A. 508, *CHICAGO & N. W. R. CO. v. CHAPMAN*, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417.

Power to limit liability by express contract.

Cited in *Springer v. Ford*, 88 Ill. App. 541, holding carrier only freed from liability for ordinary negligence by express contract; *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 13, 88 Am. St. Rep. 68, 61 N. E. 1095, holding question of assent to bill of lading stipulation limiting liability, for jury; *Baltimore & O. S. W. R. Co. v. Ross*, 105 Ill. App. 60, holding contract limiting time for presenting claim to carrier for damages, binding on shipper; *Chicago & A. R. Co. v. Davis*, 159 Ill. 59, 50 Am. St. Rep. 143, 42 N. E. 382, holding carrier not released by mere bill of lading stipulation from liability for furnishing defective refrigerator cars; *Chicago & N. W. R. Co. v. Simon*, 160 Ill. 652, 43 N. E. 596, Affirming 57 Ill. App. 504, holding carrier not exempted by mere statement in receipt or bill, from common-law liability; *United States Exp. Co. v. Council*, 84 Ill. App. 497, holding carrier not exempted by special contract

from liability for negligently causing death of live stock; *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 96 Ill. App. 340, holding carrier not exempt from liability for carelessly injuring live stock by making "flying switch;" *Georgia R. & Bkg. Co. v. Keener*, 93 Ga. 810, 53 L. R. A. 722, 44 Am. St. Rep. 197, 21 S. E. 287, holding contract limiting liability on household goods, for reduced rate, inoperative in case of carrier's negligence; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 167, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, holding doubtful whether carrier could obtain exemption from liability for negligence; *Brockway v. American Exp. Co.* 168 Mass. 258, 47 S. E. 87, holding contract exempting carrier's liability, invalid where made, not enforceable in Massachusetts; *Wabash R. Co. v. Harris*, 55 Ill. App. 162, holding mere acceptance without objection of bill of lading, limiting liability, not conclusive of assent thereto; *Ingram v. Weir*, 166 Fed. 331, holding statute prohibiting limitation by carrier of common law liability did not apply to limitation in bill of lading requiring suits to be brought within a specified time; *M. M. Mitchell Co. v. Mitchell*, 134 Ill. App. 221, holding the common law liability of carrier to transport can only be limited by an express agreement, and burden to prove such express agreement rests upon carrier; *Wells F. & Co. v. Cutter*, 140 Ill. App. 331; *Pennsylvania R. Co. v. John Anda Co.* 131 Ill. App. 431,—holding limitations of a carrier's liability contained in a bill of lading do not, in the absence of proof that such limitations were brought to attention of shipper and assented to by him, operate to relieve the carrier of its common-law liability to carry and deliver the consigned property to destination waiver in bill of lading; *Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 185, holding a common carrier cannot by express contract exempt itself from responsibility on its part, to exercise ordinary care in the transaction of its business; *Coats v. Chicago, R. I. & P. R. Co.* 239 Ill. 160, 87 N. E. 929, holding carrier may limit its liability to such damage or loss as may occur on its own line; *Cohen v. Wabash R. Co.* 156 Ill. App. 60, holding that carrier cannot by contract avoid liability for loss by negligence in carriage of goods; *Tate v. Missouri P. R. Co.* 157 Ill. App. 109, holding that burden is upon carrier to show assent of shipper to terms of contract limiting its common law liability.

Cited in notes (10 L. R. A. 419) on restriction of carrier's power to limit liability by contract; (14 L. R. A. 434) on carrier's power to limit amount of liability in cases of negligence; (46 Am. St. Rep. 780) on carrier's right to exact special contract from shipper; (88 Am. St. Rep. 98, 102, 106, 108, 112, 130) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 347) on special limitations of liability of carrier.

Distinguished in *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 75, 70 N. W. 508, refusing to enforce contract limiting liability of carrier, admitting it to be valid in state where made; *Blank v. Illinois C. R. Co.* 80 Ill. App. 484, upholding express messenger's contract relieving carrier from liability for injury, for license to ride in cars.

Liability for gross negligence.

Cited in *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 13, 88 Am. St. Rep. 68, 61 N. E. 1095, holding question whether injury was caused by defendant's gross negligence for jury; *Wabash R. Co. v. Brown*, 51 Ill. App. 658, holding exemption from liability for accident, not applicable to accident caused by gross negligence of carrier's servants; *Illinois C. R. Co. v. Leiner*, 202 Ill. 628, 95 Am. St. Rep. 266, 67 N. E. 398, holding railroad liable for death of person wrongfully on train, resulting from gross negligence.

Fixing value of goods shipped.

Cited in *Pacific Exp. Co. v. Foley*, 46 Kan. 474, 12 L. R. A. 806, 26 Am. St.

Rep. 107, 26 Pac. 665 (dissenting opinion), majority upholding contract limiting amount of liability in case of ordinary negligence, value of goods not being stated on shipment; *Central R. Co. v. Murphey*, 113 Ga. 517, 53 L. R. A. 722, 38 S. E. 970, holding general stipulation as to value of fruit shipments per car not an agreement as to value of particular car load of grapes; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 159, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, holding limitation of amount of liability in bill of lading not an agreement as to value of property shipped; *Chicago, B. & Q. R. Co. v. Miller*, 79 Ill. App. 477, holding shipper bound by value he himself placed upon his goods; *Walker-Edmund Co. v. Adams Exp. Co.* 146 Ill. App. 179, holding whether the value of goods shipped, as respect the limitation contained in the supposed contract of shipment, has been agreed upon between carrier and shipper, is a question for jury; *Cutter v. Wells F. & Co.* 237 Ill. 249, 86 N. E. 695; *Powers Mercantile Co. v. Wells F. & Co.* 93 Minn. 147, 100 N. W. 735,—holding under laws of Illinois mere delivery of receipt restricting the indemnity to certain sum did not prevent full recovery by shipper; *Hanson v. Great Northern R. Co.* 18 N. D. 334, 138 Am. St. Rep. 768, 121 N. W. 78, holding that stipulation fixing mere arbitrary valuation upon goods for purpose of limiting carrier's liability will not be enforced.

Cited in note (1 L.R.A.(N.S.) 987) on limiting valuation of property as affecting amount of recovery for loss by carrier's negligence.

Goods shipped at reduced freight rate.

Cited in *Wabash R. Co. v. Brown*, 152 Ill. 490, 39 N. E. 273, holding limitation of amount of liability for reduced rate, without due notice to shipper, not enforceable.

Distinguished in *Jennings v. Smith*, 99 Fed. 190, holding shipper bound by limitation stipulation, knowingly accepting lower rate in consideration therefor.

Construction of term "accident."

Cited in *Ullman v. Chicago & N. W. R. Co.* 112 Miss. 168, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, construing stipulation as to "accident" in bill of lading to include negligence.

Liability of carrier for injury to livestock.

Cited in note (130 Am. St. Rep. 433) on carrier's liability for loss of, or injury to, livestock.

8 L. R. A. 511, *KIRKPATRICK v. CLARK*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71.

Remedies between parties in pari delicto.

Cited in *Bishop v. American Preservers' Co.* 157 Ill. 315, 48 Am. St. Rep. 317, 41 N. E. 765, holding trust agreement to monopolize certain trade admissible by *particeps criminis* as defense in replevin by another; *Ellwood v. Walter*, 103 Ill. App. 221, holding mortgagor may prove mortgage given to defraud creditors in action to foreclose it; *Brady v. Huber*, 197 Ill. 296, 90 Am. St. Rep. 161, 64 N. E. 264, holding deed by father to daughter to defraud creditors will not be canceled at his request; *Drinkall v. Movins State Bank*, 57 L. R. A. 346, holding payee of cashier's check which he indorsed to another for gambling debt can enforce payment against drawer; *Halloran v. Halloran*, 137 Ill. 110, 27 N. E. 82, holding mortgagor in fraudulent mortgage may have same canceled as cloud upon title after its payment; *Burton v. McMillan*, 52 Fla. 245, 11 L.R.A.(N.S.) 165, 42 So. 879, holding court will not aid either of the parties to a contract the sole consideration of which was the compounding of a felony; *Decker v. Stansberry*, 249 Ill. 492, 94 N. E. 940, Ann. Cas. 1912A, 227, holding that

court will not set aside deed at suit of grantor where it was executed to defraud creditors; *Ryan v. Allen*, 138 Ill. App. 56, holding courts will have nothing to do with distribution of money paid, or property transferred, in pursuance to an illegal agreement, but will leave the parties where it finds them; *Wiltz v. Classen*, 153 Ill. App. 567, holding that law will not aid either party, where in conduct of illegal transaction, one obtains property claimed by the other; *Cochran v. Zachery*, 137 Iowa, 591, 16 L.R.A.(N.S.) 240, 126 Am. St. Rep. 307, 115 N. W. 486, 15 A. & E. Ann. Cas. 297, holding no relief can be had under an executed champertous contract; *Jolly v. Graham*, 222 Ill. 554, 113 Am. St. Rep. 435, 78 N. E. 919, holding where a deed was made without consideration and for the purpose of defrauding the wife of the grantor, neither he nor his heirs and assignees could thereafter question its validity.

Cited in footnotes to *Chateau v. Singla*, 33 L. R. A. 750, which denies relief to either party for settlement of partnership to carry on unlawful business; *Rock v. Mathews*, 14 L. R. A. 508, which refuses to cancel obligations given under agreement to compound felony; *Woodson v. Hopkins*, 70 L.R.A. 645, which holds one conducting loan office and receiving rates of interest so extortionate as to shock moral sense and be against public policy not entitled to aid of equity to compel agent to pay over money received in business or to obtain possession of property pertaining to business.

Cited in notes (12 L.R.A. 122) on parties in *pari delicto*; (6 Eng. Rul. Cas. 490) on right to recover back money paid under illegal contract.

Distinguished in *Cook County Brick Co. v. Labahn Brick Co.* 92 Ill. App. 535, holding injunction lies by one in *pari delicto* to restrain enforcement of illegal agreement to raise price of brick; *Burton v. McMillan*, 52 Fla. 476, 8 L.R.A. (N.S.) 993, 120 Am. St. Rep. 220, 42 So. 849, 11 A. & E. Ann. Cas. 380, holding the maxim "in *pari delicto*" etc. does not apply to a case where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of prosecution of her husband for the crime of embezzlement and to save him from prosecution, whether lawful or unlawful; *Fleischer v. Fleischer*, 11 N. D. 232, 91 N. W. 51, holding administrator of deceased party to unlawful contract not in *pari delicto* with defendant and could sue.

Admissibility of evidence of ownership.

Cited in *Glos v. Randolph*, 138 Ill. 271, 27 N. E. 941, holding plaintiff's solicitor's testimony not objected to, that his client owned land, with documentary evidence sufficient prima facie evidence of ownership against void tax deed; *Lavery v. Brooke*, 37 Ill. App. 53, holding legal title to land not provable by parol; *Reynolds v. Clowdus*, 4 Ind. Terr. 686, 76 S. W. 277, holding legal title to land cannot be proved by parol evidence in action of ejectment.

Jurisdiction of court of law over cases of fraud.

Cited in *Supreme Council C. K. & L. v. Beggs*, 110 Ill. App. 147, holding defense of fraud admissible in action at law on benefit certificate; *Phelps v. Nazworthy*, 226 Ill. 260, 80 N. E. 756, holding fraud is cognizable in a court of law as well as a court of equity.

Wife's separate estate.

Cited in *Brennaman v. Schell*, 212 Ill. 367, 72 N. E. 412, holding a purchase of land by a married woman with her separate funds the title to which was taken in the name of her daughter, was not fraudulent as to the husband, though made for the purpose of depriving him of dower.

8 L. R. A. 514, *HARWELL v. SHARP*, 85 Ga. 124, 21 Am. St. Rep. 149, 11 S. E. 561.

Conflict of laws.

Cited in *Cross v. Brown*, 19 R. I. 228, 33 Atl. 147, upholding garnishment attachment over foreign insolvency proceeding transferring foreign debtor's property to trustee; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 717, 43 L. ed. 1146, 19 Sup. Ct. Rep. 797, holding continuance in action for wages in one state should be granted pending garnishment proceedings against debtor for same wages in another state.

Cited in notes (19 L.R.A. 580) on protection of nonresident creditor against garnishment; (15 L.R.A.(N.S.) 1009) on injunction against suit in another state to evade local exemption laws; (122 Am. St. Rep. 451, 454) on protection of exemptions against proceedings in another state.

Abuse of process.

Cited in *Leeman v. McGrath*, 116 Wis. 51, 92 N. W. 425, holding assignment of account for collection by garnishment in another state, to evade exemption laws, not actionable; *Leeman v. McGrath*, 116 Wis. 51, 92 N. W. 425, holding that assigning claim to another and sending it outside the state for purpose of garnishment so as to secure advantage of exemption laws of other state is not malicious abuse of process.

Cited in note (36 L. R. A. 582) on debtor's right of action against creditor for collecting debt in another jurisdiction in evasion of exemption laws of domicil.

8 L. R. A. 516, *STATE v. STEELE*, 106 N. C. 766, 19 Am. St. Rep. 573, 11 S. E. 478.

Right to exclude certain persons from hotel, school, etc.

Approved in *Hutchins v. Durham*, 118 N. C. 471, 32 L. R. A. 707, 24 S. E. 723, sustaining expulsion from stall in market of licensee refusing to vacate after revocation of license and notice to leave; *McMillan v. District No. 4*, 107 N. C. 614, 10 L. R. A. 825, 12 S. E. 330, upholding legislative provision for separate schools for Indians, and excluding negroes therefrom; *Hedding v. Gallagher*, 72 N. H. 389, 64 L. R. A. 819, 57 Atl. 225, holding railroad may give teamster exclusive right to solicit baggage on depot grounds.

Cited in notes (93 Am. St. Rep. 257) on expulsion of trespasser by innkeeper; (2 Brit. Rul. Cas. 684) on duty of innkeeper as to shelter and entertainment of traveler.

8 L. R. A. 524, *MORASSE v. BROCHU*, 151 Mass. 567, 21 Am. St. Rep. 474, 25 N. E. 74.

Sufficiency of declaration.

Cited in *May v. Wood*, 172 Mass. 13, 51 N. E. 191, holding in action based on false and malicious statements, such statements should be substantially alleged; *Doyle v. Kirby*, 184 Mass. 411, 68 N. E. 843, holding declaration for slander averring plaintiff was injured in candidacy for office does not sufficiently allege special damage.

Injury to person's profession, business, or occupation.

Cited in *Hanchett v. Chiatovich*, 41 C. C. A. 651, 101 Fed. 745; *St. James Military Academy v. Gaiser*, 125 Mo. 525, 28 L. R. A. 674, 46 Am. St. Rep. 502, 28 S. W. 851; *Lovejoy v. Whitcomb*, 174 Mass. 588, 55 N. E. 322,—holding false and disparaging statement, about person in his trade and occupation, actionable *per se*; *Chiatovich v. Hanchett*, 96 Fed. 686, holding published words not actionable in themselves may become so when spoken of business, profession, or

occupation of a person; *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L. R. A. 697, 44 C. C. A. 433, 105 Fed. 171 (dissenting opinion), majority holding intentional injury to business by underselling not actionable; *Moran v. Dunphy*, 177 Mass. 487, 52 L. R. A. 116, 83 Am. St. Rep. 289, 59 N. E. 125, holding maliciously inducing employer to discharge employee an actionable tort; *Vegelahn v. Guntner*, 167 Mass. 105, 35 L. R. A. 726, 57 Am. St. Rep. 443, 44 N. E. 1077, holding damage by combined persuasion actionable, as well as if done by falsehood and fraud; *McLoughlin v. American Circular Loom Co.* 60 C. C. A. 89, 125 Fed. 205, holding special damage resulting from publication by manufacturer of letter to agent charging use of electric conduit in way forbidden by insurers, actionable; *Allis-Chalmers Co. v. Iron Molders' Union* No. 125, 150 Fed. 178, holding malicious injury to another's business actionable; *Wells & R. Co. v. Abraham*, 146 Fed. 194, holding one who maliciously and without just cause induces another to break a contract liable; *American Ins. Co. v. France*, 111 Ill. App. 385; *Merrill v. Post Pub. Co.* 197 Mass. 193, 83 N. E. 419,—holding words not actionable per se if spoken in connection with plaintiff's business and followed by special damage, are actionable; *Botkin v. Miller*, 190 Mass. 416, 77 N. E. 49, holding fact that defendants gathered in front of plaintiff's shop and threw missiles therein not alone sufficient to warrant recovery of damages for subsequent loss of business; *Nolin v. Pearson*, 191 Mass. 289, 4 L.R.A.(N.S.) 648, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, as to act deliberately done for purpose of working injury being actionable.

Cited in notes (28 L. R. A. 675) on libel or slander by expressing opinions or comments without misstating facts; (62 L. R. A. 674) on effect of bad motive to make actionable what would otherwise not be; (116 Am. St. Rep. 816, 817) on words imputing lack of knowledge, skill or integrity in regard to business occupation or profession.

Publications libelous upon proof of special damages.

Cited in *Hollenbeck v. Ristine*, 105 Iowa, 491, 67 Am. St. Rep. 306, 75 N. W. 355, holding publication of any untrue, malicious charge libelous, special damages resulting therefrom; *Martin v. The Picayune* (*Martin v. Nicholson Pub. Co.*) 115 La. 986, 4 L.R.A.(N.S.) 864, 40 So. 376, holding same.

Acts committed since commencement of action.

Cited in *Hodges v. Price*, 38 Wash. 7, 80 Pac. 202, holding proof of a series of acts, some of them done after commencement of the action, tending to show a course of conduct and throw light upon and interpret intention of party, admissible.

Cited in note (9 Eng. Rul. Cas. 84) on admissibility of declarations after commencement of action for slander.

Mistake as excuse for publication of libel.

Cited in *Peck v. Tribune Co.* 214 U. S. 189, 53 L. ed. 962, 29 Sup. Ct. Rep. 554, 16 A. & E. Ann. Cas. 1075, holding the publication of the portrait of an entirely different person from the one to whom the annexed libelous article refers is not excused because it was by mistake.

8 L. R. A. 529, *STATE v. HUNTER*, 106 N. C. 796, 11 S. E. 366.

Invalid ordinances.

Cited in *State v. Tenant*, 110 N. C. 614, 15 L. R. A. 425, 28 Am. St. Rep. 715, 14 S. E. 387, holding ordinance making right to build dependent on aldermen's arbitrary decision, void.

Cited in footnote to *Re Stegenga*, 61 L. R. A. 763, which sustains city's authority to provide for punishment of loiterers in streets and bar-rooms.

Cited in note (15 L.R.A.(N.S.) 974) on right of municipality to prohibit loitering.

Distinguished in *State v. Earnhardt*, 107 N. C. 791, 12 S. E. 426, holding ordinance providing for arrest and fine of violator void as to arrest, and valid as to fine.

Violation of unlawful ordinance.

Cited in *State v. Webber*, 107 N. C. 967, 22 Am. St. Rep. 920, 12 S. E. 598, holding violation of unauthorized ordinance not criminal offense.

Arrest without warrant.

Cited in *North v. People*, 139 Ill. 105, 28 N. E. 966, holding officer may arrest without warrant person carrying concealed weapons in his presence; *State v. McAfee*, 107 N. C. 816, 10 L. R. A. 609, footnote p. 607, 12 S. E. 435, holding commission of assault in officer's presence justifies arrest without warrant; *People v. Stark*, 2 Ill. C. C. 165, holding to justify arrest without a warrant the offense must be committed in the presence of officer making arrest; *McCaslin v. McCord*, 116 Tenn. 708, 94 S. W. 79, 8 A. & E. Ann. Cas. 245, holding private persons pursuing criminal without a warrant have no authority to break open door of stranger.

Cited in footnotes to *Cabell v. Arnold*, 22 L. R. A. 87, which holds deputy marshal not justified in making arrest on warrant in marshal's hands; *Burroughs v. Eastman*, 24 L. R. A. 859, which upholds legislative power to authorize arrest without warrant for misdemeanors; *State v. Lewis*, 19 L. R. A. 449, which denies officer's right to arrest for breach of peace not committed in his presence; *McCullough v. Greenfield*, 62 L. R. A. 906 which holds arrest under telephonic direction of officer holding warrant, unlawful; *Baltimore & O. R. Co. v. Cain*, 28 L. R. A. 688, which holds officer's arrest of disorderly passenger without warrant in response to telegram by conductor, who pointed out person to be arrested, not unlawful; *State ex rel. Livingstone v. Williams*, 67 L.R.A. 166, which holds that mandamus will not lie to compel arrest without warrant of designated persons for alleged commission of a misdemeanor.

Cited in note (34 L.R.A.(N.S.) 1183) on innocence of one arrested as affecting right under statute authorizing arrest without warrant when offender taken in act.

Illegal arrest.

Cited in *State v. Rollins*, 113 N. C. 733, 18 S. E. 394, holding good faith does not validate illegal arrest.

Killing by officer making arrest.

Cited in footnotes to *Thomas v. Kinkead*, 15 L. R. A. 558, which denies officer's right to kill one charged with misdemeanor to prevent escape from arrest; *Petrie v. Cartwright*, 59 L. R. A. 720, which denies right of peace officer without warrant to kill fleeing person guilty of misdemeanor but suspected of felony.

Killing of officer making arrest.

Cited in footnotes to *Roberson v. State*, 52 L. R. A. 751, which holds malicious and premeditated killing of officer not reduced to manslaughter because he was making arrest without warrant; *Montgomery v. State*, 55 L. R. A. 866, which sustains right to resist with whatever force necessary officer attempting to make arrest without warrant, for carrying arms, without disclosing authority.

Liability for arrest.

Cited in footnotes to *Tolchester Beach Improv. Co. v. Steinmeier*, 8 L. R. A. 846, which holds corporation not liable for arrest by policeman appointed on its application and paid by it; *Boutte v. Emmer*, 15 L. R. A. 63, which holds mayor not liable for brief imprisonment unless action arbitrary

Right to bail.

Cited in note (10 L. R. A. 847) on constitutional right to admission to bail on arrest for crime.

Breach of the peace.

Cited in note (13 L. R. A. 165) on breach of the peace.

8 L. R. A. 537, *MOSELLER v. DEAYER*, 106 N. C. 494, 19 Am. St. Rep. 540. 11 S. E. 529.

Forcible entry.

Approved in *State v. Howell*, 107 N. C. 840, 12 S. E. 569, holding one breaking open building with knowledge that his former landlord had taken possession, indictable for wilful injury.

Cited in *Chicago, G. W. R. Co. v. Iowa C. R. Co.* 142 Iowa, 473, 119 N. W. 261, holding railway company in possession of switch track could not bring action of forcible entry and detainer against another railway company claiming possession.

Cited in footnote to *State v. Davis*, 14 L. R. A. 206, which holds breaking open door of leased blacksmith shop a forcible entry, though lessee not in shop.

Cited in note (121 Am. St. Rep. 372, 406) on right to civil action for forcible entry and detainer.

Right to punitive damages.

Cited in notes (28 Am. St. Rep. 880; 8 Eng. Rul. Cas. 375) on right to punitive damages.

8 L. R. A. 539, *INDIANAPOLIS CABLE STREET R. CO. v. CITIZENS STREET R. CO.* 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893.

Granting of exclusive privileges.

Cited in *Crowder v. Sullivan*, 128 Ind. 489, 13 L. R. A. 648, 28 N. E. 94, holding permission to one company to use streets, to supply light and water, does not necessarily exclude others; *Scott v. Laporte*, 162 Ind. 59, 69 N. E. 675, as to right of city to grant exclusive right to furnish light or water to its inhabitants.

Cited in note (11 L. R. A. 437) on validity of contracts to regulate competition in trade.

Construction of franchises.

Cited in *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 112, 60 L. R. A. 830, 66 N. E. 436, construing gas franchise fixing maximum charges in favor of public; *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 198, 69 N. E. 1018, holding all grants of franchises by public are to be construed strongly against grantee.

Acceptance of franchise offered by municipality.

Cited in *Africa v. Knoxville*, 70 Fed. 734, holding valid franchise accepted by corporation becomes a contract irrevocable by municipality; *Mercantile Trust Co. v. Denver*, 161 Fed. 773, holding same.

Distinguished in *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 121, 16 L. R. A. 488, 31 N. E. 573, holding ordinance granting right to lay pipes and offering to take gas, when accepted, becomes contract binding on city.

Rights of rival companies under franchise.

Cited in *Africa v. Knoxville*, 70 Fed. 741, holding as between rival companies contending for right of way under franchises, prior occupancy determines prior right; *Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Transit Co.* 69 Ohio St. 411, 69 N. E. 991, denying right of street railroad to construct track

along right of way occupied by another; *Indiana Power Co. v. St. Joseph & E. Power Co.* 159 Ind. 48, 63 N. E. 304, holding power company may condemn land acquired by another power company by purchase without filing appropriation proceedings.

Cited in note (12 L. R. A. 221) on location of railroad; what sufficient to exclude appropriation of land by rival road.

Distinguished in *Electric City R. Co. v. Niagara Falls*, 48 Misc. 95, 95 N. Y. Supp. 73, holding the consent of an existing corporation to use of streets occupied by it, is not a condition precedent to the right of a new and competing company to obtain consent of local authorities to use of such streets.

Municipal authority over streets.

Cited in *Williams v. Citizens' R. Co.* 130 Ind. 73, 15 L. R. A. 67, 30 Am. St. Rep. 201, 29 N. E. 408, holding jurisdiction of cities over streets does not oust courts of jurisdiction over questions of personal or property rights; *Kinsey v. Union Traction Co.* 169 Ind. 631, 81 N. E. 922, as to municipal exclusive control of streets.

Consent for railways in streets.

Cited in *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 303, 26 L. R. A. 339, 47 Am. St. Rep. 264, 38 N. E. 604, holding that street railway cannot be laid upon streets without license or franchise from legislature or municipality.

Who may question corporation's right to engage in business.

Cited in *Seattle Gas & Electric Co. v. Citizens' Light & P. Co.* 123 Fed. 596, holding gas company may question power of rival paralleling its mains to take franchise; *Madison v. Madison Gas & Electric Co.* 129 Wis. 263, 8 L.R.A.(N.S.) 535, 116 Am. St. Rep. 944, 108 N. W. 65, 9 A. & E. Ann. Cas. 819, holding acts in excess and abuse of corporate franchises and privileges resulting in private injuries may be sustained a suit by private parties.

Motive power for street railroad.

Cited in footnotes to *Re Third Ave. R. Co.* 9 L. R. A. 124, which holds valid statute giving street car company right to adopt new motive power; *Hooper v. Baltimore City Pass. R. Co.* 38 L. R. A. 509, which authorizes use of trolley system for street railway without sanction of municipal authorities; *Chicago General R. Co. v. Chicago City R. Co.* 50 L. R. A. 734, which denies liability for collision with cars of other company because of running cable cars under authority to use animal power only.

Cited in note (10 L. R. A. 176) on regulation as to motive power of street railroads.

Equal privileges.

Cited in *Knight & J. Co. v. Miller*, 172 Ind. 49, 87 N. E. 823, holding anti-trust act, prohibiting contracts and combinations in restraint of trade, does not deprive persons of their natural rights nor grant unequal privileges.

8 L. R. A. 549, *STANLEY v. WABASH, ST. L. & P. R. CO.* 100 Mo. 435, 3 Inters. Com. Rep. 176, 13 S. W. 709.

Presumption as to extraterritorial force of statute.

Approved in *Gibson v. Connecticut F. Ins. Co.* 77 Fed. 564, holding statute respecting insurance on real property will be presumed to have been intended to operate only on property within state.

Cited in *Nenno v. Chicago, R. I. & P. R. Co.* 105 Mo. App. 550, 80 S. W. 24, holding a statute of a foreign state cannot be considered in construing a contract made in such state, unless proved.

Regulation of commerce.

Approved in *State v. Rankin*, 11 S. D. 149, 76 N. W. 299, holding state cannot burden interstate commerce by imposing license tax on solicitors.

Cited in *People v. Lake Shore & M. S. R. Co.* 2 Ill. C. C. 378, holding that statute as to weighing of grain is void as to interstate shipments; *Southern R. Co. v. Com.* 107 Va. 776, 17 L.R.A.(N.S.) 366, 60 S. E. 70, holding rule of state corporation commission requiring railway companies to furnish cars of required kind upon four days' notice and providing for a forfeiture for each day's default, void as to shipments to points outside state.

Cited in notes (26 Am. St. Rep. 579) on jurisdiction of Congress over interstate commerce; (27 Am. St. Rep. 568) on state regulation of interstate commerce.

Reversal for error.

Cited in *Bogges v. Metropolitan Street R. Co.* 118 Mo. 334, 23 S. W. 159, holding judgment will not be reversed for error not affecting merits of the action; *Logan v. Field*, 192 Mo. 70, 90 S. W. 127, holding same.

8 L. R. A. 551, *SINGER v. STATE*, 72 Md. 464, 19 Atl. 1044.

Government regulation of occupations.

Approved in *Ford v. State*, 85 Md. 475, 41 L. R. A. 552, 60 Am. St. Rep. 337, 37 Atl. 172, sustaining statute making possession of prohibited articles an offense; *State ex rel. Burroughs v. Webster*, 150 Ind. 618, 41 L. R. A. 217, 50 N. E. 750, holding requirement that all physicians shall obtain new certificate and license upon proper showing, valid; *State v. Randolph*, 23 Or. 82, 17 L. R. A. 472, 37 Am. St. Rep. 655, 31 Pac. 201, holding exemption of practitioners at time of passage of medical-practice act, valid; *Scholle v. State*, 90 Md. 740, 50 L. R. A. 413, 46 Atl. 326, holding exemption from medical-practice act of surgeons of United States Army, Navy, or marine hospital service, those in consultation from other states, and those temporarily under preceptors, not unreasonable; *State v. Knowles*, 90 Md. 657, 49 L. R. A. 698, 45 Atl. 877, holding statute requiring dentists to obtain certificate of proficiency from state board, valid; *State v. Gardner*, 58 Ohio St. 609, 41 L. R. A. 691, 65 Am. St. Rep. 785, 51 N. E. 136, and *State ex rel. Winkler v. Benzenberg*, 101 Wis. 177, 76 N. W. 345, sustaining statute regulating business of plumbing; *State v. Heinemann*, 80 Wis. 257, 27 Am. St. Rep. 34, 49 N. W. 818, sustaining statute requiring retailing, compounding, or dispensing medicines by registered pharmacist; *State v. Zeno*, 79 Minn. 84, 48 L. R. A. 90, 79 Am. St. Rep. 422, 81 N. W. 748, holding statute restricting occupation of barber to registered barbers, valid; *Ex parte Lucas*, 160 Mo. 233, 61 S. W. 218, holding statute regulating occupation of barbers in towns of over 50,000 inhabitants, valid.

Cited in *Felton v. Atlanta*, 4 Ga. App. 185, 61 S. E. 27; *Douglas v. People*, 225 Ill. 541, 8 L.R.A.(N.S.) 1118, 116 Am. St. Rep. 162, 80 N. E. 341,—holding statute providing for examination and licensing of plumbers a valid exercise of police power; *Kentucky Bd. of Pharmacy v. Cassidy*, 115 Ky. 703, 74 S. W. 730, holding law requiring registration of pharmacists valid; *State v. Caspare*, 115 Md. 26, 80 Atl. 606, holding that legislature may pass laws and regulations necessary for safety of health, morals and safety of society; *State v. Briggs*, 45 Or. 374, 77 Pac. 750, 2 A. & E. Ann. Cas. 424, holding law requiring examination of barbers valid.

Cited in footnote to *Schnaier v. Navarre Hotel & Importation Co.* 70 L.R.A. 722, which holds void, statute requiring every member of plumbing firm to be registered plumber.

Cited in notes (21 L.R.A. 791) as to constitutionality of statutes restricting

contracts and business; (129 Am. St. Rep. 271) on constitutional limitations on power to impose license or occupation taxes.

Distinguished in *Long v. State*, 74 Md. 572, 12 L. R. A. 427, 28 Am. St. Rep. 268, 22 Atl. 4, holding statutory prohibition of gift enterprise without element of chance, invalid.

Disapproved in *State ex rel. Richey v. Smith*, 42 Wash. 242, 5 L.R.A.(N.S.) 677, 114 Am. St. Rep. 114, 84 Pac. 851, 7 A. & E. Ann. Cas. 577, holding law providing for licensing plumbers in violation of Constitution of United States as affecting privileges and immunities of citizens.

Delegation of police power.

Cited in *Downs v. Swann*, 111 Md. 61, 23 L.R.A.(N.S.) 792, 134 Am. St. Rep. 586, 73 Atl. 653, holding state may delegate the police power to subordinate boards and commissions, and a reasonable and just exercise by them of the delegated power will be upheld.

8 L. R. A. 552, *JOHNSON v. ELKINS*, 90 Ky. 163, 13 S. W. 448.

Exemptions.

Approved in *Dickinson v. Johnson*, 110 Ky. 247, 54 L. R. A. 575, 96 Am. St. Rep. 434, 61 S. W. 267, holding salaries of public officers under \$5,000 per year, not to be ordered set apart in part for payment of debts.

Cited in *Curtis v. Helton*, 109 Ky. 496, 95 Am. St. Rep. 388, 59 S. W. 745, holding land purchased with pension check, not exempt; *Sanders v. Herndon*, 122 Ky. 769, 5 L.R.A.(N.S.) 1075, 121 Am. St. Rep. 493, 93 S. W. 14, as to pension money being exempt; *Ferguson's Estate*, 140 Wis. 587, 123 N. W. 123, 17 A. & E. Ann. Cas. 1189, holding pension money, under federal statute, is not exempt from claims of creditors of pensioner after money has been to him and converted into other property; *Nicholson v. Nicholson*, 125 Ky. 633, 128 Am. St. Rep. 263, 101 S. W. 985, holding where debtor paid on the price of homestead money which was exempt, the exemption followed the money into the homestead.

Cited in footnote to *Crow v. Brown*, 11 L. R. A. 110, which holds exempt, property purchased with pension money.

Cited in notes (19 L.R.A. 35) as to how far proceeds of exempt property retain exempt character; (46 L. ed. U. S. 834) on exemption of property purchased with pension money, or of pension money after payment to pensioner.

Distinguished in *Falkenburg v. Johnson*, 102 Ky. 548, 80 Am. St. Rep. 369, 44 S. W. 80, holding transfer of pension check to pensioner's wife as separate estate no fraud against creditors.

Disapproved in *Reiff v. Mack*, 160 Pa. 269, 40 Am. St. Rep. 720, 28 Atl. 699, holding bank deposit of proceeds of collected pension check, not subject to attachment execution.

Conditions precedent to equitable remedies of creditors.

Cited in notes (23 L.R.A.(N.S.) 67) on conditions precedent to equitable remedies of creditors; (66 Am. St. Rep. 282) on demands which will support creditor's bill.

8 L. R. A. 553, *HOLLAND v. CITIZENS' SAV. BANK*, 16 R. I. 734, 19 Atl. 654.

Compelling assignment of mortgage.

Approved in *McCulla v. Beadleston*, 17 R. I. 23, 20 Atl. 11, holding mortgagor not entitled to compel assignee of mortgage to receive payment from, and assign mortgage to, third person.

Cited in notes (27 Am. St. Rep. 753; 18 Eng. Rul. Cas. 176) on compelling mortgagee to assign mortgage on payment.

Subrogation to mortgagee's rights.

Cited in footnote to *Meeker v. Larson*, 57 L. R. A. 901, which denies right of one furnishing money to discharge mortgage, to be subrogated to mortgagee's rights.

Lis pendens.

Cited in footnote to *Taylor v. Carroll*, 44 L. R. A. 479, which holds purchaser of property relieved from effect of *lis pendens* as notice by over twenty years' delay in proceeding with foreclosure.

Cited in note (56 Am. St. Rep. 867) on law of *lis pendens*.

Rights of subsequent purchaser.

Cited in *Blackmar v. Sharp*, 23 R. I. 426, 50 Atl. 852, upholding validity of mortgages not showing they were given for future advances, against one acquiring lien intermediate recording and advances; *Silverman v. Landrum*, 19 Tex. Civ. App. 405, 47 S. W. 404, holding one who purchases land for a valuable consideration without notice that the time for enforcement of deed of trust had been deferred by parol agreement, will be protected as innocent purchaser.

Setting aside mortgage foreclosure sale for fraud.

Cited in *Nichols v. Flag*, 24 R. I. 31, 51 Atl. 1039, holding evidence showed sale was a fraudulent devise to cut out second mortgage and it would be set aside.

8 L. R. A. 556, *HAMSHER v. HAMSHER*, 132 Ill. 273, 23 N. E. 1123.

What is a religious corporation formed for religious purpose.

Cited in *Re Fay*, 37 Misc. 535, 76 N. Y. Supp. 62, holding Young Men's Christian Association not religious corporation within meaning of transfer tax law; *Re Walker*, 200 Ill. 571, 66 N. E. 144, holding building devoted in part to uses of Sunday school and in part to promiscuous gatherings of religious society, not within exemption from taxation of property "exclusively used for public worship."

Power to take and hold property.

Cited in *Alden v. St. Peter's Parish*, 158 Ill. 641, 30 L. R. A. 236, 42 N. E. 392, holding prohibition against incorporated religious societies receiving more than 10 acres of land not applicable to unincorporated society; *Wunderle v. Wunderle*, 144 Ill. 64, 19 L. R. A. 89, 33 N. E. 195, holding under statute making nonresident alien incapable of acquiring title to real estate, alien cannot hold defeasible title subject to forfeiture to state.

Cited in footnote to *Thompson v. West*, 49 L. R. A. 337, which denies right of religious corporation to buy real estate for speculation.

Right to question acts ultra vires of corporation.

Cited in *Hagerstown Mfg. Min. & Land Improv. Co. v. Keedy*, 91 Md. 438, 46 Atl. 965, holding where corporation has limited power to hold real estate, its right to hold particular lands can be questioned only by state; *Farrington v. Putnam*, 90 Me. 431, 38 L. R. A. 349, 37 Atl. 652, holding devise to charitable association of property exceeding in value limitation in its charter will not be declared void at instance of heirs; *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. 801, holding next of kin cannot question power of corporation to take devise increasing property beyond charter limit; *Chicago General R. Co. v. Chicago City R. Co.* 87 Ill. App. 26, holding fact that tort committed by corporation result of act *ultra vires*, not available to plaintiff, if act is not prohibited, and does not constitute nuisance; *Texarkana & Ft. S. R. Co. v. Texas & N. O. R. Co.* 28 Tex. Civ. App. 554, 67 S. W. 525, holding railroad cannot justify trespass on another's track by denying right to build such track; *Hill v. Gruell*, 42 Ill. App.

419, holding stockholders of dissolved corporation receiving proportionate share of assets are trustees for creditors of corporation; *Hossack v. Ottawa Development Asso.* 244 Ill. 295, 91 N. E. 439, holding that power of corporation not for pecuniary profit to hold real estate cannot be questioned in collateral proceeding; *Hubbard v. Worcester Art Museum*, 194 Mass. 286, 9 L.R.A.(N.S.) 693, 80 N. E. 490, 10 A. & E. Ann. Cas. 1025, holding right of corporation to hold real estate can only be questioned by state.

Cited in notes (32 L.R.A. 294) on right of private persons to contest power of corporation to take or hold property; (60 Am. St. Rep. 319) on right of heirs to assail legacy to corporation.

8 L. R. A. 559, ST. LOUIS, I. M. & S. R. CO. v. RAMSEY, 53 Ark. 314, 22 Am. St. Rep. 195, 13 S. W. 931.

Riparian ownership.

Approved in *Ft. Smith & V. B. Bridge Co. v. Hawkins*, 54 Ark. 517, 12 L. R. A. 491, 16 S. W. 565, holding boundary of incorporated town on navigable river extends to high-water mark although county bounded by channel; *Peuker v. Canter*, 62 Kan. 372, 63 Pac. 617, sustaining riparian ownership of accretion within original boundaries of intervening lots; *Wallace v. Driver*, 61 Ark. 435, 31 L. R. A. 319, 33 S. W. 641, holding island formed in navigable river where land formerly existed not appurtenant to upland unless formed by accretion; *Crawford Co. v. Hall*, 67 Neb. 350, 60 L.R.A. 901, 93 N. W. 781, holding rights of owner in boundary stream not navigable in fact inferior to public right to appropriate for irrigation.

Cited in *Harrison v. Fite*, 78 C. C. A. 447, 148 Fed. 783, holding the bed of a navigable stream is that soil so usually covered by water that it is wrested from vegetation, and does not extend to or include that upon which grasses, shrubs and trees grow, though covered by the great annual rises; *Morrison v. First Nat. Bank*, 88 Me. 159, 33 Atl. 782, holding the term "high water mark," when applied to a nontidal river, means the highest limit reached by the water when the river is unaffected by freshets and contains its natural and usual flow; *Nix v. Pfeifer*, 73 Ark. 203, 83 S. W. 951, holding land formed by gradual and imperceptible accretion, or by gradual receding of the water belongs to the owner of the contiguous land to which the addition is made; *Kinthead v. Turgeon*, 74 Neb. 576, 1 L.R.A.(N.S.) 764, 104 N. W. 1061, 13 A. & E. Ann. Cas. 43, holding the title to the bed of a navigable river in Nebraska is in the state, and the rights of a riparian proprietor on such streams are bounded by the banks of the river; *State v. Muncie Pulp Co.* 119 Tenn. 72, 104 S. W. 437, holding in Tennessee grants of lands lying on navigable streams extend to ordinary low-water mark, and the title to the bed of the stream remains in the state.

Cited in footnote to *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in notes (42 L. R. A. 171) as to title to land under water; (12 L. R. A. 635, 677) on navigable waters; title to land below high-water line; (42 L. R. A. 171) as to title to land under water; (19 Am. St. Rep. 229) on rights of littoral and riparian owners in navigable waters; (35 Am. St. Rep. 307, 308) on accretion and alluvion; (72 Am. St. Rep. 286) on law of accretions applicable to islands in navigable rivers; (23 Eng. Rul. Cas. 190) on ownership of riparian owner to thread of stream.

Test of navigability.

Cited in notes (42 L.R.A. 318, 126 Am. St. Rep. 712, 721) as to what waters are navigable.

8 L. R. A. 562, *BUETER v. BUETER*, 1 S. D. 94, 45 N. W. 208.

Jurisdiction of suit for support.

Approved in *Edgerton v. Edgerton*, 12 Mont. 139, 16 L. R. A. 99, 33 Am. St. Rep. 557, 29 Pac. 966, holding suit to compel husband if able to support his deserted and destitute wife, within jurisdiction of equity.

Cited in *Behrle v. Behrle*, 120 Mo. App. 682, 97 S. W. 1005; *Baier v. Baier*, 91 Minn. 170, 97 N. W. 671,—holding a wife who is living apart from her husband for a cause legally justifying her, may maintain, independent of an action for divorce, an equitable action against him for her support.

Cited in notes (77 Am. St. Rep. 231, 232, 233, 235) on wife's right to maintain separate suit for maintenance independent of suit for divorce; (38 L.R.A.(N.S.) 955, 960) on power, in absence of statute, to decree alimony or maintenance, independently of proceedings for divorce.

Allowance of attorney's fees in divorce suit.

Cited in note (9 L. R. A. 698) concerning divorce for desertion.

Duress.

Cited in *Kwentsky v. Sirovy*, 142 Iowa, 399, 121 N. W. 27, holding the threat of a husband to prosecute his wife and her paramour for criminal intimacy, whereby he procured from her a stipulation upon which a decree of court was entered setting aside a deed from himself to wife, duress, irrespective of guilt or innocence of wife.

8 L. R. A. 566, *PEASE v. RITCHIE*, 132 Ill. 638, 24 N. E. 433.

Appeal dismissed in 140 U. S. 693, 35 L. ed. 594, 11 Sup. Ct. Rep. 1026.

Who may redeem from mortgage sale.

Cited in *Paddack v. Staley*, 13 Colo. App. 370, 58 Pac. 363, holding judgment creditor may redeem before his judgment becomes a lien.

Validity of execution.

Cited in *McDonald v. Fuller*, 11 S. D. 360, 74 Am. St. Rep. 815, 77 N. W. 581, holding execution to other county valid though issued before transcript of judgment filed in county where judgment rendered; *International Packing Co. v. Cichowicz*, 114 Ill. App. 128, holding under statute execution must be entered within one year after judgment.

Title of purchaser at judicial sale.

Cited in *Pease v. Hale*, 37 Ill. App. 273, holding purchaser on execution sale has interest of mortgagor subject to mortgage; *Smith v. Mace*, 137 Ill. 73, 26 N. E. 1092, holding homestead passes to junior judgment creditor redeeming from purchaser at mortgage sale.

Effect of discharge in bankruptcy.

Cited in *Mallin v. Wenham*, 209 Ill. 258, 65 L. R. A. 606, 70 N. E. 564, Affirming 103 Ill. App. 612, holding discharge in bankruptcy does not invalidate assignment of future wages as security; *Wabash R. Co. v. Meyer*, 119 Ill. App. 107, holding discharge in bankruptcy will not defeat the right of the assignee of wages of bankrupt to recover same where earned and assigned before discharge.

Cited in footnote to *Colwell v. Tinker*, 58 L. R. A. 765, which holds judgment for criminal conversation not released by discharge in bankruptcy.

"Issuing" an instrument.

Cited in *Equitable Mut. F. Ins. Co. v. McCrea*, 3 Ill. C. C. 116, holding that issuing means execution as well as delivery of instrument.

8 L. R. A. 568, *ANDERSON v. ROBBINS*, 82 Me. 422, 19 Atl. 910.

Right of mortgagee to rent.

Cited in note (15 Eng. Rul. Cas. 637) on right of mortgagee to rent, when he is entitled to possession.

Attornment as defense to action for rent.

Cited in note (18 L.R.A.(N.S.) 397) on attornment to avoid eviction, to stranger entitled to immediate possession, as defense in action for rent.

8 L. R. A. 570, *SYMONDS v. JONES*, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. 820.

Use of trademark.

Cited in *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* 100 Me. 471, 4 L.R.A.(N.S.) 967, 62 Atl. 499, holding one is not permitted, by imitating a distinctive trademark already employed by another, to impose upon the public an article of his own manufacture as the genuine article of another.

Cited in note (25 Eng. Rul. Cas. 220) on right of use of own name as trademark.

— Assignment.

Cited in *Geo. T. Staggs Co. v. Taylor*, 95 Ky. 669, 27 S. W. 247, holding that manufacturer's autograph cannot be used on label by vendee of plant; *Alaska Packers' Asso. v. Alaska Improv. Co.* 60 Fed. 104, holding trademark used as mark of special qualities imparted by originator, not property of assignee; *Wilmer v. Thomas*, 74 Md. 490, 13 L. R. A. 382, 22 Atl. 403, holding good will and trademarks not personal in character, pass to purchaser under assignment of all property in old mills; *Layton Pure Food Co. v. Church & D. Co.* 104 C. C. A. 464, 182 Fed. 31, holding that courts will refuse relief to assignee, who uses trademark on goods made by himself at different place without giving notice of assignment, when chief effect of trademark is to point out original place of manufacture of article; *Ludwig & Co. v. Claviola Co.* 144 App. Div. 393, 129 N. Y. Supp. 310, holding that tradename under which pianos have been manufactured and sold passes to buyer of firm's assets and good will.

Cited in note (1 L.R.A.(N.S.) 712, 717, 719, 724, 725) on sale of trademark.

Trademark in geographical name.

Cited in note (45 L. ed. U. S. 366) on trademark in geographical name.

8 L. R. A. 575, *McDANIEL v. CUMMINGS*, 83 Cal. 515, 23 Pac. 795.

Surface water.

Approved in *Cushing v. Pires*, 124 Cal. 665, 57 Pac. 572, holding that landowner cannot protect his own land by turning surface water on another's land to his injury.

Cited in *Sanguinetti v. Poek*, 136 Cal. 472, 89 Am. St. Rep. 169, 69 Pac. 98, holding lower owner may protect from overflow of natural stream although to injury of higher land; *Heier v. Krull*, 160 Cal. 444, 117 Pac. 530, holding that land owner has right to complain of others who by interference with natural conditions, cause surface water to be discharged in greater quantities or in different manner than it would be discharged under natural conditions; *Humphreys v. Moulton*, 1 Cal. App. 258, 81 Pac. 1085, holding owner of land over which surface water flows in more than one channel has not right to collect the same in a single channel and discharge it upon land of another; *Wood v. Moulton*, 146 Cal. 319, 80 Pac. 92, holding owner of higher lands has no right to divert surface water from his lands onto lands of another over which they would not naturally have flowed; *Fordham v. Northern P. R. Co.* 30 Mont. 432, 66

L.R.A. 560, 104 Am. St. Rep. 729, 76 Pac. 1040, holding flood waters of a river, which became severed from the main current, or leave it never to return, and spread out over lower ground become surface waters; *Cass v. Dicks*, 14 Wash. 80, 53 Am. St. Rep. 859, 44 Pac. 113, holding proprietor of higher land bordering on river cannot enjoin the erection of a levee or embankment by the proprietor of the lower land, though such embankment may increase the accumulation of flood water on higher land; *Albany v. Sikes*, 94 Ga. 33, 26 L.R.A. 654, 47 Am. St. Rep. 132, 20 S. E. 257, as to common and civil law rules in regard to surface waters.

Cited in notes (25 L. R. A. 530) as to what is surface water; (21 L. R. A. 594, 599) on rights as to flow of surface water; (10 L. R. A. 487) as to right to use of flowing water; (85 Am. St. Rep. 720, 721, 722) on right of land owner to accelerate or diminish flow of water to or from lands of another.

Distinguished in *Davis v. Fry*, 14 Okla. 348, 69 L.R.A. 464, 78 Pac. 180, 2 A. & E. Ann. Cas. 193, holding when surface waters by natural drainage collect in a natural basin or depression upon the premises of a dominant tenement, and escape therefrom only by percolation or evaporation forming thereby a lake or pond permanent in its character, the waters so collected cease to be surface waters and may not by artificial means be drained to damage of servient tenement.

8 L. R. A. 578, *LEMBECK v. NYE*, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686.

Boundaries — By highway.

Cited in *Paine v. Consumers' Forwarding & Storage Co.* 19 C. C. A. 102, 37 U. S. App. 539, 71 Fed. 629, holding description bounding by monument having width, presumed to carry fee to center rather than edge; *Avery v. United States*, 44 C. C. A. 164, 104 Fed. 713, assuming without deciding that grantee of property bounded by side line of street takes only to such line.

— By water.

Cited in *Hardin v. Jordan*, 140 U. S. 393, 35 L. ed. 437, 11 Sup. Ct. Rep. 808, holding freshwater lakes and ponds belong to owners of adjacent soil; *Gouverneur v. National Ice Co.* 134 N. Y. 363, 18 L. R. A. 700, 30 Am. St. Rep. 669, 31 N. E. 865, holding land under small inland lakes and ponds presumed to belong with uplands; *Lamprey v. State*, 52 Minn. 194, 18 L. R. A. 676, 38 Am. St. Rep. 541, 53 N. W. 1139, holding patent for bed of meandered lake void where lands bordering thereon previously granted without reservation; *Poynter v. Chipman*, 8 Utah, 450, 32 Pac. 690, holding grantee to meander line entitled to dry land made by gradual recession of water; *Fuller v. Shedd*, 161 Ill. 488, 33 L. R. A. 159, 52 Am. St. Rep. 380, 44 N. E. 286, holding grant bounded on meandered lake does not include land under water; *Boardman v. Scott*, 102 Ga. 414, 51 L. R. A. 184, 30 S. E. 982, holding that deed of land bounded by permanent artificial pond conveys to low-water mark at date of execution; *Concord Mfg. Co. v. Robertson*, 66 N. H. 28, 18 L. R. A. 694, 25 Atl. 718, holding diversion of water of great pond unlawful where to damage of riparian owner on outlet; *Turner v. James Canal Co.* 155 Cal. 89, 22 L.R.A.(N.S.) 401, 132 Am. St. Rep. 59, 99 Pac. 520, 17 A. & E. Ann. Cas. 823, holding that the laws of riparian rights apply to all natural bodies of water; *Calkins v. Hart*, 64 Misc. 153, 118 N. Y. Supp. 1049, holding where the titles of the owners of land abutting upon a lake which is oval in form run to the center of the lake each abutting owner is entitled to the land under water in front of his premises to the thread of the lake; *Smoulter v. Boyd*, 209 Pa. 151, 66 L.R.A. 832, 103 Am. St. Rep. 1000, 58 Atl. 144, holding where land bordering on a lake is transferred by metes and bounds only that land within the metes and bounds passes; *Willey v. Lewis*, 28 Ohio

L. J. 105, 11 Ohio Dec. Reprint, 610, on the ownership of lands under a stream as affected by changes in the channel; *Bass Lake Co. v. Hollenbeck*, 11 Ohio C. C. 511, 5 Ohio C. D. 243, holding that a non-navigable inland lake is a subject of private ownership and the rights in the waters covering the lands belongs to the owners of the lands; *Dayton (City) v. Cooper Hydraulic Co.* 7 Ohio N. P. 501, 10 Ohio S. & C. P. Dec. 203, holding that where a water company was limited to the bed of a stream it meant the hollow between the low water marks at ordinary stages during the year, and the low water mark is the boundary.

Cited in notes (18 L. R. A. 697) as to ownership of bed of lakes and ponds; (40 L.R.A. 394) on separation of riparian rights from upland; (10 Eng. Rul. Cas. 217) on riparian owner's right to use of stream.

Distinguished in *Head v. Chesbrough*, 4 Ohio N. P. 76, 6 Ohio S. & C. P. Dec. 497; *Chesbrough v. Head*, 3 Ohio C. C. N. S. 519, 13-23 Ohio C. C. 430,—holding that a conveyance of land bounded by a navigable stream carries title to the center of the bed of the stream unless otherwise particularly indicated; *Lake Shore & M. S. R. Co. v. Platt*, 34 Ohio L. J. 71, 2 Ohio Leg. News 691, holding that a conveyance of land making the line of navigation the boundary line, carries title to the central thread of the stream; *Avery v. United States*, 44 C. C. A. 161, 104 Fed. 713, assuming without deciding that where the conveyance bounds the property as by the west line of a street, that the grantee takes to the west line and not to the center of the street.

Limited in *Lake Shore & M. S. R. Co. v. Platt*, 53 Ohio St. 268, 29 L. R. A. 52, 41 N. E. 243, holding conveyance of riparian lands bounded by line of navigation conveys to thread of stream; *Head v. Chesbrough*, 4 Ohio N. P. 76, holding conveyance of platted lots upon bank of navigable stream conveys grantor's rights to thread of stream where bed not platted.

Right to Injunction.

Distinguished in *Snyder v. Union Depot Co.* 19 Ohio C. C. 371, refusing injunction on cross-petition where plaintiffs are not shown to be insolvent.

— Against continuing trespasses.

Followed in *Snyder v. Union Depot Co.* 19 Ohio C. C. 371, 10 Ohio C. D. 647, on the right to enjoin the continued violation of the rules of the Union Depot company regarding the conduct of hackmen.

Approved in *Strawberry Valley Cattle Co. v. Chipman*, 13 Utah, 471, 45 Pac. 348, and *Roddy v. Dickson*, 25 Pa. Co. Ct. 93, holding restraining order proper against continuing trespass; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 70, and *Boston & M. R. Co. v. Sullivan*, 177 Mass. 233, 83 Am. St. Rep. 275, 58 N. E. 689, sustaining injunction suit where only remedy at law is by large number of suits for damages without substantial results; *Great Southern Fire Proof Hotel Co. v. McClain*, 3 Ohio N. P. 253, granting temporary injunction against threatened acts constituting repeated trespasses.

Cited in *Hayois v. Salt River Valley Canal Co.* 8 Ariz. 290, 71 Pac. 944, holding the commission of a mere trespass will not be restrained but there must be some great vexation from continued trespass, or some irreparable mischief which cannot easily be measured by money damages; *Dunker v. Field & T. Club*, 6 Cal. App. 532, 92 Pac. 502; *Cragg v. Levinson*, 238 Ill. 84, 21 L.R.A.(N.S.) 425, 87 N. E. 121, 15 A. & E. Ann. Cas. 1229; *Pierce v. Stablemen's Union*, 156 Cal. 74, 103 Pac. 324,—holding while equity will not enjoin trespass as such, yet when the acts committed and threatened are in the nature of a continuing trespass, working irreparable injury, they will be enjoined; *Hall v. Henninger*, 145 Iowa, 243, 139 Am. St. Rep. 412, 121 N. W. 6, holding that the trespasses are repeated and accompanied by threats of repetition or exclusion of the rightful

owner, they may be enjoined; *Great Southern Hotel Co. v. McClain*, 3 Ohio N. P. 253, 4 Ohio S. & C. P. Dec. 318, holding that injunction is the appropriate remedy for the prevention of trespasses which by reason of the persistency with which they are repeated, threaten to become of a permanent nature; *Fuller v. Fisk*, 43 Pa. Super. Ct. 494, holding that if the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each act by itself may not be destructive, the courts may enjoin the repetition of the trespass.

Cited in notes (99 Am. St. Rep. 738, 752) on injunction against trespass on realty; (13 L.R.A.(N.S.) 177) on injunction against repeated trespass.

Fishery rights.

Cited in notes (60 L.R.A. 497, 513, 522) on the right to fish; (131 Am. St. Rep. 754) on law of fishing.

8 L. R. A. 584, *STATE v. KAISER*, 20 Or. 50, 23 Pac. 964.

Affidavit in contempt proceedings.

Approved in *State ex rel. Hammer v. Downing*, 40 Or. 325, 66 Pac. 917, holding facts constituting contempt not committed in presence of court must be shown by affidavit; *State ex rel. Jones v. Conn*, 37 Or. 598, 62 Pac. 289, to point that affidavit for constructive contempt is essential to jurisdiction of court.

Cited in *State v. Lavery*, 31 Or. 84, 49 Pac. 852, holding amendment to relator's affidavit charging contempt must be sworn to; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 579, 70 Pac. 71, holding court cannot punish for disobedience of injunction order one whom affidavit does not show in privity with nominal parties; *St. Louis & S. F. R. Co. v. State*, 26 Okla. 81, 30 L.R.A.(N.S.) 145, 107 Pac. 929, holding that amendment to affidavit charging railway with violating certain orders of corporation commission other than order named in original affidavit, must be certified.

Publication constituting contempt.

Approved in *State v. Tugwell*, 19 Wash. 249, 43 L. R. A. 722, 52 Pac. 1056, holding publication tending to embarrass or influence the court in a pending case a contempt; *Field v. Thornell*, 106 Iowa, 16, 68 Am. St. Rep. 281, 75 N. W. 685, holding publication of scurrilous article concerning pending trial and handing copy of paper to jurors during adjournment, a contempt of court.

Cited in *Fellman v. Mercantile F. & M. Ins. Co.* 116 La. 729, 41 So. 49; *Ex parte Green*, 46 Tex. Crim. Rep. 580, 66 L.R.A. 729, 108 Am. St. Rep. 1035, 81 S. W. 723,—holding to constitute contempt publication must refer to pending case; *Re Egan*, 24 S. D. 324, 123 N. W. 478, holding that criticism of judicial officers, made after termination of suit, is not cause for disbarment, nor punishment for contempt.

Cited in footnotes to *Telegram Newspaper Co. v. Com.* 44 L. R. A. 159, which holds corporation guilty of contempt in publishing article calculated to prejudice jury and prevent fair trial; *State v. Bee Pub. Co.* 50 L. R. A. 195, which sustains punishment for contempt of newspaper publishing articles threatening judges with public odium if they decide pending cause in certain way.

Cited in notes (17 L.R.A.(N.S.) 575; 68 L.R.A. 257, 261) on statement with respect to ended cause as contempt.

Power of court to punish for contempt.

Cited in *Ex parte McCown*, 139 N. C. 107, 2 L.R.A.(N.S.) 608, 51 S. E. 957, holding the power to attach for certain class of contempts being inherent in the courts and essential to their existence and due performance of their functions, the legislature cannot deprive the courts of this power or unduly interfere with its exercise; *State Law Examiners v. Hart*, 104 Minn. 116, 17 L.R.A.(N.S.) 591,

116 N. W. 212, 15 A. & E. Ann. Cas. 197, as to power of court to punish for criticism of case which had terminated.

Statute as declaratory of common law.

Cited in *State v. Tugwell*, 19 Wash. 252, 43 L. R. A. 723, 52 Pac. 1056, to point that Washington statute on contempt is declaratory of common law.

Enforcing answer by imprisonment.

Cited in footnote to *Re Clark*, 28 L. R. A. 242, which upholds right to summarily enforce answer by imprisoning witness.

8 L. R. A. 591, *VOUGHT v. WILLIAMS*, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195.

Imperfect title or right as avoiding a contract to sell or lease realty.

Cited in *Becker v. F. O. Erickson*, 142 Ill. App. 136, holding contract to sublet cannot be enforced where lessors refuse to allow a transfer of the lease; *Wanser v. De Nyse*, 188 N. Y. 381, 117 Am. St. Rep. 871, 80 N. E. 1088, refusing specific performance of bid for purchase at sale where chain of title is clouded by uncertainty as to whether all the heirs of intestate owner joined in conveyance.

Sufficiency of title to satisfy terms of contract.

Cited in *Glassman v. Condon*, 27 Utah, 467, 76 Pac. 343, holding a contract for warranty deed subject to \$250 of a \$1000 mortgage, not satisfied by a warranty deed subject to the whole mortgage; *Wallach v. Riverside Bank*, 119 App. Div. 240, 104 N. Y. Supp. 661, holding a contract to convey "all the premises" is not satisfied by a quitclaim deed thereto which does not pass an inchoate right of dower of a former grantor's wife; *Wadick v. Mace*, 118 App. Div. 782, 103 N. Y. Supp. 889, holding a contract for a "proper deed" not satisfied by a deed requiring a judicial construction to identify property conveyed.

Reasonable objection to title.

Cited in *Scudder v. Watt*, 98 App. Div. 232, 90 N. Y. Supp. 605, on refusal of specific performance where title may be fairly questioned; *Howe v. Coates*, 97 Minn. 399, 4 L.R.A.(N.S.) 1179, 114 Am. St. Rep. 723, 107 N. W. 397, holding the objection to title must be based on a doubt such as effects value of the land and its salability; *Cowdery v. Greenlee*, 126 Ga. 791, 8 L.R.A.(N.S.) 143, 55 S. E. 918, holding that under a contract to take title unless "legally insufficient," the vendee cannot refuse to perform because one of the muniments of title because of defective attestation is not entitled to record; *Woodward v. McCollum*, 16 N. D. 45, 111 N. W. 623, holding a failure of a grantor in a deed in chain of title to sign his full name, not a reasonable ground of objection to title where body of deed contained his name in full; *Van Horn v. Stuyvesant*, 50 Misc. 435, 100 N. Y. Supp. 547, holding an encroachment on the premises amounting to a trespass, no cloud upon title; *Sprickerhoff v. Gordon*, 120 App. Div. 750, 105 N. Y. Supp. 586, holding purchaser at foreclosure sale cannot be compelled to take title which is doubtful because of defective description of property in the notice of sale; *Godfrey v. Rosenthal*, 17 S. D. 459, 97 N. W. 365, holding title not free from reasonable doubt where there is an outstanding mortgage on the premises which is outlawed or not according to what statute of limitations applies as to which there is no certainty.

Right to marketable title.

Cited in *McGuire Bros. v. Blanchard*, 107 Iowa, 493, 78 N. W. 231, holding vendee entitled to marketable title under contract binding vendor to "carry out abstract . . . and show title vested in him;" *Ebert v. Hanneman*, 69 Misc. 228, 125 N. Y. Supp. 237, holding that purchaser at foreclosure sale cannot refuse

title because of encroachment of bay window on house, which has been acquiesced in 15 years, and for which city recently issued permit.

Cited in note (20 Am. St. Rep. 217) on purchaser's duty as to taking defective title.

What is a marketable title.

Cited in *Stevenson v. Fox*, 40 App. Div. 358, 57 N. Y. Supp. 1094, holding that encroachment of buildings and foundations upon adjoining lots renders title unmarketable; *McPherson v. Schade*, 149 N. Y. 21, 43 N. E. 527, holding encroachment of building upon adjoining common alley way renders title unmarketable; *Smithers v. Steiner*, 13 Misc. 518, 34 N. Y. Supp. 678, holding title rendered unmarketable by latent encroachment of front wall 3 inches on street; *Heller v. Cohen*, 154 N. Y. 306, 48 N. E. 527, Affirming 15 Misc. 384, 36 N. Y. Supp. 668, holding defective description of premises renders sale unenforceable; *Egelhoff v. Simpson*, 50 App. Div. 601, 64 N. Y. Supp. 336, holding error in description due to widening of street, renders title unmarketable; *Reynolds v. Cleary*, 61 Hun, 594, 16 N. N. Supp. 421, holding restrictive covenant running with land, and improperly foreclosed mortgage, render title unmarketable; *Kerrigan v. Backus*, 69 App. Div. 331, 74 N. Y. Supp. 906, holding title unmarketable where subject to unimproved streets platted on map by which other conveyances made; *Bullard v. Bicknell*, 26 App. Div. 321, 49 N. Y. Supp. 666, holding title not marketable where land possessed adversely to vendor; *Hamerslag v. Duryea*, 38 App. Div. 132, 56 N. Y. Supp. 615, holding title unmarketable where adverse possession against tenant in common not established; *Simis v. McElroy*, 12 App. Div. 436, 42 N. Y. Supp. 290, holding contract for good-record title not satisfied by offer of title by adverse possession unsupported by proof; *Darrow v. Cornell*, 30 App. Div. 119, 51 N. Y. Supp. 828, holding title not marketable where deeds essential to clear record not filed; *Irving v. Campbell*, 121 N. Y. 358, 8 L. R. A. 621, 24 N. E. 821, holding vendor's title unmarketable where grantor's deed defectively acknowledged and not entitled to record; *Paolillo v. Faber*, 56 App. Div. 244, 67 N. Y. Supp. 638, holding title not marketable where acquired under power of attorney defectively acknowledged; *Hatt v. Hagaman*, 12 Misc. 173, 33 N. Y. Supp. 5, holding sale of property held by trustee under power to acquire but not to sell, not specifically enforceable; *Horne v. Rodgers*, 113 Ga. 227, 38 S. E. 768, holding title unmarketable where based upon invalid sale "on the premises," out of city, by ordinary; *Stuyvesant v. Weil*, 41 App. Div. 559, 58 N. Y. Supp. 697, holding vendee entitled to recover part payments where vendor's title dependent upon judicial proceeding in which owner erroneously named in summons and complaint; *Schenck v. Wicks*, 23 Utah, 582, 65 Pac. 732, holding outstanding trust deed in favor of grantor renders title unmarketable; *Haffey v. Lynch*, 143 N. Y. 247, 38 N. E. 298, holding *lis pendens* filed subsequent to sale contract renders title unmarketable; *Brokaw v. Duffy*, 165 N. Y. 399, 59 N. E. 196, Affirming 36 App. Div. 150, 55 N. Y. Supp. 469, holding title unmarketable where lunacy proceedings are pending against vendor's grantor; *Marks v. Halligan*, 61 App. Div. 183, 70 N. Y. Supp. 444, holding title unmarketable where interest under unconstrued will uncertain; *Reynolds v. Strong*, 82 Hun, 214, 31 N. Y. Supp. 329, holding title unmarketable where election of widow to accept will, adverse to her ownership, uncertain; *Dworsky v. Arndstein*, 29 App. Div. 278, 51 N. Y. Supp. 597, holding title not marketable where probate proceedings are irregular for failure to cite testator's brother, and there is an outstanding disputable dower interest; *Emens v. St. John*, 79 Hun, 102, 29 N. Y. Supp. 655, holding title under grant by less than all of devisees unmarketable where executor has power of sale; *Griffith v. Maxfield*, 63 Ark. 551, 39 S. W. 852, holding title unmarketable where purchased for benefit of administrator at administrator's sale, and outstanding unbarred dower in-

terest exists; *Casey v. Casey*, 19 App. Div. 223, 79 N. Y. S. R. 879, 45 N. Y. Supp. 877 (concurring opinion) holding purchaser in partition proceedings not bound to complete sale where record does not show death without issue of heirs not joined; *Fowler v. Manheimer*, 70 App. Div. 58, 75 N. Y. Supp. 17, holding title unmarketable where record fails to show decease of heirs unmarried and without issue; *Stephens v. Flammer*, 40 Misc. 281, 81 N. Y. Supp. 1064, holding purchaser on foreclosure not required to take title validity of which depends on disputable fact; *Ormsby v. Graham*, 123 Iowa, 210, 98 N. W. 724, holding owner of contract for sale of land has no marketable title; *Barger v. Gery*, 64 N. J. Eq. 270, 53 Atl. 483, holding title not rendered unmarketable by break in chain of recorded assignments of mortgage theretofore foreclosed; *McNutt v. Nelland*, 82 Kan. 426, 108 Pac. 834, holding title subject to be set aside within three years because based on a judgment by publication unmarketable; *Williams v. Bricker*, 83 Kan. 55, 30 L.R.A.(N.S.) 345, 109 Pac. 998, holding that if there be doubt or uncertainty sufficient to form basis of litigation, title is unmarketable; *Downey v. Seib*, 102 App. Div. 321, 92 N. Y. Supp. 431, holding that title based on decree reforming deed so as to convey fee to vendor is not marketable, where possible claimants were not represented in action; *Van Williams v. Elias*, 106 App. Div. 292, 94 N. Y. Supp. 611, holding title not marketable where sale is made on the assumption that runaway owner is alive and his heirs are not joined in the action; *Connely v. Putnam*, 51 Tex. Civ. App. 235, 111 S. W. 164, holding that marketable title means title free from reasonable doubt; *Barrette v. Whitney*, 36 Utah, 594, 37 L.R.A.(N.S.) 368, 106 Pac. 522, holding title to land which depends upon probate decree distributing decedent's estate cannot be held unmarketable, upon assumption that some unknown claimant exists where all known interested parties were before court.

Cited in notes (132 Am. St. Rep. 993, 1014, 1015, 1044; 4 L.R.A.(N.S.) 1172; 38 L.R.A.(N.S.) 5, 6, 9, 15, 24) on what is a marketable title.

Distinguished in *Neil v. Radley*, 31 App. Div. 29, 52 N. Y. Supp. 398, holding title by adverse possession sufficient where record not clear through scrivener's error in description; *Moot v. Business Men's Invest. Asso.* 157 N. Y. 211, 45 L. R. A. 670, 52 N. E. 1, holding record of title corrected before tender though defective at time of contract, marketable; *Sloane v. Martin*, 77 Hun, 252, 24 N. Y. Supp. 663, holding title marketable where defective record of service on infants cured by judgment; *Corbin v. Baker*, 56 App. Div. 37, 67 N. Y. Supp. 249, holding title of party to partition proceedings purchasing at sale, marketable where court order permits same, and purchase confirmed; *Kullman v. Cox*, 167 N. Y. 420, 53 L. R. A. 887, 60 N. E. 738 (dissenting opinion) majority holding title marketable where acquired in good faith by husband of mortgagor from mortgagee buying in on foreclosure.

Provision for approval of title.

Cited in *Lighton v. Syracuse*, 48 Misc. 145, 96 N. Y. Supp. 692, holding a contract to purchase by city council on approval of counsel cannot be avoided by a refusal of counsel to approve title based on no reasonable doubt.

— For approval by third person.

Cited as *obiter* in *Flanagan v. Fox*, 6 Misc. 136, 26 N. Y. Supp. 48, Reversing 3 Misc. 370, 23 N. Y. Supp. 344, holding approval by title company condition precedent on sale subject thereto.

Distinguished in *Allen v. Pockwitz*, 103 Cal. 88, 42 Am. St. Rep. 99, 36 Pac. 1039, holding purchaser's deposit recoverable where attorney's adverse opinion on sufficient examination, honestly formed; *Trowbridge v. New York City*, 24 Misc. 521, 53 N. Y. Supp. 616, refusing to restrain issue of stock to uncondi-

tioned bidder in preference to higher bidder, "subject to opinion of counsel" as to validity.

Presumption of death.

Cited in *Johnson v. Johnson*, 170 Mo. 56, 59 L. R. A. 755, 70 S. W. 241, holding testimony of sister that missing heir ran away twenty years ago when eighteen, and not heard from since, insufficient; *Dunn v. Travis*, 56 App. Div. 321, 67 N. Y. Supp. 743, refusing to distribute share of runaway beneficiary in absence of proof of death without issue; *McNulty v. Mitchell*, 41 Misc. 294, 84 N. Y. Supp. 89, holding death of man disappearing when thirty presumed after forty-three years.

Cited in notes (2 L.R.A.(N.S.) 810) on necessity of inquiry to raise presumption of death from seven year's absence; (8 Eng. Rul. Cas. 557) on presumption of death without issue.

"First class."

Cited in *Cleveland v. Martin*, 218 Ill. 91, 3 L.R.A.(N.S.) 638, 75 N. E. 772, holding contract calling for publication of a "first class" book calls merely for a marketable book.

8 L. R. A. 593, *CINCINNATI, I. ST. L. & C. R. CO. v. HOWARD*, 124 Ind. 280, 19 Am. St. Rep. 96, 24 N. E. 892.

Contributory negligence.

Cited in *Lake Erie & W. R. Co. v. Pence*, 24 Ind. App. 21, 55 N. E. 1036, holding party attempting to cross ahead of train cannot recover, though speed thereof unlawful; *Bush v. Union P. R. Co.* 62 Kan. 715, 64 Pac. 624, holding defendant's violation of regulation as to time between following trains, no excuse for plaintiff's lack of care; *Pennsylvania Co. v. Meyers*, 136 Ind. 259, 36 N. E. 32, holding duty of track walker to be upon railway does not absolve him from obligation to use due care as to approaching trains; *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 101, 25 Am. St. Rep. 416, 27 N. E. 339, holding wife guilty of contributory negligence where she failed to warn husband, driving, of apparent danger; *Silcock v. Rio Grande Western R. Co.* 22 Utah, 189, 61 Pac. 565, denying right to recover for injuries received in stopping team, carelessly left untied near railway track; *Van Winkle v. New York, C. & St. L. R. Co.* 34 Ind. App. 480, 73 N. E. 157, holding plaintiff putting himself in front of a train he knew to be on track while waiting for and watching another train was guilty of contributory negligence; *Cleveland, C. C. & St. L. R. Co. v. Houghland*, 44 Ind. App. 81, 85 N. E. 369, holding that contributory negligence is question of law when facts are undisputed, and where inferences to be drawn from them lead to but one result; *Pere Marquette R. Co. v. Strange*, 171 Ind. 172, 20 L.R.A.(N.S.) 1049, 84 N. E. 819, holding that the deliberate walking of person injured across the track ahead of the train he intends to board precludes his recovery for injury sustained; *Carson v. Genesee*, 9 Idaho, 248, 108 Am. St. Rep. 127, 74 Pac. 862, holding fact that plaintiff two weeks before injury knew of defect in sidewalk and testified that she did not think of it does not of itself establish contributory negligence.

Cited in footnote to *Howe v. Minneapolis, St. P. & S. M. R. Co.* 30 L. R. A. 684, which holds negligence of one riding with another when injured at railroad crossing a question for jury.

Cited in note (9 L. R. A. 164) on contributory negligence of passenger approaching crossing.

Distinguished in *Louisville & N. R. Co. v. Williams*, 20 Ind. App. 585, 51 N. E. 128, upholding instruction to jury to consider defendant's failure to ring bell

or blow whistle in determining plaintiff's contributory negligence; *Seofield v. Myers*, 27 Ind. App. 376, 60 N. E. 1005, holding failure to look and listen for approaching runaway team in rear does not constitute contributory negligence; *Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 273, 38 N. E. 1 (dissenting opinion) majority holding guest riding in wagon may recover where possibility of train approaching duly apprehended.

Imputing negligence.

Cited in *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 648, 45 N. E. 812, holding guest riding in carriage must prove his own diligence and freedom from negligence; *Abbitt v. Lake Erie & W. R. Co.* 150 Ind. 514, 50 N. E. 729, holding contributory negligence of coemployee acting as agent, imputable so as to defeat recovery by employee injured.

Cited in footnote to *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hirer of team bound to check driver's attempt to cross track without stopping or listening for train.

Cited in notes (110 Am. St. Rep. 295) on imputed negligence; (8 L.R.A. (N.S.) 672) on imputed negligence of driver to passenger.

Presumption of negligence from injury.

Cited in *Evansville & T. H. R. Co. v. Marohn*, 6 Ind. App. 651, 34 N. E. 27, holding presumption rebutted where evidence shows use of all reasonable care under circumstances; *Cincinnati, I. & St. L. & C. R. Co. v. Grames*, 8 Ind. App. 143, 34 N. E. 613, holding presumption rebutted by proof that, before driving over crossing, plaintiff stopped and listened, view being obstructed; *Lamport v. Lake Shore & M. S. R. Co.* 142 Ind. 275, 41 N. E. 586, holding where no affirmative proof in rebuttal, presumption not overcome by proof of defendant's negligence.

Cited in footnote to *Phillips v. Milwaukee & N. R. Co.* 9 L. R. A. 521, which holds person killed on sidewalk by railroad car presumed to have been making ordinary use of walk.

Doubted in *Pittsburgh, C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 110, 35 N. E. 1033, holding presumption of contributory negligence of person injured by collision at crossing rebutted by slight evidence.

Necessity of alleging and proving freedom from contributory negligence.

Cited in *Sale v. Aurora & L. Turnp. Co.* 147 Ind. 330, 46 N. E. 669, holding complaint not stating facts from which freedom from negligence can be inferred, nor expressly asserting same, demurrable; *Indianapolis, D. & W. R. Co. v. Wilson*, 134 Ind. 99, 33 N. E. 793, holding complaint excusing failure to look and listen only on ground of want of time, demurrable; *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 410, 32 L. R. A. 151, 42 N. E. 736, and *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 310, 47 N. E. 624, holding averment and proof of freedom from negligence, essential to plaintiff's recovery; *Evansville Street R. Co. v. Gentry*, 147 Ind. 416, 37 L. R. A. 381, 62 Am. St. Rep. 421, 44 N. E. 311, and *Kauffman v. Cleveland, C. C. & St. L. R. Co.* 144 Ind. 457, 43 N. E. 446, holding verdict properly directed where no affirmative proof of freedom from contributory negligence; *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 648, 45 N. E. 812, holding burden on plaintiff to prove both negligence of defendant and also his own freedom therefrom; *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 39, 25 N. E. 863, holding owner of team must allege and prove want of negligence on part of servant in charge at time of accident; *Pittsburgh, C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 103, 35 N. E. 1033, holding

proof of excessive speed and failure to give signals does not dispense with proof of freedom from contributory negligence.

Cited in notes (30 Am. St. Rep. 40; 33 L.R.A.(N.S.) 1104, 1133, 1142) on burden of proof as to contributory negligence.

Duty to look and listen at crossing.

Cited in *Blackburn v. Southern P. Co.* 34 Or. 223, 55 Pac. 225; *Carter v. Central Vermont R. Co.* 72 Vt. 200, 47 Atl. 797; *Cincinnati, H. & I. R. Co. v. Duncan*, 143 Ind. 526, 42 N. E. 37, — holding one failing to stop, look, and listen where view obstructed, cannot recover; *Malott v. Hawkins*, 159 Ind. 134, 63 N. E. 308, holding person approaching railroad crossing must look, listen, and, under exceptional circumstances, stop; *Miller v. Terre Haute & I. R. Co.* 144 Ind. 326, 43 N. E. 257, and *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 41, 25 N. E. 863, holding defendant's violation of statutory requirement as to signals does not excuse failure to stop, look, and listen; *Baltimore & O. & C. R. Co. v. Walborn*, 127 Ind. 148, 26 N. E. 207, holding negligence for jury where facts reasonably permit of more than one inference; *Baltimore & O. R. Co. v. Talmage*, 15 Ind. App. 214, 43 N. E. 1019 (concurring opinion) holding party failing to look and listen, negligent though engine had passed crossing within minute; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 117, 88 N. E. 1073, holding that servant of railroad has no right to rely upon train schedules, or upon custom of using certain tracks for certain trains; *Southern R. Co. v. Davis*, 34 Ind. App. 381, 72 N. E. 1053, holding that one familiar with surroundings who fails to look and listen for approaching trains at a crossing is guilty of contributory negligence; *Chicago, R. I. & P. R. Co. v. Hansen*, 78 Kan. 283, 96 Pac. 668, holding deceased free from contributory negligence where being unfamiliar with the surroundings and in the dark he drove upon a crossing situated in such a way that he could not look or listen until too late to avoid danger.

Cited in footnotes to *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman absent not negligence *per se*; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 802, which holds failure to look within 30 feet of track does not prevent recovery; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train within 35 feet of track, negligence; *Oleson v. Lake Shore & M. S. R. Co.* 32 L. R. A. 149, which holds it negligent to attempt to cross track immediately after passage of train whose smoke obstructs view; *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow in not looking and listening before crossing railroad track, for jury; *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds that failure to look and listen on dark night does not prevent recovery for injury by engine running backward; *Colorado & Southern R. Co. v. Thomas*, 70 L.R.A. 681, which holds failure to look and listen before crossing track not excused by existence of building adjoining highway which would obstruct view of tracks and by noise created therein which would prevent hearing approaching train.

Cited in notes (9 L. R. A. 162) on duty of traveler approaching railroad crossing; (11 L.R.A. 388) on negligence in crossing railroad track; (32 Am. St. Rep. 547) on duty of traveler where view at railroad crossing is obstructed.

Distinguished in *Marchal v. Indianapolis Street R. Co.* 28 Ind. App. 141, 62 N. E. 286, holding contributory negligence for jury where plaintiff drove on street railway crossing without looking, immediately after passage of car.

Effect of general verdict.

Cited in *Diamond Plate Glass Co. v. De Horthy*, 143 Ind. 385, 40 N. E. 681, and *Shirk v. Wabash R. Co.* 14 Ind. App. 137, 42 N. E. 656, holding general verdict of freedom from contributory negligence controlled by special findings

showing contrary; *Bedford v. Neal*, 143 Ind. 430, 41 N. E. 1029, setting aside verdict of freedom from contributory negligence where evidence fails to show exercise of care proportioned to known danger.

Distinguished in *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 46, 44 N. E. 669, holding verdict conclusive where evidence is not in record, and answers to interrogatories do not absolutely antagonize same.

Time to take exceptions.

Cited in *Combs v. Union Trust Co.* 146 Ind. 693, 46 N. E. 16, holding party failing to make motion to reject interrogatories at time offered in evidence, waives objection.

Form of exceptions and objections.

Cited in *Musser v. State*, 157 Ind. 431, 61 N. E. 1, holding objection that interrogatory "incompetent, immaterial, and too remote" presents no question; *Musser v. State*, 157 Ind. 428, 431, 61 N. E. 1, holding objection that evidence "hearsay, and wholly immaterial and irrelevant," not sufficiently specific; *Stratton v. Lockhart*, 1 Ind. App. 383, 27 N. E. 715, holding objection to judgment on ground of alteration insufficient where changes not specified.

Cited in note (8 L. R. A. 609) on consideration of general exceptions on appeal.

8 L. R. A. 598, *LOCEY COAL MINES v. CHICAGO, W. & V. COAL CO.* 131 Ill. 9, 22 N. E. 503.

Redemption.

Approved in *Bruschke v. Wright*, 166 Ill. 198, 57 Am. St. Rep. 125, 46 N. E. 813, holding resale of property on foreclosure by officer of court should be made subject to redemption.

Cited in *Traer v. Fowler*, 75 C. C. A. 540, 144 Fed. 813, 817, holding that coal lying in its natural deposit is real estate subject to redemption from foreclosure and execution sale.

Distinguished in *Blair v. Illinois Steel Co.* 159 Ill. 362, 31 L. R. A. 274, 42 N. E. 895, holding receiver on sale of corporate property under winding-up statute may sell without redemption.

Separate ownership of surface and minerals.

Cited in *Ames v. Ames*, 160 Ill. 601, 43 N. E. 592, holding ownership of surface and of under-lying minerals may be separated in partition suit; *Catlin Coal Co. v. Lloyd*, 176 Ill. 283, 52 N. E. 144, holding owner of minerals, title to which has been severed from the surface, may invoke in respect thereto the statute of limitations.

Corporate ownership of buildings.

Cited in *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 174, 64 L. R. A. 388, 51 N. E. 664 (dissenting opinion) majority holding manufacturing corporation authorized to hold land for transaction of its business cannot erect and rent dwellings, stores, schools, and churches.

8 L. R. A. 602, *KINCAID v. INDIANAPOLIS NATURAL GAS CO.* 124 Ind. 577, 19 Am. St. Rep. 113, 24 N. E. 1066.

Right to compensation for additional burden in highway.

Cited in *Huffman v. State*, 21 Ind. App. 454, 69 Am. St. Rep. 368, 52 N. E. 713, and *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 164, 39 N. E. 423, holding compensation must be made to fee owner for construction of pipe line along highway; *Egbert v. Lake Shore & M. S. R. Co.* 6 Ind. App. 354, 33 N. E. 659, holding railroad liable to owners abutting on highway for damages

caused by graded approach to crossing; *Haslett v. New Albany Belt & Terminal R. Co.* 7 Ind. App. 607, 34 N. E. 845, holding municipal permission to construct railroad along street does not impair abutting owner's right to compensation; *McCann v. Johnson County Teleph. Co.* 69 Kan. 225, 66 L.R.A. 180, 76 Pac. 870, 2 A. & E. Ann. Cas. 156 (dissenting opinion), on compensation to abutting land holders for additional burden to rural highway; *Ward v. Triple State Natural Gas & Oil Co.* 115 Ky. 726, 74 S. W. 709, holding the grant of right to lay gas pipe under rural highway by county board does not effect right of abutting land holder to compensation.

Cited in note (17 L. R. A. 480) on what use of street or highway constitutes additional burden.

Disapproved in *Cheney v. Barker*, 198 Mass. 363, 16 L.R.A.(N.S.) 438, 84 N. E. 492, holding that gas pipes may be laid in rural or any other highway without compensation to abutters or municipalities regardless of local benefit where such laying is for benefit of commonwealth.

Additional burden.

Cited in *Gurnsey v. Northern California Power Co.* 7 Cal. App. 542, 94 Pac. 858, holding that a grant to a lighting company of right to use streets for poles and wires is not inconsistent with use of street where light is supplied to the streets as well as for private use.

Cited in notes (106 Am. St. Rep. 266) on what are additional servitudes in highways; (7 L.R.A.(N.S.) 506) on gas-pipe line in highway or street as additional burden.

— Injunction to restrain.

Cited in *Consumers' Gas Trust Co. v. American Glass Co.* 162 Ind. 399, 68 N. E. 1020, holding that use of railway right of way for laying a gas main will not be enjoined where the damage is inconsiderable and the petitioner has allowed the laying of the pipe to proceed to practical completion.

Extent of abutting owner's rights in highways.

Cited in *Magee v. Overshiner*, 150 Ind. 133, 40 L. R. A. 372, 65 Am. St. Rep. 358, 49 N. E. 951, holding public easement greater in urban than in suburban highways; *Lostutter v. Aurora*, 126 Ind. 438, 12 L. R. A. 260, 26 N. E. 184, recognizing city's right to maintain well and pump in street; *Lake Erie & W. R. Co. v. Lee*, 14 Ind. App. 330, 14 N. E. 1058, upholding recovery for obstruction of private crossing under railroad upon public highway; *Huffman v. State*, 21 Ind. App. 459, 69 Am. St. Rep. 368, 52 N. E. 713, holding refusal of one unlawfully upon highway to depart at command of abutting owner renders him liable for criminal trespass; *Hamilton County v. Indianapolis Natural Gas Co.* 134 Ind. 212, 33 N. E. 972, holding county cannot enjoin laying gas pipes by company under permit of county officers and grant of abutting owners; *Western U. Teleg. Co. v. Krueger*, 36 Ind. App. 353, 74 N. E. 25, on rights of abutting land owners to the fee to center of highway; *Kinsey v. Union Traction Co.* 169 Ind. 578, 81 N. E. 922, holding that abutting owner has special interest in street or highway which cannot be taken away except by payment of just compensation; *Terre Haute & I. R. Co. v. Zelmer*, 166 Ind. 155, 3 L.R.A.(N.S.) 284, 76 N. E. 169, holding that abutting owner has such a proprietary right in a right of way that it may be lost by prescription to the extent of the adverse use consistent with rights of public.

Cited in note (101 Am. St. Rep. 109) on rights, obligations, and remedies of persons over whose land a highway runs.

Distinguished in *Huffman v. State*, 21 Ind. App. 456, 69 Am. St. Rep. 368,

52 N. E. 713, holding abutting owner not estopped from maintaining trespass for removal of pipe line in highway without his knowledge.

Public rights as affecting character of remedy.

Cited in *Whitlock v. Consumers Gas Trust Co.* 127 Ind. 65, 26 N. E. 570, denying injunction against laying gas-pipe line; *Midland R. Co. v. Smith*, 135 Ind. 350, 35 N. E. 284, denying injunction against railroad's use of right of way, public rights having attached; *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 104, 28 N. E. 548, denying ejectment to recover land occupied by railroad after public rights have intervened.

Distinguished in *Adams v. Ohio Falls Car Co.* 131 Ind. 380, 31 N. E. 57, holding wrongful use of public wharf by private company under permission from common council enjoined.

Public use.

Cited in *Rushville v. Rushville Natural Gas Co.* 132 Ind. 584, 15 L. R. A. 325, 28 N. E. 853, holding business of supplying natural gas subject to public regulation.

Right to damages for land taken.

Cited in *Evansville & R. R. Co. v. Charlton*, 6 Ind. App. 59, 33 N. E. 129, holding that consent to appropriation of land by railroad does not estop claim for damages.

8 L. R. A. 604, *MIDLAND R. CO. v. FISHER*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756.

Covenants running with land.

Cited in *Scott v. Stetler*, 128 Ind. 388, 27 N. E. 721, holding covenant in deed, "together with mill and all privileges thereto belonging," runs with land; *Branson v. Studabaker*, 133 Ind. 164, 33 N. E. 98, holding deed granting mill race, etc., conveys land forming essential part thereof; *Hamilton v. Shelbyville*, 6 Ind. App. 541, 33 N. E. 1007, denying power of municipality to enter into contract running with fee to drain private property; *Brockmeyer v. Sanitary Dist.* 118 Ill. App. 56, holding an agreement as part consideration of a deed, that grantee will provide and maintain suitable drainage for land remaining in grantor is not a personal covenant, but runs with the land; *Sexauer v. Wilson*, 136 Iowa, 363, 14 L.R.A.(N.S.) 193, 113 N. W. 941, 15 A. & E. Ann. Cas. 54, holding an agreement by grantee in deed to perpetually maintain a division fence, is by inference a covenant running with the land though the word "assigns" be not used.

Cited in notes (82 Am. St. Rep. 677, 678, 683) on what covenants run with the land; (126 Am. St. Rep. 349, 350, 359, 361, 378) on liability of grantee on covenants and conditions in deed; (6 L.R.A.(N.S.) 437, 438) on creation of covenant running with land by acceptance of deed poll with stipulations purporting to bind grantee; (14 L.R.A.(N.S.) 188) on necessity of word "assigns" to make covenant as to thing not in esse run with land.

— By railway companies.

Approved in *Kelly v. Nypano R. Co.* 23 Pa. Co. Ct. 187, holding covenant in deed of right of way to erect fence runs with land; *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 416, 31 N. E. 77, holding covenant to maintain crossing, cattle-guards, etc., binds purchaser under mortgage foreclosure.

Cited in *Cambria Iron Co. v. Union Trust Co.* 154 Ind. 306, 48 L. R. A. 48, 55 N. E. 745, holding condition in franchise requiring pavement between tracks carried into mortgage covering property; *Doty v. Chattanooga Union R. Co.* 103 Tenn. 572, 48 L. R. A. 164, 53 S. W. 944, holding covenant in deed of right of way that certain trains shall run, as chief consideration, follows fee; *Lake Erie*

& W. R. Co. v. Griffin, 25 Ind. App. 142, 53 N. E. 1042, holding covenant to maintain fence attaches to fee; Toledo, St. L. & K. C. R. Co. v. Burgan, 9 Ind. App. 610, 37 N. E. 31; Toledo, St. L. & K. C. R. Co. v. Cosand, 6 Ind. App. 224, 33 N. E. 251; Lake Erie & W. R. Co. v. Lee, 14 Ind. App. 330, 41 N. E. 1058, — holding agreement in deed to construct crossings and build fences imposes duty running with land; Pittsburgh, C. C. & St. L. R. Co. v. Wilson, 34 Ind. App. 327, 72 N. E. 666, holding that a covenant in a grant of right of way to railroad company, that company will make and maintain a farm crossing, runs with the land.

Cited in note (59 Am. St. Rep. 558) as to when railroad corporation becomes liable for debts of preceding corporation or partnership.

Distinguished in Evansville & S. I. Traction Co. v. Evansville Belt R. Co. 44 Ind. App. 167, 87 N. E. 21, holding that railroad which purchases street railroad property under foreclosure of mortgage executed prior to execution of crossing maintenance contract is not bound to perform crossing maintenance contract.

— As to assignee of either party.

Cited in Chicago & S. E. R. Co. v. McEwen, 35 Ind. App. 258, 71 N. E. 926, holding vendee of railroad bound to perform covenant of vendor to maintain fence cattle guards and farm crossings; Chicago, I. & L. R. Co. v. Southern Indiana R. Co. 38 Ind. App. 255, 70 N. E. 843 (dissenting opinion), on the binding effect of a covenant running with the land, on those succeeding to rights of covenanting parties.

Acceptance of unexecuted instruments.

Approved in Doty v. Chattanooga Union R. Co. 103 Tenn. 575, 48 L. R. A. 165, 53 S. W. 944, and Harlan v. Logansport Natural Gas Co. 133 Ind. 328, 32 N. E. 930, holding grant of right of way signed by grantor, accepted by grantee, binds both; Reagan v. First Nat. Bank, 157 Ind. 661, 61 N. E. 575, holding accepting provisions of mortgage for benefit of creditors constitutes contract as if signed by all.

Cited in Thiebaud v. Union Furniture Co. 143 Ind. 344, 42 N. E. 741, holding acceptance of deed containing contract to pump water for grantor and acting thereunder equivalent to signature; McPherson v. Fargo, 10 S. D. 616, 66 Am. St. Rep. 723, 74 N. W. 1057, and Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 361, 35 N. E. 392, holding acceptance of lease signed by lessor alone, and recording same, makes instrument contract; Doxey v. Service, 30 Ind. App. 178, 65 N. E. 757, holding lease accepted by lessees not signing, binding upon them; Terre Haute & I. R. Co. v. State, 159 Ind. 475, 65 N. E. 401, holding state charter, under which railroad was built, written contract, action on which not barred by six-year statute; Parker v. Carter, 91 Ark. 167, 134 Am. St. Rep. 60, 120 S. W. 836, holding that where defendant takes possession of land under a contract signed only by the other party, the holding is under a written contract governed by statute of limitations; Starwich v. Washington City Glass Co. 64 Wash. 45, 116 Pac. 459, holding that lessee is liable for rent upon acceptance of lease even though he did not sign lease or take possession thereunder.

8 L. R. A. 607, STATE *ex rel.* TAYLOR v. WARRICK COUNTY, 124 Ind. 554, 25 N. E. 10.

Mandamus to compel performance of ministerial duty.

Cited in State *ex rel.* Butler v. Callahan, 4 N. D. 489, 61 N. W. 1025, holding mandamus will lie in favor of candidate holding certificate of election against incumbent holding over; State *ex rel.* Dunkleberg v. Porter, 134 Ind. 67, 32 N. E. 1021, holding action maintainable to compel issuance of certificate of exemption from highway duty, right thereto admitted; Coats v. State, 133 Ind. 38, 32 N. E.

737, holding mandamus proper remedy for refusal of justice of the peace to accept and approve sufficient bond.

Cited in note (7 L.R.A.(N.S.) 528) on character and extent of relief by mandamus against officer rendering decision upon ground not within discretion.

8 L. R. A. 608, STATE v. HOPE, 100 Mo. 347, 13 S. W. 490.

Necessity of objecting and excepting to rulings.

Cited in State v. Taylor, 132 Mo. 287, 33 S. W. 1145, holding failure to object to order for change of venue at time thereof bars exception on appeal; Matson v. Frazer, 48 Mo. App. 309, and State v. Goddard, 162 Mo. 226, 62 S. W. 697, holding that errors of trial court will not be reviewed on appeal if no exceptions are saved; State v. Bailey, 190 Mo. 277, 88 S. W. 733, holding rulings of trial court on objections will not be reviewed unless exception be taken at the time.

— As to evidence.

Cited in Boggs v. Pacific Steam Laundry Co. 86 Mo. App. 624, holding waiver of incompetent evidence by neglect to object and except; Adair v. Mette, 156 Mo. 507, 57 S. W. 551, holding failure to object to improper evidence on trial bars exclusion on appeal; State v. McCollum, 119 Mo. 474, 24 S. W. 1021, holding failure to except to improper evidence prevents review on appeal; State v. Mareks, 140 Mo. 669, 41 S. W. 973, holding no error in refusing to exclude evidence, no objection and exception being made till close of testimony; State v. Higgins, 124 Mo. 648, 28 S. W. 178, denying duty of court to exclude improper evidence without objection and exception; Hickman v. Green, 123 Mo. 173, 29 L. R. A. 43, 22 S. W. 455, holding motion to exclude incompetent testimony too late after evidence received without objection; State v. Lehman, 175 Mo. 625, 75 S. W. 139, holding testimony cannot be excluded after cross-examination, on ground disclosed by direct examination; State v. Foley, 144 Mo. 618, 46 S. W. 733, holding omission to object to question no bar to exclusion when it appears incompetent; Edwards v. Latimer, 183 Mo. 628, 82 S. W. 109, holding objection to incompetent testimony after being permitted to be given without objection, too late; State v. Bateman, 198 Mo. 224, 94 S. W. 843; State v. Forsha, 190 Mo. 327, 4 L.R.A.(N.S.) 587, 88 S. W. 746,—holding an error in admission of evidence cannot be preserved by a motion to strike out after the evidence has been submitted to the jury.

Sufficiency of objections.

Cited in State v. Moore, 117 Mo. 401, 22 S. W. 1086, holding general objection to admission of evidence not sufficient for review; Burlington Ins. Co. v. Miller, 8 C. C. A. 614, 19 U. S. App. 588, 60 Fed. 257, holding objection to evidence as "incompetent, irrelevant, immaterial" too general to show grounds.

Waiver of rights.

Cited in Moore v. State, 96 Tenn. 220, 33 S. W. 1046, holding failure to swear witness waived by cross-examination with knowledge of omission; State v. Gamble, 119 Mo. 431, 24 S. W. 1030, holding that error in removing cause to wrong county may be waived; Milbourne v. Robison, 132 Mo. App. 205, 110 S. W. 598, holding the objection to a witness as to competency may be waived by laches; United States v. Armour & Co. 142 Fed. 825, holding oath waived by failure to insist upon it or to raise objection.

Statute construed.

Cited in State v. Terry, 109 Mo. 624, 19 S. W. 206, holding courts refuse to declare statute unconstitutional unless invalid beyond doubt; State *ex rel.* Macklin v. Rombauer, 104 Mo. 631, 15 S. W. 850, and Bowers v. Smith, 111 Mo. 56, 16 L. R. A. 759, 33 Am. St. Rep. 491, 20 S. W. 101, holding consideration of

effect of proposed construction of statute necessary to ascertain intent; *Ex parte Corliss*, 16 N. D. 542, 114 N. W. 962 (dissenting opinion), on the construction of statutes favoring legality.

Waiver of constitutional rights in trial.

Cited in *State v. Way*, 76 Kan. 938, 14 L.R.A. (N.S.) 608, 93 Pac. 159, holding the right of accused to be present at return of verdict may be waived and verdict may be returned and received by court on the voluntary absence of accused on bail; *State v. Williford*, 111 Mo. App. 672, 86 S. W. 570, holding defendant may waive his right to be confronted by the adverse witnesses.

8 L. R. A. 614, *NEW VIENNA BANK v. JOHNSON*, 47 Ohio St. 306, 24 N. E. 503.

Followed without discussion in *Quimby v. Green*, 27 Ohio L. J. 299.

Estate conveyed by mortgage.

Cited in *Stambach v. Fox*, 16 Ohio C. C. 431, 8 Ohio C. D. 627, expressing opinion that mortgage omitting word "heir" passes fee, language showing such intention.

Enforcement of partner's lien.

Cited in *Ervin v. Masterman*, 16 Ohio C. C. 74, 8 Ohio C. D. 522, holding partner's lien attaches to property acquired with partnership funds, though individual has title.

Mortgage running to a partnership.

Cited in *Carpenter v. Zarbuck*, 74 Ark. 477, 86 S. W. 299, holding mortgage taken in partnership name without naming members of firm is good against mortgagor, in equity if not in law.

Equitable mortgage.

Cited in note (18 Eng. Rul. Cas. 25) on agreement by which property is made a security for a debt due or a present advance as an equitable mortgage.

What constitutes partnership property.

Cited in *Schwab v. Hamilton, G. & C. Traction Co.* 13 Ohio S. & C. P. Dec. 121, on what constitutes partnership property.

8 L. R. A. 617, *REISE v. ENOS*, 76 Wis. 634, 45 N. W. 414.

Severance of easement from land.

Cited in footnote to *Flickinger v. Shaw*, 11 L. R. A. 134, holding construction of ditch under agreement across another's land to be used in common gives builder vested right which injunction will protect.

Cited in notes (10 L. R. A. 484) on right by prescription to use another's land; (14 L. R. A. 300) on effect of attempt to sever appurtenant easement from premises for benefit of which it exists; (136 Am. St. Rep. 685) on mode of distinguishing between an easement appurtenant and an easement in gross; (10 Eng. Rul. Cas. 14) on severance of easement from land.

Distinguished in *Macy v. Metropolitan Elev. R. Co.* 59 Hun, 367, 12 N. Y. Supp. 804, holding release by tenant of demised interest does not sever easement from land, but reinvests fee.

Scope of easement.

Cited in *D. M. Goodwillie Co. v. Commonwealth Electric Co.* 241 Ill. 83, 89 N. E. 272, holding the user of an easement to be excessive when coal and ashes are hauled thereunder from a plant partly located on nondominant property; *Diocese of Trenton v. Toman*, 74 N. J. Eq. 709, 70 Atl. 606, holding that right appurtenant to lot cannot be used for purposes and benefit of another lot.

Cited in note (95 Am. St. Rep. 327) on right to extend use of right of way to other land.

8 L. R. A. 620, IRVING v. CAMPBELL, 121 N. Y. 353, 24 N. E. 821.

Sufficiency of acknowledgment or verification.

Cited in Lemmer v. Morison, 89 Hun, 279, 35 N. Y. Supp. 623, holding recording of deed ineffectual where acknowledgment insufficient; Freedman v. Oppenheim, 80 App. Div. 488, 81 N. Y. Supp. 110, and Paolillo v. Fáber, 56 App. Div. 243, 67 N. Y. Supp. 638, holding acknowledgment defective where not stating notary's knowledge that the maker is the individual described in, and who executed, conveyance; Albany County Sav. Bank v. McCarty, 149 N. Y. 80, 43 N. E. 427, holding prima facie case of conveyance made by certificate of acknowledgment; Cream City Furniture Co. v. Squier, 2 Misc. 440, 21 N. Y. Supp. 972, holding notice of mechanic's lien, verified before foreign commissioner but without certificate of secretary of state, insufficient to create lien; Goodhue v. Cameron, 142 App. Div. 474, 127 N. Y. Supp. 120, to point that commissioner need not certify that he knew that person acknowledging agreement was attorney, or that power of attorney was exhibited and known to him.

Necessity that residence of subscribing witness shall appear in deed.

Cited in Wilson v. Wilson, 83 Neb. 565, 120 N. W. 147, on the necessity of place of residence of subscribing witness appearing from deed if it is to be read in evidence; Schefer v. Ball, 53 Misc. 453, 104 N. Y. Supp. 1028, holding absence of address of subscribing witness in deed renders it inadmissible as evidence without further proof of its execution.

Right to marketable title.

Cited in Tupy v. Kocourek, 66 Ark. 436, 51 S. W. 69, holding vendee under executory sale of two tracts of land for lump sum may rescind contract if title to one fails; Hatt v. Hagaman, 12 Misc. 173, 33 N. Y. Supp. 5, holding specific performance cannot be decreed upon contract to purchase realty, where ability to convey good, marketable title doubtful.

What is a marketable title.

Approved in Miner v. Hilton, 15 App. Div. 59, 44 N. Y. Supp. 155, holding tender of lot with building which encroached $2\frac{3}{4}$ inches beyond, not of marketable title; Snow v. Monk, 81 App. Div. 210, 80 N. Y. Supp. 719, holding 2-inch encroachment of building renders title thereto unmarketable; Harrass v. Edwards, 94 Wis. 464, 69 N. W. 69, holding title dependent upon record of deed attested by but one of several grantors not marketable; Lahey v. Kortright, 132 N. Y. 455, 30 N. E. 989, holding substituted trustees can convey marketable title where power of sale applicable to subject of trust was created; Simis v. McElroy, 12 App. Div. 436, 42 N. Y. Supp. 290, holding title not marketable when involving the rights of one not party to suit; Kountze v. Helmuth, 67 Hun, 347, 22 N. Y. Supp. 204, holding title not marketable where property is encumbered with agreements as to its use; Marshall v. Wenninger, 20 Misc. 530, 46 N. Y. Supp. 670, holding mere nonuser and inclosure for more than twenty years of land laid down on map as street, not such abandonment of easement as will make title marketable.

Cited in Howe v. Coates, 97 Minn. 399, 4 L.R.A.(N.S.) 1179, 114 Am. St. Rep. 723, 107 N. W. 397, holding a reasonable doubt as to a question of law governing rights to premises renders a title unmarketable; Wollenberg v. Rose, 45 Or. 622, 78 Pac. 751, holding that vendor must prove that title tendered is free from peril of impending litigation and where a record of impending suits in good faith is produced by vendee that such litigation is without merit.

Cited in note (38 L.R.A.(N.S.) 5, 6, 7, 20) on what is a marketable title.

Distinguished in *Holly v. Hirsch*, 135 N. Y. 598, 49 N. Y. S. R. 19, 32 N. E. 709, holding vendor has marketable title where only question is one of law, which is determined; *Freedman v. Oppenheim*, 80 App. Div. 492, 81 N. Y. Supp. 110, holding proof of twenty years' undisturbed possession under deed does not establish marketable title; *Kullman v. Cox*, 26 App. Div. 163, 49 N. Y. Supp. 908 (dissenting opinion), majority holding title marketable where obtained in good faith through purchase at mortgage foreclosure, for default upon lands which owner formerly held in trust; *Jay v. Wilson*, 91 Hun. 394, 36 N. Y. Supp. 186, holding title marketable although, subsequent to record of deed of bona fide purchaser, previous deed from his grantor appears on record.

— **Facts resting in parol.**

Cited in *Darrow v. Cornell*, 30 App. Div. 119, 51 N. Y. Supp. 828, holding tender not effectual where vendor's title depends upon unrecorded deeds; *McPherson v. Schade*, 149 N. Y. 21, 43 N. E. 527, denying specific performance where title depends upon facts resting in parol; *Moot v. Business Men's Invest. Asso.* 157 N. Y. 212, 45 L. R. A. 670, 52 N. E. 1, holding title not unmarketable for incorrect record, not demanding resort to parol evidence; *Egelhoff v. Simpson*, 50 App. Div. 602, 64 N. Y. Supp. 336, denying specific performance because title unmarketable, where record title contains defect which can be supplied only by parol evidence; *Huber v. Case*, 93 App. Div. 483, 87 N. Y. Supp. 663, holding title depending on declaration that property belonged to partnership not marketable; *Heller v. Cohen*, 154 N. Y. 306, 48 N. E. 527, Affirming 15 Misc. 384, 36 N. Y. Supp. 668, holding title not marketable where descriptions in essential instruments vary and no record title appears; *Nelson v. Jacobs*, 99 Wis. 561, 75 N. W. 406, holding adverse possession creates marketable title under statute of limitations; *Ruess v. Ewen*, 34 App. Div. 487, 54 N. Y. Supp. 357, holding title originating in tax lease, since expired, not marketable unless title by adverse possession reasonably established; *Simis v. McElroy*, 160 N. Y. 162, 73 Am. St. Rep. 673, 54 N. E. 674, holding fee simple not assured where title rests in adverse possession proved by parol; *Baecht v. Hevesy*, 115 App. Div. 513, 101 N. Y. Supp. 413, on rule that purchaser cannot be compelled to take title subject to defense only by parol evidence; *Wanser v. De Nyse*, 188 N. Y. 381, 117 Am. St. Rep. 871, 80 N. E. 1088, holding that where one of the deeds in the chain of title can only be proved by parol and there is no record as to appearance of all parties in a partition proceedings the title is unmarketable; *Moran v. Stader*, 52 Misc. 387, 103 N. Y. Supp. 175, holding a defect in certificate of acknowledgment of deed renders it not admissible to record thereby destroying marketability of future title.

Disapproved in *Cowdery v. Greenlee*, 126 Ga. 792, 8 L.R.A.(N.S.) 143, 55 S. E. 918, holding a title marketable though one of the deeds in chain of title is not admissible to record but otherwise good.

8 L. R. A. 623, *VENABLE v. RICKENBERG*, 152 Mass. 64, 24 N. E. 1083.

Creditor's bill.

Cited in *Geist v. St. Louis*, 156 Mo. 649, 79 Am. St. Rep. 545, 57 S. W. 766, holding that salary of municipal officer not garnishable in law cannot be reached by creditor's bill.

Cited in footnote to *Harper v. Clayton*, 35 L. R. A. 211, which denies power to reach unassigned right of dower by creditor's bill.

Cited in note (63 L. R. A. 694) on equitable remedy to subject choses in action to judgment after return of no property found.

Distinguished in *Haman v. Brennan*, 170 Mass. 407, 49 N. E. 655, holding non-

resident creditor may maintain bill in equity on domestic judgment to reach discharged insolvent's interest in partnership property.

8 L. R. A. 625, McCARTER v. ARMSTRONG, 32 S. C. 203, 10 S. E. 953.

Petition for rehearing denied in 32 S. C. 601, 11 S. E. 634.

Specific performance of contract.

Cited in footnote to Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co. 35 L. R. A. 167, which refuses to require payment of interest not provided for as condition of specific performance of contract.

Cited in notes (11 L. R. A. 143) on specific performance; (59 L. R. A. 883) on equitable remedy for damming back water of stream; (22 Am. St. Rep. 238) on specific performance; (68 Am. St. Rep. 754, 761) on specific performance of contract where decree cannot be enforced; (6 Eng. Rul. Cas. 665) on refusal to enforce specific performance of contract, the execution of which the court cannot superintend.

Distinguished in Murray v. Northwestern R. Co. 64 S. C. 536, 42 S. E. 617, holding equity will decree specific performance of railroad's covenant to establish depot on lands granted.

Disapproved in Blair v. St. Louis, K. & N. W. R. Co. 92 Mo. App. 557, granting specific performance of agreement to construct and maintain pass-ways for cattle under railroad, water gate, and *cul-de-sac* to low-water mark of river.

8 L. R. A. 629, O'DONNELL v. GLENN, 9 Mont. 452, 23 Pac. 1018.

Local mining customs and laws.

Cited in Wright v. Lyons, 45 Ore. 173, 77 Pac. 81, holding local mining regulations not incompatible with federal statute are valid and binding.

Location of mining claim.

Cited in note (7 L.R.A.(N.S.) 835) on location of mining claim.

Verification of location notice.

Approved in Davidson v. Bordeaux, 15 Mont. 251, 38 Pac. 1076; Brownfield v. Bier, 15 Mont. 416, 39 Pac. 465; McCowan v. Maclay, 16 Mont. 236, 40 Pac. 602,—holding declaratory statement of location of mining claim must be under oath; Preston v. Hunter, 15 C. C. A. 151, 29 U. S. App. 621, 67 Fed. 999, holding want of verification of location notice does not invalidate claim, where no adverse rights attach before record is perfected; Hickey v. Anaconda Copper Min. Co. 33 Mont. 62, 81 Pac. 806, holding that a verification to a declaratory statement defective for description by reference invalidates the statement.

Cited in note (7 L.R.A.(N.S.) 876) on verification of location notice.

Common error.

Cited in Baker v. Butte City Water Co. 24 Mont. 116, 60 Pac. 817, as discussing and applying the maxim *Communis error facit jus*.

8 L. R. A. 633, SMITH v. OSAGE, 80 Iowa, 84, 45 N. W. 404.

Estoppel by taxation.

Cited in Davenport v. Boyd, 109 Iowa, 250, 77 Am. St. Rep. 536, 80 N. W. 314, holding city estopped from claiming land held adversely, where taxes and special assessments levied for thirty years; Corey v. Ft. Dodge, 118 Iowa, 749, 92 N. W. 704, holding city estopped to deny title of one occupying for many years and improving part of street; Weber v. Iowa City, 119 Iowa, 640, 93 N. W. 637, holding public right in unused street extinguished by long-continued, actual, adverse possession; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 267, to the point that

city is estopped from claiming title to property where claimant in possession pays taxes assessed by city upon it.

Distinguished in *Hanger v. Des Moines*, 109 Iowa, 483, 80 N. W. 549, denying that collection of taxes for ten years on property occupied by public estops claiming it as street.

Estoppel as effecting public lands.

Cited in *Sioux City v. Chicago & N. W. R. Co.* 129 Iowa, 703, 113 Am. St. Rep. 501, 106 N. W. 183, holding city estopped to deny ownership of lands in railway company which city had admitted in two actions to have been conveyed to railway company and where city had allowed company to put in valuable improvements.

Adverse possession under common source of title.

Cited in *Widener v. Lapel*, 46 Ind. App. 567, 93 N. E. 240, holding that where possession of subsequent grantee of vendor who has already granted same lands is hostile and adverse such possession for twenty years perfects his title; *Chatham v. Lansford*, 149 N. C. 365, 25 L.R.A.(N.S.) 131, 63 S. E. 81, holding that one giving warranty deed is not estopped from thereafter acquiring title by adverse possession against his grantee, by continuing in possession.

8 L. R. A. 636, *LOUISVILLE, N. A. & C. R. CO. v. CORPS*, 124 Ind. 427, 24 N. E. 1046.

Review of questions not raised below.

Cited in *Taggart v. Tevanny*, 1 Ind. App. 349, 27 N. E. 511, as to question of right to raise on appeal objections to sufficiency of complaint not made in lower court; *Diggs v. Way*, 22 Ind. App. 623, 54 N. E. 412 (dissenting opinion), majority holding that case tried on theory of insufficient paragraph of complaint will be so treated on appeal, although another count good.

Duty of employer.

Cited in *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 219, 46 N. E. 543, and *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 342, 31 N. E. 792, holding employer must use reasonable care to provide safe working place and appliances; *Rogers v. Leyden*, 127 Ind. 51, 26 N. E. 210, holding employer required to use ordinary care and skill to make and keep place of work in reasonably safe condition; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 158, 33 N. E. 355, holding reasonable care required to provide reasonably safe place to work and appliances, and competent persons for service; *Rogers v. Leyden*, 127 Ind. 57, 26 N. E. 210, holding whether there has been breach of duty to keep place of work safe, and whether dangers of service increased thereby, questions for jury; *Evansville & R. R. Co. v. Doan*, 3 Ind. App. 455, 29 N. E. 940, holding assumption of risk by employee does not relieve master from duty to exercise reasonable care as to place of work and appliances; *Baltimore & O. S. W. R. Co. v. Spaulding*, 21 Ind. App. 328, 52 N. E. 410, holding it duty of employer to keep in safe condition scrap-iron bin, to which employees of blacksmith shop required to go, even if inspection necessary for that purpose.

Presumption or proof of master's negligence.

Cited in footnote to *Duntley v. Inman, P. & Co.* 59 L. R. A. 785, which holds want of care not shown by breaking of piece of machinery, causing servant's death.

Employee's assumption of risk.

Cited in notes (13 L. R. A. 375) on when servant assumes risk; (49 L. R. A. 52) on assumption of risk as conclusive defense; (13 L. R. A. 375) on question of assumption of risk by servant.

— Ordinary hazard.

Cited in *Hoosier Stone Co. v. McCain*, 133 Ind. 242, 31 N. E. 956, holding employee assumes risk of perils incident to service; *Louisville & N. R. Co. v. Kemper*, 147 Ind. 567, 47 N. E. 214, and *Peerless Stone Co. v. Wray*, 143 Ind. 577, 42 N. E. 927, holding employee assumes defects or damages open to view, or which could be known by exercise of ordinary care; *O'Neal v. Chicago & I. Coal R. Co.* 132 Ind. 113, 31 N. E. 669, holding employee must use reasonable care to ascertain ordinary perils of service, and knowledge of such as are open and obvious presumed.

— Increased hazard.

Cited in *Peirce v. Oliver*, 18 Ind. App. 94, 47 N. E. 485; *Lynch v. Chicago, St. L. & P. R. Co.* 8 Ind. App. 519, 36 N. E. 44; *Indianapolis Union R. Co. v. Ott*, 11 Ind. App. 580, 38 N. E. 842, — holding employee continuing service after knowledge of defects assumes increased risk; *Kentucky & I. Bridge Co. v. Eastman*, 7 Ind. App. 516, 34 N. E. 835, holding, though master negligent, employee voluntarily remaining in service after knowledge of defects cannot recover for injury therefrom; *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 55, 61 N. E. 18, holding knowledge of defect alone not sufficient to charge employee with assumption of risk, if without knowledge of danger; *Southern Kansas R. Co. v. Drake*, 53 Kan. 8, 35 Pac. 825, and *Romona Oolitic Stone Co. v. Johnson*, 6 Ind. App. 556, 33 N. E. 1000, holding employee continuing service without knowledge of danger from known defect, or after promise of employer to repair, does not assume risk.

Distinction between assumption of risk and contributory negligence.

Cited in *Wortman v. Minich*, 28 Ind. App. 36, 62 N. E. 85, holding assumption of risks, whether obvious or incidental, depends on contract, and has no relation to contributory negligence; *Bowles v. Indiana R. Co.* 27 Ind. App. 676, 87 Am. St. Rep. 279, 62 N. E. 94, holding statute making contributory negligence matter of defense does not relieve employee from obligation to negative knowledge of defect in complaint; *Carver v. Minneapolis & St. L. R. Co.* 120 Iowa, 350, 94 N. W. 862, as to distinction between assumption of risk and contributory negligence.

Cited in note (49 L. R. A. 52) on relation between assumption of risk and contributory negligence.

Sufficiency of complaint in action by servant for personal injury.

Cited in *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 158, 33 N. E. 355; *Ohio & M. R. Co. v. Levy*, 134 Ind. 344, 32 N. E. 815; *Ames v. Lake Shore & M. S. R. Co.* 135 Ind. 365, 35 N. E. 117; *Peerless Stove Co. v. Wray*, 143 Ind. 576, 42 N. E. 927; *Salem-Bedford Stone Co. v. Hobbs*, 144 Ind. 153, 42 N. E. 1022; *Parke County Coal Co. v. Barth*, 5 Ind. App. 163, 31 N. E. 585; *Cole Bros. v. Wood*, 11 Ind. App. 71, 36 N. E. 1074; *Chicago & E. I. R. Co. v. Beatty*, 13 Ind. App. 622, 42 N. E. 284; *Wabash & W. R. Co. v. Morgan*, 132 Ind. 446, 32 N. E. 85, — holding that complaint for injury from defect adding to perils of service must allege defects were unknown to employee; *American Rolling Mill Co. v. Hallinger*, 161 Ind. 686, 69 N. E. 460, holding complaint under employers' liability act must state facts showing nonassumption of risk; *Gaar, S. & Co. v. Wilson*, 21 Ind. App. 97, 51 N. E. 502, and *Pennsylvania Co. v. Witte*, 15 Ind. App. 586, 43 N. E. 319, holding knowledge operating as assumption of risk is independent element in right of action for injury, which must be specifically denied; *Brunell v. Southern P. Co.* 34 Or. 260, 56 Pac. 129, holding complaint must allege employer knew, or ought to have known, of defect, and that employee was ignorant of danger; *Cleveland, C. C. & St. L. R. Co. v. Parker*, 154 Ind. 154, 56 N. E. 86, holding complaint in action for causing death through negligent

construction of side track, causing engine to overturn, must negative knowledge of defect by deceased; *South Florida Teleg. Co. v. Maloney*, 34 Fla. 342, 16 So. 280, holding, where complaint based on omission of particular duty, complaint must state specifically nature of duty omitted; *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 6, 94 Am. St. Rep. 259, 61 N. E. 236, holding complaint in negligence action against employer, showing employee had no knowledge of danger, sufficient; *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 247, 87 N. E. 158; *Columbia Creosoting Co. v. Beard*, 44 Ind. App. 314, 89 N. E. 321; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 112, 88 N. E. 1073,—holding that complaint in action for injuries received by servant while passing through switch yard, must negative knowledge of danger incurred and which caused injury; *Chicago & B. Stone Co. v. Nelson*, 32 Ind. App. 361, 69 N. E. 705, holding complaint not averring absence of knowledge of danger insufficient to negative assumption of risk; *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 94, 102 Am. St. Rep. 185, 69 N. E. 669, holding an allegation in complaint of absence of fault not sufficient to negative assumption of risk; *Malott v. Sample*, 164 Ind. 651, 74 N. E. 245, holding complaint stating nature of defect not sufficient to aver knowledge actual or constructive; *Wabash R. Co. v. Hassett*, 170 Ind. 378, 83 N. E. 705, holding allegation “by the rules” without setting out the rules is not sufficient.

Cited in note (22 Am. St. Rep. 521) on sufficiency of complaint in action by servant for injuries.

Distinguished in *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 271, 65 N. E. 918, holding plaintiff injured by breaking of defective bridge need not negative previous knowledge of unsafe condition.

8 L. R. A. 637, *NAUGATUCK WATER CO. v. NICHOLS*, 58 Conn. 403, 20 Atl. 315.

Release from subscription to stock.

Approved in *Barrows v. Natchaug Silk Co.* 72 Conn. 664, 45 Atl. 951, holding failure to file certificate of increase of stock does not exempt subscriber who has acted as stockholder from paying for stock.

8 L. R. A. 640, *WEENER v. BRAYTON*, 152 Mass. 101, 25 N. E. 46.

Protection of trade-mark or label.

Approved in *State v. Bishop*, 128 Mo. 381, 29 L. R. A. 205, 49 Am. St. Rep. 569, 31 S. W. 9, holding state, by appropriate legislation, may protect labor unions in use of labels to designate articles manufactured by its members.

Cited in *Tracy v. Banker*, 170 Mass. 270, 39 L. R. A. 509, 49 N. E. 308, holding unincorporated trade union protected from use of counterfeit label by Mass. Stat. 1895, chap. 462; *Lawlor v. Merritt*, 78 Conn. 635, 63 Atl. 639, holding that a union label not stating that goods labeled were made by a member of union does not come under protective statute; *Regis v. Jaynes*, 185 Mass. 463, 70 N. E. 480, holding the manufacturer of “Rex” in a certain form may enjoin manufacture and sale of “Rexall” in same form though in dissimilar packages and without proof of actual deception to purchasers and damage to plaintiff; *Nelson v. Winchell & Co.* 203 Mass. 82, 23 L.R.A.(N.S.) 1154, 89 N. E. 180, holding that a person other than the manufacturer of goods may acquire a trade mark therein where the goods are manufactured for his exclusive distribution; *Falk v. American West Indies Trading Co.* 180 N. Y. 450, 1 L.R.A.(N.S.) 712, 105 Am. St. Rep. 778, 73 N. E. 239, 2 A. & E. Ann. Cas. 216, holding that the transferee of a naked trade mark detached from the business in which it originated cannot enjoin its infringement.

Cited in footnotes to *McVey v. Brendel*, 13 L. R. A. 377, which holds equity will not protect labor union in use of nontrade-mark label; *Cohn v. People*, 23 L. R. A. 821, which holds statute giving right to trade-mark in union label valid; *Fuller v. Huff*, 51 L. R. A. 332, which sustains right to enjoin use of term "health food" for foods previously known as "sanitarium foods;" *Koehler v. Sanders*, 9 L. R. A. 576, which denies right to appropriate word "international" as trade-mark; *Scott v. Standard Oil Co.* 31 L. R. A. 374, which holds words "fire proof oil" cannot be claimed as trade-mark for an illuminating oil; *Kipling v. G. P. Putnam's Sons*, 65 L.R.A. 873, which holds merely placing a design on the covers of an edition of an author's works, without registering it as a trade-mark, or giving notice that it is such, does not protect it from use by others.

Cited in notes (17 L. R. A. 130) on right to exclusive use of trade-mark; (29 L.R.A. 200) on protection of trade union labels and trade-marks; (39 L.R.A. (N.S.) 1191, 1192, 1194, 1195, 1198) on law as to union labels.

Distinguished in *Nelson v. Winchell & Co.* 203 Mass. 88, 23 L.R.A.(N.S.) 1157, 89 N. E. 180, holding that plaintiff can recover profits resulting from wrongful appropriation of tradename.

Questioned in *State v. Hagen*, 6 Ind. App. 171, 33 N. E. 223, holding that equity will protect trade union label against frauds and counterfeits.

Disapproved in *Schmalz v. Wooley*, 57 N. J. Eq. 310, 43 L. R. A. 90, 73 Am. St. Rep. 637, 41 Atl. 939, holding workmen in same industry may acquire right in trade-mark designed to distinguish their work from that of others; *Hetterman Bros. v. Powers*, 102 Ky. 140, 39 L. R. A. 213, 80 Am. St. Rep. 348, 43 S. W. 180, holding unincorporated labor organization entitled to protection of label, although not owner of goods to which it is affixed.

— Deceptive trade-marks.

Approved in *American Washboard Co. v. Saginaw Mfg. Co.* 50 L. R. A. 614, 43 C. C. A. 237, 103 Fed. 285, holding false designation of washboards as aluminum will not be enjoined where defendant does not represent his goods as those of complainant; *Messer v. The Fadettes*, 168 Mass. 143, 37 L. R. A. 722, 60 Am. St. Rep. 371, 46 N. E. 407, holding purchaser of name of orchestra after all the members have left cannot enjoin use of name by some of them since it would lead to public deception; *Schmalz v. Wooley*, 56 N. J. Eq. 651, 39 Atl. 539, holding label adopted by association of journeymen hatters will not be protected where they do not trade in hats or caps to which it is attached.

Cited in *Atlas Assur. Co. v. Atlas Ins. Co.* 138 Iowa, 233, 15 L.R.A.(N.S.) 631, 128 Am. St. Rep. 189, 112 N. W. 232, holding confusion of names in business sufficient ground for an injunction.

Cited in footnotes to *La Republique Francaise v. Saratoga Vichy Springs Co.* 65 L.R.A. 830, which holds conspicuous use of word "Vichy" and inconspicuous use of word "Saratoga" on bottle of water from Saratoga spring unfair competition with bottled waters from Vichy in France; *Shaver v. Heller & M. Co.* 65 L.R.A. 878, which sustains right to injunction against unfair use of names "American Ball Blue" and "American Wash Blue" under which a large and lucrative trade has been built up.

Cited in note (19 L. R. A. 56) on invalidity of deceptive trade-mark.

8 L. R. A. 644, *PHENIX NAT. BANK v. BATCHELLER*, 151 Mass. 589, 24 N. E. 917.

Effect of discharge in insolvency on foreign creditor's rights.

Cited in *Olivieri v. Atkinson*, 168 Mass. 32, 46 N. E. 422; *Stirn v. McQuade*, 66 N. H. 404, 49 Am. St. Rep. 623, 22 Atl. 451; *Regina Flour Mill Co. v. Holmes*,

156 Mass. 12, 30 N. E. 176, — holding discharge in insolvency not a bar to suit by foreign creditor; *Chase v. Henry*, 166 Mass. 579, 55 Am. St. Rep. 423, 44 N. E. 988, holding discharge in insolvency not a bar to partnership, one partner always having been a citizen and resident of another state; *Pullen v. Hillman*, 84 Me. 131, 30 Am. St. Rep. 340, 24 Atl. 795, holding nonresident creditor not barred, even though citizen of insolvent's state when contract was made; *Bergner & E. Brewing Co. v. Dreyfus*, 172 Mass. 155, 70 Am. St. Rep. 251, 51 N. E. 531, holding foreign corporation not barred by insolvency discharge, although having place of business and license in state of insolvency proceedings; *Hammond Beef & Provision Co. v. Best*, 91 Me. 437, 42 L. R. A. 531, 40 Atl. 338, holding foreign corporation not bound by insolvency discharge, although resident agent was duly served with process; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 273, 39 L. R. A. 578, 73 N. W. 39 (dissenting opinion), to point that discharge in insolvency does not relieve from debts due to nonresidents who do not present their claims.

Cited in footnotes to *Lowenberg v. Levine*, 16 L. R. A. 159, which holds foreign judgment not released by discharge in insolvency proceedings; *Pattee v. Paige*, 163 Mass. 353, 28 L. R. A. 451, 47 Am. St. Rep. 459, 40 N. E. 108, which holds nonresident's waiver of exemption from discharge of one firm not extend to claim against other firm composed in part of same members.

Cited in notes (17 L.R.A. 84) on supremacy of state or nation over devolution of property; (94 Am. St. Rep. 557) on effect of discharge in bankruptcy or insolvency on foreign creditor's rights.

Distinguished in *Columbia Falls Brick Co. v. Glidden*, 157 Mass. 177, 31 N. E. 801, holding right of action by foreign creditor lost by proving claim against insolvent's estate.

— Garnishee proceedings.

Cited in *Louisville & N. R. Co. v. Nash*, 118 Ala. 486, 41 L. R. A. 332, 72 Am. St. Rep. 181, 23 So. 825, holding payment by garnishee of judgment void for want of jurisdiction, no defense to action by nonresident creditor.

8 L. R. A. 647, *CONE v. DUNHAM*, 59 Conn. 145, 20 Atl. 311.

Presentation of claim.

Approved in *Gay's Appeal*, 61 Conn. 450, 23 Atl. 829, holding time within which claim must be exhibited does not begin to run until administrator is appointed; *Winchell v. Sanger*, 73 Conn. 405, 47 Atl. 706, and *Connecticut Trust & S. D. Co. v. Security Co.* 67 Conn. 443, 35 Atl. 342, holding statute of non-claim does not apply to express trust, which does not lose its character by commingling of trust funds with other's funds.

Cited in *Frisbie v. Preston*, 67 Conn. 454, 35 Atl. 278, to point that failure to present claim within time limited bars it; *Boyle v. Boyle*, 126 Iowa, 168, 101 N. W. 748, 3 A. & E. Ann. Cas. 575, holding minority and want of notice no excuse for failure to present claim within statutory period.

Application of statute of limitations to trusts.

Cited in *Jewell v. Jewell*, 139 Mich. 587, 102 N. W. 1059, holding that relation of principal and agent is not such a trust relation as suspends the statute of limitations against agent for money collected on old business and citing annotation to same effect; *Centerville v. Turner County*, 25 S. D. 303, 126 N. W. 605, holding that city taxes collected by county are held under implied trust and statute of limitations applies to bar recovery of excess commissions retained under claim of right.

Cited in notes (35 L. ed. U. S. 1030) on statute of limitations and lapse of

time as bar to trusts; (16 Eng. Rul. Cas. 271) on running of limitations in case of breach of fiduciary duty.

Presumption of death.

Cited in *Com. v. McKenna*, 17 Pa. Dist. R. 587, holding subsequent marriage valid where there is no evidence at time of such marriage that the deserting husband of first marriage is alive he having been absent for 7 years.

8 L. R. A. 655, *MITTEL v. KARL*, 133 Ill. 65, 24 N. E. 553.

Estates in land; right of survivorship.

Cited in *Mette v. Feltgen*, 148 Ill. 371, 36 N. E. 81, holding parties not prevented by statute from conveying estates, with right of survivorship, when clearly intending to do so; *Slater v. Gruger*, 165 Ill. 332, 46 N. E. 235, holding deed to grantees "and the survivor of them," expressly declared to be in joint tenancy, creates such estate; *Lawler v. Byrne*, 252 Ill. 196, 96 N. E. 892, holding that since passage of married woman's act joint tenancy of husband and wife is governed by rules applicable to other joint tenants; *Nangle v. Mullanny*, 113 Ill. App. 462, holding that a discharge of one of two trustees devolves the entire trust into the survivor, their holding being in nature of joint tenancy.

Cited in footnotes to *Re Albrecht*, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife; *Thornburg v. Wiggins*, 22 L. R. A. 42, which holds tenancy by entirety not created by conveyance to husband and wife "in joint tenancy."

Cited in note (30 L. R. A. 324) on tenancy by entireties.

Construction of written instruments.

Cited in *Robertson v. Guenther*, 241 Ill. 513, 25 L.R.A.(N.S.) 891, 89 N. E. 689, construing an estate for life and then to surviving children to be a contingent remainder in the surviving children; *Gaunt v. Stevens*, 241 Ill. 548, 89 N. E. 812, construing an estate to the "survivor or survivors of them" followed by "share and share alike" to be a tenancy in common and not joint estate; *Winter v. Dibble*, 251 Ill. 217, 95 N. E. 1093, holding that construction which requires rejection of entire clause in instrument is not to be admitted except from absolute necessity; *Morey v. Terre Haute Traction & Light Co.* 47 Ind. App. 22, 93 N. E. 710, holding that force and effect should be given to all words employed in contract, wherever possible.

Cited in note (14 Eng. Rul. Cas. 789) on enlarging by explaining grant by habendum clause.

— Intent of parties.

Cited in *Peoria & P. Union R. Co. v. Tamplin*, 156 Ill. 294, 40 N. E. 960, holding that in construing written instruments effect must be given to each clause, word, or term employed; *Cover v. James*, 217 Ill. 315, 75 N. E. 490, on the construction of written instruments including all words and phrases with a view to ascertain meaning of the parties; *Gage v. Cameron*, 212 Ill. 162, 72 N. E. 204, holding a clause that grantee assume all mortgages, liens, taxes and claims of any and every description shows an intention that the general inclusion refers to a class larger than the kind specifically named; *McLean County Coal Co. v. Bloomington*, 234 Ill. 97, 84 N. E. 624, construing a contract to furnish coal to be delivered "as needed" and also as fast "as required" as the city might "order" and "direct" to call for a delivery as the coal was actually needed to maintain the business for which it is required.

Passing of title.

Cited in *Fletcher v. Shepherd*, 174 Ill. 270, 51 N. E. 212, holding grantor L.R.A. Au. Vol. II.—10.

delivering quitclaim deed to daughter, and taking one in return on same premises but not recording it, does not hold title in trust for daughter.

8 L. R. A. 657, TYLER v. WADDINGHAM, 58 Conn. 375, 20 Atl. 335.

Review of conclusion.

Approved in Nolan v. New York, N. H. & H. R. Co. 70 Conn. 175, 43 L. R. A. 325, 39 Atl. 115, holding findings that railroad did not, by orders or rules, sufficiently provide for the safe operation of trains reviewable as conclusion of law.

How partnership created.

Approved in Norwalk *ex rel.* Fawcett v. Ireland, 68 Conn. 16, 35 Atl. 804, holding one running millinery store not partner of another whose goods are kept in store but not commingled, and who on sale of goods receives proceeds.

Cited in Fruin v. Chotzianoff, 79 Conn. 69, 63 Atl. 782, holding an agreement creates a partnership where the members are to share profits equally of a business conducted in all its details under a firm name though no time is set for its duration; Morgart v. Smouse, 103 Md. 468, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 A. & E. Ann. Cas. 1140, holding an agreement that one of two parties was to be included in a land deal and to furnish the capital, the profits and losses if any to be equally divided, constitutes a partnership; Church v. Odell, 100 Minn. 101, 110 N. W. 346, holding that the rules of law applicable to partnership apply to a joint undertaking for equal distribution of profits also citing annotation to same point.

Cited in footnotes to Flower v. Barnekoff, 11 L. R. A. 149, which holds as partners persons jointly agreeing to secure option on land for purpose of selling and sharing profits; Dutcher v. Buck, 20 L. R. A. 776, which holds partnership created between land owner and one cutting timber under contract for equal division of profits; Webster v. Clark, 27 L. R. A. 126, which holds partnership with community of interest in capital and profits created by so-called lease; Shrum v. Simpson, 49 L. R. A. 792, which holds no partnership created by contract for working farm and dividing proceeds; Brandon v. Connor, 63 L.R.A. 260, which holds partnership as to third persons constituted by agreement with contractors for construction of railroad to furnish services and part of necessary animals for use.

Cited in note (18 L.R.A.(N.S.) 967, 1015, 1017) on effect of agreement to share profits to create partnership.

Distinguished in Hughes v. Ewing, 162 Mo. 300, 62 S. W. 465, holding contemplated participation of profits between purchaser of land, factory owner, and broker, does not make them partners.

Interest of partners in real estate.

Cited in footnote to *Re* Oliver, 9 L. R. A. 421, which holds interest of member of firm organized to deal in land, personal estate.

Cited in note (27 L. R. A. 481) on partnership to buy and sell land.

Responsibility of partners.

Cited in note (12 L. R. A. 223) on responsibility for debt of one receiving credit.

Absolute guaranty.

Approved in Garland v. Gaines, 73 Conn. 666, 84 Am. St. Rep. 182, 49 Atl. 19, holding guarantor of payment of rent and performance of lessee's agreement for full term, in consideration of letting premises, liable on absolute guaranty.

Cited in Beardsley v. Hawes, 71 Conn. 43, 40 Atl. 1043, holding one signing

note "for security for payment" which he guarantees, liable as absolute guarantor.

Cited in notes (20 L.R.A. 262) on guaranty of payment of note; (38 L.R.A. (N.S.) 878) on guaranty: release of principal after maturity of obligation as affecting guarantor.

Validity of Sunday contract.

Cited in footnotes to *First M. E. Church v. Donnell*, 46 L.R.A. 858, which sustains subscription to church indebtedness made on Sunday; *Rodman v. Robinson*, 65 L.R.A. 682, which sustains Sunday contract for purchase and sale of real estate.

Cited in note (4 L.R.A.(N.S.) 1152) on validity of contract partially made on Sunday perfected on a secular day.

8 L. R. A. 666, *LEAKE v. WATSON*, 58 Conn. 332, 18 Am. St. Rep. 270, 20 Atl. 343.

Report of subsequent appeal in 60 Conn. 501, 21 Atl. 1075.

Following trust funds.

Approved in *Randolph v. East Birmingham Land Co.* 104 Ala. 367, 53 Am. St. Rep. 64, 16 So. 126, holding purchasers with notice on assignee's sale of lands conveyed to assignor in violation of a trust acquire no rights against beneficiary.

Cited in *Re Mitchell*, 74 Vt. 194, 52 Atl. 523, holding no trust attaches to fund derived from sale of property devised to certain persons for life, remainder to their heirs.

Cited in footnotes to *Indiana, I. & I. R. Co. v. Swannell*, 30 L. R. A. 290, which holds that property purchased by trustee for bondholders may be followed by latter into hands of purchaser with notice; *Central Stock & Grain Exchange v. Bendinger*, 56 L. R. A. 875, which holds broker liable to refund to principal, money illegally taken from agent as margins on gambling transaction.

Cited in note (63 Am. St. Rep. 473) as to when beneficiaries are bound by acts of trustees in contravention of their trusts.

8 L. R. A. 671, *BALLOCK v. STATE*, 73 Md. 1, 25 Am. St. Rep. 559, 20 Atl. 184.

Lottery.

Approved in *United States v. Fulkerson*, 74 Fed. 629, condemning as lottery, scheme for raising fund for purpose of redistribution by chance; *People v. McPhee*, 139 Mich. 691, 69 L.R.A. 508, 103 N. W. 174, 5 A. & E. Ann. Cas. 835, holding a club in which the members at intervals each paid one dollar for a chance on a suit of clothes each member having the right to withdraw at any time and if he had obtained no suit to be given value in clothing for money paid, to be a lottery.

Cited in *Russell v. Equitable Loan & Security Co.* 129 Ga. 162, 58 S. E. 881, 12 A. & E. Ann. Cas. 129, on the settling of a contingency by chance as being a lottery.

Cited in footnotes to *State ex rel. Prout v. Nebraska Home Co.* 60 L. R. A. 448, which holds scheme by which common fund distributed among contributors, a valuable preference in distribution depending on chance, a lottery; *Thornhill v. O'Rear*, 31 L. R. A. 792, which holds agreement by one person to take all chances of raffle not unlawful; *Lynch v. Rosenthal*, 31 L. R. A. 835, which holds sale of lots to be drawn by lot with one prize lot to be given to one of purchasers as result of chance void; *State ex rel. Sheets v. Interstate Sav. Invest. Co.* 52 L. R. A. 531, which holds contracts of investment security, which by chance might be called in and redeemed before reserve credit would regularly accumulate, unlaw-

ful; *Equitable Loan & S. Co. v. Waring*, 62 L.R.A. 93, which holds consideration, prize, and chance essential elements of lottery; *People ex rel. Ellison v. Lavin*, 66 L.R.A. 601, which holds distribution of prizes to those who shall make closest estimate of number of cigars on which tax is paid during specified month, a lottery.

Distinguished in *Equitable Loan & Security Co. v. Waring*, 117 Ga. 614, 62 L. R. A. 124, footnote, p. 93, 44 S. E. 320, holding determination by chance of time of redeeming investment certificates entitling holders to sum paid in, with interest, and share of accumulations from earnings and lapses, does not make scheme a lottery.

Validity of legislation against gambling.

Cited in *Ford v. State*, 85 Md. 475, 41 L. R. A. 552, 60 Am. St. Rep. 337, 37 Atl. 172, holding deprivation of liberty under statute against possession of record of lottery drawings not without due process; *Otis v. Parker*, 187 U. S. 609, 47 L. ed. 327, 23 Sup. Ct. Rep. 168, holding state constitutional provision declaring void stock-margin contracts not in conflict with Federal Constitution; *Lottery Case (Champion v. Ames)*, 188 U. S. 370, 47 L. ed. 507, 23 Sup. Ct. Rep. 321 (dissenting opinion), majority holding act prohibiting carriage of lottery tickets from one state to another, within power of Congress to regulate interstate commerce; *Ames v. Kirby*, 71 N. J. L. 447, 59 Atl. 558, holding a law prohibiting pool-room gambling by telegraphic communication with persons outside the state is valid though the persons without the state may not be violating a local law.

8 L. R. A. 673, *PHILADELPHIA, W. & B. R. CO. v. ANDERSON*, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2.

Followed without discussion in *Philadelphia, B. & W. R. Co. v. Hand*, 101 Md. 235, 61 Atl. 285; *Philadelphia, B. & W. R. Co. v. McGugan*, 102 Md. 272, 62 Atl. 752.

Degree of care required of carrier of passengers.

Cited in *Baltimore City Pass. R. Co. v. Baer*, 90 Md. 108, 44 Atl. 992, upholding action by person injured by being thrown to ground while boarding trolley car, by sudden starting of car; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 329, 84 N. W. 423, holding instructions requiring of carrier highest degree of care and skill which a careful and vigilant man would observe in like circumstance erroneous; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 111, 64 S. W. 202, holding carrier of passengers to highest, greatest, or utmost care, skill, and foresight as to motive power, appliances, and servants, they would exercise for their own protection; *Burke v. Chicago & N. W. R. Co.* 108 Ill. App. 575, holding railroad liable for injury to drunken passenger deposited on platform near track; *Colorado & S. R. Co. v. McGeorge*, 46 Colo. 19, 133 Am. St. Rep. 43, 102 Pac. 747, 17 A. & E. Ann. Cas. 880, stating the approved rule as to the care required from carriers for safety of their passengers.

Cited in notes (11 L. R. A. 367) on duty of carrier to assist in landing passengers; (11 L. R. A. 720) on duty of railroad company to care for safety of passengers; (20 L. R. A. 521) on measure of care which carrier must exercise to keep its platforms and approaches safe; (29 Am. St. Rep. 382) on degree of skill required of carrier of passengers.

— Safe place to alight.

Cited in *Topp v. United R. & Electric Co.* 99 Md. 637, 59 Atl. 52, 1 A. & E. Ann. Cas. 912, holding defendant liable for injury resulting from failure of conductor to stop street car at a safe place to alight.

— **Misleading announcement.**

Cited in *Baltimore & P. R. Co. v. Jean*, 98 Md. 548, 57 Atl. 540, holding an order of conductor "all out for Pennsylvania ave. station" before station was reached causing plaintiff to go onto platform and fall from car, to be evidence of negligence sufficient to go to jury.

— **Contributory negligence of passenger.**

Cited in *People's Bank v. Morgolofski*, 75 Md. 444, 32 Am. St. Rep. 403, 23 Atl. 1027, holding it question for jury whether it was contributory negligence to walk through open door into dark elevator shaft.

Cited in note (11 L. R. A. 130) on contributory negligence of passenger defeating recovery of damages for injuries.

— **At station or while alighting.**

Cited in *Chesapeake & O. R. Co. v. King*, 49 L. R. A. 107, 40 C. C. A. 435, 99 Fed. 255, and *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 397, 45 L. R. A. 673, 72 Am. St. Rep. 652, 42 Atl. 333, holding question of contributory negligence in failing to look for trains when crossing track in passing from train to station, for jury; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 176, 50 N. E. 713, holding passenger has right to assume carrier will not expose him to undue danger in alighting from trains at stations; *St. Louis & S. W. R. Co. v. Johnson*, 59 Ark. 130, 26 S. W. 593, holding failure to look and listen before crossing track, after alighting upon implied invitation, not contributory negligence, as matter of law; *Warner v. Baltimore & O. R. Co.* 168 U. S. 347, 42 L. ed. 496, 18 Sup. Ct. Rep. 68, holding question whether injured person was guilty of contributory negligence in crossing tracks at station improperly taken from jury; *Jones v. Baltimore & O. R. Co.* 21 D. C. 358, holding jumping from train not moving at high speed not contributory negligence, as matter of law; *United R. & Electric Co. v. Woodbridge*, 97 Md. 637, 55 Atl. 444, holding passenger not guilty of negligence, as matter of law, in alighting from street car stopping after conductor called her street; *United R. & Electric Co. v. Beidelman*, 95 Md. 483, 52 Atl. 913, holding plaintiff with rheumatism only bound to use ordinary care to avoid consequences of defendant's negligence; *Atchison, T. & S. F. R. Co. v. Holloway*, 71 Kan. 10, 114 Am. St. Rep. 462, 80 Pac. 31, holding the boarding of a moving train not contributory negligence under the circumstances; *Besecker v. Delaware, L. & W. R. Co.* 220 Pa. 513, 123 Am. St. Rep. 714, 69 Atl. 1039, 14 A. & E. Ann. Cas. 21, holding that the fact that train was moving at time passenger alighted is not notice to passenger that carrier does not intend to keep tracks between the train and station free from passing trains.

Cited in footnote to *Chesapeake & Ohio R. Co. v. King*, 49 L. R. A. 102, which sustains right of passengers alighting to presume against dangerous operation of trains.

Cited in note (13 L.R.A.(N.S.) 621) on contributory negligence of passenger as to running train or car between standing train and station.

Distinguished in *Warner v. Baltimore & O. R. Co.* 7 App. D. C. 85, holding passenger in absence of special inducement has no right to go upon railroad track without stopping and looking.

— **Res ipsa loquitur.**

Cited in *United R. & Electric Co. v. Beidelman*, 95 Md. 483, 52 Atl. 913, holding proof of occurrence of injury to passenger prima facie evidence of negligence; *United R. & Electric Co. v. Woodbridge*, 97 Md. 633, 55 Atl. 444, holding proof of injury to passenger getting off street car prima facie evidence of carrier's negligence; *Houston v. Brush*, 66 Vt. 345, 29 Atl. 380, holding mere falling of tackle block from want of derrick prima facie evidence of negligence; *Snyder v.*

Wheeling Electrical Co. 43 W. Va. 669, 39 L. R. A. 502, 64 Am. St. Rep. 922, 28 S. E. 733, holding mere falling of wire charged with heavy current of electricity to surface of street, killing man, makes prima facie case of negligence; Horowitz v. Hamburg-American Packet Co. 18 Misc. 26, 41 N. Y. Supp. 54, holding fall of pile of baggage without apparent cause prima facie evidence of negligence; Richmond R. & Electric Co. v. Hudgins, 100 Va. 416, 41 S. E. 736, holding negligence presumed where horse was frightened by short circuiting of current while passing electric car; Renfro v. Fresno City R. Co. 2 Cal. App. 324, 84 Pac. 357, on the presumption of negligence where injury has been shown to have been caused by operation of instrumentalities under defendant's control also citing annotation to same point; Dieckmann v. Chicago & N. W. R. Co. 145 Iowa, 258, 31 L.R.A.(N.S.) 343, 139 Am. St. Rep. 420, 121 N. W. 676, holding that railroad company whose train kills passenger has burden of negating inference of negligence on its part; Boucher v. Boston & M. R. Co. 76 N. H. 95, 34 L.R.A.(N.S.) 730, 79 Atl. 993, Ann. Cas. 1912B, 847, holding that inference of negligence arises not from fact of injury, but from circumstance under which it occurred.

Cited in notes (22 Am. St. Rep. 789; 30 Am. St. Rep. 736) on presumption of carrier's negligence from accident; (113 Am. St. Rep. 987, 1020) on presumption of negligence from happening of accident causing personal injuries.

Evidence to establish contributory negligence.

Cited in Pennsylvania R. Co. v. Cecil, 111 Md. 299, 73 Atl. 820, on rule that negligence of plaintiff must be established by preponderating evidence and also that it contributed to the injury.

8 L. R. A. 677, HARRIS v. BALTIMORE, 73 Md. 22, 25 Am. St. Rep. 565, 17 Atl. 1046, 20 Atl. 111, 985.

Limited authority of partners of nontrading partnership.

Cited in Presbrey v. Thomas, 1 App. D. C. 178, holding partners in nontrading partnership have no implied authority to bind firm by indorsement of commercial paper; Snively v. Matheson, 12 Wash. 95, 50 Am. St. Rep. 877, 40 Pac. 628, holding that member of general contracting and building partnership cannot, in absence of authority, usage, or necessity, bind firm by note and mortgage; Schellenbeck v. Studebaker, 13 Ind. App. 440, 55 Am. St. Rep. 240, 41 N. E. 845, holding partner in nontrading partnership without implied authority to execute firm note, in absence of necessity or custom.

Cited in note (48 Am. St. Rep. 441, 442) as to when partnership is bound by loan effected by one member.

Part assignment of claim.

Cited in Bruns v. Spalding, 90 Md. 360, 45 Atl. 194, upholding in equity assignment of a definite portion of partnership profit.

8 L. R. A. 680, WOLF v. BAUEREIS, 72 Md. 481, 19 Atl. 1045.

Right of married woman to sue in own name for personal wrong.

Cited in Dashiell v. Griffith, 84 Md. 379, 35 Atl. 1094, holding action for tort to wife properly brought in name of husband and wife; Samarzevosky v. Baltimore City Pass. R. Co. 88 Md. 480, 42 Atl. 206, holding that prior to October, 1892, husband and wife were required to join in action for personal injuries to wife; Wolf v. Frank, 92 Md. 143, 52 L. R. A. 105, 48 Atl. 132, upholding action by married woman in own name for alienation of husband's affections under statute; Capital Traction Co. v. Rockwell, 17 App. D. C. 380, holding that married woman may maintain action for negligence in own name under "married woman's act" of 1896.

Cited in note (28 Am. St. Rep. 79) on joinder of husband and wife in action for personal injury.

Proviso or exception in statute or Constitution.

Cited in *Leader Printing Co. v. Nicholas*, 6 Okla. 309, 50 Pac. 1001, holding proviso or exception relates to paragraph or distinct portion of the enactment immediately preceding it, unless intent is contrary; *State ex rel. Riter v. Quayle*, 26 Utah, 30; 71 Pac. 1060, holding that proviso in Constitution should be confined to paragraph next preceding, unless contrary intention appears.

Interruption of running of limitations; amendment.

Cited in footnote to *Love v. Southern R. Co.* 55 L. R. A. 471, which sustains right to file new declaration after limitation period has elapsed, naming statutory beneficiaries in action for death.

Validity of contracts of married women.

Cited in *Lyell v. Walbach*, 113 Md. 578, 33 L.R.A.(N.S.) 743, 77 Atl. 1111, to the point that prior to acts of 1898 chapter 457, contracts of married women were void, except in those instances where common law powers were enlarged by statute.

8 L. R. A. 682, *KERN v. MYLL*, 80 Mich. 525, 45 N. W. 587.

Landlord's liability for condition of premises.

Approved in *Wilcox v. Hines*, 100 Tenn. 550, 41 L. R. A. 281, 66 Am. St. Rep. 778, 46 S. W. 297, holding landlord liable to tenant for nuisance existing at date of lease; *Sunasack v. Morey*, 196 Ill. 573, 63 N. E. 1039, holding landlord liable for injury resulting from failure to inform tenant of presence of sewer gas; *Borggard v. Gale*, 205 Ill. 514, 68 N. E. 1063, sustaining instruction limiting landlord's liability for latent defect in premises, to case of fraud or concealment.

Cited in *Howell v. Schneider*, 24 App. D. C. 548, holding landlord not liable to tenant for defective condition of premises in the absence of express warranty or active deceit; *Douglas v. Marsh*, 141 Mich. 214, 104 N. W. 624, on the non-liability of landlord for injury to tenant from defects in premises known by tenant as well as by landlord; *Morgan v. Sheppard*, 156 Ala. 409, 47 So. 147, holding complaint demurrable that fails to aver that defects causing injury are latent and not disclosed by landlord.

Cited in notes (34 L. R. A. 828) on liability of landlord to tenant for concealment of defects; (33 L. R. A. 454) on implied covenants as to fitness of premises other than furnished houses; (22 Am. St. Rep. 853) on liability of landlord for nuisance; (9 Eng. Rul. Cas. 457) on implied obligation of landlord to repair, and implied warranty of fitness of premises for purposes for which they are let; (15 Eng. Rul. Cas. 341) on liability of landlord letting premises in defective condition.

Distinguished in second appeal in 94 Mich. 477, 54 N. W. 176 holding landlord not chargeable with negligent ignorance of existence of well, equivalent to knowledge, when well had been filled ten years and no complaint made; *Fowler Cycle Works v. Fraser*, 110 Ill. App. 129, holding false representation that roof did not leak not invalidate lease.

8 L. R. A. 685, *PEOPLE v. MORRIS*, 80 Mich. 634, 45 N. W. 591.

Policy of law as affecting court.

Cited in *Re McDonald*, 4 Wyo. 161, 33 Pac. 18, to point that policy of law is within province of legislature rather than court.

Cruel or unusual punishment.

Approved in *State v. Becker*, 3 S. D. 41, 51 N. W. 1018, holding fine of not

more than \$500 and imprisonment for not more than six months not cruel and unusual punishment for maintaining common nuisance by unlawfully selling liquor; *Territory v. Ketchum*, 10 N. M. 720, 55 L. R. A. 91, 65 Pac. 169, holding death penalty for assault upon train with intent to commit robbery or other felony not cruel or unusual punishment.

Cited in *People v. Oppenheimer*, 156 Cal. 737, 106 Pac. 74, holding a statute imposing death penalty on life prisoners of state making an assault with a deadly weapon and malice aforethought not invalid as shocking to the moral sense of the people; *Weems v. Miller*, 217 U. S. 407, 54 L. ed. 815, 30 Sup. Ct. Rep. 544 (dissenting opinion), as to what constitutes cruel and unusual punishment for crime.

Cited in footnote to *Com. v. Murphy*, 30 L. R. A. 734, which sustains statute imposing imprisonment for life for criminal intimacy with girl under sixteen.

Cited in note (35 L. R. A. 564, 573) on cruel and unusual punishment.

Effect of plea of "guilty."

Cited in *Hollibaugh v. Hehn*, 13 Wyo. 277, 79 Pac. 1044, holding that a statute providing for "commitment until sentence" of persons pleading guilty to indictment does not deprive prisoner of right to trial by jury.

S L. R. A. 687, *AMAKER v. NEW*, 33 S. C. 28, 11 S. E. 386.

Statute of limitation for fraud.

Cited in *Goforth v. Goforth*, 47 S. C. 133, 25 S. E. 40, holding statute of limitation does not run from discovery of fraud, if party simply waits to have rights under deed assailed; *Jackson v. Plyler*, 38 S. C. 500, 37 Am. St. Rep. 782, 17 S. E. 255, holding statutory limitation for beginning action for relief on ground of fraud does not apply to simple case of foreclosure of mortgage; *McGee v. Jones*, 34 S. C. 153, 13 S. E. 326, holding statute of limitations does not run until right of action exists; *McColgan v. Muirland*, 2 Cal. App. 11, 82 Pac. 1113, holding that the statute of limitations for fraud will not defeat an equitable defense against a judgment obtained without consideration by fraud; *Louisville Bkg. Co. v. Buchanan*, 117 Ky. 981, 80 S. W. 193, 4 A. & E. Ann. Cas. 929, holding that the statute of limitations, for frauds applies only to actions based thereon and not to defenses; *State ex rel. Cardwell v. Stuart*, 111 Mo. App. 498, 86 S. W. 471, holding that the defect in a release procured by fraud may be pleaded though the statute of limitations has run out against the fraud, where the person pleading has established a cause of action not based on the fraud; *Rutherford v. Carr*, 99 Tex. 106, 87 S. W. 815, holding that the statute of limitations against fraud may not be invoked to sustain a void deed as a defense against a cause of action not itself barred.

Cited in footnotes to *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery, known to husband, to deny same; *Smith v. Blachley*, 53 L. R. A. 849, which holds running of limitation against action to recover back money not prevented by fraud, unless investigation prevented by affirmative efforts; *Mereness v. First Nat. Bank*, 51 L. R. A. 410, which holds running of limitations on demand certificate of deposit not interrupted by bank's misrepresentations in denial of liability; *Pietsch v. Milbrath*, 68 L.R.A. 945, which holds that the fraudulent concealment of a cause of action at law will not prevent running of limitations where the statute expressly states that it shall not run under under such circumstances in equity cases.

Instructions to jury.

Cited in *Parr v. Lindler*, 40 S. C. 201, 18 S. E. 636, holding correctness of in-

struction to jury could not be considered in this case; *Lancaster v. Lee*, 71 S. C. 285, 51 S. E. 139, holding an instruction as to the execution and delivery of a deed not erroneous for failure to cover bona fides of the deed and the question of fraud raised by the pleadings.

Joinder of causes of action.

Cited in *Ferst's Sons v. Powers*, 58 S. C. 403, 36 S. E. 744, holding action on account for goods sold and delivered may be joined with one to set aside for fraud of creditors, and attachment may issue; *Miller v. Hughes*, 33 S. C. 542, 12 S. E. 419, holding demand for money due and for relief from fraud may be sought in same action.

Admissibility of evidence on question of fraud.

Cited in *Archer v. Long*, 38 S. C. 277, 16 S. E. 998, holding evidence admissible to show claim to property void without alleging fraud; *Williams v. Griffin*, 58 S. C. 372, 36 S. E. 665, holding evidence admissible to show that bill of sale to defendant was intended as mortgage, and its payment.

Effect on title of conveyance in fraud of creditors.

Cited in note (67 L.R.A. 878) on effect on legal title of conveyance of land in fraud of creditors.

8 L. R. A. 691, *WOLCOTT v. ASHENFELTER*, 5 N. M. 442, 23 Pac. 780.

Creation of priority by specific lien.

Distinguished in *Madison v. Rutten*, 16 N. D. 286, 13 L.R.A.(N.S.) 557, 113 N. W. 872, holding that mere taking possession of mortgaged chattels by mortgagee does not validate a mortgage which was otherwise invalid as against creditors of mortgagor.

Lien of judgment on personality.

Cited in *Rapp v. Venable*, 14 N. M. 511, 110 Pac. 834, to the point that judgment is not lien on personal property.

Conditions precedent to equitable remedies of creditors.

Cited in note (23 L.R.A.(N.S.) 30), on lien as condition precedent to equitable remedies of creditors.

8 L. R. A. 696, *BILLS v. BILLS*, 80 Iowa, 269, 20 Am. St. Rep. 418, 45 N. W. 748.

Precatory words in wills.

Approved in *Re Marti*, 132 Cal. 671, 61 Pac. 964, holding word "desire" not import a trust or charge.

Cited in *McDuffie v. Montgomery*, 128 Fed. 110, holding request as to disposal of property at devisee's death accompanying absolute devise creates no trust.

Cited in footnotes to *Jewell v. Louisville Trust Co.* 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention, on liberal terms, of specified person in employ of firm of which testator a partner; *Williams v. Baptist Church*, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church and "suggesting" as to its application.

Cited in notes (13 L.R.A. 563) on effect of precatory words in will; (37 L.R.A.(N.S.) 656) on creation of trust by precatory words in will; (25 Eng. Rul. Cas. 476, 478) on construing words of general purpose in will into a trust which will defeat the general purpose of the gift.

Limitation of devise by subsequent or repugnant conditions.

Followed in *Hambel v. Hambel*, 109 Iowa, 463, 80 N. W. 528, holding absolute devise to widow not limited by subsequent directions to divide property among children on her death or remarriage.

Approved in *Meacham v. Graham*, 98 Tenn. 206, 39 S. W. 12, holding absolute

estate not limited by subsequent provision unless clear, certain, and unmistakable; *Meyer v. Weiler*, 121 Iowa, 54, 95 N. W. 254, and *Mulvane v. Rude*, 146 Ind. 483, 45 N. E. 659, holding after absolute devise a gift over of property undisposed of by first taker at his death void for repugnancy; *Channell v. Aldinger*, 121 Iowa, 299, 96 N. W. 781, holding provision for further disposition of property in case of devisee's death intestate and without issue repugnant to absolute devise.

Cited in *Jordan v. Woodin*, 93 Iowa, 463, 61 N. W. 948, holding bequest to widow and son limited by provision that if both die before son attains majority. estate should go to testator's heirs; *Stivers v. Gardner*, 88 Iowa, 311, 55 N. W. 516, holding devise limited by subsequent provision that on husband's death or remarriage land should go to testatrix's son and daughter; *Snodgrass v. Brandenburg*, 164 Ind. 63, 72 N. E. 1030, holding wife to take a fee-simple title to testator's estate under clause "I bequeath my entire estate both real and personal to my beloved wife" though followed by a "request that at her death my estate be equally divided between my children;" *Steiff v. Seibert*, 128 Iowa, 748, 6 L.R.A.(N.S.) 1188, 105 N. W. 328, holding that testator after devising land in fee cannot provide for its disposal on death of the taker of the fee; *Pool v. Napier*, 145 Iowa, 702, 124 N. W. 755, holding that devise to wife, with power to use and transfer same, containing further provision that upon devisee's death remainder to go to certain heirs creates life estate, with power of disposition, and remaining property goes to designated heirs; *Moore's Estate*, 138 Wis. 606, 120 N. W. 417, holding estate not limited by provision for purchase of other devisee's interests by one stipulated, the testator valuing the estate to be purchased at \$6000.

Cited in footnote to *Roth v. Rauschenbusch*, 61 L. R. A. 455, which holds fee simple by devise to one absolutely and forever not cut down by subsequent words as to disposition of any remainder on devisee's death.

Distinguished in *limas v. Neidt*, 101 Iowa, 352, 70 N. W. 203, holding devise to daughter limited by charge in favor of other children and providing for division of shares of children dying before majority.

Estate passing under will.

Cited in *Re Hansen*, 87 Neb. 570, 127 N. W. 879, holding that in case of doubt as to whether testator intended giving to wife fee-simple in land or only life estate, the fact that law would give her life estate therein, should be considered.

Cited in footnote to *Cornwell v. Wulff*, 45 L. R. A. 53, which holds absolute power of disposition in instrument conveying land carries full power in land itself.

Distinguished in *Re Proctor*, 95 Iowa, 173, 63 N. W. 670, holding devise to wife for life with power to sell property to pay debts and for her support does not vest absolute estate in her; *Wilhelm v. Calder*, 102 Iowa, 347, 71 N. W. 214, holding devise to children did not vest on testator's death where estate was to be held by executor until widow's death or until youngest child became of age, and then divided between those living; *Shaw v. Shaw*, 115 Iowa, 195, 88 N. W. 327, holding widow does not take absolute title under devise to her as long as she remains testator's widow, with gift over to heirs on her remarriage.

Intent of testator contrary to absolute devise.

Cited in *Smullin v. Wharton*, 73 Neb. 686, 103 N. W. 288, holding that devise absolute in form is not affected by unexpressed intent that it should be held as trust but that equity acting upon the conscience of the devisee may subsequently impress such trust out of relation of parties.

8 L. R. A. 697, STATE, LEEDS, PROSECUTOR, v. ATLANTIC CITY, 52 N. J. L. 332, 19 Atl. 780.

Mode of testing title to office — By certiorari.

Approved in State, Roberts, Prosecutor, v. Shafer, 63 N. J. L. 184, 42 Atl. 770, holding, in testing the validity of laws or regulations under certiorari, collateral questions involving the legality of an election to office may be raised.

Cited in note (7 Eng. Rul. Cas. 331) on mode of trying title to office.

— By mandamus.

Approved in Fort v. Howell, 58 N. J. L. 543, 34 Atl. 751, holding mandamus improper remedy to test title of incumbent holding under color of right; State *ex rel.* Bennett v. Trenton, 55 N. J. L. 74, 25 Atl. 113, holding mandamus proper proceeding where contest is not over right to possession, but over existence of office; Morton v. Broderick, 118 Cal. 482, 50 Pac. 644, holding mandamus lies to compel entry of tax levy, although title to office incidentally involved.

Cited in *Re Delgado*, 140 U. S. 592, 35 L. ed. 581, 11 Sup. Ct. Rep. 874, holding mandamus may issue to compel recognition of *de facto* commissioners by clerk of the board; Kimball v. Olmsted, 20 Wash. 636, 56 Pac. 377 (dissenting opinion), majority holding mandamus not proper remedy of one illegally removed from office, when legality of removal depends upon statutory construction; State v. Sutherland, 165 Ind. 350, 75 N. E. 642, holding that a *defacto* officer's title to office and right to perform duties thereof cannot be collaterally questioned; Matney v. King, 20 Okla. 48, 93 Pac. 737,—holding that mandamus must be granted where the holding of the office is colorable only.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L.R.A. 644, which authorizes mandamus to compel canvassing board to disregard illegal return; *People ex rel. Corscadden v. Howe*, 66 L.R.A. 664, which holds that mandamus will lie to compel payment by county treasurer of salary of superintendent of county penitentiary whom commissioners have attempted to remove from office under invalid statute during time he retains possession of the office.

Cited in note (19 L.R.A.(N.S.) 57, 60, 61) on mandamus to restore to office one illegally removed.

Distinguished in State *ex rel.* Warmolts v. Keegan, 69 N. J. L. 188, 54 Atl. 813, where mandamus issued to compel clerk to record vote of an alderman whose title was not in dispute.

— By quo warranto.

Distinguished in State, Roberson, Prosecutor, v. Bayonne, 58 N. J. L. 331, 33 Atl. 734, holding quo warranto exclusive remedy to test title to public office.

— Necessary parties.

Cited in *Jersey City v. Davis*, 80 N. J. L. 613, 76 Atl. 969, to the point that in application for mandamus persons whose rights are already adjudicated may properly be omitted; State *ex rel.* Moyer v. Baldwin, 77 Ohio St. 543, 19 L.R.A. (N.S.) 59, 83 N. E. 907, 12 A. & E. Ann. Cas. 10, on the rule that incumbent is not a necessary party to mandamus proceedings to restore relator to an office to which he is *prima facie* entitled.

De facto officers.

Cited in State *ex rel.* Comstock v. Hempstead, 83 Conn. 557, 78 Atl. 442, Ann. Cas. 1912A, 927, holding that office is full, *de facto*, when occupied by one by virtue of appointment, giving color of title.

Cited in note (140 Am. St. Rep. 195, 197) on *de facto* officers.

8 L. R. A. 700, GIANT POWDER CO. v. OREGON P. R. CO. 14 Sawy. 560, 42 Fed. 470.

What is a "structure" within lien law.

Approved in *Ban v. Columbia Southern R. Co.* 54 C. C. A. 417, 117 Fed. 31, holding term "other structure" in lien law includes railroad; *Chaffee v. Union Dry Dock Co.* 68 App. Div. 584, 73 N. Y. Supp. 908, holding vessel in course of construction in ship yard a "structure," within law as to master's duty to erect scaffolds about structures.

Distinguished in *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.* 11 C. C. A. 14, 22 U. S. App. 537, 63 Fed. 14, holding statutory lien given one who builds structure does not give lien for material used in constructing railroad.

Filing lien on part of road.

Approved in *Ban v. Columbia Southern R. Co.* 54 C. C. A. 417, 117 Fed. 37, holding subcontractor building extension need not file lien on entire road.

Lien for giant powder.

Followed in *Schaghticoke Powder Co. v. Greenwich & J. R. Co.* 183 N. Y. 313, 2 L.R.A.(N.S.) 291, 111 Am. St. Rep. 751, 76 N. E. 153, 5 A. & E. Ann. Cas. 443, holding powder used in railroad construction to come under lien law for "materials used."

Approved in *Rapauno Chemical Co. v. Greenfield & N. R. Co.* 59 Mo. App. 10, holding giant powder a lienable article.

Cited in *Hercules Powder Co. v. Knoxville, L. F. & J. R. Co.* 113 Tenn. 397, 67 L.R.A. 492, 106 Am. St. Rep. 836, 83 S. W. 354, holding powder used in railroad construction is "material used" within lien law; *George H. Sampson Co. v. Com.* 202 Mass. 335, 88 N. E. 911, holding gunpowder used in blasting for a sewer to be "material used" in structure; *Kansas City use of Kansas City Hydraulic Press Brick Co. v. Yaumans*, 213 Mo. 179, 112 S. W. 225, holding that recovery may be had under lien laws for dynamite blasting powder fuse and caps, as "material used" in building sewer; *Luttrell v. Knoxville, L. & J. R. Co.* 119 Tenn. 517, 123 Am. St. Rep. 737, 105 S. W. 565, holding explosives to be lienable materials in construction of railroad although no lien is allowed for material for shanties and tools.

Lien on railroads or against corporation.

Cited in *New England Engineering Co. v. Oakwood Street R. Co.* 75 Fed. 165, holding lien given for work done on any railroad includes street railways; *Choctaw & M. R. Co. v. Speer Hardware Co.* 71 Ark. 132, 71 S. W. 267, denying right of person furnishing provisions and supplies to employees of subcontractor to lien on railroad.

Cited in footnote to *Steger v. Arctic Refrigerating Co.* 11 L. R. A. 580, which holds lien for laying pipes on land of strangers for refrigerating company enforceable against entire plant of company.

Cited in note (65 Am. St. Rep. 171) on including railroad property in mechanic's lien in addition to that on which work was performed or materials furnished.

Cited as changed by statute in *Ban v. Columbia Southern R. Co.* 109 Fed. 500, holding that amount of liens of subcontractors, etc., against railroad cannot exceed amount actually due to original contractor.

"Materials used."

Cited in *St. Louis, I. M. & S. R. Co. v. Love*, 74 Ark. 534, 86 S. W. 395, holding that statute does not confer a lien against a railroad for hire of teams or money or supplies furnished to a sub-contractor where such supplies do not become a part of the railroad; *Cincinnati, R. & M. R. Co. v. Shera*, 36 Ind. App.

322, 73 N. E. 293, holding coal consumed in steam shovel operation not material used in construction of railroad entitling the vendor thereof to lien against the road; *Avery v. Woodruff*, 144 Ky. 230, 36 L.R.A.(N.S.) 870, 137 S. W. 1088, holding that person furnishing lumber to mould concrete for building is entitled to lien for its value; *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 22, 36 L.R.A.(N.S.) 875, 130 N. W. 866, holding person furnishing lumber for cofferdam used in construction of permanent dam is entitled to mechanic's lien.

Distinguished in *City Trust, S. D. & Surety Co. v. United States*, 77 C. C. A. 397, 147 Fed. 158, holding coal used in excavating machinery to come within bond for payment for "labor and materials."

8 L. R. A. 707, *MANLEY v. STAPLES*, 62 Vt. 153, 19 Atl. 983.

Effect of former adjudication of mental capacity.

Cited in *Re Hendershott*, 134 Iowa, 322, 120 Am. St. Rep. 438, 111 N. W. 969, holding that a finding that decedent was not of sufficient mental capacity to make a contract is admissible in a subsequent suit to set aside her will for lack of testamentary capacity.

8 L. R. A. 708, *ROWELL v. VERSHIRE*, 62 Vt. 405, 19 Atl. 990.

Liability for support of child or parent.

Approved in *Parkhurst v. Krellinger*, 69 Vt. 379, 38 Atl. 67, holding parent liable for support of emancipated daughter, furnished at his request and in mutual expectation of payment.

- Cited in footnote to *McCook County v. Kammos*, 31 L. R. A. 461, which holds children liable under statute to county furnishing support to poor parents.

Distinguished in *Brandon v. Jackson*, 74 Vt. 79, 52 Atl. 114, holding town may recover on promise of person legally liable to pay for pauper's support.

Insane person.

Approved in *Vershire v. Hyde Park*, 64 Vt. 641, 25 Atl. 431, holding unemancipated insane daughter takes settlement of father and is not transient pauper.

Cited in footnotes to *Bon Homme County v. Berndt*, 50 L.R.A. 351, which sustains statute making estates of insane persons, without heirs in United States dependent thereon for support, chargeable with expense of maintenance in hospital; *Richardson v. Stuesser*, 69 L.R.A. 829, which denies husband's liability for support of his wife at an insane asylum to which she has been removed by due process of law.

Town's liability for aid to poor person.

Reaffirmed on second appeal in 63 Vt. 512, 22 Atl. 604, which denies right of parent to recover from town for support of his insane pauper child under overseer's agreement to pay for same, though he is poor and has large family.

Cited in footnote to *Patrick v. Baldwin*, 53 L. R. A. 613, which denies liability of town to private person furnishing relief to poor person.

8 L. R. A. 710, *BRISTOR v. BURR*, 120 N. Y. 427, 24 N. E. 937.

Recovery of real property; right of possession.

Cited in *Oschlager v. Surbeck*, 22 Misc. 597, 50 N. Y. Supp. 862, holding entry upon premises as place of abode, and occupancy as such, gives right of possession; *Jennings v. McCarthy*, 40 N. Y. S. R. 680, 16 N. Y. Supp. 161, holding possession of premises by servant, after termination of employment, may be converted into tenancy at will, if continued until it becomes inconvenient to remove.

Cited in footnote to *Bowman v. Bradley*, 17 L. R. A. 213, which holds farm hand's right to occupy house ceases on termination of service.

Distinguished in *School Dist. No. 11 v. Batsche*, 106 Mich. 333, 29 L. R. A. 578, 64 N. W. 196, holding when occupancy of employee is to enable him to perform service for employer, and no rent is reserved, possession is that of employer.

Right to maintain ejectment.

Cited in *Danihee v. Hyatt*, 151 N. Y. 496, 45 N. E. 939, holding ejectment will not lie against husband assisting wife in maintaining possession.

Forcible ejectment of tenant.

Cited in *Johnson v. Maxwell*, 19 Misc. 707, 77 N. Y. S. R. 1157, 43 N. Y. Supp. 1156, holding landlord using only such force as is necessary to eject tenant, after his refusal to vacate on request, not liable for assault; *Liebstadter v. Federgreen*, 80 Hun, 245, 29 N. Y. Supp. 1039, holding owner cannot, by surreptitiously barring tenant's access to premises, acquire such lawful possession as entitles him to forcibly resist tenant's efforts to enter; *Lobdell v. Keene*, 85 Minn. 96, 88 N. W. 426, holding landlord not entitled, pending appeal from judgment in his favor in forcible entry and detainer, to eject tenant by force and violence; *Brendlin v. Beers*, 144 App. Div. 405, 129 N. Y. Supp. 222, to the point that owner of real property cannot by resorting to force obtain its possession from one wrongfully withholding same from him.

Cited in note (17 L.R.A.(N.S.) 456) on civil liability for assault in regaining possession of land, by one entitled.

Distinguished in *Re Ballou*, 62 Misc. 516, 116 N. Y. Supp. 1118, holding that the relation of tenant working property on shares with the landlord is more than that of master and servant and the landlord cannot eject such tenant, but may bring only breach of contract for failure to properly work the land.

8 L. R. A. 712, *FIFTH AVE. BANK v. COLGATE*, 120 N. Y. 381, 24 N. E. 799.

Limited partnerships.

Cited in *Skolny v. Richter*, 139 App. Div. 537, 124 N. Y. Supp. 152, holding that purpose of law authorizing limited partnership is to enable person to invest in business and acquire share of profits without becoming liable generally for firm debts or risking more capital than contributed; *Patterson v. Youngs*, 72 Misc. 93, 129 N. Y. Supp. 673, to the point that renewal certificate of special partnership need not state that original capital is unimpaired, and if such statement is made and is untrue, it gives no ground for action.

Cited in footnotes to *State, Tide Water Pipe Co., Prosecutor, v. State Assessors*, 27 L. R. A. 684, which holds limited partnership a corporation for purpose of taxation; *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded as partnership instead of corporation in Massachusetts.

— Rights and liabilities of special partner.

Cited in *Van Voorhis v. Webster*, 85 Hun, 594, 33 N. Y. Supp. 121, holding, for purpose of compelling accounting, special partner has same rights as general partner; *White v. Eiseman*, 134 N. Y. 103, 31 N. E. 276, holding statute exempting limited partner from common-law liability of partner should be liberally construed; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 536, 31 S. E. 392, holding special partner liable as general partner if statute requiring amount contributed to be specified in certificate not complied with; *Webster v. Lanum*, 70 C. C. A. 56, 137 Fed. 379, holding substantial compliance with statute respecting registration of amount put in by special partner, and his affidavit of payment, entitles special partner to his exemptions from general liability.

— Renewal of partnership agreement.

Cited in *Hardt v. Levy*, 72 Hun, 234, 25 N. Y. Supp. 248, holding same formality required in certificate of renewal or continuance of limited partnership as in original formation; *Hardt v. Levy*, 72 Hun, 234, 25 N. Y. Supp. 248, holding certificate reciting capital originally contributed by special partner need not state it remains unimpaired.

Distinguished in *Durgin v. Colburn*, 176 Mass. 112, 57 N. E. 213, holding special partner liable as general, if capital at time of renewal not equal in amount to that originally contributed, as required by statute.

Disapproved in *Fourth Street Nat. Bank v. Haines*, 15 Pa. Co. Ct. 38, 3 Pa. Dist. R. 439, 35 W. N. C. 355, holding special partner liable as general partner if at time of renewal capital contributed by him has been impaired.

Construction of statutes.

Cited in *Re Manning*, 71 Hun, 249, 24 N. Y. Supp. 1039, holding language used in statute must be given its natural and obvious meaning; *Coughlin v. New York*, 35 Misc. 449, 71 N. Y. Supp. 91, holding interpretation which gives significance to all words of statute preferred; *Re Clark*, 61 App. Div. 340, 70 N. Y. Supp. 353, holding court cannot correct errors or cure supposed defects in statute to meet exigencies of particular case.

8 L. R. A. 719, *LIPMAN v. NIAGARA F. INS. CO.* 121 N. Y. 454, 24 N. E. 699.

Insurance; legal effect of binding slip.

Cited in *Belt v. American Cent. Ins. Co.* 29 App. Div. 551, 53 N. Y. Supp. 316, holding "binding slip" and agreement as to premium constitute present contract of insurance; *J. C. Smith & W. Co. v. Prussian Nat. Ins. Co.* 68 N. J. L. 676, 54 Atl. 458, holding delivery of binding slip effects valid temporary insurance, though rate undetermined; *Hicks v. British America Assur. Co.* 162 N. Y. 288, 48 L. R. A. 426, 56 N. E. 743, holding oral contract to insure property, subject to provisions of standard policy, conditions of which must be complied with; *Van Tassel v. Greenwich Ins. Co.* 28 App. Div. 166, 51 N. Y. Supp. 79, and *Underwood v. Greenwich Ins. Co.* 161 N. Y. 420, 55 N. E. 936, holding binding slip subject to conditions of original policy, when renewal, and subject to terms of usual policy of insurer, if independent agreement; *Van Tassel v. Greenwich Ins. Co.* 72 Hun, 145, 25 N. Y. Supp. 301, holding that binding slip issued for purposes of renewal continues original policy, subject to stipulations contained therein; *Springer v. Anglo-Nevado Assur. Corp.* 33 N. Y. S. R. 544, 11 N. Y. Supp. 533, holding agreement to continue insurance valid, and that recovery may be had thereon before issuance of policy or payment of premium; *Sproul v. Western Assur. Co.* 33 Or. 107, 54 Pac. 180, holding, when kind of policy not stipulated in preliminary agreement, law presumes usual and ordinary policy of company contemplated; *British American Ins. Co. v. Wilson*, 77 Conn. 562, 60 Atl. 293, holding that insured can cancel obligation under binder on five days notice where binder refers to standard form of policy giving that privilege, since such reference makes provisions of policy applicable to binder; *Cunningham v. Connecticut F. Ins. Co.* 200 Mass. 337, 86 N. E. 787, holding no binding contract of insurance can be inferred from a request for insurance on identified property made to broker of several companies, no stipulation or binding slip being made as to insurer premium or other terms though the broker made out policies.

Distinguished in *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 150, 62 N. E. 167, holding liability of individual underwriters upon certificate of agents of unincorporated association subject to conditions of open policy, which certificate stated was issued by association.

Parol evidence as to usage under binding slip.

Cited in *Underwood v. Greenwich Ins. Co.* 54 App. Div. 390, 66 N. Y. Supp. 651, holding it admissible to show usage as to temporary nature of binding slip and method of terminating liability; *Northwestern F. & M. Ins. Co. v. Connecticut F. Ins. Co.* 105 Minn. 489, 117 N. W. 825, holding evidence of customs of insurance company not admissible to alter or change an express written contract.

Cancellation of policy.

Cited in *Karelsen v. Sun Fire Office*, 122 N. Y. 549, 25 N. E. 921, holding notice sufficient if served on agents of assured, when such notice sufficient under terms of usual policy.

Cited in notes (10 L. R. A. 145) on cancellation of insurance policies; (20 L.R.A. 285) on notice of cancellation; (39 L.R.A.(N.S.) 829) on time from which notice of cancellation of fire insurance becomes effective; (38 L.R.A.(N.S.) 630) on insurance broker as agent for the insured as to cancellation of policy.

8 L. R. A. 722, *MOTON v. HULL*, 77 Tex. 80, 13 S. W. 849.

Injunction against maintenance of action in another jurisdiction.

Cited in *Lightfoot v. Murphy*, 47 Tex. Civ. App. 114, 104 S. W. 511, holding courts of Texas cannot restrain suit pending in Arkansas by citizens of latter state for garnishment of wages not subject to such process in Texas.

Cited in notes (21 L.R.A. 75) on injunction against maintenance of attachment proceeding in foreign jurisdiction; (15 L.R.A.(N. S.) 1009) on injunction against suit in another state to evade local exemption laws; (59 Am. St. Rep. 883) on right to prosecute transitory causes of action in another jurisdiction.

Distinguished in *Gulf, C. & S. F. R. Co. v. Cleburne Ice & Cold Storage Co.* 37 Tex. Civ. App. 336, 83 S. W. 1100, holding that a district court may not enjoin the bringing of suit in county court where such county court is of competent jurisdiction.

8 L. R. A. 724, *SANFORD v. KANE*, 133 Ill. 199, 23 Am. St. Rep. 602, 24 N. E. 414.

Rights of assignee.

Approved in *Romberg v. McCormick*, 194 Ill. 210, 62 N. E. 537, holding security of mortgage passes as equitable incident to assignee of note secured thereby, but that right is subject to defenses.

Cited in footnote to *Taylor v. Carroll*, 44 L. R. A. 479, which holds special title acquired by assignee of mortgage for foreclosure will not vest in his administrator.

Cited in note (13 L. R. A. 294) on form and sufficiency of assignment of mortgage.

Execution of power of sale.

Approved in *Stevens v. Shannahan*, 160 Ill. 344, 43 N. E. 350, holding administratrix may execute power of sale granted to mortgagee or legal representatives, although his heirs, representatives, administrators, or assigns are authorized to make deed.

Usury.

Approved in *Fowler v. Equitable Trust Co.* 141 U. S. 400, 35 L. ed. 791, 12 Sup. Ct. Rep. 1, holding loan usurious where, besides interest, lender's agent, in pursuance of agreement with lender, exacts commission for procuring loan.

Cited in note (46 Am. St. Rep. 199) on what transactions are usurious.

Husband's or wife's liability on covenants.

Approved in *Center v. Elgin City Bkg. Co.* 185 Ill. 537, 57 N. E. 439, holding

husband joining in deed to release his dower not liable on covenants in deed; *Granath v. Johnson*, 90 Ill. App. 311, holding wife joining in deed to release her dower not liable on covenants; *Western Springs v. Collins*, 40 C. C. A. 34, 98 Fed. 934, holding married woman not liable on covenants in deed of husband's lands under statute authorizing married woman to contract as if unmarried.

Cited in *Granath v. Johnson*, 90 Ill. App. 310, to point that at common law married woman not bound by covenant in trust deed to pay indebtedness of husband; *Adam v. Rockey*, 139 Ill. App. 512, holding wife not liable for covenants in deed where she signs merely for purpose of releasing her dower right.

Cited in notes (22 L.R.A. 780) on estoppel by covenant from acquiring superior title; (57 Am. St. Rep. 172) on estoppel of married women; (11 Eng. Rul. Cas. 71) on estoppel to claim dower.

Construction of deed.

Approved in *Elgin City Bkg. Co. v. Center*, 83 Ill. App. 413, holding, in construing deed, court will not only look at its words but to the circumstances and condition of the parties; *Granath v. Johnson*, 90 Ill. App. 313, holding equity will construe deeds according to true intent and meaning, as understood by the parties.

8 L. R. A. 727, *WEST v. PEOPLE'S BANK*, 67 Miss. 729, 7 So. 513.

Sufficiency of return to attachment.

Cited in note (20 Am. St. Rep. 808) on sufficiency to return to attachment.

Title in suit to remove cloud.

Cited in *Wilkinson v. Hiller*, 71 Miss. 679, 14 So. 442, holding complainant seeking to cancel title must show good legal or equitable title in himself.

Cited in footnote to *Oppenheimer v. Levi*, 60 L. R. A. 729, which holds possession unnecessary to enable reversioner to sue, for removal of cloud, tenant acquiring tax title after agreeing to pay taxes.

Effect of legal remedy on jurisdiction to remove cloud on title.

Cited in note (12 L.R.A.(N.S.) 65) on effect on legal remedy upon equitable jurisdiction to remove cloud on title.

8 L. R. A. 732, *JOHNSON v. SUPREME LODGE, K. OF H.* 53 Ark. 255, 13 S. W. 794.

Who are heirs.

Cited in *Vogt v. Vogt*, 26 App. D. C. 55, holding that when the word "heirs" is used in gift of personalty it should be held to refer to children and next of kin entitled to take as statutory distributees; *Page v. Metropolitan L. Ins. Co.* 98 Ark. 344, 135 S. W. 911, holding that term "legal representatives," when used in policy of insurance, should be understood in technical sense, in absence of anything to contrary in policy or application.

Cited in footnotes to *Conger v. Lowe*, 9 L. R. A. 168, which holds word "heirs" in will will be construed as word of limitation; *Hindry v. Holt*, 39 L. R. A. 351, which holds right of action for death limited to lineal descendants by words "heirs or heirs" in statute.

Cited in notes (13 L. R. A. 48) as to who are heirs; (30 L. R. A. 593) as to meaning of word "heirs" in life insurance policy; (44 Am. St. Rep. 404, 408; 52 Am. St. Rep. 571; 3 L.R.A.(N.S.) 905) as to who are legal heirs to whom insurance payable; (24 Am. St. Rep. 443) on construction of "heirs" and "children" in wills and deeds.

Widow as heir at law.

Cited in *Lyons v. Yerex*, 100 Mich. 217, 43 Am. St. Rep. 452, 58 N. W. 1112, L.R.A. Au. Vol. II.—11.

holding widow entitled to share in proceeds of life insurance policy payable to heirs at law; *Thomas v. Covert* (*Thomas v. Supreme Lodge, K. P.*) 126 Wis. 598, 3 L.R.A.(N.S.) 907, 105 N. W. 922, 5 A. & E. Ann. Cas. 456, holding that under a benefit certificate to be paid to "legal heirs" the widow is a beneficiary taking same as child.

Cited in footnote to *Mullen v. Reed*, 24 L. R. A. 664, which holds widow not an heir at law.

Cited in notes (30 L.R.A. 596) on widow as "heir" within meaning of insurance policy; (52 Am. St. Rep. 561) on same point.

Widow as trustee.

Distinguished in *McDonald v. Humphries*, 56 Ark. 66, 19 S. W. 234, holding widow has interest only as trustee in policy made payable to her for the purpose of better securing repayment of assessments advanced by third person.

Who may object to beneficiary.

Approved in *Nye v. Grand Lodge, A. O. U. W.* 9 Ind. App. 154, 36 N. E. 429, holding that contestant for insurance cannot take advantage of rules of association or corporation as to who may be beneficiary, waived by it.

Cited in *Maynard v. Life Ins. Co.* 132 N. C. 712, 44 S. E. 405, holding administrator of insured debtor cannot contest validity of creditor's insurance or its assignment; *Baltimore & O. R. Co. v. Veltri*, 37 Pa. Super. Ct. 410, holding that a stranger to a beneficiary contract may not object to noncompliance with society by-law as to designation of beneficiary; *Alfsen v. Crouch*, 115 Tenn. 355, 89 S. W. 329, holding that a provision limiting the beneficiaries may be waived by mutual aid society and cannot be taken advantage of by third parties.

Cited in notes (52 Am. St. Rep. 559, 128 Am. St. Rep. 319) on who may object to beneficiary on waiver by insurer of his want of insurable interest.

Insurance contract as affected by pecuniary interest.

Cited in *Ingersoll v. Knights of Golden Rule*, 47 Fed. 274, holding beneficiary's absence of pecuniary interest in life insured does not render contract void as against public policy.

8 L. R. A. 735, *STATE v. MCGONIGLE*, 101 Mo. 353, 20 Am. St. Rep. 609, 13 S. W. 758.

Courts as ministerial agents.

Cited in *Sears v. Stone County*, 105 Mo. 242, 24 Am. St. Rep. 378, 16 S. W. 878, holding that judges act in administrative capacity in auditing claims against county.

Alteration of instruments — Bonds.

Followed in *State ex rel. Howell County v. Findley*, 101 Mo. 372, 14 S. W. 111, holding material alteration of contract releases surety *in toto*.

Cited in *Schuster v. Weiss*, 114 Mo. 166, 19 L. R. A. 185, 21 S. W. 438, holding change in appeal bond without consent releases sureties; *Anselm v. Groby*, 62 Mo. App. 425, holding surety discharged when undertaking enlarged without consent; *State v. Allen*, 69 Miss. 525, 30 Am. St. Rep. 563, 10 So. 473, holding erasure without authority of surety after execution of bond discharges others; *Fred Heim Brewing Co. v. Hazen*, 55 Mo. App. 282, holding sureties discharged by change of contract into bond after execution; *Hendry v. Cartwright*, 14 N. M. 87, 8 L.R.A.(N.S.) 1061, 89 Pac. 309, on the rule that a material noticeable erasure of a surety's name puts the obligee on notice.

Cited in note (90 Am. St. Rep. 202, 203, 204) on liability of surety on alteration of official bond.

— Notes.

Cited in *McMurtrey v. Sparks*, 71 Mo. App. 131, holding alteration of date in note by payee bars recovery on original contract.

Effect of forging other signatures or releasing other sureties.

Followed in *State ex rel. Howell County v. Findley*, 101 Mo. 373, 14 S. W. 111, holding subsequent sureties on county collector's bond, discharged by erasure of signature of solvent surety, without their consent.

Cited in *Sullivan v. Williams*, 43 S. C. 510, 21 S. E. 642, holding surety estopped, by intrusting bond to one of the principals, from showing forgery of other principal's name.

Cited in footnote to *Hurt v. Ford*, 41 L. R. A. 823, which denies right to make subsequent signature of another person essential to validity of note delivered to payee or his agent.

Cited in note (45 L. R. A. 331) on conditional execution of contract under parol agreement that it shall not take effect until others have signed it.

Distinguished in *Cass County v. American Exch. Nat. Bank*, 11 N. D. 247, 91 N. W. 59, holding that an erasure of the name of a surety on a bond does not release the preceding sureties where the instrument is not completed at time of erasure.

Effect of spoliation.

Cited in *State ex rel. Pemiscot County v. Scott*, 104 Mo. 32, 17 S. W. 11, holding mutilation of bond after execution, delivery, and approval no defense.

Ratification of alteration.

Followed in *State ex rel. Howell County v. Findley*, 101 Mo. 377, 14 S. W. 111, holding waiver of alteration necessary to estop release of surety.

Liability for acts of agent.

Cited in *Fogg v. School District*, 75 Mo. App. 171, holding school district liable on original bonds fraudulently resold before maturity to bona fide purchaser by agent intrusted to redeem such bonds with proceeds of new issue; *Hendry v. Cartwright*, 14 N. M. 72, 8 L.R.A.(N.S.) 1061, 89 Pac. 309, holding clerk of court to be agent of obligee of bond and not the agent of surety for whose acts such surety would be liable.

Cited in note (90 Am. St. Rep. 194) on liability of surety leaving official bond in hands of principal to be delivered on condition that others sign.

8 L. R. A. 740, *BOSTON SAFE DEPOSIT & T. CO. v. COFFIN*, 152 Mass. 95, 25 N. E. 30.

Construction to avoid partial intestacy.

Approved in *Carney v. Kain*, 40 W. Va. 820, 23 S. E. 650, holding will will be construed to prevent intestacy if intent to dispose of whole estate clearly appears.

Cited in *Angell v. Angell*, 28 R. I. 600, 68 Atl. 583, construing the word "remainder" in a will as not being meant in technical sense where intent of testator is to dispose of entire estate and a technical construction would defeat that intention.

Cited in footnote to *Balch v. Pickering*, 14 L. R. A. 125, which holds literal construction of will, resulting in intestacy, against evident intention of testator.

Implication to effectuate intent.

Approved in *Allen's Succession*, 48 La. Ann. 1049, 55 Am. St. Rep. 295, 20 So. 193, and *Seaver v. Griffing*, 176 Mass. 62, 57 N. E. 220, holding necessary words may be supplied to effectuate testator's obvious intention.

Cited in *Thissell v. Schillinger*, 186 Mass. 185, 71 N. E. 300, holding that where

trust was created for brother of testatrix in first clause of will followed by bequests to others largely exceeding personal estate, and provision for sale of realty to pay legacies, the brother will take the unlimited use of residue; *Peabody v. Tyszkiewicz*, 191 Mass. 320, 77 N. E. 839, holding that where general intent of testator appears to be to keep the principal intact, but the will fails to expressly carry out such intent the courts will do so by implication; *Sanger v. Bourke*, 209 Mass. 486, 95 N. E. 894; *Jones v. Gane*, 205 Mass. 45, 91 N. E. 129,—holding that when it appears that testator intended to make certain disposition, though not expressed in formal words, such intention will be given effect; *Griffin v. Fairmont Coal Co.* 59 W. Va. 582, 2 L.R.A.(N.S.) 1162, 53 S. E. 24 (dissenting opinion), on the implication of bequests not expressly provided for as being justified only by clearly apparent intent; *Polsey v. Newton*, 199 Mass. 455, 85 N. E. 574, 15 A. & E. Ann. Cas. 139 (dissenting opinion), on the limitations upon judicial construction of will to carry out intent of testator.

Cited in notes (10 L.R.A. 818) on supplying omissions in will to carry testator's intent into effect; (15 L.R.A.(N.S.) 75) on devise or bequest by implication.

Bequest to survivor.

Approved in *Bailey v. Brown*, 19 R. I. 682, 36 Atl. 581, holding bequest to survivor means those who outlive or live after testator.

Heirs.

Cited in footnotes to *Hindry v. Holt*, 39 L. R. A. 351, which holds word "heirs" in statute giving right of action for death limits right to lineal descendants; *Gannon v. Peterson*, 55 L. R. A. 701, which holds use of words "heirs," "issue," or "children" indiscriminately by testator warrants court in reading them interchangeably; *Wool v. Fleetwood*, 67 L.R.A. 445, which holds that meaning of words "lawful heirs" cannot be restricted as including children only.

Cited in note (12 L. R. A. 723) on meaning of heirs at law.

Comity.

Cited in note (10 L. R. A. 767) on recognition of foreign laws.

Construction of will.

Cited in note (14 Eng. Rul. Cas. 655) on consideration of whole in construing will.

8 L. R. A. 750, *WINDRAM v. FRENCH*, 151 Mass. 547, 24 N. E. 914.

Fraudulent representations.

Cited in *Burns v. Dockray*, 156 Mass. 137, 30 N. E. 551, holding positive statement that title is good when it is not, by person in position to know, fraudulent; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 442, 34 N. E. 625, holding false representations in a letter to one person, intended and used to defraud others relying upon it, actionable; *Light v. Jacobs*, 183 Mass. 211, 66 N. E. 799, holding conspirators liable for fraud of one, though ignorant of manner of its perpetration; *Wesselhoeft v. Schanze*, 153 Ill. App. 448, to the point that by authenticating certificate of stock which recited that corporation is owner of certain number of shares thereof, corporation makes representation upon which purchaser may rely; *Scott v. Abbott*, 87 C. C. A. 475, 160 Fed. 579, holding the maker of false statements liable to persons deceived thereby where the persons deceived relied on information put in the hands of others with the intent to deceive.

Cited in footnote to *Hindman v. First Nat. Bank*, 57 L. R. A. 108, which holds bank falsely certifying that all of authorized capital of insurance company is on deposit liable to one purchasing stock in reliance on same.

Cited in note (18 Am. St. Rep. 561) on liability for false representations.

Extent of reliance upon representations and promises.

Cited in *Roberts v. French*, 153 Mass. 62, 10 L. R. A. 657, 25 Am. St. Rep. 611, 26 N. E. 416, holding false representations, relied on, need not have furnished only motive for buying, to be actionable; *Light v. Jacobs*, 183 Mass. 210, 66 N. E. 799, holding fraudulent representations as to security ground for rescinding contract, though plaintiff also made separate inquiries; *Martin v. Meles*, 179 Mass. 117, 60 N. E. 397, upholding action to recover contribution promised toward fund to defend lawsuit.

Rules as to technical objections to pleadings.

Cited in *Billings v. Mann*, 156 Mass. 205, 30 N. E. 1136, holding clerical error must be pointed out distinctly in the demurrer, to allow amendment; *Stratton v. Seaverns*, 163 Mass. 77, 39 N. E. 779, holding court will not for first time on appeal "go into nice verbal criticism" of bill in equity; *Emmons v. Alvord*, 177 Mass. 469, 59 N. E. 120, holding attention should be specifically called in the demurrer to minute verbal criticism of declaration; *Steffe v. Old Colony R. Co.* 156 Mass. 263, 30 N. E. 1137, holding mere defects or omissions in form of statement relied on must be pointed out in demurrer; *Soper v. Manning*, 158 Mass. 384, 33 N. E. 516, holding that general request to rule petition to vacate judgment insufficient in form must point out defect; *May v. Wood*, 172 Mass. 16, 51 N. E. 191 (dissenting opinion), majority holding false and malicious statements relied upon to support action should be substantially alleged; *Remington v. Central P. R. Co.* 198 U. S. 99, 49 L. ed. 963, 25 Sup. Ct. Rep. 577, permitting an allegation of a conclusion of law to avoid an intolerable prolixity on matters not likely to be controverted.

Conclusions of law and facts.

Cited in *Com. v. Clancy*, 154 Mass. 132, 27 N. E. 1001, holding, after allegations of city, county, and state, charging defendant with committing offense within judicial district of court, sufficient; *Haskell v. Merrill*, 179 Mass. 123, 60 N. E. 485, holding words "loan," "security," and "delivery" in findings not conclusions of law; *Mulhall v. Fallon*, 176 Mass. 267, 54 L. R. A. 938, 79 Am. St. Rep. 309, 57 N. E. 386, holding testimony that woman was almost entirely dependent upon son for support not inadmissible as conclusion.

Right to recover back payments.

Cited in *Alton v. First Nat. Bank*, 157 Mass. 343, 18 L. R. A. 145, 34 Am. St. Rep. 285, 32 N. E. 228, holding money paid to bank by indorser of discounted instrument, supposed negotiable by both, cannot be recovered back.

Personal liability of corporate officers and of agents.

Cited in *Donovan v. Purtell*, 216 Ill. 641, 1 L.R.A.(N.S.) 183, 75 N. E. 334, holding the officer of a corporation personally liable for fraud on a third person under cover of the corporation.

Cited in note (1 L.R.A.(N.S.) 260) on liability of corporate officer for misrepresentations which induce sale or purchase of stock.

8 L. R. A. 752, *GAYLORD v. NEW BRITAIN*, 58 Conn. 398, 20 Atl. 365.

Municipal liability for accumulation of ice.

Approved in *Magaha v. Hagerstown*, 95 Md. 74, 51 Atl. 832, holding municipality may be liable for accumulation of ice resulting from its own negligence.

Cited in notes (21 L. R. A. 271, 272) on liability of city for ice on street; (58 L. R. A. 326) on liability for ice on walk from temporary causes.

Distinguished in *Stanke v. St. Paul*, 71 Minn. 53, 73 N. W. 629, holding city not liable for negligent failure to keep gutter open, whereby ice formed on walk, unless notified that ice usually formed there.

— From conditions not within street limits.

Cited in *Udkin v. New Haven*, 80 Conn. 297, 14 L.R.A.(N.S.) 871, 68 Atl. 253, holding city not liable for failure to repair drain pipe discharging water into street such pipe being without the limits of the street; *Derochie v. Cornwall*, 21 Ont. App. Rep. 288, dismissing appeal from 23 Ont. Rep. 360, dissenting opinion, on the nonliability of municipalities for existing defective conditions not within limits of sidewalks.

Question for jury.

Cited in *Scoville v. Salt Lake City*, 11 Utah, 65, 39 Pac. 481, holding question whether existence of defect constituted sufficient notice, for jury.

8 L. R. A. 753, *MONTANA UNION R. CO. v. LANGLOIS*, 9 Mont. 419, 18 Am. St. Rep. 745, 24 Pac. 209.

Rights of solicitors of patronage at depots, etc.

Approved in *McConnell v. Pedigo*, 92 Ky. 471, 18 S. W. 15, denying right of railroad company to give exclusive platform rights to one carrier.

Cited in *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 200, 10 L. R. A. 821, 22 Am. St. Rep. 693, 47 N. W. 667; *Pennsylvania Co. v. Chicago*, 181 Ill. 300, 53 L. R. A. 227, 54 N. E. 825; *State v. Reed*, 76 Miss. 222, 43 L. R. A. 136, 71 Am. St. Rep. 528, 24 So. 308, — denying right to grant to one hackman exclusive right to solicit patronage; *Hedding v. Gallagher*, 69 N. H. 663, 76 Am. St. Rep. 204, 45 Atl. 96, and *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 649, 46 L. R. A. 437, 34 S. E. 372, denying right of carrier to enter into contract allowing baggage company exclusive privilege of entering depot; *Lindsay v. Anniston*, 104 Ala. 262, 27 L. R. A. 437, 53 Am. St. Rep. 44, 16 So. 545, holding ordinance against soliciting patronage at depot not void as violating contract giving exclusive right to transfer company; *Colorado Springs v. Smith*, 19 Colo. 558, 36 Pac. 540, holding ordinance providing that hotel runners, etc., must occupy allotted portion of platform not construed as allowing carrier to grant exclusive privileges; *Lucas v. Herbert*, 148 Ind. 66, 37 L. R. A. 377, 47 N. E. 146, not deciding right of railroad company to grant exclusive privilege to hackman; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 196, 47 L. R. A. 535, 81 N. W. 835, upholding right of railroad company to grant exclusive privileges to hackmen to solicit business, if regulations are reasonable; *Palmer Transfer Co. v. Anderson*, 131 Ky. 223, 19 L.R.A.(N.S.) 759, 133 Am. St. Rep. 237, 115 S. W. 182, holding that a railroad company cannot confer rights on a transfer company the result of which is to practically create a monopoly of that calling in the person or company receiving the privileges; *Com. v. Grau*, 24 Lanc. L. Rev. 147, 16 Pa. Dist. 807, 10 Del. Co. Rep. 232, holding that a railroad company cannot grant exclusive privileges to one person or company with respect to the business connected with the station.

Cited in notes (13 L. R. A. 848) on rights of solicitors of patronage at depots, etc. (16 L.R.A. 449) on regulations as to admission of passengers to depot; (22 Am. St. Rep. 701, 702) on discrimination by carrier between hackmen or other solicitors.

Distinguished in *Hedding v. Gallagher*, 72 N. H. 390, 64 L. R. A. 819, 57 Atl. 225, sustaining railroad's right to grant exclusive privilege of soliciting baggage at depot, where service adequate and rates reasonable; *State ex rel. Sheets v. Union Depot Co.* 71 Ohio St. 390, 68 L.R.A. 797, 73 N. E. 633, 2 A. & E. Ann. Cas. 186, holding that a railroad company may grant exclusive hack room to transfer company no constitutional or statutory provision to the contrary appearing.

Disapproved in effect in *Brown v. New York C. & H. R. R. Co.* 75 Hun, 362,

27 N. Y. Supp. 69, upholding right of common carrier to grant exclusive privilege to coach company to enter trains and depot; *Donovan v. Pennsylvania Co.* 61 L. R. A. 143, 57 C. C. A. 363, 120 Fed. 216, holding railroad may give hackman exclusive right to solicit within station; *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 374, 16 L.R.A.(N.S.) 781, 94 Pac. 10, 14 A. & E. Ann. Cas. 489, holding that a railroad company subject to legislative control may exclude all but one carriage concern from soliciting business on its grounds.

8 L. R. A. 759, *GUFFEY v. HUKILL*, 34 W. Va. 49, 26 Am. St. Rep. 901, 11 S. E. 754.

Enforcing forfeiture clause in lease.

Sustained in *Hukill v. Guffey*, 37 W. Va. 429, 16 S. E. 544, holding execution of second lease works forfeiture of first lease for breach of condition, without re-entry.

Approved in *Island Coal Co. v. Combs*, 152 Ind. 390, 53 N. E. 452, holding failure of lessee to comply with condition *ipso facto* terminates lease.

Cited in *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 87, 34 S. E. 923, holding lease to other party and possession thereunder invalidates prior executory lease; *Island Coal Co. v. Combs*, 152 Ind. 391, 53 N. E. 452, holding possession of premises sufficient re-entry by lessor; *Martin v. Ohio River R. Co.* 37 W. Va. 354, 16 S. E. 589, holding re-entry unnecessary under statute to work forfeiture of conditional estate; *Duffield v. Michaels*, 97 Fed. 833, holding right to terminate lease not waived by accepting payments, previous rentals unpaid; *Reese v. Zinn*, 103 Fed. 98, upholding lessor's right to cancel lease, when premises abandoned by lessee; *Huggins v. Daley*, 48 L. R. A. 325, 40 C. C. A. 20, 99 Fed. 614, holding requirement in lease of completion of well within fixed time condition precedent to vesting estate in lessee; *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 851, holding acquiescence in delays in completing wells waives breach of forfeiture clause in lease; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 162, Ind. 14, 62 L. R. A. 899, 67 N. E. 259, holding subsequent to develop property implied in oil and gas lease; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 162 Ind. 14, 62 L. R. A. 899, 67 N. E. 259, holding forfeiture of gas lease sufficiently evidenced by long-continued failure to develop property, where lessor continued in possession; *Tennessee Oil, Gas & Mineral Co. v. Brown*, 65 C. C. A. 524, 131 Fed. 701, holding a second lease under the circumstances to clearly express intention of lessor to avoid the former agreement; *Geer v. Boston Little Circle Zinc Co.* 126 Mo. App. 187, 103 S. W. 151, holding re-entry to terminate lease providing for notice of forfeiture by mail, but not prescribing term of notice where such entry can be made peaceably immediately following mailing of notice of forfeiture; *Baxter v. Heimann*, 134 Mo. App. 264, 113 S. W. 1152, holding that notice by lessor declaring forfeiture for violation of covenant as provided for by lease terminated the lease and the lessee's liability for rent; *Gartland v. Hickman*, 56 W. Va. 84, 67 L.R.A. 699, 49 S. E. 14, on the *ipso facto* termination of lease on breach of condition; *White v. Bailey*, 65 W. Va. 586, 23 L.R.A.(N.S.) 240, 64 S. E. 1019 (dissenting opinion), on re-entry as the remedy, where deed has a re-entry clause; *Garrett v. South Penn Oil Co.* 66 W. Va. 597, 66 S. E. 741, to the point that execution of second lease is sufficient declaration of forfeiture of first without demand and re-entry.

Cited in footnote to *Kneeland v. Schmidt*, 11 L. R. A. 498, holding exclusive possession by landlord acceptance terminating lease.

Cited in notes (12 L. R. A. 290) on leases of oil lands; (31 L. R. A. 673) on manner of enforcing forfeiture clause; (47 Am. St. Rep. 199, 120 Am. St. Rep. 64) on waiver of forfeiture of lease.

Distinguished in *Thomas v. Hukill*, 34 W. Va. 397, 12 S. E. 522, holding unequivocal declaration necessary to terminate lease conveying conditional estate; *Friend v. Mallory*, 52 W. Va. 60, 43 S. E. 114, holding oil lease not terminated by execution of another during term for which rent was paid.

Termination of oil lease.

Cited in *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.* 119 La. 834, 44 So. 481, holding contract not binding on lessee where lease is for sole purpose of exploiting land for gas and oil, and providing that lessee may throw up lease at any time without payment of damages.

Forfeiture for delay in operations.

Cited in *Mansfield Gas Co. v. Alexander*, 97 Ark. 173, 133 S. W. 837, holding that failure to develop right to prospect for gas for eight years justified finding of forfeiture of fifty year lease of lands where lease required lessor to begin work within one year; *Price v. Black*, 126 Iowa, 306, 101 N. W. 1056, holding forfeiture of coal lease takes place on breach of implied covenant to work with reasonable diligence where lessee has contracted to work mine in workmanlike manner and pay royalty.

Remedy against unlawful possession under oil lease.

Cited in *Haskell v. Sutton*, 53 W. Va. 225, 44 S. E. 533 (dissenting opinion), majority holding that drilling wells and taking oil under void lease may be enjoined.

Who may maintain unlawful detainer.

Cited in note (121 Am. St. Rep. 373) on right of lessee to maintain civil action for forcible entry and detainer.

8 L. R. A. 765, *CHICAGO v. McLEAN*, 133 Ill. 148, 24 N. E. 527.

Followed without special discussion in *Chicago v. Moore*, 40 Ill. App. 335.

Damages for mental and bodily suffering.

Approved in *Pittsburg, C. C. & St. L. R. Co. v. Story*, 63 Ill. App. 244; *South Chicago City R. Co. v. Walters*, 70 Ill. App. 272; *West Chicago Street R. Co. v. Lups*, 74 Ill. App. 426; *Kellyville Coal Co. v. Yehanka*, 94 Ill. App. 82; *Central R. Co. v. Serfass*, 153 Ill. 384, 39 N. E. 119; *Norfolk & W. R. Co. v. Marpole*, 97 Va. 600, 34 S. E. 462, — holding mental and bodily suffering resulting from injury ground of damage; *Chicago City R. Co. v. Canevin*, 72 Ill. App. 90, holding mental pain resulting from or accompanying physical pain element of damages; *Chicago v. Davies*, 110 Ill. App. 429, holding damages allowable for mental suffering resulting from bodily injuries; *North Chicago Street R. Co. v. Duebner*, 85 Ill. App. 604, holding mental pain not element of damage unless directly connected with physical pain; *Chicago City R. Co. v. Taylor*, 170 Ill. 57, 48 N. E. 831, holding mental suffering due to injury and part of it, ground of damage, otherwise as to injured feelings not part of attendant pain; *Mueller v. Kuhn*, 59 Ill. App. 356, holding pain and suffering of body and mind subjects of compensatory, not punitive, damages; *Central R. Co. v. Serfass*, 53 Ill. App. 452, holding instruction authorizing recovery for pain and suffering, both mental and physical, not misleading so as to allow recovery for vexation of mind arising from reflection, where plaintiff was child three years old; *Braun v. Craven*, 175 Ill. 408, 42 L. R. A. 202, 51 N. E. 657, holding fright or terror superinducing nervous shock not ground of liability; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, 6 C. C. A. 452, 13 U. S. App. 317, 57 Fed. 478, holding damages not recoverable for mental suffering due to delay in delivering telegram; *Butner v. Western U. Teleg. Co.* 2 Okla. 241, 4 Inters. Com. Rep. 772, 37 Pac. 1087, holding mental

pain or anguish resulting from nondelivery of telegram not independent basis of damage.

Cited in *Denver City Tramway Co. v. Martin*, 44 Colo. 338, 98 Pac. 836, on physical and mental suffering resulting from negligent injury as an element of damage; *Dichols v. Oregon Short Line R. Co.* 28 Utah, 330, 78 Pac. 866, holding loss of memory caused by bodily injury resulting from railway wreck an element of damage.

Cited in footnotes to *Chapman v. Western U. Teleg. Co.* 17 L. R. A. 430, which holds pain and suffering due to delay in delivering message not recoverable; *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804, which denies recovery for mental anguish from non performance of contract; *Maynard v. Oregon R. & Nav. Co.* 68 L.R.A. 477, which holds mental anguish from inability to work and properly support child not proper element of damages for personal injury.

Cited in notes (11 L. R. A. 45) on pain and suffering as elements of damages; (12 L. R. A. 699) on mental suffering as an element of damages; (13 L. R. A. 860) on damages for mental anguish alone not recoverable; (17 L. R. A. 72) on recovery for pain and suffering.

Allegation of damage.

Approved in *West Chicago Street R. Co. v. McCallum*, 169 Ill. 243, 48 N. E. 424, holding permanency of injury need not be pleaded; *Chicago City R. Co. v. Taylor*, 170 Ill. 57, 48 N. E. 831, holding mental suffering may be shown under general allegations of declaration; *Baltimore & O. S. W. R. Co. v. Slanker*, 180 Ill. 358, 54 N. E. 309, holding all particulars of injury need not be enumerated in order to prove them; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 90, 41 C. C. A. 42, 100 Fed. 758, holding allegation of bodily injury in railroad collision admits proof of fright and shock to system; *Western Brewery Co. v. Meredith*, 166 Ill. 310, 46 N. E. 720, permitting recovery for mental and bodily suffering, although special damages for mental suffering not alleged; *Croco v. Oregon Short Line R. Co.* 18 Utah, 319, 44 L. R. A. 288, 54 Pac. 985, holding plaintiff need not specially aver all the physical injuries sustained, resulting from or aggravated by the negligent act complained of.

Cited in *Oolitic Stone Co. v. Ridge*, 174 Ind. 578, 91 N. E. 944, holding that under complaint alleging that plaintiff was crushed about shoulders, head, breast and abdomen, evidence that his memory was impaired and that he coughed for two years after injury is admissible; *Rapid Transit R. Co. v. Allen*, 54 Tex. Civ. App. 248, 117 S. W. 486, holding that under complaint alleging grievous or permanent bodily injury evidence of impairment of mind is admissible.

Question for jury.

Approved in *Vandalia v. Ropp*, 39 Ill. App. 349, and *William Graver Tank Works v. McGee*, 58 Ill. App. 254, holding question whether facts show want of ordinary care, for jury; *Chicago v. Moore*, 139 Ill. 209, 28 N. E. 1071, holding negligence question of fact for jury under circumstances disclosed; *North Chicago Street R. Co. v. Williams*, 140 Ill. 281, 29 N. E. 672, holding exercise of due care while getting on street car question for jury; *Lake Shore & M. S. R. Co. v. Hundt*, 140 Ill. 530, 30 N. E. 458, holding question whether putting car in motion without brakeman on it is negligence, for jury; *Pullman Palace Car Co. v. Connell*, 74 Ill. App. 452, holding question whether failure to look where one steps constitutes negligence, for jury; *Tucker v. Champaign County Agri. Board*, 52 Ill. App. 325, holding question whether one who stepped into hole in floor, exercised ordinary care, for jury; *Chicago v. McCrudden*, 92 Ill. App. 259, holding question whether child, injured while walking backwards and talking to playmates, was negligent, for jury; *Columbus v. Strassner*, 124 Ind. 486, 25

N. E. 65, holding question whether plaintiff injured on defective walk was, under the circumstances, guilty of contributory negligence, for jury; McLeansboro v. Trammel, 109 Ill. App. 526, holding question whether failure to look at pathway constitutes negligence, for jury; Upper Alton v. Green, 112 Ill. App. 443, holding failure to keep constant watch of sidewalk for defects not negligence *per se*.

Cited in Merchants Ice & Cold Storage Co. v. Bargholt, 129 Ky. 71, 110 S. W. 364, 16 A. & E. Ann. Cas. 965, holding contributory negligence, question for jury where plaintiff while looking at a building across street, fell over a cake of ice left on sidewalk by defendant; Chicago v. Kubler 133 Ill. App. 527, holding instructions referring to facts or conditions as constituting due care or the lack of it objectionable as an invasion of province of the jury.

Negligence as a matter of law.

Cited in Udwin v. Spirkel, 136 Ill. App. 159, holding it not negligence as a matter of law to walk on sidewalk without looking at the walk

8 L. R. A. 767, STATE v. VOSS, 80 Iowa, 467, 45 N. W. 898.

Effect of postponement of execution of sentence.

Cited in Miller v. Evans, 115 Iowa, 102, 56 L. R. A. 102, footnote, p. 101, 91 Am. St. Rep. 143, 88 N. W. 198, denying right to relief suspending mittimus, under sentence of imprisonment on failure to pay fine; *Re Strickler*, 51 Kan. 702, 33 Pac. 620, holding sentence of imprisonment, to begin at indefinite future time, illegal; *Re Markuson*, 5 N. D. 185, 64 N. W. 939, holding court orders postponing imprisonment void; Neal v. State, 104 Ga. 512, 42 L. R. A. 191, footnote, p. 190, 69 Am. St. Rep. 175, 30 S. E. 858, which holds void, attempt to suspend execution of sentence after pronouncing it; Tanner v. Wiggins, 54 Fla. 212, 45 So. 459, 14 A. & E. Ann. Cas. 718, denying right of trial court to suspend sentence lawfully imposed except for conditions authorized by law such as to give effect to appeal or on account of some emergency; Franklin Union No. 4 v. People, 220 Ill. 393, 4 L.R.A.(N.S.) 1020, 110 Am. St. Rep. 248, 77 N. E. 176 (dissenting opinion), on the final nature of a judgment with respect to execution of sentence imposed thereby; Smith v. District Ct. 132 Iowa, 605, 109 N. W. 1085, 11 A. & E. Ann. Cas. 296, holding that a judgment or sentence cannot be corrected by adding an omitted fine, six years after sentence imposed; Tuttle v. Lang, 100 Me. 127, 60 Atl. 892, holding that where convict is at large without day of voluntary discharge of magistrate on the day of sentence he cannot afterwards be taken on execution; State ex rel. Cary v. Langum, 112 Minn. 124, 127 N. W. 465, to the point that court has no power to suspend sentence for indefinite period; Ex parte Clendenning, 22 Okla. 116, 1 Okla. Crim. Rep. 235, 19 L.R.A.(N.S.) 1045, 97 Pac. 650, holding that where after sentence on conviction, court makes an order of discharge of convict under which he is released, it has no power or jurisdiction after lapse of time of sentence and after term to issue commitment on such sentence; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. 158 Fed. 136, holding court cannot remit a fine paid on execution of sentence for an offense against the United States, where no steps have been taken by convicted person for a review.

Cited in footnotes to Weber v. State, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term; Miller v. State, 40 L. R. A. 109, which upholds statute for indiscriminate sentence of criminals; People *ex rel.* Forsyth v. Monroe County Ct. of Sessions, 23 L. R. A. 856, which holds valid, act authorizing court to suspend sentence; State v. Crook, 29 L. R. A. 260, which holds power of court over accused after suspension of sentence not lost by committing him for refusal to pay costs as

ordered; *People ex rel. Boenert v. Barrett*, 63 L.R.A. 82, which denies power of court indefinitely to suspend sentence after conviction, or to release on a parol.

Cited in note (33 L.R.A.(N.S.) 120) on power of court to suspend or stay execution of sentence.

8 L. R. A. 769, *TRAVELERS INS. CO. v. CALIFORNIA INS. CO.* 1 N. D. 151, 45 N. W. 703.

Limitation of action on insurance policy.

Cited in *Egan v. Oakland Ins. Co.* 29 Or. 406, 54 Am. St. Rep. 798, 42 Pac. 990, holding right of action on policy computed from date of loss; *State Ins. Co. v. Meesman*, 2 Wash. 464, 26 Am. St. Rep. 870, 27 Pac. 77, and *Hart v. Citizens' Ins. Co.* 86 Wis. 79, 21 L. R. A. 745, footnote, p. 743, 39 Am. St. Rep. 877, 56 N. W. 332, which requires time for suing on policy to be computed from date of fire; *Farmer's Co-op. Creamery Co. v. Iowa State Ins. Co.* 112 Iowa, 610, 84 N. W. 904, holding that failure to sue on policy within six months from fire extinguishes right; *Provident Fund Soc. v. Howell*, 110 Ala. 510, 18 So. 311, and *McFarland v. Railway Officials & E. Acci. Asso.* 5 Wyo. 140, 27 L. R. A. 53, footnote, p. 48, 63 Am. St. Rep. 29, 38 Pac. 347, holding that period of limitation for action on policy begins from time of death; *Baker v. Baker*, 161 Ill. App. 441, holding that action must be brought within time limited in contract and negotiations for compromise do not constitute waiver where they were ended before expiration of time limited; *Dolan v. Royal Neighbors*, 123 Mo. App. 154, 100 S. W. 498, holding limitation as to time of action contained in policy not void as contrary to general statute of limitation; *Appel v. Copper Ins. Co.* 76 Ohio St. 63, 10 L.R.A.(N.S.) 677, 80 N. E. 955, 10 A. & E. Ann. Cas. 821, holding that limitation in policy prohibiting suit unless commenced within six months after "fire" runs from time of fire though payment of loss was to be 60 days after proof of loss received by company.

Cited in footnote to *Cooper v. United States Mut. Acci. Asso.* 16 L. R. A. 138, which holds limitation period for death indemnity runs from time of death instead of accident.

Cited in notes (47 L.R.A. 697) on literal construction of limitation of suit on policy for fixed period after loss; (63 L. R. A. 868) on conflict of laws as to contracts of insurance; (28 Am. St. Rep. 583) on limitation of actions on insurance policies; (14 Eng. Rul. Cas. 22) on construction of "fire" in limitation clause.

Disapproved in effect in *Read v. State Ins. Co.* 103 Iowa, 311, 64 Am. St. Rep. 180, 72 N. W. 665, holding right to sue on policy expires six months from notice of proof of loss; *Sample v. London & L. F. Ins. Co.* 46 S. C. 496, 47 L. R. A. 705, 57 Am. St. Rep. 701, 24 S. E. 334, holding limitation of action for loss on policy begins at accrual of right.

Who may sue on policy.

Cited in *Palmer Sav. Bank v. Insurance Co. of N. A.* 166 Mass. 193, 32 L. R. A. 617, 55 Am. St. Rep. 387, 44 N. E. 211, holding mortgagee entitled to sue on policy issued to mortgagor; *Brown v. Commercial F. Ins. Co.* 21 App. D. C. 341, holding mortgagee to whom loss is made payable as interest may appear may maintain action on policy; *Ruohs v. Traders' F. Ins. Co.* 111 Tenn. 421, 102 Am. St. Rep. 790, 78 S. W. 85, holding original policy holder entitled to sue company reinsuring for a sufficient consideration from original insurers.

Cited in notes (25 L.R.A. 306) on who may maintain action for proceeds of insurance; (8 L.R.A.(N.S.) 862) as to whom reinsurer is liable.

8 L. R. A. 772, *SWIFT v. TOPEKA*, 43 Kan. 671, 23 Pac. 1075.

Rights of bicyclists.

Approved in *Laredo Electric & R. Co. v. Hamilton*, 23 Tex. Civ. App. 484, 56 S. W. 998, holding bicyclist may recover for injury due to defect in highway; *Geiger v. Perkiomen & R. Turnp. Road*, 4 Pa. Dist. R. 113, holding bicyclists may use turnpike as traveling public; *North Chicago Street R. Co. v. Cossar*, 203 Ill. 614, 68 N. E. 88, holding bicyclist must use same degree of care as drivers of other vehicles.

Cited in *Gagnier v. Fargo*, 11 N. D. 76, 95 Am. St. Rep. 705, 88 N. W. 1030, holding city council has power to regulate or prohibit use of sidewalks by bicyclists.

Cited in notes (8 L. R. A. 829) as to use of streets in cities and towns; (19 L. R. A. 632) as to regulation of bicycle riding; (47 L. R. A. 289, 291) on bicycle law; (48 Am. St. Rep. 378) on rights by bicyclists in road and presumption of negligence from being on wrong side.

Construction of ordinance or statute.

Cited in *Darlington Lumber Co. v. Missouri P. R. Co.* 216 Mo. 672, 116 S. W. 530; *Sedalia ex rel. Taylor v. Smith*, 206 Mo. 363, 104 S. W. 15,—holding that an ordinance susceptible of a valid and an invalid construction will be construed with a view to validity; *Julian v. Kansas City Star Co.* 209 Mo. 101, 107 S. W. 496 (dissenting opinion), on the construction of statutes with a view to validity.

— Penal.

Cited in *Makker v. Tough*, 79 Kan. 54, 19 L.R.A. (N.S.) 678, 98 Pac. 792, 17 A. & E. Ann. Cas. 208, holding penal ordinance will be strictly construed in a civil action to which the city is not a party where such ordinance is involved for purpose of avoiding a contract.

8 L. R. A. 774, *STATE v. SMITH*, 44 Kan. 75, 21 Am. St. Rep. 266, 24 Pac. 84.

Discharge of jury.

Approved in *Upchurch v. State*, 36 Tex. Crim. Rep. 630, 44 L. R. A. 698, footnote, p. 695, 38 S. W. 206, upholding right of accused to be present when necessity for discharge of jury before verdict is investigated; *State v. Curry*, 74 Kan. 626, 87 Pac. 745, holding that it must affirmatively appear of record that jury were discharged on a finding of the court that they could not agree.

Cited in *State v. Reed*, 53 Kan. 770, 42 Am. St. Rep. 322, 37 Pac. 174, and *State v. Allen*, 59 Kan. 761, 54 Pac. 1060, holding discharge of jury before verdict operates as acquittal unless record discloses sufficient reason; *State v. Klauer*, 70 Kan. 389, 78 Pac. 802, holding discharge of jury equivalent to an acquittal where no finding of a necessity of discharge is entered of record, and no judicial investigation or determination is made; *State v. Turpin*, 54 Or. 369, 103 Pac. 438, holding that failure of court to convene upon three days which intervened between two series of holidays declared by the executive after institution of prosecution operated under statute as a discharge of jury without cause and an acquittal of the accused; *People v. Fishman*, 64 Misc. 260, 119 N. Y. Supp. 89, holding that a plea of former jeopardy cannot be sustained by a discharge of jury because of a conversation between complaining witness and foreman of jury pending trial.

Proceedings during absence of accused.

Cited in *Percer v. State*, 118 Tenn. 774, 103 S. W. 780, holding presence of accused in room adjoining court room on rendition of verdict, he being able to see only part of jury and unable to see judge through the door between the rooms not a satisfaction of his constitutional right.

Distinguished in *State v. Way*, 76 Kan. 938, 14 L.R.A.(N.S.) 608, 93 Pac.

159, holding that a verdict against accused may be lawfully received in his voluntary absence on bail unexcused by judge.

8 L. R. A. 778, *McCONNELL v. OSAGE*, 80 Iowa, 293, 45 N. W. 550.

Order limiting number of witnesses.

Approved in *Preston v. Cedar Rapids*, 95 Iowa, 74, 63 N. W. 577, sustaining right of trial court to limit number of witnesses on given point; *Larson v. Eau Claire*, 92 Wis. 90, 65 N. W. 731, sustaining limitation of number of witnesses upon single question where made after reasonable number examined; *Meier v. Morgan*, 82 Wis. 294, 33 Am. St. Rep. 39, 52 N. W. 174, holding that ruling limiting witnesses on particular fact must be objected to when made.

Cited in *Campbell v. Campbell*, 30 R. I. 92, 73 Atl. 354 (dissenting opinion), on the power of the court to limit the number of witnesses on any one point.

Expert evidence.

Approved in *Morgan v. Fremont County*, 92 Iowa, 646, 61 N. W. 231, holding testimony of bridge builder as to life of timbers like those used in bridge admissible; *Anderson v. Illinois C. R. Co.* 109 Iowa, 528, 80 N. W. 561, holding testimony of man familiar with methods of work incompetent to show implements commonly used for moving timbers.

Cited in note (10 L. R. A. 739) on evidence as to defendant's negligence.

Evidence of general defective condition.

Approved in *Munger v. Waterloo*, 83 Iowa, 561, 49 N. W. 1028; *Smith v. Des Moines*, 84 Iowa, 687, 51 N. W. 77; *Bailey v. Centerville*, 108 Iowa, 23, 78 N. W. 831; *Ledgerwood v. Webster City*, 93 Iowa, 729, 61 N. W. 1089; *Wilberding v. Dubuque*, 111 Iowa, 488, 82 N. W. 957, — holding evidence of general defective condition of walk admissible to prove notice of particular defect; *Kircher v. Larchwood*, 120 Iowa, 582, 95 N. W. 184, holding evidence of general condition of walk competent as bearing upon defendant's knowledge of condition at place of accident; *Lorig v. Davenport*, 99 Iowa, 482, 68 N. W. 717, holding evidence that walk was old and in bad condition admissible as showing notice; *Faulk v. Iowa County*, 103 Iowa, 447, 72 N. W. 757, holding testimony of absence of cap rail from bridge for some time before accident admissible on question of notice; *Harrison v. Ayrshire*, 123 Iowa, 532, 99 N. W. 132, holding evidence of condition of stringer in walk competent in action for injury caused by board breaking; *Frohs v. Dubuque*, 109 Iowa, 221, 80 N. W. 341, holding evidence of construction of walk from old material admissible to show notice of defect; *Smith v. Sioux City*, 119 Iowa, 33, 93 N. W. 81, holding city chargeable with notice of defects in walk notoriously decayed; *Smith v. Pella*, 86 Iowa, 240, 53 N. W. 226, holding ordinance prescribing manner of constructing sidewalks admissible upon question of proper construction of walk claimed defective.

Cited in *McCartney v. Washington*, 124 Iowa, 385, 100 N. W. 80, holding evidence as to the ordinary life of such a walk admissible; *Patton v. Sanborn*, 133 Iowa, 653, 110 N. W. 1032, allowing testimony as to life and durability of such timber and nails as were used in construction of the walk; *Witt v. Latimer*, 139 Iowa, 276, 117 N. W. 680, holding it competent to prove general dilapidated condition of walk on the issue of neglect and notice.

Cited in note (10 L. R. A. 740) on necessity of evidence of notice of defect.

Privileged communications.

Approved in *Prader v. National Masonic Acci. Asso.* 95 Iowa, 157, 63 N. W. 601, holding incompetency of confidential communications to physicians extends to knowledge acquired by personal examination; *Briesenmeister v. Supreme Lodge K. of P.* 81 Mich. 536, 45 N. W. 977, holding privilege of confidential communi-

education to physician waived if not claimed before testimony admitted; *Burgess v. Sims Drug. Co.* 114 Iowa, 280, 54 L. R. A. 366, footnote p. 364, 89 Am. St. Rep. 359, 86 N. W. 307, which holds waiver of patient's privilege as to communication to physician confined to trial in which made.

Cited in *Battis v. Chicago, R. I. & P. R. Co.* 124 Iowa, 627, 100 N. W. 543, holding physician excused under statute from testifying as to condition of patient when brought to and while in his office.

Distinguished in *Crago v. Cedar Rapids*, 123 Iowa, 50, 98 N. W. 354, holding testimony of attending physician, based on hypothetical questions, not incompetent as disclosing confidential communications; *State v. Booth*, 121 Iowa, 713, 97 N. W. 74, holding mere offer of attending physician as witness, no ground for reversal.

— Waiver of privilege.

Cited in *May v. Northern P. R. Co.* 32 Mont. 540, 70 L.R.A. 119, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, holding that physician cannot without consent of patient be examined as to her condition where his relation to her is elicited in cross examination, she not introducing him as a witness or in any other way connecting him with the case; *Union P. R. Co. v. Thomas*, 81 C. C. A. 491, 152 Fed. 369, holding that neither the commencement of an action based on injury nor testimony of condition of the injured party constitutes a waiver of the privilege as to communications to physician; *Slater v. Sorge*, 166 Mich. 179, 131 N. W. 565, holding that calling physician who treated plaintiff for dog bite, and testifying that another physician treated him previously, was not waiver of privilege to object to testimony of other physician as to character of injury.

Inferences from refusal or unwillingness to waive privilege.

Cited in *Pennsylvania R. Co. v. Durkee*, 78 C. C. A. 107, 147 Fed. 101, 8 A. & E. Ann. Cas. 790, holding that no unfavorable inference can be drawn from the refusal of plaintiff to waive his privilege as to communications made to physician; *Arnold v. Maryville*, 110 Mo. App. 262, 85 S. W. 107, on the rule that a person cannot be asked as a witness whether he is willing to waive his privilege as to communication to physician.

8 L. R. A. 781, *HOFFMAN v. CHIPPEWA COUNTY*, 77 Wis. 214, 45 N. W. 1083.

Alteration of compensation fixed by law.

Cited in *Endion Improv. Co. v. Evening Telegram Co.* 104 Wis. 439, 80 N. W. 734, holding county cannot compromise claim for publishing notices at rate fixed by law; *Rettinghouse v. Ashland*, 106 Wis. 597, 82 N. W. 556, holding public officer's agreement to accept less than legal compensation void.

Powers of counties.

Cited in *Frederick v. Douglas County*, 96 Wis. 417, 71 N. W. 798, holding county quasi corporation only, without power to employ attorney.

Estoppel of counties.

Cited in *Gilbert v. Pier*, 102 Wis. 336, 78 N. W. 566, holding county not estopped from claiming title to lands by misstatement of officer making tax sale as to county's interest.

Cited in note (137 Am. St. Rep. 366) on estoppel of county or municipal corporation to contest illegal claims or expenditures.

8 L. R. A. 783, *KELLY v. MISSOURI P. R. CO.* 101 Mo. 67, 13 S. W. 806.

Contributory negligence.

Approved in *Jennings v. St. Louis, I. M. & S. R. Co.* 112 Mo. 276, 20 S. W. 490, holding one who stops within 20 feet of track without seeing or hearing in-

dication of danger not guilty of contributory negligence in going on track without looking again; *Baker v. Kansas City, Ft. S. & M. R. Co.* 147 Mo. 166, 48 S. W. 838, holding one driving on track after freight train passes, and struck by cars that had got loose, not negligent where view was obstructed; *Dahlstrom v. St. Louis, I. M. & S. R. Co.* 108 Mo. 540, 18 S. W. 919, holding plaintiff's failure, before stopping on track, to look in direction of car that struck him does not prevent recovery unless he would have discovered immediate danger.

Cited in *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 41, 43 N. E. 576, holding contributory negligence of one injured in crossing large number of parallel tracks usually question for jury; *Moore v. Lindell R. Co.* 176 Mo. 545, 75 S. W. 672, denying street railroad's liability for killing woman stepping on track directly in front of car; *Deitring v. St. Louis Transit Co.* 109 Mo. App. 539, 85 S. W. 140, holding person not guilty of contributory negligence who in passing before a moving train exercised the diligence of an ordinarily prudent person; *Krehmeyer v. St. Louis Transit Co.* 220 Mo. 684, 120 S. W. 78 (dissenting opinion), on the exception to the general rule of non-recovery in case of contributory negligence.

Cited in footnote to *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track by train running at excessive speed without ringing bell.

Cited in note (24 Am. St. Rep. 398) on contributory negligence as a bar to recovery.

— **Proximate cause.**

Approved in *Hogan v. Citizens' R. Co.* 150 Mo. 55, 51 S. W. 473, holding plaintiff's direct contributory negligence will bar recovery; *Oates v. Metropolitan Street R. Co.* 168 Mo. 548, 58 L. R. A. 451, 68 S. W. 906, holding negligence or contributory negligence must be direct and proximate cause of injury; *Corcoran v. St. Louis, I. M. & S. R. Co.* 105 Mo. 406, 24 Am. St. Rep. 394, 16 S. W. 411, holding concurring negligence of plaintiff which defendant did not or was not required to know at time of injury bars recovery; *Klockenbrink v. St. Louis & M. River R. Co.* 81 Mo. App. 357, holding negligence of party having last opportunity of avoiding accident sole proximate cause of injury.

Cited in note (12 L. R. A. 283) that proximate cause of injury fixes liability.

— **Defendant's failure to use reasonable care.**

Approved in *Hutchinson v. St. Louis & M. River R. Co.* 88 Mo. App. 382; *Hanlon v. Missouri P. R. Co.* 104 Mo. 389, 16 S. W. 233; *Dlauhi v. St. Louis, I. M. & S. R. Co.* 139 Mo. 297, 40 S. W. 890, — holding plaintiff may recover notwithstanding contributory negligence, if defendant by reasonable care could have prevented accident; *Schlereth v. Missouri P. R. Co.* 115 Mo. 101, 21 S. W. 1110, holding contributory negligence no defense if engineer could have avoided injury after danger became apparent; *Edwards v. Chicago & A. R. Co.* 94 Mo. App. 41, 67 S. W. 950, holding engineer's failure to take measures to stop train after discovering plaintiff's peril, actionable; *Burnstein v. Cass Ave. & Fair Grounds R. Co.* 56 Mo. App. 53, holding duty to stop car arises on first appearance of danger and should be in time to prevent injury; *Jett v. Central Electric R. Co.* 178 Mo. 673, 77 S. W. 738, holding street railroad's liability for killing children playing on track, question for jury, where evidence shows motor-man might have seen them in time to stop; *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 688, 72 S. W. 900, sustaining instruction that street car company would be liable for collision with person negligently driving along track, if avoidable by ordinary care; *Parks v. St. Louis & Suburban R. Co.* 178 Mo. 117, 77 S. W. 70, holding street car company's liability for injury to passenger

crushed between cars passing on curve, while riding on step, with knowledge of motorman and conductor, question for jury; *Zumault v. Kansas City Suburban Belt R. Co.* 175 Mo. 315, 74 S. W. 1015, denying railroad's liability for striking man sitting dangerously near track, where engineer was not guilty of wanton recklessness; *Carrifer v. Missouri P. R. Co.* 175 Mo. 482, 74 S. W. 1002, denying railroad's liability for killing pedestrian on track, by engineer not showing wilful disregard of human life.

Cited in *Seullin v. Wabash R. Co.* 184 Mo. 707, 83 S. W. 760; *Everett v. St. Louis & S. F. R. Co.* 214 Mo. 93, 112 S. W. 486; *Reyburn v. Missouri P. R. Co.* 187 Mo. 574, 86 S. W. 174,—holding company liable for death of person negligently walking on track when accident was caused by failure or refusal of engineer or fireman to warn him of their approach from behind when such was within their power; *Rapp v. St. Louis Transit Co.* 190 Mo. 161, 88 S. W. 865, holding contributory negligence no excuse for injury where defendant could have prevented it after discovery of position of person injured; *Sites v. Knott*, 197 Mo. 711, 96 S. W. 206, holding negligence of person crossing railroad track does not preclude recovery for injury sustained where operators of engine could have seen position of such person in time to have avoided such injury; *McQuade v. St. Louis & S. R. Co.* 200 Mo. 158, 98 S. W. 552, holding that where motorman should have seen deceased in time to prevent death, his failure to do so until too late does not excuse the liability; *Bectenwald v. Metropolitan Street R. Co.* 121 Mo. App. 599, 97 S. W. 557, holding defendant liable for injury from collision with plaintiff who failed to look back while driving along street railway track, where motorman could with use of due care have avoided injury after discovery of plaintiff; *Wilkerson v. St. Louis & S. F. R. Co.* 140 Mo. App. 315, 124 S. W. 543, holding defendant liable where engineer failed, after discovery of plight of plaintiff to use such care in stopping, or signalling as to avoid injury where the means so to do are in his power; *Williams v. Metropolitan Street R. Co.* 114 Mo. App. 6, 89 S. W. 59; *Levelsmeier v. St. Louis & S. R. Co.* 114 Mo. App. 419, 90 S. W. 104; *Waddell v. Metropolitan Street R. Co.* 213 Mo. App. 16, 111 S. W. 542,—on recovery in face of contributory negligence where injury could have been avoided by due care of defendant after discovery of position of one injured; *Woods v. Wabash R. Co.* 188 Mo. 257, 86 S. W. 1082, holding an instruction embodying the doctrine of "last clear chance" obviates the necessity of instructions on contributory negligence.

Cited in footnote to *Cincinnati, H. & D. R. Co. v. Kassen*, 16 L. R. A. 674, which authorizes recovery for injury to negligent person by one not using care after discovering danger.

Distinguished in *Koons v. Kansas City Suburban Belt R. Co.* 178 Mo. 608, 77 S. W. 755, denying railroad's liability for avoidable killing of flagman who also might have avoided accident; *McGauley v. St. Louis Transit Co.* 179 Mo. 592, 79 S. W. 461, holding contributory negligence bars recovery for collision by street car, in absence of evidence showing accident avoidable by ordinary care of motorman; *Guyer v. Missouri P. R. Co.* 174 Mo. 351, 73 S. W. 584, denying railroad's liability for crossing accident where evidence does not show engine might have been stopped in time; *Theobald v. St. Louis Transit Co.* 191 Mo. 437, 90 S. W. 354, holding plaintiff cannot recover in face of his own negligence where there is no evidence to show that defendant had the means to avert the accident, or knew of position of plaintiff in time to avoid collision.

Disapproved in *Murphy v. Wabash R. Co.* 228 Mo. 123, 128 S. W. 481 (dissenting opinion), on estoppel of defendant to say that plaintiff was contribu-

torily negligent where his servants were in a position to avoid injury after discovery of plaintiff's peril or should have been so and failed.

— **Traveler's presumption that railway will obey law.**

Approved in *Jennings v. St. Louis, I. M. & S. R. Co.* 112 Mo. 276, 20 S. W. 490; *Sullivan v. Missouri P. R. Co.* 117 Mo. 222, 23 S. W. 149; *Weller v. Chicago, M. & St. P. R. Co.* 120 Mo. 652, 23 S. W. 1061, — holding traveler may presume company will obey state and municipal laws in running train.

Cited in *Deitring v. St. Louis Transit Co.* 109 Mo. App. 539, 85 S. W. 140, holding a person walking on track has the right to assume, unless he has knowledge to contrary, that trains will not be operated beyond speed limit.

Cited in notes (3 L.R.A.(N.S.) 197) on stepping on track in front of train running in excess of speed prescribed by ordinance as negligence; (24 L.R.A.(N.S.) 493) on assumption which one approaching crossing may indulge as to speed of coming train.

— **Wanton or wilful injuries.**

Approved in *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 236, 50 L. R. A. 856, 57 S. W. 770; *Morgan v. Wabash R. Co.* 159 Mo. 275, 60 S. W. 195; *Sharp v. Missouri P. R. Co.* 161 Mo. 236, 61 S. W. 829; *Tanner v. Missouri P. R. Co.* 161 Mo. 511, 61 S. W. 826, — holding contributory negligence no defense to injury wantonly or wilfully inflicted.

Cited in *Markowitz v. Metropolitan Street R. Co.* 186 Mo. 359, 69 L.R.A. 392, 85 S. W. 351, holding evidence of mere negligence not sufficient to justify an instruction to find for plaintiff in spite of his own negligence; *Heinzle v. Metropolitan Street R. Co.* 213 Mo. 118, 111 S. W. 536, holding that act of defendant's servants need not have been wilful in injuring child crossing track to permit of recovery; *Bourrett v. Chicago & N. W. R. Co.* 152 Iowa, 591, 36 L.R.A.(N.S.) 966, 132 N. W. 973, to the point that contributory negligence is no bar to recovery for wilful injury.

Distinguished in *Feeback v. Missouri P. R. Co.* 167 Mo. 217, 66 S. W. 965, holding company owes trespasser no duty except to avoid wanton injury.

Violation of ordinance.

Approved in *Dahlstrom v. St. Louis, I. M. & S. R. Co.* 108 Mo. 538, 18 S. W. 919; *Gratiot v. Missouri P. R. Co.* 116 Mo. 463, 16 L. R. A. 191, 21 S. W. 1094; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 641, 80 Am. St. Rep. 650, 58 S. W. 32; *Hutchinson v. Missouri P. R. Co.* 161 Mo. 253, 84 Am. St. Rep. 710, 61 S. W. 635, — holding running train in violation of ordinance negligence *per se*.

Cited in *Baker v. Kansas City, Ft. S. & M. R. Co.* 147 Mo. 166, 48 S. W. 838, holding contributory negligence must be clearly made out where violation of law results in injury; *Sluder v. St. Louis Transit Co.* 189 Mo. 161, 5 L.R.A.(N.S.) 220, 88 S. W. 648 (dissenting opinion), on violation of municipal speed ordinance as negligence *per se*, and the right of pedestrians to compliance with ordinance; *Neary v. Northern P. R. Co.* 41 Mont. 503, 110 Pac. 226, holding that running of railroad train in excess of speed limit fixed by ordinance is negligence *per se*.

Sufficiency of pleading.

Approved in *Shaw v. Missouri P. R. Co.* 104 Mo. 656, 16 S. W. 832, holding petition alleging negligent management of train whereby deceased was fatally injured states cause of action.

Admissibility of evidence.

Approved in *Hanlon v. Missouri P. R. Co.* 104 Mo. 391, 16 S. W. 233, holding proof of negligence of railway company after its employees saw plaintiff's peril admissible under allegation of negligent management of train.

8 L. R. A. 787, *PEEL v. ATLANTA*, 85 Ga. 138, 11 S. E. 582.

Damages in eminent domain.

Cited in *Austin v. Augusta Terminal R. Co.* 108 Ga. 679, 47 L. R. A. 759, 34 S. E. 852, holding "damages to property taken for public purpose" refers to land; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 261, 13 L. R. A. 401, 27 Am. St. Rep. 246, 13 S. E. 489, holding damages recoverable for injury due to overflow of river, caused by erection of embankment; *Metropolitan West Side Elev. R. Co. v. Goll*, 100 Ill. App. 335, denying liability of railroad company for depreciation in value of adjoining property.

Cited in notes (11 L. R. A. 548) on action on case based on contract; (12 L.R.A. 675) on right of eminent domain; (109 Am. St. Rep. 907, 908) on what constitutes "damage" to property within provision that property shall not be taken or damaged for public use without compensation.

Distinguished in *Austin v. Augusta Terminal R. Co.* 108 Ga. 732, 47 L. R. A. 779, 34 S. E. 852 (dissenting opinion), majority holding railroad company not liable for depreciation in value of property, due to smoke and noise in absence of physical interference with property.

Test of damages.

Cited in *Austin v. Augusta Terminal R. Co.* 108 Ga. 676, 47 L. R. A. 759, 34 S. E. 852, holding railroad company liable to same extent as individual at common law for "private property damaged for public purpose;" *Howard v. Bibb County*, 127 Ga. 292, 56 S. E. 418, holding complaint insufficient for failure to allege special damage to premises from act of county in making public road.

8 L. R. A. 788, *FIRST NAT. BANK v. HUMMEL*, 14 Colo. 259, 20 Am. St. Rep. 257, 23 Pac. 986.

Reaffirmed on later appeal in 2 Colo. App. 571, 32 Pac. 72.

What constitutes trust fund.

Cited in *Myers v. Board of Education*, 51 Kan. 102, 37 Am. St. Rep. 263, 32 Pac. 658, holding entire assets of insolvent bank subject to lien for public moneys wrongfully deposited therein; *State v. Thum*, 6 Idaho, 330, 55 Pac. 858, holding trust, and not debt, created by unauthorized deposit of public money in bank; *Lincoln v. Morrison*, 64 Neb. 826, 57 L. R. A. 887, 90 N. W. 905, holding municipality entitled to preference over general creditors in fund enriched by trust moneys; *Cady v. South Omaha Nat. Bank*, 49 Neb. 129, 68 N. W. 358, holding money deposited in bank without notice by commission merchant, trust fund for principal; *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 261, 71 S. W. 977; *Meldrum v. Henderson*, 7 Colo. App. 258, 43 Pac. 148; *Foster v. Rincker*, 4 Wyo. 493, 35 Pac. 470, — holding money collected by bank on negotiable instrument, trust fund recoverable as such by payee on bank's insolvency; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 789, 59 Am. St. Rep. 572, 69 N. W. 115, holding money subject to call in payment of due and canceled note constitutes trust fund taking precedence in insolvent's estate; *McClure v. La Plata County*, 19 Colo. 125, 34 Pac. 763, holding public moneys embezzled by county treasurer collectible out of estate, only if latter enriched thereby; *Bramell v. Adams*, 146 Mo. 86, 47 S. W. 931, holding equitable proceeding against administrator to recover proceeds of trust property not barred by limitation applicable to claim; *Re Belt*, 29 Wash. 543, 92 Am. St. Rep. 916, 70 Pac. 74, holding probate court may determine whether property in dispute should be included in inventory of estate; *Cotting v. Berry*, 50 Colo. 226, 114 Pac. 641, holding that where moneys improperly diverted from trust are traced into specific property which is worthless, successor representing trust, will not be permitted to

waive his claim upon such securities and assert preferential lien upon general assets of defaulting trustee; *Bottom v. Barton*, 19 Colo. App. 325, 75 Pac. 153, holding that the proceeds from a note impressed with a trust may also be so impressed; *Page County v. Rose*, 130 Iowa, 300, 5 L.R.A.(N.S.) 891, 106 N. W. 744, 8 A. & E. Ann. Cas. 114, holding that a bank holds money collected on tax receipts credited to county treasurer in his official capacity, impressed with a trust in favor of county where deposit of tax receipts for collection was unauthorized; *Probate Ct. v. Williams*, 30 R. I. 161, 73 Atl. 382, holding sureties on administrator's bond not liable for property coming into hands of administrator, which is not assets of the estate though charged to him in his representative capacity.

Cited in footnotes to *Ferchen v. Arndt*, 29 L. R. A. 664, which denies power of consignors to impress, with trust lien, funds of consignees in hands of receiver; *Bohle v. Hasselbroch*, 61 L. R. A. 323, which holds *cestuis que trust* entitled to lien upon land purchased in part with trust funds, or to land itself, subject to charge for amount paid in excess of trust funds.

Cited in notes (32 Am. St. Rep. 125, 128, 129) on right to pursue and recover trust funds; (33 Am. St. Rep. 227) on right of beneficiary to follow trust property.

Distinguished in *Holden v. Piper*, 5 Colo. App. 73, 37 Pac. 34, holding administrator *de bonis non* of insolvent trustee not entitled to preference where assignment does not disclose that trust fund included; *Pearson v. Haydel*, 90 Mo. App. 261, holding creditor's claims not enforceable against estate where not shown that estate enriched by embezzled trust funds; *Kimmel v. Bean*, 68 Kan. 602, 64 L. R. A. 788, 75 Pac. 1118, denying bank's liability to principal for deposit applied in good faith on agent's overdraft.

Party in interest.

Cited in *Moulton v. McLean*, 5 Colo. App. 464, 39 Pac. 78, holding county treasurer, and not county, proper party to action against bank on personal bond to secure deposit of county moneys; *Stewart v. Price*, 64 Kan. 207, 64 L. R. A. 601, 67 Pac. 553 (dissenting opinion), majority holding assignee of account for purpose of collection not real party in interest.

Cited in note (64 L. R. A. 585) on who is real party in interest within meaning of statutes defining parties by whom action must be brought.

Proper parties to action on trust fund.

Cited in *Best v. Rocky Mountain Nat. Bank*, 37 Colo. 157, 7 L.R.A.(N.S.) 1038, 85 Pac. 1124, holding that a bank may sue on a note made out by mistake to its president, the bank being the real party in interest, though statute provides for suit in case like this to be made in name of person named in note; *Cunningham v. Bank of Nampa*, 13 Idaho, 173, 10 L.R.A.(N.S.) 710, 121 Am. St. Rep. 257, 88 Pac. 975, holding beneficiaries proper parties with trustee in recovery of trust fund.

8 L. R. A. 795, *JOHNSON v. JOUCHERT*, 124 Ind. 105, 24 N. E. 580.

Wife's separate estate.

Cited in *Cochran v. Benton*, 126 Ind. 62, 25 N. E. 870, holding mortgage securing money borrowed to discharge prior lien thereon, valid; *Till v. Collier*, 27 Ind. App. 340, 61 N. E. 203, holding mortgage securing loan to pay off *prima facie* valid prior lien enforceable though prior lien voidable; *Goff v. Hankins*, 11 Ind. App. 458, 39 N. E. 294, holding pledge of personalty for husband's debt void, though no agreement signed or personal liability incurred; *Herbert v. Rupertus*, 31 Ind. App. 555, 68 N. E. 598, holding husband's interest in deceased wife's lands

first applicable to mortgage securing loan for living expenses; *Shirk v. Stafford*, 31 Ind. App. 251, 67 N. E. 542, holding married woman's contract of suretyship voidable at her election; *Evans v. Faircloth-Byrd Merchantile Co.* 165 Ala. 179, 51 So. 785, 21 Ann. Cas. 1164, holding that mortgage on wife's land to secure husband's debts, is void under section 4497 of Code of 1907; *Palmer v. Smith*, 88 Ga. 87, 13 S. E. 956, holding that conveyance of land by wife to pay husband's debts is void only as against her and is not available to stranger to her title; *Alexander v. Shalala*, 228 Pa. 299, 31 L.R.A.(N.S.) 845, 139 Am. St. Rep. 1004, 77 Atl. 554, 20 Ann. Cas. 1330, holding that deed from wife directly to husband is void although he joins in deed, where statute requires husband to join in wife's deed.

Cited in note (20 L. R. A. 702) on validity of deed from wife to husband.

Distinguished in *Heal v. Niagara Oil Co.* 150 Ind. 485, 50 N. E. 482, holding lease to gas and oil well company not encumbrance within meaning of statute.

Defense of coverture.

Cited in *McCoy v. Barns*, 136 Ind. 381, 36 N. E. 134, holding mortgage by husband and wife to secure purchase money for land conveyed to them in entirety binding, since wife not surety; *Taylor v. Hearn*, 131 Ind. 542, 31 N. E. 201, holding wife estopped as against mortgagee to deny relationship of principal to loan made to her on representation that it is for her own use.

— Parties entitled to.

Cited in *Lackey v. Boruff*, 152 Ind. 378, 53 N. E. 412, holding judgment creditors of husband cannot set aside wife's surety note and mortgage; *Plaut v. Storey*, 131 Ind. 51, 30 N. E. 886, holding lienors cannot defeat mortgage to wife to secure her liability upon husband's notes as against payee of notes; *Voreis v. Nussbaum*, 131 Ind. 270, 16 L. R. A. 47, 31 N. E. 70, holding wife alone entitled to defense of nonliability on her suretyship note in hands of innocent purchaser for value in due course.

Distinguished in *Columbian Oil Co. v. Blake*, 13 Ind. App. 691, 42 N. E. 234, holding defense available to defendant in action by *feme covert* on contract voidable by her at her election.

Necessity of pleading coverture.

Cited in *Dickey v. Kalfsbeek*, 20 Ind. App. 293, 50 N. E. 590, holding defense not available unless pleaded, even though complaint shows fact of coverture.

Common-law disabilities generally.

Cited in *Postlewaite v. Postlewaite*, 1 Ind. App. 476, 28 N. E. 99, holding action for alienation of husband's affections maintainable by wife after divorce; *Worth v. Patton*, 5 Ind. App. 275, 31 N. E. 1130, holding contract by husband to convey property to wife in consideration of her joining in conveyance of other property valid in equity.

8 L. R. A. 798, *WELLER v. McCORMICK*, 52 N. J. L. 470, 19 Atl. 1101

Trees in highway.

Cited in *Western U. Teleg. Co. v. Krueger*, 30 Ind. App. 30, 64 N. E. 635, holding proprietor of fee of highway may maintain action for injury to trees thereon.

Cited in note (15 L. R. A. 554) on ownership and control of trees in highway.

Rights and liabilities as to use of highway.

Cited in *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 388, 20 Atl. 859, denying abutting owner's right to enjoin erection of trolley poles in highway; *Sutphen v. Hedden*, 67 N. J. L. 327, 51 Atl. 721, holding contractor liable for injury to passerby by blowing down of fence erected to guard excavation for new building in street; *Ivins v. Trenton*, 68 N. J. L. 506, 53 Atl. 202, sustaining

ordinance prohibiting erection of signs or stationary awnings across sidewalks; *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 351, 59 L. R. A. 460, 96 Am. St. Rep. 552, 53 Atl. 404, holding person injured by defect in paving between car tracks cannot maintain action against company charged by ordinance with repair; *Colegrove Water Co. v. Hollywood*, 151 Cal. 430, 13 L.R.A. (N.S.) 908, 90 Pac. 1053, holding licensee of owner of fee to street may lay pipe for conducting water under the street so long as it will not interfere with public use of such street; *Budd v. Camden Horse R. Co.* 70 N. J. L. 785, 59 Atl. 229, holding that the public right to unobstructed use of streets is superior to the right of abutting landowners to have doors and gates swing out across the street line; *Friedman v. Snare & T. Co.* 71 N. J. L. 609, 70 L.R.A. 150, 108 Am. St. Rep. 764, 61 Atl. 401, 2 A. & E. Ann. Cas. 497, holding that occupant's or owners of abutting property may pile repair or building material in street adjacent to their property subject to use of public in streets; *Mitchell v. Brady*, 124 Ky. 415, 13 L.R.A. (N.S.) 752, 124 Am. St. Rep. 408, 99 S. W. 266, holding tenant of building from which pipe protruding out over street fell and killed person, liable therefor.

Cited in notes (12 L.R.A. 190) on liability of abutting owners for injuries caused by material falling into street; (101 Am. St. Rep. 114) on rights, obligations and remedies of persons over whose land a highway runs.

Liability inferred from control and possession.

Cited in *Waller v. Ross*, 100 Minn. 9, 12 L.R.A. (N.S.) 726, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715, holding liability of person having awning extending over street is to be determined on the grounds of *res ipsa loquitur*, and not on grounds of absolute liability; *Anderson v. McCarthy Dry Goods Co.* 49 Wash. 404, 16 L.R.A. (N.S.) 935, 126 Am. St. Rep. 870, 95 Pac. 325, holding that the falling of an overhead basket carrier though of standard make in common use on a customer is a *prima facie* negligent cause of injury.

8 L. R. A. 800, *RICHARDSON v. GERMAN INS. CO.* 89 Ky. 571, 13 S. W. 1.

Change of title as affecting insurance policy.

Cited in *Gerling v. Agricultural Ins. Co.* 39 W. Va. 700, 20 S. E. 691, holding invalid deed not such transfer of title as to forfeit policy; *Planters' Mut. Ins. Asso. v. Dewberry*, 69 Ark. 300, 86 Am. St. Rep. 195, 62 S. W. 1047, and *Forest City Ins. Co. v. Hardesty*, 182 Ill. 49, 74 Am. St. Rep. 161, 55 N. E. 139, Affirming 77 Ill. App. 421, holding change of title by death of insured works no forfeiture of policy.

Cited in note (14 Eng. Rul. Cas. 30) as to whether death of insured effects change of interest.

8 L. R. A. 801, *BELCHER'S SUGAR REF. CO. v. ST. LOUIS GRAIN ELEVATOR CO.* 101 Mo. 192, 13 S. W. 822.

Public use.

Approved in *Knapp, S. & Co. v. St. Louis Transfer R. Co.* 126 Mo. 34, 28 S. W. 627, holding property used as stock yards for convenience of public devoted to public use; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 299, 15 S. W. 931, holding land appropriated to public use cannot be transferred unconditionally to private use; *Reighard v. Flinn*, 194 Pa. 356, 44 Atl. 1080, Affirming 29 Pittsb. L. J. N. S. 340, holding city may maintain wharf to facilitate use of public landing; *State ex rel. Citizens Electric Lighting & P. Co. v. Longfellow*, 169 Mo. 129, 69 S. W. 374, holding city cannot, without violation of public trust, permit riparian owner on navigable river to erect building beyond low-water mark.

Cited in *Seibert v. Missouri P. R. Co.* 188 Mo. 670, 70 L.R.A. 77, 87 S. W. 995,

holding that railway safety gates for street crossings do not in themselves constitute a nuisance, but are a public utility; *State ex rel. Roland v. Dreyer*, 229 Mo. 238, 129 S. W. 904, holding that railroad use of lever is not inconsistent use and city had power to grant same; *People ex rel. Swan v. Doxsee*, 136 App. Div. 405, 120 N. Y. Supp. 962, holding that the occupation of a public dock by an ice house and other apparatus by a private company for which a rental is paid is a private use of public property.

— **Of streets for wires or poles.**

Approved in *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 573, 42 L. R. A. 122, 46 S. W. 981, holding city in its proprietary capacity may permit telegraph and telephone companies to lay wires and construct conduits in the street; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 471, 37 L. ed. 814, 13 Sup. Ct. Rep. 990, holding use of streets for telegraph poles not a private use, and city may charge rental therefor.

Equity jurisdiction.

Cited in *Bridgens v. Dollar Sav. Bank*, 66 Fed. 14, holding equity may inquire into alleged fraudulent transactions conducted between insolvent bank and another bank of which it was an adjunct, by managing agent of both.

Who may plead ultra vires.

Cited in *State Ins. Co. v. Farmers' Mut. Ins. Co.* 65 Neb. 41, 90 N. W. 997, holding that the plea of ultra vires with respect to making of a contract cannot be interposed by a stranger to the contract unless he can show violation of a duty owing to himself.

Cited in note (70 Am. St. Rep. 179) on who may plead ultra vires.

8 L. R. A. 806, *HORSCH v. DWELLING HOUSE INS. CO.* 77 Wis. 4, 45 N. W. 945.

Insurable interest.

Cited in *Davis v. Phoenix Ins. Co.* 111 Cal. 414, 43 Pac. 1115, and *Gettelman v. Commercial Union Assur. Co.* 97 Wis. 241, 72 N. W. 627, holding person in possession of real estate under contract of purchase, upon which substantial payment has been made, has insurable interest; *Edwards v. Agricultural Ins. Co.* 88 Wis. 452, 60 N. W. 782, holding mechanic's-lien claimant has insurable interest in building subject to lien.

Cited in footnote to *Home Ins. Co. v. Mendenhall*, 36 L. R. A. 374, which holds expectant heir, placed in possession by his father with assurance that property has been devised to him by will, has insurable interest.

Cited in notes (104 Am. St. Rep. 991; 66 L.R.A. 662) on insurable interest of husband in wife's property; (13 Eng. Rul. Cas. 277) on insurable interest of agent.

8 L. R. A. 808, *JANESVILLE v. CARPENTER*, 77 Wis. 238, 20 Am. St. Rep. 123, 46 N. W. 128.

Unjust discrimination.

Cited in *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 534, 58 L. R. A. 751, 91 Am. St. Rep. 934, 90 N. W. 1098, holding penal statute forbidding discharge of employee because member of labor union invalid; *Phipps v. Wisconsin C. R. Co.* 133 Wis. 157, 113 N. W. 456, holding a classification to justify a legal discrimination must be reasonable and based on conditions necessitating the act.

Equitable remedy for nuisance.

Approved in *Madison v. Mayers*, 97 Wis. 415, 40 L. R. A. 651, 65 Am. St. Rep. 127, 73 N. W. 48, holding suit to enjoin filling of lake outside of street not within

city's power to make general police regulations and provide for abatement of nuisance; *McCann v. Strang*, 97 Wis. 553, 72 N. W. 1118, holding electric light plant, under circumstances of case, not abatable as nuisance; *Ryan v. Schwartz*, 94 Wis. 409, 69 N. W. 178, holding abutter has action to abate building partly in highway.

Cited in note (51 L. R. A. 659) as to right of municipality to maintain suit to enjoin or abate public nuisance.

Distinguished in *North Bloomfield Gravel Min. Co. v. United States*, 32 C. C. A. 96, 59 U. S. App. 377, 88 Fed. 676, holding injunction will lie against hydraulic mining not conducted as required by statute.

Rights of riparian owners.

Approved in *Hall v. Alford*, 114 Mich. 167, 38 L. R. A. 207, 72 N. W. 138, holding fowling in marsh, trespass as to riparian owner; *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 90 Wis. 399, 28 L. R. A. 446, 48 Am. St. Rep. 937, 61 N. W. 1121, holding rights of lower riparian owners in stream can be taken by state only for public use, and then upon compensation; *Willow River Club v. Wade*, 100 Wis. 95, 42 L. R. A. 314, 76 N. W. 273, holding fishing in navigable river with hook and line from rowboat not trespass against riparian owner; *Jones v. Seaboard Air Line R. Co.* 67 S. C. 194, 45 S. E. 188, holding riparian owner on navigable river may maintain action for damages against railroad obstructing flow of freshet waters by negligently constructed bridge piers; *Grand Rapids v. Powers*, 89 Mich. 115, 14 L. R. A. 507, 28 Am. St. Rep. 276, 50 N. W. 661, holding legislature cannot fix building line upon non-navigable river subject to riparian proprietorship; *St. Louis v. Hill*, 116 Mo. 536, 21 L. R. A. 228, 22 S. W. 861, holding establishment of building line without notice to lot owners unlawful taking; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 271, 35 L. ed. 1010, 12 Sup. Ct. Rep. 173, holding ownership of riparian proprietors extends to center of stream subject to right of public to use it as highway if it is navigable; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 364, 42 L. ed. 503, 18 Sup. Ct. Rep. 157, holding rights of riparian proprietorship to be measured by decisions of state courts; *Priewe v. Wisconsin State Land v. Improv. Co.* 93 Wis. 547, 33 L. R. A. 650, 67 N. W. 918, holding legislature cannot take rights of riparian owner for sole benefit of private parties.

Cited in notes (10 L.R.A. 637) as to right to erect wharves; (127 Am. St. Rep. 52) on relative rights of state and riparian owner in navigable waters.

Equal protection and privileges.

Approved in Opinion of the Justices, 66 N. H. 664, 33 Atl. 1076, holding taking for public use of property of particular railroad for less than its value, not justified; *Anderton v. Milwaukee*, 82 Wis. 284, 15 L. R. A. 832, 52 N. W. 95, holding statute invalid which discriminates between owners of lots similarly situated as to compensation for change of street grade; *State ex rel. Kellogg v. Currens*, 111 Wis. 435, 56 L. R. A. 255, 87 N. W. 561, sustaining requirement of examination of graduates of foreign schools before receiving license to practise medicine, from which local graduates excepted; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 164, 41 L. ed. 671, 17 Sup. Ct. Rep. 255, holding statute imposing attorney's fee upon railway corporations omitting to pay certain claims as specified, invalid; *Atchison, T. & S. F. R. Co. v. Matthews*, 175 U. S. 120, 43 L. ed. 918, 19 Sup. Ct. Rep. 609 (dissenting opinion), majority holding valid, statute making proof that fire was caused by operation of railroad, and of damages, prima facie evidence of negligence.

Cited in *Knowles v. New Sweden Irrigating Dist.* 16 Idaho, 231, 101 Pac. 81,

holding that any destruction interruption or deprivation of the usual and ordinary use of property amounts to a "taking" in violation of constitutional guaranty; *State v. Redmon*, 134 Wis. 116, 14 L.R.A.(N.S.) 239, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408, holding an act giving the occupant of a lower berth in sleeping car, control of the upper berth unless occupied in an unreasonable restriction and interference with the ordinary use of property; *Crane v. Waldron*, 133 Mich. 85, 94 N. W. 593 (dissenting opinion), on the invalidity of a statute denying the equal protection of the law; *Phipps v. Wisconsin C. R. Co.* 133 Wis. 157, 113 N. W. 456, holding that statute denying equal remedy in law is void unless it comes under circumstances of proper classification; *State v. Redmon*, 134 Wis. 116, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408, holding that statute giving occupant of lower berth in sleeping car control of upper berth when unoccupied, is unconstitutional.

Cited in notes (25 Am. St. Rep. 877) on 14th amendment as to special privileges, burdens and restrictions; (47 Am. St. Rep. 545) on quarantine and health laws and regulations.

Usurpation of judicial power.

Cited in *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 226, 119 N. W. 309, holding that statute providing that all questions of negligence and contributory negligence shall be for jury does not deprive courts of judicial power vested by constitution.

What are public nuisances.

Cited in note (107 Am. St. Rep. 200, 210) on what are public nuisances.

8 L. R. A. 814, *DUDLEY v. DUDLEY*, 76 Wis. 567, 45 N. W. 602.

Conveyances in fraud of wife.

Cited in *Arnegard v. Arnegard*, 7 N. D. 494, 41 L. R. A. 265, footnote, p. 258, 75 N. W. 797, holding secret deed to son just before marriage to prevent wife's right from vesting on marriage, void as to her homestead right, when building of home thereon was inducement to marriage.

Cited in footnotes to *Ward v. Ward*, 51 L. R. A. 858, which holds second wife's right to dower not defeated by fraudulent antenuptial conveyance to sons by former marriage; *Arnegard v. Arnegard*, 41 L. R. A. 258, which holds secret unrecorded deed to son on eve of grantor's marriage fraudulent as to wife.

Cited in notes (18 L.R.A. 79) on power of husband to defeat dower; (12 Eng. Rul. Cas. 765; 24 Eng. Rul. Cas. 184; 103 Am. St. Rep. 418) on antenuptial conveyance in fraud of intended wife.

Distinguished in *Murray v. Murray*, 115 Cal. 272, 37 L. R. A. 628, 56 Am. St. Rep. 97, 47 Pac. 37, sustaining action by deserted wife for setting aside of husband's deed given for purpose of depriving her of her right to maintenance.

8 L. R. A. 818, *BRENNAN v. GORDON*, 118 N. Y. 489, 16 Am. St. Rep. 775, 23 N. E. 810.

Master's duty to instruct employee.

Followed in *Lowry v. Anderson Co.* 96 App. Div. 468, 89 N. Y. Supp. 107, holding it the duty of employer to instruct 15 year old office boy in the operation of an elevator of which he had no knowledge.

Cited in *Felton v. Girardy*, 43 C. C. A. 442, 104 Fed. 130, and *Louisville & N. R. Co. v. Miller*, 43 C. C. A. 438, 104 Fed. 126, holding master having notice of dangers, and of inexperience of employee, must use reasonable care in cautioning and instructing him how best to discharge duty; *Ferguson v. Smith*, 15 Misc. 253, 36 N. Y. Supp. 415, holding superficial instructions to boy set to work cutting

wedges on buzz saw do not relieve master from liability for injury due to saw binding in wet and knotty lumber; *Corbett v. St. Vincent's Industrial School*, 79 App. Div. 339, 79 N. Y. Supp. 369, holding question whether master negligent in putting inexperienced boy to work on laundry mangle, without proper instructions, for jury; *Koehler v. Syracuse Specialty Mfg. Co.* 12 App. Div. 59, 42 N. Y. Supp. 1105 (concurring opinion), majority holding inexperienced employee assumes risk of perils incident to use of machinery, when apparent to person of ordinary observation; *Evans Laundry Co. v. Crawford*, 67 Neb. 161, 93 N. W. 177, holding that an inexperienced servant assumes all the ordinary risks incident to his employment after being reasonably warned and instructed by master; *Collins v. Waterbury Co.* 144 App. Div. 672, 129 N. Y. Supp. 661, holding that master is bound to instruct and qualify common laborer before putting him in charge of machinery; *Fisher v. Prairie*, 26 Okla. 349, 109 Pac. 514, holding that master is bound to instruct inexperienced person in use of dangerous instruments; and sufficiency of instructions is for jury; *Manzi v. Washburn Wire Co.* 29 R. I. 463, 72 Atl. 394, holding inexperienced servant does not assume risk from dangers of which he has no knowledge; *Chicago, R. I. & P. R. Co. v. Galloway*, 137 Ill. App. 306, holding young and inexperienced servant does not assume risk from dangers not obvious and of which he has not been properly warned by master; *Tennessee Coal, I. & R. Co. v. Jarrett*, 111 Tenn. 573, 82 S. W. 224, holding it the duty of master to warn ordinary laborer of the risks incident to a changed form of employment; *Smith v. Manhattan R. Co.* 112 App. Div. 204, 98 N. Y. Supp. 1, holding an instruction to be careful without specific warning does not relieve master from duty to supply workman near a third rail with nonconducting tools.

Cited in footnotes to *Holland v. Tennessee Coal, Iron & R. Co.* 12 L. R. A. 232, which holds it master's duty to warn servant of danger of flying iron when boiler of iron punctured; *Fisher v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 519, holding it section foreman's duty to notify conductor of approaching train of snowslide.

Cited in notes (8 L. R. A. 819) on duty of master to instruct servant in use of dangerous machinery; (44 L. R. A. 88) on duty to instruct, considered with reference to doctrine of common employment; (44 L. R. A. 46) on risks arising from servant's transfer to new duties.

Distinguished in *Gaertner v. Schmitt*, 21 App. Div. 404, 47 N. Y. Supp. 521, holding negligence cannot be predicated on omission of master to instruct inexperienced employee as to dangers of machinery, when danger is open and obvious.

Master's responsibility for due performance of duty delegated to another.

Cited in *Louisville & N. R. Co. v. Miller*, 43 C. C. A. 438, 104 Fed. 126, holding duty of qualifying inexperienced servant for safe performance of new and dangerous duty is personal to master; *Strauss v. Haberman Mfg. Co.* 23 App. Div. 4, 48 N. Y. Supp. 425, holding foreman altering running of stamping machine in such way as to increase risk, without instructing employee of danger, represents master; *Lebbering v. Struthers*, 157 Pa. 323, 33 W. N. C. 103, 27 Atl. 720, holding master responsible for incompetency or negligence of servant charged with duty of instructing inexperienced employee as to operation of dangerous machinery; *Tivnan v. Keahon*, 117 App. Div. 52, 101 N. Y. Supp. 1076, holding master liable for failure of his vice-principal to properly instruct servant in the operation of a dangerous engine; *Greco v. Pratt Chuck Co.* 127 App. Div. 802, 111 N. Y. 1000, holding master liable for injury resulting from negligence of man delegated to instruct new servant; *Isola v. Delaware, L. & W. R. Co.* 134 App. Div. 315, 118

N. Y. Supp. 888, holding railroad liable for injury to servant resulting from loosening of brake of car by incompetent servant at direction of foreman.

Cited in footnote to *Spees v. Boggs*, 52 L. R. A. 933, which holds employer not bound to explain cause of elevator injuring employee.

Cited in notes (12 L. R. A. 97) on when master liable for negligence of coservant acting under authority; (54 L. R. A. 97) on liability of railway companies for negligence of servants who transmit orders; (18 L. R. A. 828) on negligence of superiors; (26 L.R.A.(N.S.) 622) on delegability of master's duty to instruct or warn servants.

Who are fellow servants.

Cited in footnotes to *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train; *Clark v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant roadmaster not fellow servant of gang of men working under him; *Fisher v. Oregon, Short Line & U. N. R. Co.* 16 L. R. A. 519, which holds section foreman and conductor not fellow servants.

Cited in note (75 Am. St. Rep. 611) on who is a vice principal.

Liability of master for injury to servant by elevator.

Cited in note (15 L.R.A.(N.S.) 786) on liability of master to servant injured by elevators not inclosed as required.

8 L. R. A. 822, *COOK v. WINCHESTER*, 81 Mich. 581, 46 N. W. 106.

Wills; execution.

Cited in *Raymond v. Wagner*, 178 Mass. 318, 59 N. E. 811, holding attestation in room adjoining that where testatrix was in bed, after which paper was shown to her, sufficient; *Cunningham v. Cunningham*, 80 Minn. 187, 51 L. R. A. 645, 81 Am. St. Rep. 256, 83 N. W. 58, holding attestation in room adjoining that where testator was, after which paper was returned to him, and by him pronounced to be "all right," sufficient; *Healey v. Bartlett*, 73 N. H. 111, 59 Atl. 617, 6 A. & E. Ann. Cas. 413, holding that it is immaterial that testator does not actually see signing of attesting witnesses where he could have done so by slight physical exertion he being able to exert himself to that extent.

Cited in footnotes to *Re Booth*, 12 L. R. A. 452, which holds holographic will containing maker's name at beginning only, insufficiently executed; *Re Conway*, 11 L. R. A. 796, which holds reference, before signature on face of will, to items on back, insufficient.

Cited in notes (1 L.R.A.(N.S.) 393) as to when witness is deemed to subscribe in testator's presence; (114 Am. St. Rep. 230) on attestation and witnessing of wills.

Disapproved in *Calkins v. Calkins*, 216 Ill. 465, (1 L.R.A.(N.S.) 397) 108 Am. St. Rep. 233, 75 N. E. 182, holding that a signing of will by testator is presence of attesting witness followed by signing of the latter in an adjoining room out of sight of testator not a satisfactory compliance with statute.

Conflict of laws.

Cited in footnotes to *Cross v. United States Trust Co.* 15 L. R. A. 606, which upholds bequest valid by law of testator's domicile; *Cotting v. DeSartiges*, 16 L. R. A. 367, which holds question whether will of donee constitutes execution of power of appointment given by will, to be governed by law of donor's domicile; *Hope v. Brewer*, 18 L. R. A. 458, which holds valid, gift to charity in foreign country, if valid by law thereof.

8 L. R. A. 828, *CHARLOTTE v. PEMBROKE IRON WORKS*, 82 Me. 391, 19 Atl. 902.

Municipal powers over obstructions affecting highway.

Cited in *Com. v. Fitzgerald*, 164 Mass. 589, 42 N. E. 119, holding county has special property in bridge used as highway sufficient to sustain indictment for burning.

Cited in footnotes to *Lostutter v. Aurora*, 12 L. R. A. 259, which authorizes city to fit up abandoned well in street without abutting owner's consent; *Fitch v. New York, P. & B. R. Co.* 10 L. R. A. 188, which holds temporary use of street by railroad company while building approach to bridge not a trespass.

Cited in notes (39 L. R. A. 653, 656, 683) on power of municipality over nuisances affecting highways and waters in general; (10 L. R. A. 474) on liability of municipality for permitting street obstruction.

Abatement of nuisance by action.

Cited in *Yonkers v. Federal Sugar Ref. Co.* 136 App. Div. 706, 121 N. Y. Supp. 494, holding that to enable a city to sue in abatement of a nuisance it must show some special injury to its property or to property in which it has some trust relation for benefit of its citizens or general public.

Cited in footnotes to *O'Brien v. Central Iron & Steel Co.* 57 L. R. A. 508, which authorizes private action for permanent obstruction of street within 200 feet of abutter; *Jacksonville, T. & K. W. R. Co. v. Thompson*, 26 L. R. A. 410, which denies right to maintain private action for inconvenience from obstruction of highway in common with others.

Cited in note (9 L. R. A. 716, 717) on remedy for nuisance by action.

Right to maintain nuisance.

Cited in notes (53 L. R. A. 891, 899) on prescriptive right to maintain obstructions and encroachments in general; (59 L. R. A. 847) on rights in general as against public dam stream; (23 Am. St. Rep. 174) on prescriptive right to maintain public nuisance.

8 L. R. A. 833, *DOE v. ROE*, 82 Me. 503, 17 Am. St. Rep. 499, 20 Atl. 83.

Liability for interrupting marital relations.

Approved in *Lonstorf v. Lonstorf*, 118 Wis. 161, 95 N. W. 961, and *Morgan v. Martin*, 92 Me. 192, 42 Atl. 354, denying right of wife to damages for alienation of husband's affections by another woman; *Smith v. Smith*, 98 Tenn. 107, 60 Am. St. Rep. 838, 38 S. W. 439, holding wife's right to damages for alienation of husband's affections unenforceable without enabling statute, until coverture terminated; *Hodge v. Wetzler*, 69 N. J. L. 492, 55 Atl. 49, denying that the right of a married woman to sue for alienation of husband's affections is conferred by married woman or practice acts.

Cited in *Kroessin v. Keller*, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, denying right of wife to maintain action in nature of criminal conversation against another woman; *Sims v. Sims*, 79 N. J. L. 581, 29 L.R.A. (N.S.) 845, 76 Atl. 1063, holding that under statute married woman may maintain action for damages for alienation of her husband's affections.

Cited in footnotes to *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Houghton v. Rice*, 47 L. R. A. 311, which denies right of action against another woman for alienation of husband's affections unaccompanied by adultery; *Hodgkinson v. Hodgkinson*, 27 L. R. A. 120, which holds one bringing about husband's desertion liable to suit by wife; *Wolf v. Frank*, 52 L. R. A. 102; *Betser v. Betser*, 52 L. R. A. 630; *Clow v. Chapman*, 26 L. R. A. 412; *Dietzman v. Mullin*, 50 L. R. A. 808; *Warren v. Warren*, 14 L. R. A. 645, which authorizes action for alienating husband's affections.

Cited in notes (10 L. R. A. 468; 11 L. R. A. 549) on liability for destroying marital relations; (4 L.R.A.(N.S.) 645) on wife's right under enabling acts to sue for alienation of affections; (28 Am. St. Rep. 218; 46 Am. St. Rep. 473) on wife's action for alienation of husband's affections.

Distinguished in *King v. Hanson*, 13 N. D. 98, 99 N. W. 1085, holding that wife may maintain an action for the alienation of husbands affections under affirmative statute.

Disapproved in effect in *Gerner v. Gerner*, 185 Pa. 237, 40 L. R. A. 550, 64 Am. St. Rep. 646, 39 Atl. 884, upholding right of wife to recover for alienation of husband's affections by father; *Wolf v. Frank*, 92 Md. 140, 52 L. R. A. 104, 48 Atl. 132, upholding statutory right of wife to recover for alienation of husband's affections; *Gerner v. Gerner*, 42 W. N. C. 51; *Knapp v. Wing*, 72 Vt. 337, 47 Atl. 1075; *Price v. Price*, 91 Iowa, 696, 29 L. R. A. 151, 51 Am. St. Rep. 360, 60 N. W. 202; *Humphrey v. Pope*, 122 Cal. 257, 54 Pac. 847; *Warren v. Warren*, 89 Mich. 125, 14 L. R. A. 546, 50 N. W. 842,—sustaining right of wife to recover damages for alienation of husband's affections and loss of support; *Nolin v. Pearson*, 191 Mass. 290, 4 L.R.A.(N.S.) 648, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding that under the married woman emancipation laws a right to sue for alienation of husbands affections is confined; *Quick v. Church*, 23 Ont. Rep. 272, holding that the wife might sue for alienation of affections of husband at common law, and that the enabling statutes conferred no new cause of action, but removed difficulty in enforcing it.

Effect on limitations of agreement to deny cause of action.

Cited in footnote to *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery, known to husband, to deny same.

8 L. R. A. 834, *LOOMIS v. ROCKFORD INS. CO.* 77 Wis. 87, 20 Am. St. Rep. 96, 45 N. W. 813.

Indivisible contracts of insurance.

Followed and explained on subsequent appeal in 81 Wis. 366, 51 N. W. 564, which holds evidence that property insured belongs to different classes, insurable at different rates, does not sufficiently establish indivisibility of contract.

Approved in *Taylor v. Anchor Mut. F. Ins. Co.* 116 Iowa, 630, 57 L. R. A. 331, 93 Am. St. Rep. 261, 88 N. W. 807, holding entirety of premium in policy upon dwelling and live stock will not prevent recovery for loss of former, although liability for latter avoided by encumbrance; *Stevens v. Queen Ins. Co.* 81 Wis. 338, 29 Am. St. Rep. 905, 51 N. W. 555, holding policy covering buildings and personalty contained therein, entire contract, although risk distributed; *Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.* 83 Wis. 187, 53 N. W. 448, holding policy indivisible which distributes risk between house and other farm buildings and contents; *Burr v. German Ins. Co.* 84 Wis. 78, 36 Am. St. Rep. 905, 54 N. W. 22, holding policy indivisible where upon personalty in warehouse, risk being distributed to several items, but premium paid in gross; *Worechek v. New Denmark Mut. Home F. Ins. Co.* 102 Wis. 90, 78 N. W. 411, holding false swearing as to loss forfeits entire policy covering building and contents; *Kahler v. Iowa State Ins. Co.* 106 Iowa, 385, 76 N. W. 734, holding entire policy which covers house and contents avoided by change of title in former; *Liverpool & L. & G. Ins. Co. v. Tillis*, 110 Ala. 210, 17 So. 672, raising, without deciding, question whether breach of "iron safe clause" defense to liability for loss of building.

Cited in *Goorberg v. Western Assur. Co.* 150 Cal. 516, 10 L.R.A.(N.S.) 879, 119 Am. St. Rep. 246, 89 Pac. 130, 11 A. & E. Ann. Cas. 801, holding a breach of con-

dition as to title of building insured in a policy including separate sum of insurance for furniture, therein invalidates the policy as to the furniture also; *Republic County Mut. F. Ins. Co. v. Johnson*, 69 Kan. 152, 105 Am. St. Rep. 157, 76 Pac. 419, 2 A. & E. Ann. Cas. 20, holding that insurance cannot be recovered for loss of corn crib by wind under a policy covering house, hay and grain, also each insured for definite amount where house contrary to condition in policy has been left vacant for over 30 days; *Miller v. Delaware Ins. Co.* 14 Okla. 87, 65 L.R.A. 176, 75 Pac. 1121, 2 A. & E. Ann. Cas. 17, holding insurance recoverable on building and fixtures under a policy covering stock also, where insured failed to keep invoice of stock as required.

Cited in footnote to *Coleman v. New Orleans Ins. Co.* 16 L. R. A. 174, which holds policy for separate amounts on storehouse and goods severable.

Cited in notes (19 L. R. A. 212; 20 L. R. A. 271) as to severability of insurance in same policy; (29 Am. St. Rep. 909) on divisibility of insurance contract; (29 Am. St. Rep. 910) on entirety in insurance contract.

Disapproved in *Parsons v. Lane (Re Millers' & Mfrs. Ins. Co.)* 97 Minn. 124, 4 L.R.A.(N.S.) 244, 106 N. W. 485, 7 A. & E. Ann. Cas. 1144, denying recovery on machinery destroyed by fire situated near building insured under same policy where insured did not own such building as was required under the policy.

8 L. R. A. 837, *HRONEK v. PEOPLE*, 134 Ill. 139, 23 Am. St. Rep. 652, 24 N. E. 861.

Single subject expressed in act.

Cited in *Feek v. Bloomington* 82 Mich. 416 10 L. R. A. 77, 47 N. W. 37, holding local option law, as a whole, has but a single object,—prohibition; *State ex rel. Dunn v. Humboldt County*, 21 Nev. 238, 29 Pac. 974, holding matters connected with subject of act need not be mentioned in title; *State v. Haas*, 2 N. D. 204, 50 N. W. 254, holding but one subject embraced in act regulating sale of liquor and excepting pharmacists; *Stanley v. State*, 135 Ga. 862, 70 S. E. 591, holding that act of 1907 regulating sale of narcotic drugs is not unconstitutional on ground that it refers to more than one subject matter.

Cited in notes (24 Am. St. Rep. 518) on title of statutes; (28 Am. St. Rep. 387) on statutes embracing only one subject; (64 Am. St. Rep. 71, 74, 75) on sufficiency of title of statute.

Credibility of witnesses.

Cited in *Cicero & P. Street R. Co. v. Priest*, 89 Ill. App. 308, holding witness may be asked if he is not gambler, to affect his credibility.

Religious test for witnesses.

Cited in *McAmore v. Wiley*, 49 Ill. App. 618, holding no religious test required to qualify person to be a witness.

Cited in note (42 L. R. A. 554, 558) on religious belief as qualification of witness.

Punishment of accessory to crime.

Cited in *State v. Kent*, 4 N. D. 582, 27 L. R. A. 688, 62 N. W. 631, holding accessory before the fact may be convicted of murder.

Calling attention to particular testimony.

Approved in *State v. Oliphant*, 128 Mo. App. 266, 107 S. W. 32, refusing instruction that testimony of detective should be received with "the greatest caution and distrust."

Cited in *People v. Campbell*, 234 Ill. 395, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 A. & E. Ann. Cas. 186, holding an instruction calling attention to particular witness or testimony is not commendable.

Proof of corpus delicti.

Cited in note (68 L.R.A. 41) on proof of corpus delicti.

8 L. R. A. 842, **NEWMAN v. PHILLIPSBURGH HORSE CAR R. CO.** 52 N. J. L. 446, 19 Atl. 1102.

Imputing negligence of parent or guardian to child.

Cited in *Evansville v. Senhenn*, 151 Ind. 53, 41 L. R. A. 732, 68 Am. St. Rep. 218, 47 N. E. 634; *Jeffersonville v. McHenry*, 22 Ind. App. 15, 53 N. E. 183; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 683; *Chicago & G. W. R. Co. v. Kowalski*. 34 C. C. A. 4, 92 Fed. 312, — holding, in suit by infant in its own right for personal injury, parent's negligence cannot be imputed to it; *Markey v. Consolidated Traction Co.* 65 N. J. L. 84, 46 Atl. 573, holding child who is *non sui juris* cannot be charged with negligence of person having it in custody; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 711, 25 L. R. A. 792, 41 Am. St. Rep. 799, 19 S. E. 730, holding negligence of parent allowing child twenty-two months old to go on railroad track cannot be imputed to child in action in its behalf for injury; *South Covington & C. Street R. Co. v. Herrklotz*, 104 Ky. 415, 47 S. W. 265, holding child under four years of age cannot be guilty of contributory negligence; *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 683, 40 Atl. 651, holding traction company not relieved from liability for death of child under three years old, by fact that child was permitted to roam streets unattended; *Profit v. Chicago G. W. R. Co.* 91 Mo. App. 375, holding injury inflicted upon infant by wrongdoer not excused by negligence of third party having child in custody, though parent; *Warren v. Manchester Street R. Co.* 70 N. H. 359, 47 Atl. 735, holding negligence of parent in exposing infant to danger not imputable to child in action by administrator for causing death; *Atlanta & C. Air-Line R. Co. v. Gravitt* 93 Ga. 379, 26 L. R. A. 557, 44 Am. St. Rep. 145, 20 S. E. 550, holding negligence of parent not imputable to child, but such negligence in good defense to action by parent for death of child; *Jacksonville Electric Co. v. Adams*, 50 Fla. 437, 39 So. 183, 7 A. & E. Ann. Cas. 241, holding that in an action by child for injury sustained the negligence of its parents cannot be imputed, also citing annotation; *Davis v. Seaboard Air Line R. Co.* 136 N. C. 117, 48 S. E. 591, 1 A. & E. Ann. Cas. 214, holding that contributory negligence of father is a defense to an action by administrator for wrongful death of infant of tender years; *Atchison, T. & S. F. R. Co. v. Calhoun*, 18 Okla. 82, 89 Pac. 207, 11 A. & E. Ann. Cas. 681, holding contributory negligence of mother or another no defense to an action for injury to infant in its own right.

Cited in notes (21 L.R.A. 77, 81) on contributory negligence of parent or custodian as bar to child's action for personal injury; (110 Am. St. Rep. 284) on imputed negligence of parent to child.

Contributory negligence of children.

Cited in *Schneider v. Winkler*, 74 N. J. L. 73, 70 Atl. 731, holding child of 6 years cannot be charged with contributory negligence in falling into an insufficiently guarded opening in sidewalk; *Carleo v. Delaware, L. & W. R. Co.* 77 N. J. L. 609, 72 Atl. 89, holding careless conduct of child of tender years in crossing track is no answer where breach of duty of defendant is proximate cause or material factor in the accident; *Ritscher v. Orange & P. Valley R. Co.* 79 N. J. L. 464, 75 Atl. 209, holding that question whether boy, six years of age who to avoid what seemed to him impending danger suddenly run in front of approaching car, is guilty of contributory negligence is for jury.

Cited in footnotes to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve year old boy using street as playground; *Graney v. St. Louis, I. M. & S. R. Co.* 38 L. R. A. 633, which denies.

negligence *per se* of twelve year old boy in standing so near passing train as to be drawn under by current of air.

8 L. R. A. 846, TOLCHESTER BEACH IMPROV. CO. v. STEINMEIER, 72 Md. 313, 20 Atl. 188.

Special officer acting in public and private capacity.

Cited in *Wells v. Washington Market Co.* 8 Mackey, 394, holding unsalaried officer of police force, employed by market company to collect rents, etc., when making arrests acts in capacity of police officer; *Tyson v. Joseph H. Bauland Co.* 68 App. Div. 314, 74 N. Y. Supp. 59, holding jury might properly find arrest by special officer in department store was pursuant to his private employment therein; *Brill v. Eddy*, 115 Mo. 605, 22 S. W. 488, holding presumption that special officer in employ of private corporation acted in his public capacity may be rebutted by proof to contrary; *Sharp v. Erie R. Co.* 90 App. Div. 507, 85 N. Y. Supp. 553, denying railroad's liability for shooting, in attempt to arrest person standing ride, by policeman employed as railroad detective; *Adler v. White City Constr. Co.* 147 Ill. App. 24, holding private corporation not liable for acts of special police appointed at its request and paid by it, such acts being committed without knowledge or direction of corporation; *Heggen v. Ft. Dodge, D. M. & S. R. Co.* 150 Iowa, 318, 130 N. W. 148, holding that conductor of passenger train is agent of company while suppressing misconduct of passenger, and not public officer, and for his conduct company is liable; *Tucker v. Erie R. Co.* 69 N. J. L. 21, 45 Atl. 557, holding railroad company not liable for false arrest, and malicious prosecution by special railway policemen done on their own account as police officers and not instigated by company; *McKain v. Baltimore & O. R. Co.* 65 W. Va. 237, 23 L.R.A.(N.S.) 294, 131 Am. St. Rep. 964, 64 S. E. 18, 17 A. & E. Ann. Cas. 634, holding railway company not liable for unwarranted act of special policeman not instigated by the company nor done in performance of an actual railway duty; *Philadelphia, B. & W. R. Co. v. Stumpo*, 112 Md. 578, 77 Atl. 266, holding that special police officer is not acting for corporation when he assaults a person not on its premises and for an offense of which the corporation could not complain; *Deek v. Baltimore & O. R. Co.* 100 Md. 184, 108 Am. St. Rep. 399, 59 Atl. 650, holding it a question for the jury whether a special officer acts for state or corporation in shooting a trespasser on a train, such officer being employed by carrier also having state commission; *Tolchester Beach Improv. Co. v. Scharnagl*, 105 Md. 210, 65 Atl. 916, holding evidence sufficient to go to jury on question of private or public act of person having a government commission as a policeman to keep order on vessel and protect property, where he assaulted and arrested a passenger; *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 615, 67 S. E. 1103, holding that railroad is not liable *prima facie* for acts of special officers appointed by governor under section 31 of chapter 145 of Code.

Cited in notes (37 L.R.A. 40) on test of existence of relation of master and servant; (4 L.R.A.(N.S.) 284) on liability for arrest or false imprisonment by servant employed as detective, policeman, or watchman; (67 Am. St. Rep. 426) on false imprisonment.

Distinguished in *Baltimore, C. & A. R. Co. v. Ennalls*, 108 Md. 78, 16 L.R.A.(N.S.) 1100, 69 Atl. 638, holding company liable for false imprisonment where plaintiff was without cause arrested on premises of defendant by special police officer appointed by Governor to protect defendants property, such arrest being authorized by superintendent though not specifically.

Ratification of illegal act.

Cited in *Central R. Co. v. Brewer*, 78 Md. 403, 27 L. R. A. 65, 28 Atl. 615,

holding ratification of superintendent's arrest of passenger for putting counterfeit coin in box for fare, not shown by fact that officers and servants of company testified against person arrested.

Unauthorized act of servant in making or causing arrest.

Cited in *Barabasz v. Kabat*, 86 Md. 36, 37 Atl. 720, holding master not liable for servant's unauthorized act in causing an unlawful arrest; *Baltimore & Y. Turnp. Road v. Green*, 86 Md. 167, 37 Atl. 642, holding turnpike company, without ratification, not liable for unauthorized arrest and prosecution of person for nonpayment of tolls; *Markley v. Snow*, 207 Pa. 453, 64 L. R. A. 687, 56 Atl. 999, denying partnership's liability for arrest at instance of superintendent, on charge of burning its building; *Carter v. Worchester County*, 94 Md. 626, 51 Atl. 830, holding county commissioners not liable for unauthorized and unratified act of road supervisor in causing an illegal arrest; *Beiswanger v. American Bonding & T. Co.* 98 Md. 299, 57 Atl. 202, holding master not liable for malicious prosecution set in motion by employee acting outside the scope of his employment; *Bernheimer Bros. v. Becker*, 102 Md. 255, 3 L.R.A.(N.S.) 224, 111 Am. St. Rep. 356, 62 Atl. 526, holding employer not liable for detention and search of customer suspected of stealing by a servant, where no authority for such act could be implied from his employment; *Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 524, 67 L.R.A. 459, 48 S. E. 816, 1 A. & E. Ann. Cas. 718, holding railroad company not liable for wrongful arrest brought about by ticket agent, for supposed theft of money from the office, in the absence of express antecedent authority or subsequent ratification.

Distinguished in *St. Louis, I. M. & S. R. Co. v. Hackett*, 58 Ark. 388, 41 Am. St. Rep. 105, 24 S. W. 881, holding railroad company liable for act of night watchman, also a deputy sheriff, for wrongfully shooting another in course of employment.

— Authorized act.

Cited in *Schmidt v. New Orleans R. Co.* 116 La. 322, 7 L.R.A.(N.S.) 174, 40 So. 714, holding street car company liable for wrongful arrest, of passenger caused by conductor in performance of his duty.

8 L. R. A. 849, *PENDERGAST v. YANDES*, 124 Ind. 159, 24 N. E. 724.

Liberal construction of lien statutes.

Cited in *Aurora Nat. Bank v. Black*, 129 Ind. 598, 29 N. E. 396, holding contract for delivery of iron, "property" within employees' lien law; *Jenckes v. Jenckes*, 145 Ind. 633, 44 N. E. 632, holding mechanics' liens take priority over mortgage not recorded until rights to liens had been created; *Heckman v. Tammen*, 84 Ill. App. 550, and *Bell v. Hiner*, 16 Ind. App. 186, 44 N. E. 576, holding laborer's lien for wages superior to prior chattel mortgage; *Heckman v. Tammen*, 84 Ill. App. 545, construing terms "labor," etc., as used in labor claim statute, to include all service involving physical labor; *Kritzer v. Tracy Engineering Co.* 16 Cal. App. 293, 116 Pac. 700, holding that foreman in mine is entitled to lien under Code Civ. Pro. 1183, as person who performs labor in improvement.

Cited in notes (18 L.R.A. 307) on who are laborers, employees, or servants within the meaning of statutes giving them preferences; (58 Am. St. Rep. 307) on who are laborers.

Distinguished in *Raynes v. Kokomo Ladder & Furniture Co.* 153 Ind. 318, 54 N. E. 1061, holding general manager of concern not entitled to protection of laborers' lien statute.

8 L. R. A. 851, CEDAR SPRINGS v. SCHLICH, 81 Mich. 405, 45 N. W. 994.

Bona fide holder of bonds.

Cited in Schmid v. Frankfort, 131 Mich. 200, 91 N. W. 131, and Thompson v. Mecosta, 127 Mich. 528, 86 N. W. 1044, holding bond reciting its issue for public improvement good in hands of bona fide purchaser, although issued for private improvement; Grant Twp. v. Reno Twp. 107 Mich. 414, 65 N. W. 376, to point that invalid bonds showing prima facie authority are good in hands of bona fide purchaser without notice; Risley v. Howell, 12 C. C. A. 221, 22 U. S. App. 635, 64 Fed. 455, holding that bona fide purchaser may recover on bonds, although ordinance, misappropriating them to unlawful use, is mentioned in them by date; Bates v. Hastings, 145 Mich. 582, 108 N. W. 1005, holding bonds valid on their face though issued for illegal purpose are good in the hands of innocent holders.

Aid of private enterprise.

Approved in Cheboygan County v. Mentor Twp. 94 Mich. 388, 54 N. W. 169, denying mandamus to compel imposition of tax ostensibly to buy a county farm, but really to aid a private enterprise; Dodge v. Van Buren Circuit Judge, 118 Mich. 193, 76 N. W. 315, holding act invalid which attempts to authorize issue of bonds in aid of railroad enterprise in violation of Constitution.

Cited in Atty. Gen. ex rel. Brotherton v. Detroit, 148 Mich. 99, 111 N. W. 860, holding bonds issued to build a street railway void, such enterprise being an internal improvement prohibited by city charter.

Injunctive relief as to ultra vires contract.

Cited in Detroit v. Detroit City R. Co. 60 Fed. 163, holding equity will not refuse injunctive relief to parties to *ultra vires* contract made in good faith and under mistake of law.

Polley of equity.

Cited in Root v. Snyder, 161 Mich. 214, 126 N. W. 206, holding that equity will correct rather than avoid a deed which is ineffective to carry out the intent of the parties.

Equitable nature of discretionary judicial powers.

Cited in Sherwood v. Ryneanson, 141 Mich. 95, 104 N. W. 392, holding mandamus will not issue to compel payment of an order in full for work not yet completed.

8 L. R. A. 854, SUMMERVILLE v. PRESSLEY, 33 S. C. 56, 26 Am. St. Rep. 659, 11 S. E. 545.

Right to judge of what necessary for health.

Cited in Darlington v. Ward, 48 S. C. 573, 38 L. R. A. 336, 26 S. E. 906, holding town council has exclusive right to judge what necessary and requisite for health in passing ordinance prohibiting keeping of hogs within town limits; Darlington v. Ward, 48 S. C. 578, 38 L. R. A. 337, 26 S. E. 906, holding ordinance regulating health, comfort, and convenience may disturb enjoyment of individual rights and yet be valid; State ex rel. George v. Aiken, 42 S. C. 236, 26 L.R.A. 353, 20 S. E. 221, holding dispensary act by which state assumes entire control of liquor traffic valid; Charleston v. Werner, 38 S. C. 495, 37 Am. St. Rep. 776, 17 S. E. 33, holding act amending charter of city to authorize the filling up of low lots and grounds valid; Feek v. Bloomingdale, 82 Mich. 416, 10 L. R. A. 77, 47 N. W. 37, holding local option act valid; Kirk v. Board of Health (Kirk v. Wyman) 83 S. C. 388, 23 L.R.A.(N.S.) 1195, 65 S. E. 387 (dissenting opinion), on the rule that as to whether a police regulation is necessary or not for the purpose, it is not for the courts to judge.

Cited in notes (11 L. R. A. 286) on constitutional protection of property rights; (14 L. R. A. 583) on constitutional equality of privileges, immunities, and protection; (36 L. R. A. 602) on power of municipal corporations to define, prevent, and abate nuisances; (25 Am. St. Rep. 885) on 14th amendment as to special privileges, burdens and restrictions; (47 Am. St. Rep. 547) on quarantine and health laws and regulations.

Jurisdiction of local offense.

Cited in *Sullivan v. Haug*, 82 Mich. 559, 10 L. R. A. 267, 46 N. W. 795, holding criminal subject to jurisdiction of court in which offense committed, and to its mode of procedure.

Extent of exercise of police power.

Cited in *Opinion of Justices*, 103 Me. 513, 19 L.R.A.(N.S.) 426, 69 Atl. 627, 13 A. & E. Ann. Cas. 745, holding that legislature might under police power regulate the cutting of trees on uncultivated land to prevent droughts, freshets and preserve water supply.

8 L. R. A. 858, *SNELL v. CHICAGO*, 133 Ill. 413, 24 N. E. 532.

Followed without discussion in *Chicago & A. R. Co. v. Chicago*, 150 Ill. 597, 37 N. E. 1029.

In whom powers of taxation reside.

Cited in *Givins v. Chicago*, 188 Ill. 351, 58 N. E. 912, holding board of local improvement not constitute corporate authorities upon whom devolve powers of taxation for local improvements.

Cited in notes (33 L. R. A. 181, 189) on legislative power to fix tolls, rates, or prices; (15 L. R. A. 651) on right to take toll on road within city.

Power of county or city over highways.

Cited in *Trotier v. St. Louis, B. & S. R. Co.* 180 Ill. 474, 54 N. E. 487, holding county board, and not highway commissioners, must consent to construction of electric railway on highway in which is turnpike road; *Belleville v. St. Clair County Turnp. Co.* 234 Ill. 436, 17 L.R.A.(N.S.) 1077, 84 N. E. 1049, on maintaining toll gates within city limits; *Northwestern Elev. R. Co. v. Chicago*, 1 Ill. C. C. 493, holding that the control of the streets is in the city holding them in fee though merely as trustee for public.

Cited in note (17 L.R.A.(N.S.) 1071) on extension of city limits to include toll road as "taking" of property.

Distinguished in *Ft. Wayne Land & Improv. Co. v. Maumee Ave. Gravel Road Co.* 132 Ind. 82, 15 L. R. A. 651, 30 N. E. 880, holding extension of limits of municipality not take from private turnpike company right to exact tolls.

Legalization of corporate acts.

Cited in *State ex rel. Crow v. Lincoln Trust Co.* 144 Mo. 595, 46 S. W. 593, holding mere recognition by legislature of powers not theretofore existing in corporation not create them; *Lindsay v. United States Sav. & L. Asso.* 120 Ala. 175, 42 L. R. A. 789, 24 So. 171, holding act regulating building and loan associations void to the extent of attempt to legalize past transaction tainted with fraud; *Shields v. Ross*, 158 Ill. 221, 41 N. E. 985, holding highway commissioners cannot lay out any part of highway within limits of city.

Cited in footnote to *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 328, which holds corporation in suit to wind it up entitled to object to order directing suits for unpaid stock subscriptions.

Cited in notes (33 L. R. A. 576) on period of existence of private corporations; (9 L. R. A. 275) on dissolution of corporation.

Subject expressed in title.

Cited in *Culver v. People*, 161 Ill. 98, 43 N. E. 812, holding act in relation to special assessments, which only adopted article of act, did not adopt subsequent amendments to that act; *Hogan v. Akin*, 181 Ill. 453, 55 N. E. 137, holding title of act "to regulate assignment of" chattel mortgage notes shows chattel mortgages generally were not intended to be regulated; *Katz v. Herrick*, 12 Idaho, 22, 86 Pac. 873, holding an act unconstitutional enacted for sole purpose of legalizing past acts of corporations, not expressing its object in title.

Cited in footnote to *State v. Snow*, 11 L. R. A. 355, which holds prohibition of article intended for use as lard, containing other ingredients than fat of swine within title.

Statutory reference to general law.

Cited in *State ex rel. Miller v. Leich*, 166 Ind. 682, 78 N. E. 189, 9 A. & E. Ann. Cas. 302, holding that a statutory reference to the general law of a particular subject imports not only the law as it then existed, but includes subsequent modifications.

Construction of franchise.

Cited in *Chicago v. Rothschild & Co.* 130 Ill. App. 557, construing an ordinance for construction of elevated railway not to authorize a passage way connecting elevated with private store such passage way being closed except when store is open; *Rock Island v. Central U. Teleph. Co.* 132 Ill. App. 255, construing a grant to company by ordinance limited to the duration of its existence, to be a grant merely for its life as a corporation and valid; *Alpena: Portland Cement Co. v. Jenkins & R. Co.* 244 Ill. 361, 91 N. E. 480, to the point that "corporate powers" refers to franchises belonging to corporation for purpose of authorizing it to transact the particular business in which it intends to engage.

Power exhausted by exercise thereof.

Cited in *Chicago & N. W. R. Co. v. Chicago Mechanics' Institute*, 239 Ill. 222, 87 N. E. 933 (dissenting opinion), on the exhaustion of the discretionary right to erect toll gates and houses by establishment thereof.

Power lost by non user.

Cited in *Chicago Terminal Transfer R. Co. v. Chicago*, 220 Ill. 316, 7 N. E. 204, Affirming 121 Ill. App. 211, holding that the construction of one track across a street within the time limit does not preserve right to construct full number authorized.

Determination of franchise.

Cited in *McCarter v. Vineland Light & P. Co.* 73 N. J. Eq. 713, 70 Atl. 177, holding that a person purchasing at a receiver's sale all the franchises of a gas corporation has no power as a natural person to convey such franchises; *McCarter v. Vineland Light & P. Co.* 73 N. J. Eq. 717, 70 Atl. 177 (dissenting opinion), on the death of a franchise with that of the person owning it.

Contract exemptions from legislative power to fix tolls.

Cited in note (46 L. ed. U. S. 597) on contract exemptions from legislative power to fix tolls, rates, or prices.

L. R. A. CASES AS AUTHORITIES.

CASES IN 9 L. R. A.

9 L. R. A. 33, *PEOPLE v. NORTH RIVER SUGAR REF. CO.* 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834.

Action by receiver to recover profits from other party to illegal combination in *Gray v. Oxnard Bros. Co.* 59 Hun, 388, 13 N. Y. Supp. 86.

Forfeiture of franchise and dissolution of corporation.

Cited in *People ex rel. Union P. R. Co. v. Colorado Eastern R. Co.* 8 Colo. App. 307, 46 Pac. 219, holding that, to support action by people for redress of wrong, injury must have been done to people; *People ex rel. McIlhany v. Chicago Live Stock Exchange*, 170 Ill. 570, 39 L. R. A. 377, 62 Am. St. Rep. 404, 48 N. E. 1062, holding that, to warrant forfeiture of charter, misconduct must tend to injure public by affecting welfare of people; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 318, 52 L. R. A. 543, 83 Am. St. Rep. 754, 60 N. E. 220, granting judgment of ouster against corporation for issuing and selling investment certificates in nature of lottery; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 486, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding agreement of gas lighting company with competing corporation, fixing price to consumers, sufficient warrant for declaring forfeiture of franchise; *People v. Equitable Mut. F. Ins. Co.* 12 Misc. 560, 33 N. Y. Supp. 708, holding that temporary receiver will not be appointed in action to dissolve corporation when public injury not shown imminent; *State ex rel. Crowe v. National School of Osteopathy*, 76 Mo. App. 445, holding issue of diploma by school of osteopathy in violation of law not ground for forfeiture of charter; *Re Consolidated Gas Co.* 56 Misc. 52, 106 N. Y. Supp. 407, holding court will not dissolve corporation for misconduct other than violation of law of its being which has resulted or tends to result in injury to public; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 451, 116 S. W. 902, holding domestic corporation which combines with foreign corporation to fix and maintain prices of commodity in restraint of trade guilty of misuser of power justifying forfeiture of franchise; *People ex rel. Atty. Gen. v. Michigan Sanitarium & Benev. Asso.* 151 Mich. 464, 115 N. W. 423, holding quo warranto proper in proceeding to oust domestic charitable corporation from exercising rights in excess of its charter; *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth & Co.* 143 Mich. 103, 106 N. W. 868, on appropriateness of quo warranto to inquire into right of foreign corporation to transact business; *People v. Bleecker Street & F. Ferry R. Co.* 140 App. Div. 615, 125 N. Y. Supp. 1045, holding that supreme court is vested with discretion to grant or withhold leave to bring action to annul corporate franchise; *State v. Central Lumber Co.* 24 S. D. 166, — L.R.A.(N.S.) —, 123 N. W. 504, holding that implied agreement exists that corporation will use powers for public benefit, and that in case of

serious breach thereof, it shall forfeit its right to exist; *Gainesville Water Co. v. Gainesville*, 103 Tex. 399, 128 S. W. 370, to the point in order to forfeit corporate franchise prosecutor must show material and serious transgressions, and such as to harm or menace public welfare.

Cited in footnotes to *State ex rel. Sheets v. Mt. Hope College Co.* 52 L. R. A. 365, which authorizes dissolution of educational institution for sale of diplomas without regard to merit; *People v. Buffalo Stone & Cement Co.* 15 L. R. A. 240, which holds manufacturing corporation liable to forfeiture of charter for failure to make annual report required by statute; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 53 L. R. A. 413, which authorizes forfeiture of corporate charter for combination to fix price for gas; *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 328, which upholds statute empowering state auditor to institute proceedings for dissolution of insolvent corporation.

Cited in notes (9 L.R.A. 275) on dissolution of corporation; (103 Am. St. Rep. 555) on power of corporation to sell all its assets, where sale is practical extinction of corporation.

Combinations, legal and illegal.

Cited in *Chevra Bnai Israel v. Chevra Bikur Cholim*, 24 Misc. 190, 52 N. Y. Supp. 712, holding that corporations cannot consolidate without legislative authority; *Davis v. Congregation Beth Tephila Israel*, 40 App. Div. 426, 57 N. Y. Supp. 1015, holding consolidation of religious corporations under statutory authority invalid, where conditions as to exercise of power not complied with; *State ex rel. Walker v. Equitable Loan & Invest. Asso.* 142 Mo. 341, 41 S. W. 916, and *McCutcheon v. Merz Capsule Co.* 31 L. R. A. 420, 19 C. C. A. 114, 37 U. S. App. 586, 71 Fed. 793, holding any conduct destroying separate activity of corporations by taking away right freely and independently to exercise franchise, contrary to public policy; *Bishop v. American Preservers' Co.* 157 Ill. 313, 48 Am. St. Rep. 317, 41 N. E. 765, and *Unckles v. Colgate*, 148 N. Y. 533, 43 N. E. 59, holding partnership agreement between manufacturing corporations, whereby corporate management is surrendered to directors selected by board of trustees, unlawful; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 488, 47 Am. St. Rep. 200, 41 N. E. 188, holding agreement between distilling corporations, intrusting to trustees conduct of business, with view of controlling manufacture and sale of all distillery products, illegal; *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 362, 9 L. R. A. 761, 3 Inters. Com. Rep. 395, 22 Am. St. Rep. 593, 26 N. E. 159, holding contract for combination of common carriers to stifle competition illegal; *National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 267, holding combination between business corporations to suppress competition, fix prices, limit production, and restrain trade unlawful; *DeWitt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 532, 14 N. Y. Supp. 277, holding combination of manufacturers binding members not to sell, under penalty, below price fixed, against public policy; *American Preservers' Trust v. Taylor Mfg. Co.* 46 Fed. 155, holding corporation will not be restrained from violating trust agreement, whereby exercise of its powers is committed to board of trustees representing parties to trust contract; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.* 85 Me. 540, 35 Am. St. Rep. 385, 27 Atl. 525, holding damages not be recovered for breach of covenants in lease of gas lighting plant to competing corporation; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 43, 36 L. R. A. 670, 45 N. E. 390 (dissenting opinion), majority holding lease by gas lighting corporation of entire plant to competing company for twenty-five years not illegal so as to preclude action for rent accrued under it; *Stockton v. Central R. Co.* 50 N. J. Eq. 76, 17 L. R. A. 107, 24 Atl. 964, holding lease of railroad to nominal lessee to evade statute forbidding lease to foreign railway corporation invalid; *Bishop*

v. American Preservers' Co. 157 Ill. 315, 48 Am. St. Rep. 317, 41 N. E. 765, holding evidence that bill of sale to illegal trust was obtained by threats admissible in action to enforce same; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 38, 62 L. R. A. 648, 96 Am. St. Rep. 598, 67 N. E. 136 (dissenting opinion), majority upholding agreement between manufacturers and wholesalers made to fix jobbing and retail prices of proprietary medicines; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 391, 61 L. R. A. 474, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination to fix and maintain price of meat illegal; *Strait v. National Harrow Co.* 18 N. Y. Supp. 233, holding illegal, combination of all manufacturers of harrows in the United States to regulate price and control production; *United States v. MacAndrews & F. Co.* 149 Fed. 834, holding where corporations which have almost entire sale of article of commerce throughout the United States form association which results in virtual monopoly in interstate distribution of article, they are guilty of conspiracy in restraint of trade within anti-trust law; *Williams v. Johnson*, 208 Mass. 552, 95 N. E. 90, to the point that corporation cannot enter into partnership; *Locker v. American Tobacco Co.* 121 App. Div. 453, 106 N. Y. Supp. 115, on validity of agreement among association giving one member thereof exclusive right to sell in particular territory; *Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.* 58 W. Va. 28, 112 Am. St. Rep. 936, 50 S. E. 876, 6 A. & E. Ann. Cas. 154, holding agreement by two corporations supplying community with natural gas whereby they divide territory, with exclusive rights to each therein, fix prices and prohibit change of prices, prohibit production in territory of other and bind themselves to use for public consumption only gas produced by other, illegal as creating monopoly; *Fechteler v. Palm Bros. & Co.* 66 C. C. A. 336, 133 Fed. 465, holding corporation cannot, in absence of express authority, enter partnership for transaction of its business.

Cited in footnotes to *State ex rel. Watson v. Standard Oil Co.* 15 L. R. A. 145, which holds agreement by which stock of corporations is transferred to trustees, who elect directors of several corporations, and thereby control affairs in interest of trust, against public policy; *Stockton v. Central R. Co.* 17 L. R. A. 97, which holds lease of railroad franchises and roads tends to monopoly; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful.

Cited in notes (53 L.R.A. 380, 381, 387) on right of corporation to consolidate; (16 L.R.A.(N.S.) 1136) on validity of agreements to control voting power of stock; (74 Am. St. Rep. 236, 249, 269) on combinations constituting unlawful trusts; (115 Am. St. Rep. 411) on power of corporation to enter into partnership with another corporation or an individual.

Distinguished in *Oakdale Mfg. Co. v. Garst*, 18 L. R. A. 486, 23 L. R. A. 640, 49 Am. St. Rep. 784, 28 Atl. 973, upholding agreement of individual manufacturers to unite in corporation and not engage in same business individually for five years; *Queen Ins. Co. v. State*, 86 Tex. 270, 22 L. R. A. 492, 24 S. W. 397, holding combination of insurance companies to increase rates not within rule making agreements to increase price of merchandise illegal; *Edmunds v. Illinois C. R. Co.* 2 Ill. C. C. 478, holding one corporation may own stock in another for a lawful purpose.

Right to question validity of corporate acts.

Cited in *People v. Ulster & D. R. Co.* 128 N. Y. 248, 28 N. E. 635, holding wilful neglect of railway corporation to exercise all its franchises not of itself ground for forfeiture unless state so elects; *Willoughby v. Chicago Junction R. & Union Stock-Yards Co.* 50 N. J. Eq. 676, 25 Atl. 277, holding invalidity of original incorporation on ground that object is to hold stock of another corpora-

tion can be questioned only by state; *Booth Bros. v. Baird*, 83 App. Div. 500, 82 N. Y. Supp. 432, holding vendees receiving benefit of contract estopped from asserting that it was ultra vires as to vendor; *Doubleday, P. & Co. v. Shumaker*, 60 Misc. 234, 113 N. Y. Supp. 83, holding defense of ultra vires does not apply to executed contract; *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.* 101 C. C. A. 39, 177 Fed. 829, on capacity of corporation to perform act outside its enumerated powers.

Distinguished in *Stockton v. American Tobacco Co.* 55 N. J. Eq. 376, 36 Atl. 971, holding that purpose of incorporators to create monopoly cannot be inquired into in action to restrain exercise of corporate powers.

Identity of corporation.

Cited in *Vesta Mills v. Charleston*, 60 S. C. 9, 38 S. E. 226, holding newly organized corporation composed of new incorporators, purchasing plant of old corporation, within ordinance granting exemption from taxation for five years from time of establishment; *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.* 29 Mont. 459, 75 Pac. 89, holding, under statute authorizing consolidation of domestic mining corporations, it is not against public policy to permit such corporation to hold and vote stock in another like corporation; *United States v. Milwaukee Refrigerator Transit Co.* 142 Fed. 254, holding where corporation is organized and owned by officers and stockholders of another, so that their interests are identical, corporations will be considered identical where interests of justice require; *State v. Creamery Package Mfg. Co.* 110 Minn. 433, 126 N. W. 126, holding legal entity will be disregarded where adopted as mere cloak by individuals under which unlawful practices may be concealed; *Milbrath v. State*, 138 Wis. 364, 131 Am. St. Rep. 1012, 120 N. W. 252, holding where person controls corporation, which is mere instrumentality for conducting his business, fact that money was paid into corporation for his individual use does not negative conversion by him individually; *McCherry v. Snare & T. Co.* 130 App. Div. 249, 114 N. Y. Supp. 674 (dissenting opinion), on impersonality of acts by corporation.

Liability for acts of corporate agents.

Cited in *Michigan Slate Co. v. Iron Range & H. B. R. Co.* 101 Mich. 28, 59 N. W. 646, holding corporation bound by acts of agent appointed by officers of company to conduct its business.

Cited in footnote to *Leinkauf v. Lombard*, 20 L. R. A. 48, which holds that irregular way of conducting business by corporate managers does not relieve corporation from liability.

Cited in note (12 L. R. A. 168) on estoppel of corporation to deny liability on its contracts.

Exercise of police power over corporations.

Cited in note (13 L. R. A. 454) on telegraph companies subject to police power of municipalities.

9 L. R. A. 45, *QUEEN INS. CO. v. LESLIE*, 47 Ohio St. 409, 24 N. E. 1072.

Statutes regulating insurance contracts.

Cited in *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 56, 19 C. C. A. 292, 37 U. S. App. 692, 72 Fed. 418, upholding statute providing policy not forfeitable by insured's misrepresentations made in good faith, and not material to risk; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 255, 28 L. R. A. 799, 32 S. W. 5, upholding statute making void, stipulations in insurance policies limiting liability to less than full amount; *Daggs v. Orient Ins. Co.* 136 Mo. 390, 35 L. R. A. 228, footnote, p. 227, 58 Am. St. Rep. 638, 38 S. W. 85,

holding statute requiring payment of full amount of insurance for total loss constitutional; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 64 L.R.A. 453, 105 Am. St. Rep. 916, 78 S. W. 119, holding statute prohibiting forfeitures of policies in certain cases, justifiable as exercise of police power; *State L. Ins. Co. v. Westcott*, 166 Ala. 196, 52 So. 344, holding that statute molds obligation of contract of insurance into conformity with its provisions; *Adams v. Atlas Mut. Ins. Co.* 135 Iowa, 301, 112 N. W. 651, holding void, a provision in policy declaring removal of property should increase risk as matter of law, where statute provides that stipulation in policy shall not prevent recovery if it be shown nonobservance of provision did not contribute to loss, except that condition against removal shall not be affected by provision; *Germania F. Ins. Co. v. Werner*, 76 Ohio St. 557, 12 L.R.A.(N.S.) 460, 118 Am. St. Rep. 891, 81 N. E. 980, holding statutory provision of "any change increasing risk" refers only to change in insured structure itself and does not include anything distinct from corpus of insured structure.

Cited in footnote to *Hartford Fire Ins. Co. v. Redding*, 67 L.R.A. 518, which upholds statute requiring insurer to fix insurable value of property and state the same in the policy and making measure of damages in case of total loss the amount so fixed.

Waiver of provisions of statute.

Cited in *Dennis v. Moses*, 18 Wash. 579, 40 L. R. A. 310, 52 N. W. 333, holding mortgagor's statutory right to remain in possession during period of redemption cannot be waived by instrument creating debt; *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. 781, holding stockholder in building and loan association cannot waive statutory right of withdrawal; *Berteche v. Equitable Loan & Invest. Asso.* 147 Mo. 362, 71 Am. St. Rep. 571, 48 S. W. 954, holding recitals in mortgage as to maturity of stock in building and loan association yield to statutory provisions; *Kreisser v. Ashtabula Gaslight Co.* 2 Ohio C. C. N. S. 602, 24 Ohio C. C. 317, holding that the stipulation in a bond waiving the right to proceed against stockholders on their statutory liabilities is void as against public policy.

Distinguished in *Hull v. Standard Coal & Iron Co.* 20 Ohio C. C. 535, 11 Ohio C. D. 332, holding that a bond whereby the holder agreed to waive his right to pursue stockholders on their statutory liability is valid and not contrary to public policy.

— Insurance laws.

Followed in *New York L. Ins. Co. v. Block*, 12 Ohio C. C. 230, 6 Ohio C. D. 169, holding that the local statute applying to insurance policies cannot be evaded by making the policy subject to the laws of another state, but such policy is subject to the local statute.

Cited in *Havens v. Germania F. Ins. Co.* 123 Mo. 417, 26 L. R. A. 110, 45 Am. St. Rep. 570, 27 S. W. 718, holding stipulations of insurance policy must yield to provisions of statute; *Home F. Ins. Co. v. Weed*, 55 Neb. 151, 75 N. W. 539, holding provision in policy limiting liability on total loss in case of coinsurance yields to statute; *Western Assur. Co. v. Phelps*, 77 Miss. 660, 27 So. 745, holding statute not waived by accepting policy prescribing different rule for fixing amount of loss; *Insurance Co. v. Luce*, 11 Ohio C. C. 480, holding submission of loss to arbitration not waiver of statutory right to full value insured; *German Ins. Co. v. Eddy*, 36 Neb. 466, 19 L. R. A. 709, 54 N. W. 856, and *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 54, 81 Am. St. Rep. 608, 57 N. E. 962, holding insured not bound by waiver of statute making whole insurance payable for total loss; *Phœnix Ins. Co. v. Levy*, 12 Tex. Civ. App. 47, 33 S. W. 992, and *Milwaukee Me-*

chanies' Ins. Co. v. Russell, 65 Ohio St. 256, 56 L. R. A. 161, footnote p. 159, 62 N. E. 338, holding void, condition giving insurer option to rebuild in case of total loss; State L. Ins. Co. v. Westcott, 166 Ala. 196, 52 So. 344, holding that a statute providing that all contracts made on applications signed in the state should be governed by its provisions, renders void any provision to the contrary in any such policies though issued in another state; New Orleans Real Estate Mortg. & Securities Co. v. Teutonia Ins. Co. 128 La. 67, 54 So. 466, holding that statute providing for measure of liability under insurance policy cannot be changed by contract; Phoenix Ins. Co. v. Luce, 11 Ohio C. C. 480, 5 Ohio C. D. 212, holding that the provisions of the statute relative to insurance policies cannot be waived or contracted away and therefore the insured did not waive his right to payment of the full insured value by submitting to arbitration; North American Acci. Ins. Co. v. Sickles, 2 Ohio C. C. N. S. 229, 13-23 Ohio C. C. 601, holding that the statute relating to life insurance policies becomes a part of policies and contrary provisions in the policies cannot control the operation of the statute; New Orleans Real Estate, Mortg. & Securities Co. v. Teutonia Ins. Co. 128 La. 67, 54 So. 466, holding clause in fire insurance policy limiting insurer's liability for acts of civil authorities was void under valued policy statute.

Distinguished in Trustees v. London & L. Fire Ins. Co. 12 Ohio S. & C. P. Dec. 169, holding that the provision of the insurance laws as to the selection and qualification of arbitrators could be waived.

Forfeiture of policy.

Followed in United Firemen's Ins. Co. v. Kukral, 7 Ohio C. C. 359, 4 Ohio C. D. 634, on the failure to disclose encumbrances on the premises as a failure to disclose facts material to the risk and avoiding the policy under the statute.

Cited in United Firemen's Ins. Co. v. Kukral, 7 Ohio C. C. 359, holding occupancy other than stated in policy, known to agent, in absence of intentional fraud, does not avoid policy; Moody v. Amazon Ins. Co. 52 Ohio St. 23, 26 L. R. A. 317, 49 Am. St. Rep. 699, 38 N. E. 1011, and Phillips v. Ohio Farmers' Ins. Co. 13 Ohio C. C. 684, holding nonoccupancy of insured premises without insurer's consent does not invalidate insurance unless increasing risk; United Firemen's Ins. Co. v. Kukral, 7 Ohio C. C. 358, holding failure to disclose mortgage at time of insuring does not avoid policy in absence of intentional fraud; New York L. Ins. Co. v. Bloek, 12 Ohio C. C. 230, holding misrepresentations, not fraudulently made nor material to risk, do not avoid life insurance; People's Mut. F. Ins. Co. v. Bowersox, 5 Ohio C. C. 449, holding judgment liens not materially increasing risk do not avoid policy; Henderson v. Ohio Farmers' Ins. Co. 2 Ohio N. P. 21, holding encumbrance of building without insurer's consent, not increasing risk, does not avoid policy; Webster v. Dwelling House Ins. Co. 53 Ohio St. 569, 30 L. R. A. 722, 53 Am. St. Rep. 658, 42 N. E. 546, Affirming 7 Ohio C. C. 528, holding subsequent mortgage without insurer's consent avoids policy; Peoples' Mut. F. Ins. Co. v. Bowersox, 5 Ohio C. C. 451, 3 Ohio C. D. 221, holding that a judgment lien upon the premises does not render void an insurance policy unless it materially increases the risk though the policy provided otherwise; Henderson v. Ohio Farmers' Ins. Co. 2 Ohio N. P. 21, 2 Ohio S. & C. P. Dec. 188, holding that under the statute a mortgage upon the insured premises is no defense to an action upon the policy unless it increases the risk; Phillips v. Ohio Farmers' Ins. Co. 13 Ohio C. C. 684, 6 Ohio C. D. 269, holding that the company was not released from liability on the policy if the premises became vacant, unless the risk was materially increased thereby; Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011, holding that the vacancy of the building did not avoid the policy unless it increased the risk; Kehm v. German Mut. Ins. Co. 8 Ohio N. P. 544, 11 Ohio S. & C. P. Dec. 745, on the right of the

insured to be protected against unreasonable forfeitures and defenses; *Standard L. & Acci. Ins. Co. v. Saylor*, 2 Ohio N. P. N. S. 312, 15 Ohio S. & C. P. Dec. 144, holding that an allegation of a misstatement in the application for life insurance, as a defense to an action on the policy, is insufficient unless there is an allegation of wilfulness and fraud in making such misstatement.

Distinguished in *Sun Fire Office v. Clark*, 53 Ohio St. 426, 38 L. R. A. 568, 42 N. E. 248, holding additional insurance without insurer's consent, increase in risk avoiding policy; *Doten v. Aetna Ins. Co.* 77 Minn. 477, 80 N. W. 630, holding clause in insurance law providing for avoidance of policy for leaving premises vacant without insurer's consent not affected by clause providing that in absence of change increasing risk whole amount payable in case of total loss; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 150, 39 N. E. 757, holding in absence of statute to contrary, breach of condition against future encumbrances avoids insurance, though risk not increased.

Explained in *Sun Fire Office v. Clark*, 34 Ohio L. J. 283, holding that the taking of additional insurance does increase the risk so as to avoid a policy under the statute.

Effect of "valued policy statutes."

Followed in *Sun Mut. Ins. Co. v. Hock*, 8 Ohio C. C. 344, 4 Ohio C. D. 555, holding that the value of the building is of little importance in an action on a valued policy where the loss is total; *Phoenix Ins. Co. v. Port Clinton Fish Co.* 14 Ohio C. C. 167, 7 Ohio C. D. 472, holding that under the statute the company was liable for the whole amount of the policy if the loss was total, notwithstanding there was other concurrent insurance.

Cited as a leading case in *Brown v. Hartford F. Ins. Co.* 12 Ohio S. & C. P. Dec. 360, holding that a condition of the policy that arbitration is to be a condition precedent to suit upon the policy is void under the statute whether the loss is total or partial.

Cited in *Lancashire Ins. Co. v. Bush*, 60 Neb. 121, 82 N. W. 313; *Sun Mut. Ins. Co. v. Hock*, 8 Ohio C. C. 344; *Springfield F. & M. Ins. Co. v. Hull*, 51 Ohio St. 278, 25 L. R. A. 40, 46 Am. St. Rep. 571, 37 N. E. 1116,—holding that total destruction entitles insured to full amount of insurance; *McCullum v. Hartford F. Ins. Co.* 67 Mo. App. 79, holding statute prescribing amount payable on total loss does not render proof of loss unnecessary; *Schild v. Phoenix Ins. Co.* 6 Ohio N. P. 135, holding that insured's estimate in proof of loss does not affect right to recover total insurance as fixed by statute; *Hubbard v. Winshel*, 6 Ohio N. P. 252, holding insured entitled to whole insurance on total loss, irrespective of value of interest in absence of intentional fraud; *German-A. Ins. Co. v. McBee*, 12 Ohio C. C. N. S. 229, 31 Ohio C. C. 470, holding company liable for full amount of the policy where the loss was total notwithstanding an allegation as to proportionate liability; *Hubbard v. Austin*, 6 Ohio N. P. 252, 8 Ohio S. & C. P. Dec. 115, holding that where the interest insured was a life estate, and the loss was total the insured could recover the full face of the policy though in excess of the value of the life estate; *Schild v. Phoenix Ins. Co.* 6 Ohio N. P. 135, 8 Ohio S. & C. P. Dec. 46, holding that the loss being total the value of the property becomes immaterial and evidence to show the value is not admissible; *Springfield F. & M. Ins. Co. v. Hull*, 51 Ohio St. 270, 25 L.R.A. 37, 46 Am. St. Rep. 571, 37 N. E. 1116, holding that the amount of recovery in case of total loss is the face of the policy; *Pennsylvania F. Ins. Co. v. Drackett*, 63 O. S. 41, 81 Am. St. Rep. 608, 57 N. E. 962, holding that a consent to arbitration does not preclude the recovery of the face of the policy where the loss is total.

Distinguished in effect in *Zalesky v. Home Ins. Co.* 108 Iowa, 345, 79 N. W. 69,

construing insurance law as not rendering inoperative, provision in policy for appraisal as condition precedent to action; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 30 L.R.A. 719, 53 Am. St. Rep. 658, 42 N. E. 546, Affirming 7 C. C. 528, 4 Cir. D. 711, holding that the taking of a subsequent mortgage invalidates the policy regardless of an increase of risk under the statute.

Disapproved in *Simon v. Queen Ins. Co.* 120 La. 485, 45 So. 396, 14 A. & E. Ann. Cas. 847, holding provision that insured should on failure to obtain insurance to certain amount become coinsurer for deficit valid as against "valued policy" statute.

Existing laws as part of contract.

Cited in *People's Bldg. & L. Asso. v. Hanson*, 5 Ohio N. P. 163, holding lien for assessment upon liquor traffic superior, by virtue of existing law, to that of prior mortgage; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 153, 36 L. R. A. 273, 64 Am. St. Rep. 715, 26 S. E. 421, holding that existing laws enter into and are not waived by contract of life insurance; *People's Bldg. & L. Asso. v. Hanson*, 5 Ohio N. P. 163, 7 Ohio St. 180, holding that all laws in force at the time and place a contract is made and where it is to be performed, which in their nature are applicable, enter into and become a part of the contract.

Distinguished in *Hewins v. London Assur. Corp.* 184 Mass. 183, 68 N. E. 62, holding foreign insurance policy issued in violation of statute providing for standard form binding upon company in form issued.

Power of state to restrict liberty of contract.

Cited in *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 375, 33 L.R.A.(N.S.) 706, 108 N. W. 902, upholding constitutionality of law declaring every corporation operating railroad in state shall be liable for injury to servant from negligence of fellow servant, regardless of any contract of insurance, indemnity, relief or benefit.

Arbitration as condition precedent to action on policy.

Cited in note (15 L.R.A.(N.S.) 1064) on arbitration as condition precedent to action on insurance policy.

9 L. R. A. 50, *NEWTON v. TOLLES*, 66 N. H. 136, 49 Am. St. Rep. 593, 19 Atl. 1092.

Rescission of contract.

Cited in *Bigham v. Madison*, 103 Tenn. 363, 47 L. R. A. 268, 52 S. W. 1074, holding contract of sale can be rescinded where there is mutual mistake as to part of land conveyed; *Hoops v. Fitzgerald*, 204 Ill. 330, 68 N. E. 430, Affirming 105 Ill. App. 541, holding lease made with mutual understanding that walls sufficient to support two additional stories will be rescinded if not strong enough for purpose; *Loudon v. Carroll*, 130 Mich. 81, 89 N. W. 578, holding action maintainable at law for recovery of purchase price by grantee wishing to rescind, and tendering reconveyance.

9 L. R. A. 52, *ELLIOTT v. CALDWELL*, 43 Minn. 357, 45 N. W. 845.

Substantial performance as condition precedent to recovery.

Cited in *Birch Cooley v. First Nat. Bank*, 86 Minn. 388, 90 N. W. 789, denying railroad company's right to municipal bonds where road was not finished until eighteen months after expiration of time limit; *Peterson v. Mayer*, 46 Minn. 470, 13 L. R. A. 74, 49 N. W. 245, holding embezzlement by agent hired to make collections bar to recovery for wages, contract to remit being unfulfilled; *Siple v. Stickney*, 190 Mass. 47, 5 L.R.A.(N.S.) 471, 112 Am. St. Rep. 309, 76 N. E. 226, 5 A. & E. Ann. Cas. 611, holding person employed to carry on a farm in absence of the owner cannot recover on his contract where he deceives owner

as to the expenses incurred although no loss results to the owner; *Hoglund v. Sortedahl*, 101 Minn. 361, 112 N. W. 408, holding there could be no recovery for the balance of the money due on a contract on the ground of substantial compliance where the evidence showed that the building was out of plumb and had crack in the wall; *Riley v. Carpenter*, 143 N. C. 217, 55 S. E. 628, holding a contract for the sale of goods stipulating that the bill of lading was to be sent direct to the buyer was not substantially complied with when the seller shipped the goods with the bill of lading attached; *Johnson v. Fehsefeldt*, 106 Minn. 204, 20 L.R.A.(N.S.) 1073, 118 N. W. 797; *Uldrickson v. Samdahl*, 92 Minn. 298, 100 N. W. 5,—on failure of performance necessary to defeat a right of action under a contract.

Distinguished in *Hoffman v. Independent District*, 96 Iowa, 323, 65 N. W. 322, holding vendee must show breach of warranty before relief from payment will be granted.

— On building contracts.

Cited in *Taylor v. Marcum*, 60 Minn. 295, 62 N. W. 330, holding substantial compliance with contract to build grain bins necessary to right of recovery for contract price; *Anderson v. Todd*, 8 N. D. 160, 77 N. W. 599, denying builder's right to recover where deviations important, and not susceptible of remedy without reconstruction; *Perry v. Quackenbush*, 105 Cal. 308, 38 Pac. 740, denying right of builder to recover, where evidence shows intentional and fraudulent deviation from contract; *Anderson v. Pringle*, 79 Minn. 435, 82 N. W. 682, holding rule as to substantial compliance without application where performance of building contract essentially different from agreement; *McDermott v. Grimm*, 4 Colo. App. 42, 34 Pac. 909, raising, but not deciding, question as to effect of noncompliance with contract; *City Street Improv. Co. v. Kroh*, 158 Cal. 325, 110 Pac. 933, to the point that where substantial performance of building contract, and imperfections are accidental employer is presumed to agree to take structure, with implied agreement by contractor to make proper deductions; *Nance v. Patterson Bldg. Co.* 140 Ky. 567, 140 Am. St. Rep. 398, 131 S. W. 484, to the point that substantial performance of building contract means that there are only unintentional deviations which do not impair structure as whole, and may be compensated for by deductions from contract price.

Cited in footnote to *Spence v. Ham*, 51 L. R. A. 238, which denies substantial compliance with building contract where omission cannot be remedied without partial reconstruction.

Cited in note (24 L.R.A.(N.S.) 337, 340) on recovery upon substantial performance of building contract.

Occupancy as waiver of substantial performance.

Cited in *MacKnight Flintie Stone Co. v. New York*, 31 App. Div. 234, 52 N. Y. Supp. 747, denying that occupancy by municipal corporation of building on its land is waiver of substantial performance of contract to furnish water-tight cellar; *Anderson v. Todd*, 8 N. D. 161, 77 N. W. 599, holding occupancy of building not acceptance according to conditions of contract.

Variance between pleadings of express and proof of implied contract.

Cited in *Ecker v. Isaacs*, 98 Minn. 148, 107 N. W. 1053, holding a party bringing an action on an express contract cannot recover on proof of an implied contract.

Admissibility of proof of waiver of performance.

Cited in *McDermott v. Grimm*, 4 Colo. App. 42, 34 Pac. 909, holding in action on a contract proof of waiver of nonperformance is inadmissible unless pleaded..

9 L. R. A. 55, MOORE v. NORMAN, 43 Minn. 428, 19 Am. St. Rep. 247, 45 N. W. 857.

Sufficiency of tender.

Cited in Moore v. Norman, 52 Minn. 85, 18 L.R.A. 360, 38 Am. St. Rep. 526, 53 N. W. 809, holding tender not good if coupled with condition of surrender of notes; Lilienthal v. McCormick, 54 C. C. A. 483, 117 Fed. 97, holding tender, to be effectual, must be unconditional, bona fide, and sufficient; Malone v. Wright, 90 Tex. 57, 36 S. W. 420, holding refusal of pledgee to deliver property not conversion, unless tender made in good faith; Bank of Benson v. Howe, 45 Minn. 42, 47 N. W. 449, holding tender of amount of deficiency after chattel mortgage foreclosure, not including expenses and sheriff's fees, insufficient to discharge lien on unsold property; Leet v. Armbruster, 143 Cal. 670, 77 Pac. 653, holding purchaser's title at foreclosure sale divested by valid tender of amount required for redemption; Pittsburgh Plate Glass Co. v. Leary, 25 S. D. 263, 31 L.R.A. (N.S.) 759, 126 N. W. 271, Ann. Cas. 1912B, 928, to the point that tender of amount secured by lien will destroy lien and leave only personal claim against debtor.

Cited in note (33 L. R. A. 235) on effect of unaccepted tender on lien of mortgage or pledge.

Necessity of keeping tender good.

Cited in Dunn v. Hunt, 63 Minn. 485, 65 N. W. 948, holding that tender must be kept good to be effectual in subsequent suit to compel redemption.

Acts of mortgagor as affecting mortgagee.

Cited in Blyth & F. Co. v. Houtz, 24 Utah, 69, 66 Pac. 611, denying mortgagee bound by warranties, where mortgagor exercises statutory right to sell property before default; Thomas v. Seattle Brewing & Malting Co. 48 Wash. 563, 15 L.R.A. (N.S.) 1166, 125 Am. St. Rep. 945, 94 Pac. 116, 15 A. & E. Ann. Cas. 494, holding lien of a chattel mortgage discharged by tender of the amount due with costs, pending foreclosure.

9 L. R. A. 58, MOORE v. RUGG, 44 Minn. 28, 20 Am. St. Rep. 539, 46 N. W. 141.

Ownership of photographic negative.

Cited in note (50 L. R. A. 397) on use of negative or engraved plates without consent of party who has paid for same.

Distinguished in Press Pub. Co. v. Falk, 59 Fed. 325, holding that one photographing actress in her public character free of charge, owns photograph and negative.

9 L. R. A. 59, WALCOTT v. WELLS, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367.

Cause removed to Federal court on ground of local prejudice in Walcott v. Watson, 46 Fed. 529.

Writ of prohibition.

Cited in Eastham v. Holt, 43 W. Va. 619, 27 S. E. 883, holding writ will not be granted to prevent further proceedings upon indictment for murder, on ground that court abused its power; State *ex rel.* Spalding v. Benton, 12 Mont. 79, 29 Pac. 425, refusing writ commanding judge to refrain from further proceedings in administration of estate, where there was adequate remedy by appeal; Overland Gold Min. Co. v. McMaster, 19 Utah, 187, 56 Pac. 977, refusing writ to prevent enforcement of judgment of justice of peace for want of jurisdiction, where there was adequate remedy by appeal; Mason v. Grubel, 64 Kan. 841, 68 Pac. 660, holding writ enjoining justice of peace from taking jurisdiction of complaint against liquor dealer for maintaining nuisance improperly issued, where other statutory

remedies available; *State ex rel. Pulliam v. Fort*, 107 Mo. App. 336, 81 S. W. 476, holding writ will not lie from appellate court to prohibit circuit court from prohibiting county court from acting on dramshop license application; *Morris v. Randall*, 129 Ky. 727, 112 S. W. 856, holding writ lies to prevent unauthorized person from usurping judicial power, in absence of any other adequate remedy; *Bell v. First Judicial Dist. Ct.* 28 Nev. 293, 1 L.R.A.(N.S.) 846, 113 Am. St. Rep. 854, 81 Pac. 875, 6 A. & E. Ann. Cas. 982, holding constitutionality of statute providing for vacation of office pending appeal from order for removal therefrom, may be determined on application for writ of prohibition to restrain further prosecution of removal proceedings; *Turner v. Langan*, 29 Nev. 284, 88 Pac. 1088, holding writ will not lie to restrain judge of district court from canvassing returns from election precinct in election contest, an adequate remedy by appeal existing to aggrieved party; *Knight v. District Ct.* 32 Nev. 350, 108 Pac. 358, holding that writ of prohibition does not lie where relator has another remedy.

Cited in footnotes to *Bullard v. Thorpe*, 25 L. R. A. 605, which grants prohibition against splitting actions before justice into amounts too small to permit appeal; *Havemeyer v. Superior Court*, 10 L. R. A. 627, which granted prohibition to prevent receiver from proceeding under order appointing him.

Cited in notes (111 Am. St. Rep. 940, 965) on writ of prohibition; (7 Eng. Rul. Cas. 333) on writ of prohibition to try validity of acts of *de facto* officer.

De facto officer.

Cited in *Sawyer v. Dooley*, 21 Nev. 397, 32 Pac. 439, holding acts of governor as *de facto* member of board of equalization valid as to public; *Tower v. Whip*, 53 W. Va. 164, 63 L. R. A. 946, 44 S. E. 179, holding judgment by judge regularly elected, but failing to take constitutional oath, neither void nor reversible; *Tower v. Whip*, 53 W. Va. 164, 63 L.R.A. 937, 44 S. E. 179, holding special judge elected as provided by law a *de facto* officer though he did not take oath of office as required by statute; *State ex rel. Bales v. Bailey*, 106 Minn. 143, 19 L.R.A.(N.S.) 777, 130 Am. St. Rep. 592, 118 N. W. 676, 16 A. & E. Ann. Cas. 338, holding where organization of court is authorized by law, such court, though defectively organized, is a *de facto* court, and judge and clerk thereof *de facto* officers, and court's right to exercise judicial functions cannot be inquired into collaterally.

Cited in notes (21 L.R.A. 142) on *de facto* officers and offices under unconstitutional statutes; (15 L.R.A.(N.S.) 101) on *de jure* office as condition of *de facto* officer; (140 Am. St. Rep. 200) on *de facto* officers.

De facto office or capacity under unconstitutional statute.

Cited in *Thompson v. Couch*, 144 Mich. 672, 108 N. W. 363, holding where city charter provided for three justices of the peace and was amended so that there was but one justice, one elected justice under amendment was a *de facto* officer, even though amendment was unconstitutional, and his right to hold office could not be attacked collaterally; *Clark v. American Cannel Coal Co.* 35 Ind. App. 71, 73 N. E. 727, holding there cannot be a *de facto* corporation under such law; *State v. Cochran*, 55 Or. 177, 105 Pac. 884, holding that supreme court will take jurisdiction of collateral attack on constitutionality of the offices of certain of its members.

9 L. R. A. 67, *CENTRAL TRUST CO. v. SHEFFIELD & B. COAL, IRON & R. CO.* 42 Fed. 106.

Mechanic's Lien.

Cited in *Meek v. Parker*, 63 Ark. 372, 58 Am. St. Rep. 119, 38 S. W. 900, up-

holding mechanic's lien for boxes and wheels built for dry kiln; *New England Engineering Co. v. Oakwood Street R. Co.* 75 Fed. 166, holding that Ohio statute, giving liens for work done on railways, etc., applies to street railroads; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 222, 50 Pac. 744, holding matte pots and ore cars sold smelting company "fixtures" subject to lien; *Peaceable Creek Coal Co. v. Jackson*, 26 Okla. 2, 108 Pac. 409, Ann. Cas. 1912B, 1, holding that coal mine is "improvement" within meaning of section 6751, Comp. Laws, 1909, relating to mechanics' liens.

Cited in footnote to *Hereules P. Co. v. Knoxville, L. & J. R. Co.* 67 L.R.A. 487, which sustains right to lien for explosives consumed in grading roadbed or driving tunnel for railroad company.

Limited in *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.* 11 C. C. A. 15, 23 U. S. App. 537, 63 Fed. 15, holding lien given for materials used in buildings and machinery not available when materials are used in construction of railroad.

9 L. R. A. 69, *JACKSONVILLE v. LEDWITH*, 26 Fla. 163, 23 Am. St. Rep. 558, 7 So. 885.

Second appeal in 32 Fla. 4, 13 So. 454, as to validity of defense set up by new cross-bill.

Right to regulate sale of articles of food.

Followed in *Blanchard v. Ivers*, 40 Fla. 120, 24 So. 66, upholding power of city to confine sale of marketable articles to public market under reasonable regulations.

Cited in *State v. Sarradat*, 46 La. Ann. 703, 24 L. R. A. 588, 15 So. 87, upholding city's right to establish, regulate, and lease space in, public market.

Cited in footnotes to *State v. Layton*, 62 L.R.A. 164, which upholds constitutionality of statute prohibiting sale of baking powder containing alum; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food whereby damage or inferiority is concealed.

Cited in notes (24 L. R. A. 584) on market regulations restricting sales; (53 L. R. A. 764) on constitutionality of statutes attempting to grant monopoly.

Delegation of authority to regulate and license.

Cited in *Walsh v. Denver*, 11 Colo. App. 528, 53 Pac. 458, holding ordinance delegating city council's power to regulate butcher business void.

Cited in note (53 Am. St. Rep. 572) on delegation of police power.

Right to impose license tax.

Cited in *Ex parte Sims*, 40 Fla. 440, 25 So. 280, denying city's power to impose special additional tax on wholesale malt liquor dealers holding state license to sell spirituous, vinous, or malt liquors; *Canova v. Williams*, 41 Fla. 515, 27 So. 30, upholding right of city, under special charter, to impose liquor-license tax exceeding 50 per cent of state tax; *State v. McKinney*, 29 Mont. 388, 74 Pac. 1095, 1 A. & E. Ann. Cas. 579, holding license provided by statute for sale of milk, not a tax; *Howland v. State*, 56 Fla. 432, 21 L.R.A.(N.S.) 197, 47 So. 963 (dissenting opinion), on power of city to require fee granting license to sell meat.

Cited in footnote to *Re Snyder*, 68 L.R.A. 708, which sustains right of farmer to sell products of his farm in city without license.

Cited in notes (47 Am. St. Rep. 702) on license or regulation of business as sanitary measure; (129 Am. St. Rep. 274) on constitutional limitations on power to impose license or occupation taxes.

Ordinances void for partiality.

Cited in *Ex parte Theisen*, 30 Fla. 535, 32 Am. St. Rep. 36, 11 So. 901, holding ordinance forbidding sale of liquor within certain distance of school or church without consent of council void for discrimination; *Sherlock v. Stuart*, 96 Mich. 208, 21 L. R. A. 590, 55 N. W. 845 (dissenting opinion), majority upholding discretionary power of council to grant application for liquor license; *Elkhart v. Murray*, 165 Ind. 306, 1 L.R.A.(N.S.) 943, 112 Am. St. Rep. 228, 75 N. E. 593, 6 A. & E. Ann. Cas. 748, holding ordinance making it unlawful for street car to operate without fender of particular manufacture, or one equally as good, void as lacking uniformity and unjustly discriminating in favor of particular manufacture.

Limitation of amount of license fees.

Cited in *Atkins v. Phillips*, 26 Fla. 298, 10 L. R. A. 161, 8 So. 429, holding monthly license tax of \$5 on meat business outside of public market, valid.

Cited in footnote to *Littlefield v. State*, 28 L. R. A. 588, which holds that license for sale of milk should not be disproportionate to cost of issuing license and regulating business.

Cited in notes (30 L. R. A. 416, 427, 429) on limit of amount of license fees.

Right to change location of market.

Cited in *Petz v. Detroit*, 95 Mich. 181, 54 N. W. 644, holding city may discontinue market, regardless of terms of tenants.

Ordinance invalid in part.

Cited in *Canova v. Williams*, 41 Fla. 512, 27 So. 30, holding that invalidity of part of ordinance does not affect validity of portion not dependent thereon.

Regulation by ordinance.

Cited in *Pensacola v. Southern Bell Teleph. Co.* 49 Fla. 173, 37 So. 820, holding resolution invalid where it is adopted by board of commissioners, the president of board being present and assenting thereto and signing minutes, but resolution is not after adoption submitted to such president in his capacity as mayor for his consideration and rejection or approval, as required by law.

Validity of ordinance affecting conduct of business.

Cited in *Butte v. Paltrovich*, 30 Mont. 22, 104 Am. St. Rep. 698, 75 Pac. 521, holding ordinance making it unlawful to keep open or transact business between six at night and seven in morning in operation of pawn shop, loan office or second hand store is a regulation and not a prohibition within statute providing regulation of certain business.

9 L. R. A. 81, *CONTINENTAL INS. CO. v. KYLE*, 124 Ind. 132, 19 Am. St. Rep. 77, 24 N. E. 727.

Vacant or unoccupied premises.

Cited in *Hoover v. Mercantile Town Mut. Ins. Co.* 93 Mo. App. 118, 69 S. W. 42, holding use should be considered in determining whether premises "unoccupied;" *Schuermann v. Dwelling House Ins. Co.* 161 Ill. 440, 52 Am. St. Rep. 377, 43 N. E. 1093, holding house from which tenants have moved, leaving a few articles in one room, unoccupied; *Limburg v. German F. Ins. Co.* 90 Iowa, 713, 23 L. R. A. 100, 48 Am. St. Rep. 468, 57 N. W. 626, holding building vacated by tenant leaving counter and small quantity of liquor, without owner's knowledge, unoccupied; *Home Ins. Co. v. Boyd*, 19 Ind. App. 193, 49 N. E. 285, holding house vacant or unoccupied where tenant stores household goods in one room and departs without intention of returning to eat or sleep; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 94, 30 L. R. A. 635, 51 Am. St. Rep. 457, 33 Atl. 429, holding house where employees occasionally sleep and where provisions are kept, but not used as

fixed abode, unoccupied; *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 338, 49 N. E. 471, holding house from which tenant is moving on day of fire not vacant; *Connecticut F. Ins. Co. v. Buchanan*, 4 L.R.A.(N.S.) 765, 73 C. C. A. 111, 141 Fed. 882, holding normal school, which was not the home or abode of any person, but where occasional visits were made by former teacher who kept his library therein, and being in fact untenanted, was vacant and unoccupied within provisions of policy.

Cited in footnotes to *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds house not vacant because custodian has access to only one room; *Hampton v. Hartford F. Ins. Co.* 52 L. R. A. 344, which holds church in which services held, though windows are boarded up, not unoccupied as matter of law; *Stone v. Howard Ins. Co.* 11 L. R. A. 771, which holds that custom to cease operations in shoe factory in dull season does not render nugatory provision avoiding policy if operations cease; *Louck v. Orient Ins. Co.* 33 L. R. A. 712, which holds policy on idle distillery not void because not in operation; *German Ins. Co. v. Russell*, 58 L. R. A. 234, which holds policy absolutely forfeited by premises remaining vacant for time specified in policy; *Limburg v. German F. Ins. Co.* 23 L. R. A. 99, which holds altering or repairing insured building not occupancy; *Moody v. Amazon Ins. Co.* 26 L. R. A. 313, which holds nonoccupancy, without increase of risk or fraud, insufficient to avoid policy; *Henderson Trust Co. v. Stuart*, 48 L. R. A. 49, which holds executor liable for loss of insurance from failure to apply for extension of vacancy permit; *Brehm Lumber Co. v. Svea Ins. Co.* 68 L.R.A. 110, which holds policy on shingle mill and dry kiln in close proximity divisible as to amounts of indemnity and avoided in entirety by shutting down of mill without permission, though shingles are still transferred into and out of the kiln.

Cited in note (20 Am. St. Rep. 826) on meaning of "vacant and unoccupied" in insurance policy.

Forfeiture by breach of stipulation.

Cited in *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 368, 28 N. E. 868, holding that breach of agreement in policy not to change use so as to increase hazard defeats policy.

Distinguished in *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.* 76 S. C. 80, 10 L.R.A.(N.S.) 740, 121 Am. St. Rep. 941, 56 S. E. 654, 11 A. & E. Ann. Cas. 780, holding policy not avoided by temporary increase of hazard, where loss occurs from some other source.

Validity of provisions against encumbrances.

Cited in *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 625, 39 N. E. 534; *Shaffer v. Milwaukee Mechanics' Ins. Co.* 17 Ind. App. 215, 46 N. E. 557; *Traders Ins. Co. v. Cassell*, 24 Ind. App. 242, 56 N. E. 259; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 146, 39 N. E. 757,—holding condition in policy against present or future encumbrance of personalty valid.

Parol evidence to modify policy.

Cited in *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 82, 38 N. E. 865, holding stipulation that vacancy without consent will avoid policy not modifiable by parol evidence.

Effect of entry of finding or judgment.

Cited in *Williams v. Freshour*, 136 Ind. 365, 36 N. E. 280, holding that finding made and entered cannot be changed; *Burnett v. Milnes*, 148 Ind. 237, 46 N. E. 464, holding trial court cannot, after finding and judgment, hear additional evidence.

Construction of insurance policy.

Cited in note (22 Am. St. Rep. 330) on construction of insurance policy.

9 L. R. A. 86, MUETZE v. TUTEUR, 77 Wis. 236, 20 Am. St. Rep. 115, 46 N. W. 123.

What constitutes publication of libel.

Cited in Monson v. Lathrop, 96 Wis. 389, 65 Am. St. Rep. 54, 71 N. W. 596, holding that writing and delivering libelous telegram for transmission constitute publication.

Cited in note (9 Eng. Rul. Cas. 38) on what constitutes a publication of libel.

Libelous publications and threatening letters.

Cited in Brown v. Vannaman, 85 Wis. 454, 39 Am. St. Rep. 860, 55 N. W. 183, holding letter advising shipper to "look out for" consignee libelous *per se*; State v. Armstrong, 106 Mo. 416, 13 L. R. A. 426, 27 Am. St. Rep. 361, 16 S. W. 604, holding words "Bad Debt Collecting Agency" on envelope sent through mails, libelous; Burton v. O'Niell, 6 Tex. Civ. App. 616, 25 S. W. 1013, holding letters imputing dishonesty to person addressed, sent in open envelopes, indorsed "Bad Debt Collecting Agency," libelous *per se*; White v. Parks, 93 Ga. 634, 20 S. E. 78, holding publication of name in list of delinquent debtors libelous *per se*.

Cited in footnotes to State v. McCabe, 34 L. R. A. 127, which denies right to send threatening letters or circulars to debtor; State v. Brady, 9 L. R. A. 606, which holds false publication that member of certain family had been convict, libelous.

Cited in notes (49 L.R.A. 613) on blacklisting dealer, as libel; (3 L.R.A. (N.S.) 340) on charging one with refusal to pay debt as libel.

Distinguished in Denney v. Northwestern Credit Assn. 55 Wash. 334, 25 L.R.A. (N.S.) 1023, 104 Pac. 769, holding where mercantile report was not libelous *per se* a direct loss traceable thereto must be pleaded, giving the names of parties who refused plaintiff credit or withdrew their custom unless shown impossible so to plead; Green v. Minnes, 22 Ont. Rep. 188, as to advertising claim against debtor for sale not being libelous.

Privileged communication.

Cited in Woodhouse v. Powles, 43 Wash. 621, 8 L.R.A. (N.S.) 787, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 A. & E. Ann. Cas. 54, holding member of association of wholesalers which had agreed to report delinquent customers liable for actual damage to customer who had been reported delinquent by mistake.

Cited in footnote to Mitchell v. Bradstreet Co. 20 L. R. A. 138, which holds voluntary publication by mercantile agency of false statement that firm has assigned not privileged.

Cited in notes (20 L.R.A. (N.S.) 366) on libel and slander; privilege as affected by extent of publication; (104 Am. St. Rep. 146) on what libelous statements are privileged.

Evidence to support charge of unworthiness of credit.

Cited in State v. Armstrong, 106 Mo. 417, 13 L. R. A. 426, 27 Am. St. Rep. 361, 16 S. W. 604, holding evidence of specific indebtedness of prosecutrix to other persons inadmissible in action for libel in imputing unworthiness of credit.

Impeachment of witness.

Cited in Goodwin v. State, 114 Wis. 323, 90 N. W. 170, holding evidence as to witness's illegitimate pregnancy inadmissible upon question of credibility; Kolb v. Union R. Co. 23 R. I. 76, 54 L. R. A. 648, footnote p. 646, 91 Am. St. Rep. 614, 49 Atl. 392, which denies right to cross-examine plaintiff in suit for husband's death as to subsequent birth of illegitimate child.

Evidence of plaintiff's character.

Cited in Lowe v. Ring, 123 Wis. 112, 101 N. W. 381, holding in action for assault and battery evidence of previous assaults and batteries at particular

times not admissible; *Early v. Winn*, 129 Wis. 298, 109 N. W. 633; *Register Newspaper Co. v. Stone*, 31 Ky. L. Rep. 460, 11 L.R.A.(N.S.) 242, 102 S. W. 800,—holding general reputation of plaintiff in action for libel may be put in evidence in mitigation of damages but not by evidence of particular facts or acts; *Lydiard v. Daily News Co.* 110 Minn. 145, 124 N. W. 985, holding defendant in action for libel may as a defense and in mitigation of damages prove the bad character of plaintiff, but such proof cannot be established by evidence of specific offenses not charged in the publication.

Cited in note (38 L.R.A.(N.S.) 1184) on bad character or reputation of plaintiff as mitigating damages for libel or slander.

Incorrect statement of evidence by court.

Cited in *Horr v. C. W. Howard Co.* 126 Wis. 165, 105 N. W. 668, holding objection to is waived unless attention is called thereto.

9 L. R. A. 90, *BURNHAM v. HESELTON*, 82 Me. 495, 20 Atl. 80.

Transactions between persons in fiduciary relation.

Cited in *Appleton v. Turnbull*, 84 Me. 81, 24 Atl. 592, holding purchase by pledgee on sale of pledged property presumptively void; *Edgerly v. Edgerly*, 73 N. H. 409, 62 Atl. 716, holding wherever it appears that donor in a will was dependent upon or under control of donee, and that the latter took an active part in procuring the gift, it may be inferred that gift was procured by undue influence; *Peirce v. Palmer*, 31 R. I. 473, 77 Atl. 201, Ann. Cas. 1912B, 181 (dissenting opinion), on party alleging fraud in making contract as having burden of proof.

— Attorney and client.

Cited in *Lewis v. Broun*, 36 W. Va. 7, 14 S. E. 444, holding assignment by client to attorney of interest in property in litigation voidable; *Riegi v. Phelps*, 4 N. D. 277, 60 N. W. 402, holding attorney liable for money collected, when he has settled with client without disclosing true amount; *United States v. Coffin*, 83 Fed. 544, holding burden of showing fairness of transaction between attorney and client on attorney; *French v. Cunningham*, 149 Ind. 637, 49 N. E. 797, holding burden on attorney to show fairness of contract for fees, entered into after employment; *Stief v. Smyth*, 26 Montg. Co. L. Rep. 38, holding that law will treat advantage gained by attorney through his failure to fully inform client as constructive fraud; *Re Jones*, 29 Utah, 343, 81 Pac. 162, holding it not necessary for client to show active fraud in order to obtain relief but the law will presume in his favor as soon as the confidential relation is shown to have existed at time of transaction complained of.

Cited in footnotes to *Kidd v. Williams*, 56 L.R.A. 879, which holds independent advice unnecessary to enable client to make binding settlement with attorney for past services; *Dorr v. Camden*, 65 L.R.A. 348, which holds that contract for contingent fee must, in order to be sustained, be shown to have been entered into by the client after full knowledge of the facts and circumstances justifying such contract.

Cited in notes (23 L.R.A.(N.S.) 681, 682) on right and duty of attorney as to purchase of subject-matter of litigation or of retainer from client; (83 Am. St. Rep. 186, 187) on contracts between attorneys and clients.

What contracts with attorney champertous.

Cited in footnotes to *Johnson v. Van Wyck*, 41 L. R. A. 520, which holds agreement by attorney to prosecute suit at own expense for half of recovery champertous; *Newman v. Freitas*, 50 L. R. A. 548, which holds void, contract to pay

attorney one third of all amounts recovered in divorce suit; *Irwin v. Curie*, 58 L. R. A. 830, which sustains right of person placing demands in attorney's hands to recover agreed compensation, though statute forbids such agreements; *Reece v. Kyle*, 16 L. R. A. 723, which holds attorney's agreement to advance costs of collecting judgment not champertous; *Croco v. Oregon Short-Line R. Co.* 44 L. R. A. 285, which authorizes agreement that attorney's compensation shall depend on success and be payable out of proceeds of litigation.

9 L. R. A. 94, *PILLSBURY v. BROWN*, 82 Me. 450, 19 Atl. 858.

Width of highways.

Approved in *Bowers v. Barrett*, 85 Me. 386, 27 Atl. 260, holding way of usual width acquired, though but part used for thirty years; *Webb v. Butler County*, 52 Kan. 379, 34 Pac. 973, holding abutter's encroachment upon highway with fence or by use will not lessen public's right to entire width of highway when public exigencies require; *Marchand v. Maple Grove*, 48 Minn. 275, 51 N. W. 606, holding width of highway obtained by adverse user to be measured by extent of user, with adjacent land needed for ordinary repairs and improvements; *Bayard v. Standard Oil Co.* 38 Or. 446, 63 Pac. 614, holding width of highway established by public user, not necessarily confined to thread or course of actual travel.

Cited in *Quinn v. Baage*, 138 Iowa, 434, 114 N. W. 205, holding the public is not bound to take possession of the entire highway or street, but may use such portion as may be necessary for public convenience and appropriate remainder whenever needed; *Illinois Steel Co. v. Jeka*, 123 Wis. 434, 101 N. W. 399, as to highway by adverse occupancy being full width of legal highway.

Cited in note (12 Eng. Rul. Cas. 571) on right to use highway for entire width.

Establishment of highway by user.

Cited in *Coakley v. Boston & M. R. Co.* 159 Mass. 35, 33 N. E. 930, holding town way not made country way by long-continued use by public; *Shanline v. Wiltsie*, 70 Kan. 183, 78 Pac. 436, 3 A. & E. Ann. Cas. 140, holding where a legal highway is duly established along a section line, but through misapprehension departs somewhat from true line at one place, such conditions will not operate to affect an abandonment of public easement of true course, or to create by prescription or limitation a right of way over the way actually used for travel.

Cited in note (57 Am. St. Rep. 747, 748, 749, 763) on highways by user.

Submission on evidence.

Approved in *Elm City Club v. Howes*, 92 Me. 214, 42 Atl. 392, holding that defendant cannot object to insufficient account annexed, where case is submitted to law court on evidence.

Variance between pleading and proof.

Cited in *Eveleth v. Gill*, 97 Me. 318, 54 Atl. 756, holding variance, consisting of declaration under one statute and proof under another, substantial.

Sidewalk on highway.

Cited in *Hitchcock v. Zink*, 80 Neb. 32, 13 L.R.A.(N.S.) 1113, 127 Am. St. Rep. 743, 113 N. W. 795, holding sidewalk constructed outside travelled way for teams, but within boundaries of road, does not constitute an additional burden.

Appeal as waiving technicalities in pleading.

Cited in *Robbins v. Bangor R. & Electric Co.* 100 Me. 498, 1 L.R.A.(N.S.) 965, 62 Atl. 136; *Hurd v. Chase*, 100 Me. 564, 62 Atl. 660,—holding by reporting

the case the parties waived technical questions of pleading, there being no stipulation otherwise.

9 L. R. A. 96, *EISNER v. HEILEMAN*, 52 N. J. L. 378, 19 Am. St. Rep. 449, 20 Atl. 46.

9 L. R. A. 97, *WILDER v. WILDER*, 89 Ala. 414, 18 Am. St. Rep. 130, 7 So. 767.

Estoppel of married women.

Approved in *Vincent v. Walker*, 93 Ala. 169, 9 So. 382, holding recital of consideration not estop married women to show absence of consideration, in transaction not within enabling statute; *Vansandt v. Weir*, 109 Ala. 108, 32 L. R. A. 203, 19 So. 424, holding equitable estoppel not operate to deprive married women of statutory separate estate; *Jackson v. Knox*, 119 Ala. 323, 24 So. 724, holding parol sale of land by married woman owning same not enforceable, though possession given and consideration received; *Brooks v. Laurent*, 39 C. C. A. 211, 98 Fed. 656, holding statutory right to sue and be sued as *feme sole* subjects married women to estoppel by pleadings.

Cited in footnotes to *Arthur v. Israel*, 10 L.R.A. 693, which holds divorced woman estopped to set up invalidity of decree by subsequently marrying; *Grice v. Woodworth*, 69 L.R.A. 584, which holds married woman estopped to set up invalidity of contract by her husband and herself to sell homestead for failure to comply with certain conditions after purchaser has paid purchase price, taken possession, and made valuable improvements.

Distinguished in *Curry v. American Freehold Land Mortg. Co.* 107 Ala. 437, 54 Am. St. Rep. 105, 18 So. 328, holding wife's joinder in mortgage not estop her from asserting priority of her lien reserved in original conveyance to husband.

9 L. R. A. 100, *EAST END STREET R. CO. v. DOYLE*, 88 Tenn. 747, 17 Am. St. Rep. 933, 13 S. W. 936.

Additional servitudes.

Cited in *Detroit City R. Co. v. Mills*, 85 Mich. 673, 48 N. W. 1007 (dissenting opinion), majority holding electric street railway not additional servitude upon highway; *Frazier v. East Tennessee Teleph. Co.* 115 Tenn. 421, 3 L.R.A.(N.S.) 325, 112 Am. St. Rep. 856, 90 S. W. 620, 5 A. & E. Ann. Cas. 838, holding telephone poles and wires not additional burden on street; *Wilkins v. Chicago, St. L. & N. O. R. Co.* 110 Tenn. 465, 75 S. W. 1026, as to steam railway being additional burden on street.

Cited in notes (17 L.R.A. 478) on what use of street or highway constitutes additional burden; (106 Am. St. Rep. 258) on what are additional servitudes in highways.

Distinguished in *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 142, 43 L. R. A. 235, 24 So. 502, holding electric street railway not additional servitude upon highway.

Disapproved in *Howe v. West End Street R. Co.* 167 Mass. 50, 44 N. E. 386, holding duly authorized trolley railway in street not additional servitude.

Meaning of term "railroad."

Approved in *Katzenberger v. Lawo*, 90 Tenn. 239, 13 L. R. A. 186, 25 Am. St. Rep. 681, 16 S. W. 611, holding passenger train, propelled by dummy engine within statute regulating use of "railroads."

Cited in *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 698, 9 C. C. A. 672, 22 U. S. App. 220, 61 Fed. 611, holding horse railway not within statutes requiring stopping of every engine or train before crossing intersecting railroad;

Diebold v. Kentucky Traction Co. 117 Ky. 156, 63 L.R.A. 641, 111 Am. St. Rep. 230, 77 S. W. 674, 4 A. & E. Ann. Cas. 445, holding provisions as to street railroads not applicable to an electric trunk line between two cities.

Rights in street.

Cited in Acker v. Knoxville, 117 Tenn. 228, 96 S. W. 973, holding it not actionable wrong to an abutter simply to lay a car line wholly on his side of the middle of the street.

Cited in footnotes to Chicago G. W. R. Co. v. First M. E. Church, 50 L. R. A. 488, which holds maintenance of water tank in street not authorized by grant of right to operate railroad; Lostutter v. Aurora, 12 L. R. A. 259, which authorizes city to fit up for use abandoned well in street without abutting owner's consent.

Cited in notes (25 Am. St. Rep. 479, 36 L.R.A.(N.S.) 683, 714) on abutter's right to compensation for railroads in streets.

Damages.

Cited in Stewart v. Ohio River R. Co. 38 W. Va. 450, 18 S. E. 604, holding depreciation of market value of abutting property, measure of damages for railway in street; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 522, 27 L. R. A. 243, 29 S. W. 104, holding street railway liable for cost of return wires as substitute for telephone company's ground circuit destroyed by conduction.

9 L. R. A. 102, POLLASKY v. MINCHENER, 81 Mich. 280, 21 Am. St. Rep. 516, 46 N. W. 5.

Privileged communications and libel of merchants.

Cited in Brewer v. Chase, 121 Mich. 537, 46 L. R. A. 402, 80 Am. St. Rep. 527, 80 N. W. 575, holding answer to libel, published without malice to repel charge, privileged; Mitchell v. Bradstreet Co. 116 Mo. 238, 20 L. R. A. 142, footnote, p. 138, 38 Am. St. Rep. 592, 22 S. W. 358, holding voluntary publication by mercantile agency of false statement that firm has assigned not privileged; Wolff v. Smith, 112 Mich. 365, 70 N. W. 1010 (dissenting opinion), majority holding privilege no defense for reiteration of alleged slander after occasion for privilege has ceased; People v. Pratt, 133 Mich. 134, 67 L.R.A. 929, 94 N. W. 752 (dissenting opinion), as to what communications are privileged; Flynn v. Boglarsky, 164 Mich. 518, 32 L.R.A.(N.S.) 742, 129 N. W. 674, holding that privileged character of writing may be lost by excessive publication, or by general circulation among people of community; Robinson v. Dun, 28 Ont. Rep. 24, holding publishing information in regard to plaintiff's financial standing was a matter of qualified privilege but want of reasonable care in collecting the information was evidence of malice which destroyed privilege.

Cited in footnotes to Douglass v. Daisley, 57 L. R. A. 475, which denies privilege, as matter of law, to communication by commercial agency that assignor, to secure indorser, had made assignment for creditors; Dun v. Weintraub, 50 L. R. A. 670, which holds publication by commercial agency of false statement reflecting upon merchant's responsibility and standing in community, libelous *per se*.

Cited in notes (104 Am. St. Rep. 140, 146) on what libelous statements are privileged; (20 L.R.A.(N.S.) 366) on libel and slander; privilege as affected by extent of publication; (36 L.R.A.(N.S.) 452) on libel and slander: privilege of communications between principal and agent; (9 Eng. Rul. Cas. 82) as to what communications enjoy a qualified privilege: (2 Brit. Rul. Cas. 215, 217, 218) on report of mercantile agency as privileged.

Master's liability for acts of servant.

Cited in note (27 L. R. A. 199) on master's civil responsibility for wrongful or negligent act of servant or agent towards one having no claim on master by reason of contract, incipient or perfected.

9 L. R. A. 106, *PEOPLE v. BOUCHARD*, 82 Mich. 156, 46 N. W. 232.

Municipal jurisdiction.

Approved in *State v. Eason*, 114 N. C. 794, 23 L. R. A. 524, 41 Am. St. Rep. 811, 19 S. E. 88, holding ordinance prohibiting throwing of fish or offal into river void where municipality bounded by low-water line.

Cited in note (46 L. R. A. 280) on jurisdiction over sea.

9 L. R. A. 108, *FIDELITY TRUST & S. V. Co. v. MERCHANT'S NAT. BANK*, 90 Ky. 225, 13 S. W. 910.

Right of set-off.

Approved in *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 91, 47 Am. St. Rep. 576, 58 N. W. 826, holding insolvency ground for equitable set-off, although assignment for benefit of creditors made under statutes; *Hodgin v. Peoples' Nat. Bank*, 124 N. C. 542, 32 S. E. 887, upholding right of bank to set off debt of insolvent partnership against partnership deposit; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 354, 15 L. R. A. 716, 18 S. W. 822, and *Thomas v. Exchange Bank*, 99 Iowa, 208, 35 L. R. A. 380, 68 N. W. 780, holding bank may set off against deposit, unmatured debts of insolvent depositors; *Georgia Seed Co. v. Talmadge*, 96 Ga. 256, 22 S. E. 1001, holding that bank may apply in satisfaction unmatured notes due from insolvent bank, amount deposited by latter bank in former; *Kortjohn v. Continental Nat. Bank*, 63 Mo. App. 171, holding debt by maker of voluntary assignment, not then due, will not operate as set-off to claim acquired by assignee under the assignment; *Thompson v. Union Trust Co.* 130 Mich. 510, 97 Am. St. Rep. 494, 90 N. W. 294, holding depositor entitled to set off amount of deposit against notes payable to insolvent bank; *Neely v. Grayson County Nat. Bank*, 25 Tex. Civ. App. 516, 61 S. W. 559, holding that bank may set off deposit against unmatured notes of depositor.

Cited in *Brown v. Pegram*, 149 Fed. 521, holding unliquidated demands may be enforced by set-off; *Little v. City Nat. Bank*, 115 Ky. 630, 103 Am. St. Rep. 349, 74 S. W. 699, holding bank holding note of decedent maturing a day after his death entitled to set off from deposit of decedent; *Smith v. Perry*, 197 Mo. 451, 95 S. W. 337, holding in action of accounting trustees estate entitled to set off certain claims held by trustee individually against insolvent estate of cestui que trust.

Cited in notes (10 L. R. A. 380) on what constitutes set-off; (15 L. R. A. 710, 711) on right of bank to set off unmatured claim against deposit account of insolvent debtor; (25 L.R.A.(N.S.) 395) on effect of immaturity of claim at time of insolvency proceedings upon right of set-off; (111 Am. St. Rep. 422; 27 L.R.A.(N.S.) 814) on right of bank to set off unmatured claim against deposit; (47 Am. St. Rep. 581, 583, 584) on equitable set-off after insolvency.

Distinguished in *Merchants' Nat. Bank v. Robinson*, 97 Ky. 556, 28 L. R. A. 761, 31 S. W. 136, denying right of bank to set off deposit against unmatured debt of insolvent depositor, so as to defeat payment of latter's check to third person; *Stone v. Dodge*, 96 Mich. 516, 21 L. R. A. 284, 56 N. W. 75, denying right to set off certificate of deposit procured from creditor after suspension and before application for receiver, against debt due at suspension.

9 L. R. A. 110, *SULLIVAN v. HERGAN*, 17 R. I. 109, 20 Atl. 232.

Contracts promotive of illegal transactions.

Cited in *Edwards County v. Jennings*, 89 Tex. 621, 35 S. W. 1053, holding void, bond executed to secure performance of contract creating monopoly; *Haddock v. Salt Lake City*, 23 Utah, 527, 65 Pac. 491, holding it error to refuse amendment of answer setting up illegality of contract sued upon; *Miller v. Maguire*, 18 R. I. 771, 30 Atl. 966, holding lease not invalidated by knowledge of lessor that lessee intended to use premises for illegal purpose; *Teoli v. Nardolillo*, 23 R. I. 94, 49 Atl. 489, refusing to confirm master's report in partnership accounting upon objection showing illegality in partnership business; *Cole v. Brown-Hurley Hardware Co.* 139 Iowa, 499, 18 L.R.A.(N.S.) 1167, 117 N. W. 746, 16 A. & E. Ann. Cas. 846, holding there can be no recovery on a quantum meruit for services rendered or other consideration furnished under a contract which is void for illegality, or for reasons of public policy; *Mitchell v. Branham*, 104 Mo. App. 487, 79 S. W. 739, as to when contract partially illegal void.

Cited in note (117 Am. St. Rep. 497, 505) on contracts, consideration for which has partly failed, or is partly illegal.

Distinguished in *Atwood v. Lester*, 20 R. I. 665, 40 Atl. 866, holding fraudulent intent to deprive equitable owner of interest in note unavailable to guarantors as defense; *Hatch v. Hanson*, 46 Mo. App. 330, holding that part owner of successful lottery ticket cannot set up illegality of contract as defense to claim of other owner.

9 L. R. A. 111, *HUNTLEY v. HOLT*, 58 Conn. 445, 20 Atl. 469.

Liability for mechanic's lien.

Followed in *Lyon v. Champion*, 62 Conn. 77, 25 Atl. 392, denying that mechanic's lien attaches to wife's property "by virtue of agreement," where she consented to improvement, another assuming liability.

Cited in *Alderman v. Hartford & N. Y. Transp. Co.* 66 Conn. 53, 33 Atl. 589, holding acquiescence in use of stone in building insufficient under statute to charge owner for materials furnished by "agreement;" *National Wall Paper Co. v. Sire*, 37 App. Div. 407, 55 N. Y. Supp. 1009, denying liability of landlord for mechanic's lien for repairs made at instigation of tenant, though he saw work in progress; *Cawley v. Day*, 4 S. D. 225, 56 N. W. 749, denying wife's property chargeable with mechanic's lien for improvement, contract being made by husband in his own name; *Foskett & B. Co. v. Swayne*, 70 Conn. 75, 38 Atl. 893, holding non-suit error, where evidence sufficient to prove that materials furnished "by virtue of agreement;" *Coorsen v. Ziehl*, 103 Wis. 387, 79 N. W. 562, holding neglect of wife to advise contractor of her ownership not consent to improvement of property; *Hillhouse v. Pratt*, 74 Conn. 120, 49 Atl. 905, holding mechanic's liens superior to purchase price mortgage, where deed was to be withheld until partial completion of building by vendee; *Hanson v. News Pub. Co.* 97 Me. 103, 53 Atl. 990, denying right to mechanic's lien against building, for temporary partitions put in by tenant; *York v. Mathis*, 103 Me. 76, 68 Atl. 746; *Christianson v. Hughes*, 18 N. D. 287, 138 Am. St. Rep. 762, 122 N. W. 384,—holding that no lien attached under section 6237 of Revised Codes of 1905, for material furnished in painting wife's house where material was ordered by husband against wife's protest and she did not know where material was purchased and did not give notice of objection to materialman; *Clark v. North*, 131 Wis. 604, 11 L.R.A. (N.S.) 770, 111 N. W. 681, 11 A. & E. Ann. Cas. 1080, holding mere acquiescence in the erection or alteration with knowledge is not sufficient evidence of consent which the statute requires; *Allis-Chalmers Co. v. Central Trust Co.* 39 L.R.A. (N.S.) 84, 111 C. C. A. 428, 190 Fed. 703, holding that mortgagee not in pos-

session is not owner within meaning of mechanic's lien statute, which gives lien for material furnished "by consent of owner."

Cited in note (83 Am. St. Rep. 523) on mechanics' liens on separate property of married woman.

Estoppel.

Cited in *Weidemann v. Springfield Breweries Co.* 78 Conn. 664, 63 Atl. 162, holding party setting up estoppel by conduct must show that he exercised due diligence to know the truth.

Cited in note (57 Am. St. Rep. 176) on estoppel of married women.

9 L. R. A. 113, *CAREY v. MACKEY*, 82 Me. 516, 17 Am. St. Rep. 500, 20 Atl. 84.

Liquidated damages and penalty.

Cited in footnotes to *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond a penalty, instead of liquidated damages; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time a penalty, when actual damages easily assessable; *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid city for failure to complete electric light plant within specified time liquidated damages; *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per hundred feet for logs not delivered by specified date, one for liquidated damages.

Cited in note (6 Eng. Rul. Cas. 560) as to when stipulation in contract is for a penalty and when for liquidated damages.

Agreements governed by law of place of execution.

Cited in *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 392, holding that law of place where note made governs as to capacity of parties; *Nichols & S. Co. v. Marshall*, 108 Iowa, 521, 79 N. W. 282, holding married woman's contract, void where executed, not enforceable in state of domicile.

Cited in note (5 Eng. Rul. Cas. 867) on law governing validity of contracts.

Contracts for separation.

Cited in *Foote v. Nickerson*, 70 N. H. 514, 54 L. R. A. 564, footnote, p. 554, 48 Atl. 1088, holding man and wife cannot make valid agreement for separation; *Jones v. Jones*, 1 Colo. App. 31, 27 Pac. 85, as to cases where wife would be justified in separating from husband and asking separate maintenance; *Moreland v. Moreland*, 108 Va. 100, 60 S. E. 730, holding under statutes it is not essential to contract of separation making provision for a wife's separate maintenance that the provision for said maintenance be made through intervention of a trustee.

Cited in notes (83 Am. St. Rep. 865, 874, 882) on validity and effect of separation agreements; (12 L.R.A.(N.S.) 850) on validity of agreement between husband and wife renouncing marital rights.

9 L. R. A. 117, *SEARS v. KINGS COUNTY ELEV. R. CO.* 152 Mass. 151, 25 N. E. 98.

Notice and acceptance of corporate action.

Cited in *Benton v. Springfield Y. M. C. A.* 170 Mass. 537, 64 Am. St. Rep. 320, 49 N. E. 928, holding vote by building committee of corporation, choosing architect, not officially communicated to him, no contract; *New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 232, holding offer to exchange bonds contemplated by corporate action cannot be accepted by holders until officially communicated to them; *Lynch v. William Richards Co.* 37 N. B. 554, holding in an action for tolls for driving lumber by the assignee of a river

driving company an allegation in the declaration that the company did by resolution of its board of directors, recorded upon the minutes of the company containing apt words in that behalf assign and transfer to plaintiff a certain debt and chose in action arising therefrom not sufficient allegation of assignment under statute.

Parol evidence.

Cited in *Thomas v. Barnes*, 156 Mass. 584, 31 N. E. 683, holding admissible, parol evidence of delivery and acceptance of written contract signed by one party; *Grath v. Mound City Roofing Tile Co.* 121 Mo. App. 250, 98 S. W. 812, holding parol admissible to fill out incomplete memorandum of contract shown on minutes of corporation.

Right of directors to compensation.

Cited in *Lowe v. Ring*, 123 Wis. 374, 101 N. W. 698, 3 A. & E. Ann. Cas. 731, holding a president of a corporation cannot sue upon an implied contract to enforce a claim for services as an officer, when he is a stockholder or director.

Cited in footnotes to *Bassett v. Fairchild*, 52 L. R. A. 611, which sustains director's right, without direct contract, to compensation for services not connected with office; *Huffaker v. Germania Safety Vault & T. Co.* 46 L. R. A. 384, which holds directors entitled to compensation for extraordinary services at large expense, saving company from bankruptcy.

9 L. R. A. 118, *SOUTHWORTH v. EDMANDS*, 152 Mass. 203, 25 N. E. 106.

To whom property assessable.

Cited in footnote to *Minneapolis & N. Elevator Co. v. Traill County*, 50 L.R.A. 267, which sustains statute taxing grain in elevators, etc., in proprietor's name.

Cited in note (22 Eng. Rul. Cas. 501) on who is in occupation of land for purpose of taxation.

Distinguished in *Kerslake v. Cummings*, 180 Mass. 67, 61 N. E. 760, holding sale of property, occupied by widow and children and owned by children, for taxes assessed to widow, void.

Possession of premises in marital and parental relations.

Cited in *Trefethen v. Lyman*, 90 Me. 383, 38 L. R. A. 193, 60 Am. St. Rep. 271, 38 Atl. 335, holding rent of wife's premises occupied by herself and husband not chargeable to latter; *Kirchgassner v. Rodick*, 170 Mass. 545, 49 N. E. 1015, denying liability of stepfather to stepchild for use and occupation of premises inherited from her father; *Kerslake v. Cummings*, 180 Mass. 68, 61 N. E. 760, holding property of intestate, partly occupied by widow and minor children and partly rented in name of widow, not in latter's possession for purpose of taxation.

Delinquent tax sales.

Cited in *Rothchild Bros. v. Rollinger*, 32 Wash. 313, 73 Pac. 367, holding officer selling land for delinquent irrigation assessments not required to designate in writing, particular portion to be sold.

9 L. R. A. 122, *PROCTOR v. NATIONAL BANK*, 152 Mass. 223, 25 N. E. 81.

Action to enjoin collection of notes against insolvent without accounting for amount already received, in *Batcheller v. National Bank*, 157 Mass. 34, 31 N. E. 481.

Effect of assignment as to residents where transfer made.

Sustained in *Batcheller v. National Bank*, 157 Mass. 34, 31 N. E. 481, upholding right of creditor to prove balance of claim against insolvent, without accounting for amount received from property of debtor out of state.

Approved in *Thompson v. Tetley*, 68 N. H. 482, 41 Atl. 179, denying right of assignee to recover funds obtained by creditor by suit in another state prior to insolvency.

Cited in *King v. Cross*, 175 U. S. 408, 44 L. ed. 216, 20 Sup. Ct. Rep. 131, holding that attachment by resident, of debt due insolvent nonresident, prevails over assignment; *Allen v. Buchanan*, 97 Ala. 403, 38 Am. St. Rep. 187, 11 So. 777, holding that equity will enjoin seizure by resident creditor of exempt property of resident debtor in another state; *Bloomington v. Weil*, 29 Wash. 624, 70 Pac. 94, denying right of foreign creditor to attach real estate of foreign debtor after voluntary general assignment to foreign assignee, properly recorded.

Cited in note (23 L. R. A. 41) on assignments under statute as to residents where insolvency transfer was made.

Distinguished in *Crippen v. Rogers*, 67 N. H. 211, 25 L. R. A. 822, 50 Atl. 346, holding that sale of notes by nonresident to avoid insolvency laws of his state gives transferee no superior rights.

Injunction against proceedings at law.

Cited in footnote to *Kaufmann v. Liggett*, 67 L.R.A. 353, which sustains right to injunction against proceedings at law to obtain possession of leased property where lessee has an equitable right to a continuance of possession.

Cited in note (122 Am. St. Rep. 452) on protection, by injunction, of exemptions against proceedings in another state.

9 L. R. A. 124, *Re THIRD AVE. R. CO.* 121 N. Y. 536, 24 N. E. 951.

Motive power and change of same.

Cited in *People ex rel. Luckings v. Railroad Comrs.* 30 App. Div. 74, 51 N. Y. Supp. 781, holding consent to change of motive power irrevocable in absence of statutory authority; *Re Rochester & L. O. R. Co.* 51 App. Div. 67, 64 N. Y. Supp. 429, holding lineal foot frontage rule not adopted by omitting "in value" after "property" in provision for consent of owners to proposed change of motive power; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 733, holding municipal consent to change of motive power does not create or renew grant of railway franchise; *St. Michael's P. E. Church v. Forty-Second Street M. & St. N. Ave. R. Co.* 26 Misc. 605, 57 N. Y. Supp. 881, holding that under authorization to maintain street railway, change of motive power can only be made as provided by law; *Potter v. Collis*, 19 App. Div. 402, 46 N. Y. Supp. 471, holding injunction will not issue to restrain authorized change of motive power, where only formal permit unobtained.

Cited in footnotes to *Hooper v. Baltimore City Pass. R. Co.* 38 L. R. A. 509, which authorizes use of trolley system for street railway without sanction of municipal authorities; *Chicago General R. Co. v. Chicago City R. Co.* 50 L. R. A. 734, which denies liability for collision with cars of other company because of running cable cars under authority to use animal power only.

Cited in notes (10 L.R.A. 176) on regulations as to motive power for street railroads; (36 L.R.A.(N.S.) 802) on abutter's right to compensation on change of motive power by railroads in streets.

Consent of abutting owners as essential to construction and operation of street railway.

Cited in *Re Long Island R. Co.* 189 N. Y. 444, 82 N. E. 443, holding statute authorizing construction and operation of a new railroad not operative unless constitutional provision requiring consent of adjoining owners or consent of appellate division and local authorities in charge of street.

Mandamus.

Cited in *Lauritsen v. Seward*, 99 Minn. 325, 109 N. W. 404, as to nature of writ of mandamus.

9 L. R. A. 126, *Re GILL*, 79 Iowa, 296, 44 N. W. 553

Inheritance by or from aliens.

Cited in notes (21 L. R. A. 243) on right of nonresident widow to statutory allowance; (31 L. R. A. 93) on effect of state Constitutions and statutes on question of inheritance by or from alien; (31 L. R. A. 179) on alien's right to inherit; (11 L.R.A.(N.S.) 362) on widow's right to exemption or allowance for support out of personal assets of nonresident husband.

Purchasers or lienors.

Approved in *Bennett v. Hibbert*, 88 Iowa, 164, 55 N. W. 93, holding acquisition by devise within statute permitting aliens to acquire land by "purchase;" *Boggs v. Douglass*, 105 Iowa, 347, 75 N. W. 185, holding judgment plaintiff in possession of land cannot apply rents and profits therefrom to satisfaction of judgment as against owner thereof not judgment defendant.

Cited in *Central Trust Co. v. Stepanek*, 138 Iowa, 136, 15 L.R.A.(N.S.) 1031, 128 Am. St. Rep. 175, 115 N. W. 891, holding assignee of chattel mortgage "purchaser" under statute requiring recording of chattel mortgage where there is no change of possession.

9 L. R. A. 127, *HANNAN v. WILLIAMSBURGH CITY F. INS. CO.* 81 Mich. 556, 45 N. W. 1120.

What insurance policy covers.

Followed without discussion in *Hannan v. Westchester F. Ins. Co.* 81 Mich. 561, 45 N. W. 1122.

Cited in *Guthrie Laundry Co. v. Northern Assur. Co.* 17 Okla. 577, 87 Pac. 649, 10 A. & E. Ann. Cas. 936, holding policy on a "2-story basement and brick building, with metal roof, and its additions adjoining and communicating, including foundations, occupied as a steam laundry" included boiler house connected by steam pipe and an overhead arch.

Cited in notes (33 L.R.A.(N.S.) 160, 162) on import of word "additions" in fire insurance policy; (14 Eng. Rul. Cas. 26) on what insurance policy covers.

9 L. R. A. 129, *WOOLDRIDGE v. STERN*, 42 Fed. 311.

Statute of frauds.

Cited in footnotes to *Hand v. Osgood*, 30 L. R. A. 379, which holds void, oral lease of land for one year with privilege of three; *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds; *Weatherford, M. W. & N. W. R. Co. v. Wood*, 28 L. R. A. 526, which holds not within statute of frauds, contract to give pass to man and his family annually for ten years; *Brown v. Throop*, 13 L. R. A. 646, which holds parol agreement in March for lease of ice-house for one year from April, to be left full on surrendering possession, valid.

Cited in notes (10 L.R.A. 727) on lease within statute of frauds; (15 L.R.A. (N.S.) 320) on effect of statute of frauds upon parol contracts for services performable within a year, though not so intended; (138 Am. St. Rep. 602, 604) on agreements not to be performed within a year.

9 L. R. A. 132, *MacKAY v. OHIO RIVER R. CO.* 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737.

Ejection of passenger; refusal to take ticket.

Cited in *Callaway v. Mellett*, 15 Ind. App. 369, 57 Am. St. Rep. 238, 44 N. E. 198, holding railroad liable for expulsion of one presenting expired ticket, accepted without fault upon application and payment for proper ticket; *Price v. Chesapeake & O. R. Co.* 46 W. Va. 542, 35 N. E. 255, holding railroad not liable for damages for ejection of passenger not showing ticket or conductor's check; *Hot Springs R. Co. v. Deloney*, 65 Ark. 181, 67 Am. St. Rep. 913, 45 S. W. 351, holding that passenger may recover damages when ejected upon presenting ticket improperly made out, and refusing to pay fare; *Trezona v. Chicago G. W. R. Co.* 107 Iowa, 27, 43 L. R. A. 139, 77 N. W. 486; *Grogan v. Chesapeake & O. R. R. Co.* 39 W. Va. 416, 19 S. E. 563,—holding that passenger presenting expired ticket may be ejected with necessary force, upon refusal to pay fare or get off; *Western Maryland R. Co. v. Stocksedale*, 83 Md. 254, 34 Atl. 880, holding railroad not liable for expulsion of passenger presenting return coupon dependent for validity upon known condition unperformed; *Kiley v. Chicago City R. Co.* 189 Ill. 390, 52 L. R. A. 628, 82 Am. St. Rep. 460, 59 N. E. 794, holding tender of transfer which should be valid, but is not, because of conductor's mistake, will not prevent expulsion with reasonable force; *Mahoney v. Detroit Street R. Co.* 93 Mich. 616, 18 L. R. A. 337, 32 Am. St. Rep. 528, 53 N. W. 793, holding passenger failing to ask or obtain transfer may be ejected from car to which he changes; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 181, 66 N. E. 950 (dissenting opinion), majority holding street car company liable for ejection of passenger through mistake of conductor on another car in giving transfer; *Norton v. Consolidated R. Co.* 79 Conn. 114, 118 Am. St. Rep. 132, 63 Atl. 1087, 6 A. & E. Ann. Cas. 943, holding passenger entitled only to nominal damages, who by company's negligence lacks proper transfer, but refusing to pay fare is put off with no unnecessary force; *Shelton v. Erie R. Co.* 73 N. J. L. 563, 9 L.R.A. (N.S.) 729, 118 Am. St. Rep. 704, 66 Atl. 403, 9 A. & E. Ann. Cas. 883, holding expulsion from a railroad train of person who refuses to pay to the conductor any fare other than the tender of a limited ticket that on its face has expired is not actionable although agent made a mistake in selling passenger the ticket; *Virginia & S. W. R. Co. v. Hill*, 105 Va. 737, 6 L.R.A. (N.S.) 902, 54 S. E. 872, holding conductor sole judge of ticket.

Cited in footnotes to *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round-trip ticket unstamped from inability to find agent; *Atkinson v. Southern R. Co.* 55 L. R. A. 223, which holds carrier liable for ejection of passenger because train does not stop at his station as ticket seller had incorrectly told him; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, which holds face of ticket conclusive evidence to conductor as to terms of contract; *Wardwell v. Chicago, M. & St. P. R. Co.* 13 L. R. A. 596, which authorizes ejection for refusal to make up deficiency of one from whom less than full fare mistakenly received; *Kansas City, M. & B. R. Co. v. Riley*, 13 L. R. A. 38, which holds carrier liable for conductor's refusal to accept return coupon; *United Railways & Electric Co. v. Hardesty*, 57 L. R. A. 275, which denies carrier's duty to accept coupon detached from commutation book; *Mahoney v. Detroit Street R. Co.* 18 L. R. A. 335, which authorizes ejection of one refusing to pay fare without having previously obtained transfer; *Illinois C. R. Co. v. Harper*, 64 L. R. A. 283, which holds passenger entitled to damages from carrier for wrongful ejection due to error of ticket agent; *Texas & Pacific R. Co. v. Payne*, 70 L.R.A. 946, which holds refusal of agent at intermediate terminal to make necessary indorsement on return trip ticket "because his instructions were dif-

ferent" not final breach of contract by carrier so as to preclude recovery by passenger for damages from subsequent ejection.

Cited in notes (12 L.R.A. 824) on ejection of passenger for refusal to pay fare; (122 Am. St. Rep. 639) on rule that ejection is breach of contract and not tort.

Distinguished in *Moore v. Ohio River R. Co.* 41 W. Va. 172, 23 N. E. 539, holding that conductor may take up mileage known to passenger to be invalid, and eject passenger with necessary force upon refusal to pay fare; *Trice v. Chesapeake & O. R. Co.* 40 W. Va. 275, 21 S. E. 1022, holding railroad liable for ejection of passenger who tenders unexpired mileage book as indicated by correction of date thereon, where conductor does not avail himself of means to ascertain who made correction; *Jevons v. Union P. R. Co.* 70 Kan. 496, 78 Pac. 817, holding where a railroad ticket correctly recites the date of its issuance, but is marked with a punch in a manner that, according to its printed statements, indicates that it had expired prior to that date, it cannot be said as a matter of law that it is void and that its holder may not recover damages for being expelled from a train when he presents it for passage; *Breen v. St. Louis Transit Co.* 108 Mo. App. 448, 83 S. W. 998, holding passenger tendering lawful money for his fare which was refused as counterfeit not obliged to leave car.

Denied in *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 131, 46 L. R. A. 615, 76 Am. St. Rep. 639, 52 S. W. 872, holding mistake of conductor in punching wrong hour on transfer ticket will not defeat his right of passage; *Cincinnati, N. O. & T. P. R. Co. v. Harris*, 115 Tenn. 509, 5 L.R.A.(N.S.) 782, 91 S. W. 211, holding passenger purchasing transportation from initial carrier on its line and line of connecting carrier and receiving an order for ticket on agent of connecting carrier which she was unable to obtain by reason of negligence of such agent was entitled to damages for indignities offered by conductor of connecting carrier when she presented order to him instead of ticket.

Disapproved in *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 173, 41 N. E. 712, holding railroad liable for damages in ejecting passenger with ticket to intermediate station, sold through agent's fault; *Morrill v. Minneapolis Street R. Co.* 103 Minn. 372, 123 Am. St. Rep. 341, 115 N. W. 395, holding the duty to see that a proper transfer slip is given rests upon conductor and not upon passenger.

Remedy for expulsion.

Cited in *Lovings v. Norfolk & W. R. Co.* 47 W. Va. 592, 35 S. E. 962, sustaining recovery of damages for wrong by passenger ejected upon failure to produce ticket wrongfully taken up by another conductor, and refusal to pay fare.

Distinguished in *Boster v. Chesapeake & O. R. Co.* 36 W. Va. 327, 15 S. E. 158, holding trespass lies for ejection, without force, of passenger offering to pay fare; *Sheets v. Ohio River R. Co.* 39 W. Va. 478, 20 S. E. 566, holding case lies for ejection of passenger by conductor, acting through want of necessary information.

Disapproved in *Pouillin v. Canadian P. R. Co.* 47 Fed. 861, holding action *ex delicto* lies for expulsion of passenger presenting ticket, invalid because of agent's mistake.

Implied contract between carrier and passenger.

Cited in *Chudnovski v. Eckels*, 232 Ill. 318, 83 N. E. 846, holding it exists by reason of the relation.

9 L. R. A. 135, *HEARTT v. KRUGER*, 121 N. Y. 386, 18 Am. St. Rep. 829, 24 N. E. 841.

Party walls and easements.

Approved in *Duncan v. Rodecker*, 90 Wis. 4, 62 N. W. 533, holding destruction of buildings terminates party-wall agreement; *Bonney v. Greenwood*, 96 Me. 342, 52 Atl. 786, holding covenant that grantor's wall shall forever remain partition wall terminated by destruction of wall; *Shirley v. Crabb*, 138 Ind. 203, 46 Am. St. Rep. 376, 37 N. E. 130, holding right under reservation of necessary use of stairway and hall extinguished by burning of building; *Odd Fellows' Asso. v. Hegele*, 24 Or. 24, 32 Pac. 679, holding party-wall agreement, to run so long as such wall shall stand, not creative of perpetual easement; *Corn v. Bass*, 43 App. Div. 54, 59 N. Y. Supp. 315, holding party-wall agreement running with land, providing for contribution toward repairing and rebuilding same, an encumbrance; *De Baun v. Moore*, 22 App. Div. 487, 48 N. Y. Supp. 16, holding purchaser of interest in party wall cannot require closing of existing windows not interfering with his beneficial use; *Schaefer v. Blumenthal*, 51 App. Div. 519, 64 N. Y. Supp. 687, holding title to premises not marketable where party walls of house not upon lot; *North Powder Mill. Co. v. Coughanour*, 34 Or. 18, 54 Pac. 223, holding permanent right to divert not created by grant of land with appurtenant water rights for growing wheat; *McKenna v. Eaton*, 182 Mass. 348, 94 Am. St. Rep. 661, 65 N. E. 382, holding right of support and shelter on dividing line of double house lost by destruction of other half by lawful order of board of health; *Johnston v. Long Island Invest. & Improv. Co.* 85 App. Div. 64, 82 N. Y. Supp. 961, holding conveyance, subject to encroachment of frame building, not a reservation of the fee; *Deeves v. Constable*, 87 App. Div. 358, 84 N. Y. Supp. 592, holding easement requiring setting back of buildings from street line extinguished by change of residential into business street.

Cited in *Jackson v. Bruns*, 129 Iowa, 618, 3 L.R.A.(N.S.) 512, 106 N. W. 1, holding the owner of the second story of a building, in the absence of contract, has no equitable right to compel the owner of the first story to repair his foundation and walls for the purpose of furnishing support for the second story, where the defective condition was the result of natural deterioration due to the elements and not the fault of the owner; *Bowhay v. Richards*, 81 Neb. 767, 19 L.R.A.(N.S.) 884, 116 N. W. 677, holding where a wall is entirely upon the property of one party, the right of adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon the destruction of building by fire; *Norris v. Hoffman*, 133 App. Div. 599, 118 N. Y. Supp. 156, holding an easement created by a deed is not extinguished by mere nonuser; *Kerwin v. Post*, 120 App. Div. 181, 104 N. Y. Supp. 1005, holding the easement of each proprietor in a party wall ceases with the existence of the state of things which created it and when that has transpired there is no right in one owner in case the other refuses to co-operate to rebuild the wall and claim contribution.

Cited in footnotes to *Clemens v. Speed*, 19 L. R. A. 240, which denies to party-wall owners easement from support of buildings; *Putzell v. Drovers & M. Nat. Bank*, 22 L. R. A. 632, which upholds right to remove boundary wall for erection of better wall; *Burr v. Lamaster*, 9 L. R. A. 637, which holds party wall and agreement to pay for same on using it an encumbrance; *Harber v. Evans*, 10 L. R. A. 41, which authorizes injunction against making openings in party wall.

Cited in note (89 Am. St. Rep. 937) on party walls.

Distinguished in *Douglas v. Coonley*, 156 N. Y. 525, 66 Am. St. Rep. 580, 51 N. E. 283, *Reversing* 84 Hun, 162, 32 N. Y. Supp. 444, holding that reconstruc-

tion of party wall destroyed by fire operates to revive easement of door therein and passage upon adjoining stairs; *Remsen v. Wingert*, 112 App. Div. 235, 98 N. Y. Supp. 388, holding an easement in light and air created by deed, unlike an easement in a party wall created by implied agreement, survives the destruction of the building and is not lost by nonuser.

9 L. R. A. 138, *AMERICAN EXP. CO. v. PEOPLE*, 133 Ill. 649, 23 Am. St. Rep. 641, 24 N. E. 758.

Fish and game laws.

Approved in *Organ v. State*, 56 Ark. 270, 19 S. W. 840, holding prohibition of exportation of game and fish not violation of commerce clause; *State v. Rodman*, 58 Minn. 401, 59 N. W. 1098, sustaining prohibition of possession during closed season of game lawfully killed; *Smith v. State*, 155 Ind. 614, 51 L. R. A. 406, footnote, p. 404, 58 N. E. 1044, holding prohibition of possession of quail during closed season, although same lawfully killed, valid; *Ex parte Kenneke*, 136 Cal. 529, 89 Am. St. Rep. 177, 69 Pac. 261, upholding statute making buying or selling of quail, a misdemeanor; *Geer v. Connecticut*, 161 U. S. 528, 40 L. ed. 796, 16 Sup. Ct. Rep. 600, Affirming *State v. Geer*, 61 Conn. 152, 13 L. R. A. 806, 3 Inters. Com. Rep. 734, 22 Atl. 1012, holding prohibition of fowling for purpose of conveying beyond state limits, valid; *State v. Harrub*, 95 Ala. 185, 15 L. R. A. 764, 4 Inters. Com. Rep. 103, 36 Am. St. Rep. 195, 10 So. 752, holding act prohibiting exportation of oysters in shells, taken in public waters, or taking thereof by nonresident, valid; *State v. Dow*, 70 N. H. 288, 53 L. R. A. 316, 47 Atl. 734, holding statute prohibiting fishing for trout with intent to sell or trade, proper protection of public right of fishery; *People v. O'Neil*, 110 Mich. 328, 33 L. R. A. 697, 68 N. W. 227, sustaining prohibition of sale of game or fish during closed season or during year, although same applies to imported game or fish; *Javins v. United States*, 11 App. D. C. 350, holding possession of game during closed season violates prohibition thereof, although same taken or killed in foreign state; *Stevens v. State*, 89 Md. 674, 43 Atl. 929, holding statute prohibiting possession of or trading in specified game in certain localities during closed season valid; *People v. Van Pelt*, 130 Mich. 625, 90 N. W. 424, upholding power of state to make such restrictions for protection of game as it sees fit.

Cited in *State v. Mallory*, 73 Ark. 254, 67 L.R.A. 780, 83 S. W. 955, 3 A. & E. Ann. Cas. 852; *People v. Booth Fisheries Co.* 253 Ill. 429, 97 N. E. 837,—holding that legislature has power to prohibit killing or taking wild game; *State v. Heger*, 194 Mo. 711, 93 S. W. 252, holding state may grant to individuals the right to hunt and kill game at such times and upon such terms and under such restrictions as it may seem proper; *Ex parte Blardone*, 55 Tex. Crim. Rep. 192, 21 L.R.A.(N.S.) 610, 115 S. W. 838, holding law prohibiting sale of game birds valid; *Raymond v. Kibbe*, 43 Tex. Civ. App. 215, 95 S. W. 727, holding legislature has right to prescribe a distinct set of rules governing the taking of shrimp, and as the occupation is open to all such regulations are not class legislation; *State v. Niles*, 78 Vt. 272, 112 Am. St. Rep. 917, 62 Atl. 795, holding each resident of state has a qualified property of the wild game therein, namely, the constitutional right to hunt and take the same subject to the regulations as the state in the exercise of its police power may impose for common benefit of all its people, but a nonresident has no property whatever in such wild game.

Cited in footnote to *State v. Snowman*, 50 L. R. A. 544, which sustains statute requiring license for business of guiding in inland fishing and forest hunting.

Cited in notes (13 L.R.A. 804) on game laws as affecting interstate com-

merce; (21 L.R.A.(N.S.) 608) on power of legislature to prohibit sale of game taken within state; (78 Am. St. Rep. 247, 248) on fish and game laws.

9 L. R. A. 140, MANCHESTER LOCOMOTIVE WORKS v. TRUESDALE, 44 Minn. 115, 46 N. W. 301.

Priority of lien.

Cited in Hickson Lumber Co. v. Gay Lumber Co. 150 N. C. 288, 21 L.R.A. (N.S.) 846, 63 S. E. 1045, holding that rights of one advancing money to procure realty are subordinate to recorded mortgage of after-acquired property.

Cited in footnote to Illinois Trust & Sav. Bank v. Doud, 52 L. R. A. 481, which holds claim for money loaned to pay interest on mortgage debt inferior to lien of prior mortgage.

Cited in note (54 Am. St. Rep. 413) on claims taking precedence over mortgages of railways and similar property.

Mortgage of after-acquired corporate property.

Cited in Murray v. Farmville & P. R. Co. 101 Va. 269, 43 S. E. 553, on mortgage of after-acquired property by corporation being subject to same rule of construction as a similar mortgage by an individual.

Consideration in contract for sale.

Cited in Kilmer v. Moneyweight Scale Co. 36 Ind. App. 572, 76 N. E. 271, holding that in contract of sale of article, title to remain in vendor until paid for, and possession and use thereof in vendee, there is sufficient consideration for agreement to pay purchase price.

Effect of delivery on vendor's lien.

Cited in note (83 Am. St. Rep. 457) on effect of delivery of personalty on lien of vendor.

9 L. R. A. 145, ALFF v. RADAM, 77 Tex. 530, 19 Am. St. Rep. 792, 14 S. W. 164.

Trade-mark; unfair competition in business.

Reaffirmed in Radam v. Microbe Destroyer Co. 81 Tex. 129, 26 Am. St. Rep. 783, 16 S. W. 990, holding use of words "microbe killer" as trade-mark not prevent use of words, "microbe destroyer" by another company.

Cited in Sterling Remedy Co. v. Eureka Chemical & Mfg. Co. 70 Fed. 707, refusing to enjoin use of name "Baco-Curo" and of advertising bearing general resemblance only to that of concern selling similar article called "No-To-Bac;" Goodman v. Bohls, 3 Tex. Civ. App. 191, 22 S. W. 11, holding goodwill and business injured by use of tobacco package so similar to another as to deceive public; Scanlan v. Williams, 53 Tex. Civ. App. 32, 114 S. W. 862, to the point that injunction will lie to prevent fraudulent use of name to deceive public; Trinidad Asphalt Mfg. Co. v. Standard Paint Co. 90 C. C. A. 195, 163 Fed. 980, holding word "Ruberoid" which is merely a misspelling of a descriptive term cannot be appropriated as a trademark.

Cited in footnotes to Cady v. Schultz, 29 L. R. A. 524, which holds no property right acquirable in words "scientific dentistry at higher prices;" McVey v. Brendel, 13 L. R. A. 377, which holds equity will not protect labor union in use of non-trade-mark label; American Waltham Watch Co. v. United States Watch Co. 43 L. R. A. 826, which authorizes injunction against deceptive use of word "Waltham" by other manufacturer of watches at same place; Schmidt v. Brieg, 22 L. R. A. 790, which holds words "Sarsaparilla and Iron" not claimable as trade-mark; Kyle v. Perfection Mattress Co. 50 L. R. A. 628, which holds word "perfection" as name or mattress valid trade-mark; Hygeia Distilled Water Co. v. Hygeia Ice Co. 49 L. R. A. 147, which holds use of word "Hygeia," as indicating

name of goddess, but not in natural signification of healthfulness, protected as trade-mark; *Koehler v. Sanders*, 9 L. R. A. 576, which denies right to appropriate word "international" as trade-mark; *Bolander v. Peterson*, 11 L. R. A. 350, which holds words "Svenska Snusmagasinet" cannot be exclusively claimed as trade-mark; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, which authorizes injunction against use of geographical name on flour made elsewhere, of wheat of different grade.

Cited in notes (19 L. R. A. 56) on invalidity of deceptive trade-mark; (17 L. R. A. 129-131) on competition in business, use of trademark; (85 Am. St. Rep. 98) on what words or phrases may constitute a valid trademark; (25 Eng. Rul. Cas. 222) on infringement of trademark.

9 L. R. A. 152, *BARDWELL v. ANDERSON*, 44 Minn. 97, 20 Am. St. Rep. 547, 46 N. W. 315.

Due process of law.

Cited in *State v. Sponaugle*, 45 W. Va. 421, 43 L. R. A. 731, 32 S. E. 283, holding forfeiture of land for nonpayment of taxes, due process.

Cited in note (43 Am. St. Rep. 532) on due process of law as applied to insane persons.

— As to service, notice, and hearing.

Cited in *Hinekley v. Kettle River Co.* 70 Minn. 109, 72 N. W. 835, holding service on domestic corporation, without officer in state, by depositing summons in office of secretary of state, sufficient; *Easton v. Childs*, 67 Minn. 245, 69 N. W. 903, holding sheriff's return on summons, that defendant cannot be found, need not be filed as prerequisite to publication; *Davis v. St. Louis County*, 65 Minn. 313, 33 L. R. A. 434, 60 Am. St. Rep. 475, 67 N. W. 997, holding act providing for location of land by county surveyor on application of resident owners without notice to nonresident owners, void; *McNamara v. Casserly*, 61 Minn. 345, 63 N. W. 880, holding resident owners of land, under decree of distribution by probate court, entitled to personal notice of direct attack on that decree; *Carlson v. Phinney*, 56 Minn. 478, 58 N. W. 38, holding that nonresident defendant, failing to plead within prescribed time after substituted service, will not be permitted to defend; *State ex rel. Blaisdell v. Billings*, 55 Minn. 473, 43 Am. St. Rep. 524, 57 N. W. 794, holding act providing for commitment of insane persons, without hearing of any kind, not due process of law; *Smith v. Hurd*, 50 Minn. 506, 36 Am. St. Rep. 661, 52 N. W. 922, holding section of act providing for service by publication in foreclosing mechanic's lien void, although defendants are nonresidents; *Irwin v. Pierro*, 44 Minn. 491, 47 N. W. 154, holding "decree of heirship," obtained by simply presenting *ex parte* affidavit to judge, without due process of law; *State ex rel. Andreu v. Canfield*, 40 Fla. 65, 42 L. R. A. 82, 23 So. 591 (dissenting opinion), majority holding that record of writ of error in minute-book of court serves as notice to defendants in error that writ removed; *Raher v. Raher*, 150 Iowa, 535, 35 L.R.A.(N.S.) 306, 129 N. W. 494 (dissenting opinion), on power of legislature to provide for substituted service of notice upon resident, temporarily absent; *Fenton v. Minnesota Title Ins. & Trust Co.* 15 N. D. 372, 125 Am. St. Rep. 599, 109 N. W. 363, holding that publication of summons without description of the land is insufficient notice to adverse claimant in action to quiet title; *Nelson v. Chicago, B. & Q. R. Co.* 225 Ill. 209, 8 L.R.A.(N.S.) 1191, 116 Am. St. Rep. 133, 80 N. E. 109, holding that personal judgment may be rendered against resident defendant upon constructive service by publication and mail, where statute authorizes suit in a county and defendant cannot be found therein.

Cited in notes (50 L. R. A. 586, 588) on what service of process is sufficient to constitute due process of law; (16 L. R. A. 233) on validity of personal judgments rendered on constructive service of process; (35 L.R.A.(N.S.) 295) on constructive or substituted service on resident as due process; (53 Am. St. Rep. 181) on mode as to service of process on absent citizens.

Distinguished in *Shepherd v. Ware*, 46 Minn. 177, 24 Am. St. Rep. 212, 48 N. W. 773, holding service of summons by publication under statute, in action to quiet title against party named and parties unknown, sufficient as action *in rem*; *McClymond v. Noble*, 84 Minn. 331, 87 Am. St. Rep. 354, 87 N. W. 838, holding service by publication sufficient in action to determine adverse claims to land against defendant named and owners unknown.

Statute of limitations.

Cited in *Carson v. Cochran*, 52 Minn. 75, 53 N. W. 1130, holding right to foreclose mortgage not barred by statute of limitations when payments made within fifteen years.

Nature of action to foreclose a mortgage.

Cited in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 152, 70 L.R.A. 816, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, holding that action to foreclose a mortgage is an action in personam.

9 L. R. A. 155, *FERGUSON v. NEILSON*, 17 R. I. 81, 33 Am. St. Rep. 855, 20 Atl. 229.

Liability of owner of building for injuries.

Cited in *Collier v. Struby*, 99 Tenn. 251, 47 S. W. 90, holding married woman not liable for negligence of agent of her building, by which passenger in elevator is injured; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 673, 46 S. W. 63, holding owner of leased building liable for death of person rightfully in house, who stepped through door into open space.

Liability of wife for torts of servants.

Cited in note (131 Am. St. Rep. 136) on liability of married women for torts of servants.

Liability of husband for torts of wife.

Cited in note (92 Am. St. Rep. 164, 165) on liability of husband for torts of wife.

9 L. R. A. 156, *HOVEY v. EAST PROVIDENCE*, 17 R. I. 80, 20 Atl. 205.

Mechanics' liens on public buildings.

Cited in *Atascosa County v. Angus*, 83 Tex. 203, 29 Am. St. Rep. 637, 18 S. W. 563, holding grant of lien against "all buildings" does not include public buildings unless specified; *Phillips v. University of Virginia*, 97 Va. 473, 47 L. R. A. 285, 34 S. E. 66, holding lien cannot be asserted upon state university unless so provided; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533, holding lien for labor cannot be established upon public schoolhouse.

Cited in footnote to *Steger v. Arctic Refrigerating Co.* 11 L. R. A. 580, which holds lien for laying pipes on land of strangers for refrigerating company enforceable against entire plant of company.

Cited in note (35 L. R. A. 143) on mechanics' liens on public property.

Liability of state to garnishment.

Cited in *Tucker v. Pollock*, 21 R. I. 320, 43 Atl. 369, holding state cannot be sued in garnishment, by making agent a nominal defendant; *Re Abolishing of School Districts*, 27 R. I. 602, 65 Atl. 302, as to property of municipal corporation not being subject to attachment or other process.

9 L. R. A. 157, *BECKE v. MISSOURI P. R. CO.* 102 Mo. 544, 13 S. W. 1053.

Imputed negligence.

Cited in *Dickson v. Missouri P. R. Co.* 104 Mo. 504, 16 S. W. 381, holding negligence of driver of wagon, not under control of injured party, cannot be imputed to him; *Profit v. Chicago G. W. R. Co.* 91 Mo. App. 375, holding father's negligence in driving over railroad tracks not imputable to infant child; *Johnson v. St. Joseph*, 96 Mo. App. 671, 71 S. W. 106, holding concurrent negligence of driver of wagon, not shown to have been in employ of injured woman, not imputable to her; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 417, 49 N. W. 670, holding negligence of driver of vehicle not imputable to child being driven; *O'Rourke v. Lindell R. Co.* 142 Mo. 352, 44 S. W. 254, holding negligence of officials on railway, one of whose passengers was injured by car of another railway not imputable to passenger; *Cotton v. Willmar & S. F. R. Co.* 99 Minn. 371, 8 L.R.A.(N.S.) 653, 116 Am. St. Rep. 422, 109 N. W. 835, 9 A. & E. Ann. Cas. 935; *Sluder v. St. Louis Transit Co.* 189 Mo. 139, 5 L.R.A.(N.S.) 206, 88 S. W. 648; *Petersen v. St. Louis Transit Co.* 199 Mo. 341, 97 S. W. 860; *Stotter v. Chicago & A. R. Co.* 200 Mo. 143, 98 S. W. 509; *Marsh v. Kansas City Southern R. Co.* 104 Mo. App. 586, 78 S. W. 284; *Burleigh v. St. Louis Transit Co.* 124 Mo. App. 732, 102 S. W. 621; *Zalotuchin v. Metropolitan Street R. Co.* 127 Mo. App. 586, 106 S. W. 548; *Loso v. Lancaster County*, 77 Neb. 473, 8 L.R.A.(N.S.) 630, 109 N. W. 752; *Foley v. East Flamborough Twp.* 26 Ont. App. Rep. 47,—holding contributory negligence of driver of vehicle is not imputed to an occupant thereof who has in good faith entrusted himself to driver's care; *Moon v. St. Louis Transit Co.* 237 Mo. 435, 141 S. W. 870, holding that negligence of master's servant is not imputable to master's wife.

Cited in footnotes to *East Tennessee, V. & G. R. Co. v. Markens*, 14 L. R. A. 281, which holds hack driver's negligence in colliding with train not imputable to passenger; *Union P. R. Co. v. Lapsley*, 16 L. R. A. 800, which holds negligence of carriage owner in driving team not imputable to passenger; *Mullen v. Owosso*, 23 L. R. A. 693, which holds negligence of driver of private carriage imputable to woman voluntarily riding with him; *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hirer of team and of driver bound to check latter's attempt to cross track without stopping and listening for train; *Kopplitz v. St. Paul*, 58 L. R. A. 74, which holds negligence of omnibus driver not imputable to member of picnic party carried; *Duval v. Atlantic Coast Line R. Co.* 65 L.R.A. 722, which holds father's negligence in driving not imputable to daughter riding with him; *McKernan v. Detroit Citizens' Street R. Co.* 68 L.R.A. 347, which holds negligence of driver of fire engine in colliding with street car not imputable to fireman riding on engine; *St. Louis & S. F. R. Co. v. McFall*, 69 L.R.A. 217, which holds engineer's negligence resulting in collision not imputable to conductor; *Markowitz v. Metropolitan Street R. Co.* 69 L.R.A. 389, which holds negligence of driver imputable to employer seated beside him; *Colorado & Southern R. Co. v. Thomas*, 70 L.R.A. 681, which denies right of recovery for death by collision with train of one joining with driver of conveyance in testing danger of attempting to cross tracks in front of train.

Cited in notes (12 L. R. A. 282) on imputing carrier's negligence to passenger (37 L. R. A. 74), on which of two or more persons is the master of another who is conceded to be the servant of one of them, as bearing on doctrine of imputed negligence; (8 L.R.A.(N.S.) 601, 607, 614, 621) on imputed negligence of driver to passenger; (110 Am. St. Rep. 290) on imputed negligence.

Distinguished in *Bailey v. Citizens R. Co.* 152 Mo. 462, 52 S. W. 406, holding railroad company, repairing crossing without negligence, not liable for injury to conductor of another company due to negligence of his gripman in making cross-

ing; *Munger v. Sedalia*, 66 Mo. App. 632, holding negligence of husband, driving with wife when buggy overturned, cannot be imputed to her by mere relationship of marriage.

Question for jury as to negligence.

Cited in *Schroeder v. Chicago & A. R. Co.* 108 Mo. 333, 18 L. R. A. 831, 18 S. W. 1094, holding declaration by court that servant's obedience to orders is negligence justifiable only where no other conclusion fairly deducible from evidence; *Reed v. St. Louis, I. M. & S. R. Co.* 107 Mo. App. 246, 80 S. W. 919, holding where the facts with respect to contributory negligence are such that reasonable minds might differ as to their effect, the question of negligence is for the jury.

Speed at railway crossing.

Cited in *McGhee v. Campbell*, 42 C. C. A. 98, 101 Fed. 940, holding running of engine at rapid speed at night without headlight, negligence; *Everett v. St. Louis & S. F. R. Co.* 214 Mo. 96, 112 S. W. 486, holding same.

Cited in footnotes to *Evison v. Chicago St. P. & M. & O. R. Co.* 11 L. R. A. 435, which holds ordinance limiting speed of railway trains in city unreasonable and void in suburbs.

Cited in note (3 L.R.A.(N.S.) 780) on speed of train at country crossing as negligence.

Contributory negligence.

Cited in footnotes to *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence; *Louisville & N. R. Co. v. Webb*, 11 L. R. A. 674, which holds failure to use senses before crossing track not excused by unlawful speed of train and watchman's failure to do duty; *Passman v. West Jersey & Seashore R. Co.* 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution.

Statutes providing for recovery for death by wrongful act.

Cited in *Casey v. St. Louis Transit Co.* 116 Mo. App. 249, 91 S. W. 419, as to statute of Missouri being remedial and penal.

9 L. R. A. 165, *CONGER v. LOWE*, 124 Ind. 368, 24 N. E. 889.

Conditions attached to legacy.

Cited in *Overton v. Lea*, 108 Tenn. 556, 68 S. W. 250, upholding conditional limitation that devisee should not alien to certain persons; *Zillmer v. Landguth*, 94 Wis. 609, 69 N. W. 568, holding condition against alienation after devise of fee void for repugnancy; *Hayes v. Martz*, 173 Ind. 290, 89 N. E. 303, holding that will dividing land to grandson, remainder over in case of his death before 21, leaving no children, to testator's son and daughter and in case of death before 21, leaving children, then remainder over to such children, land not to be sold by grandson, gives grandson contingent fee, and to others mentioned contingent remainder; *Matlock v. Lock*, 38 Ind. App. 305, 73 N. E. 171, holding will dividing land to grandchild and if such grandchild shall before she arrives at the age of forty, "attempt to convey, mortgage, or encumber all or any part of said real estate," then over to other devisees does not violate statute against perpetuities.

Cited in footnotes to *Re Jones*, 48 L. R. A. 580, which sustains legacy conditioned on legatee being declared reformed man at expiration of specified time; *Glover v. Condell*, 35 L. R. A. 360, which holds ownership of fund, subject to limitation, given by bequest to son, and over in case of death without living heirs.

Cited in notes (3 L.R.A.(N.S.) 677) on validity of restraints on alienation

during limited time; (25 Eng. Rul. Cas. 624) on invalidity of condition in absolute bequest that legatee shall not sell.

Construction of word "heirs" in devise or conveyance.

Cited in *Bonner v. Bonner*, 28 Ind. App. 151, 62 N. E. 497, holding devise for life "and to heirs in fee" passes fee to first taker; *Perkins v. McConnell*, 136 Ind. 385, 36 N. E. 120, holding devise to person for life and, after decease, "to lawful heirs," passes fee, context not showing contrary intention; *Granger v. Granger*, 147 Ind. 101, construing devise to one for life, then to "heirs of his body . . . him surviving," as devise for life with remainder to children, and not to heirs; *Tinder v. Tinder*, 131 Ind. 385, 30 N. E. 1077, construing and "heirs" in deed describing grantees as "heirs" of person living, as meaning "children;" *Wescott v. Binford*, 104 Iowa, 649, 65 Am. St. Rep. 530, 74 N. W. 18, holding devise not governed by rule in *Shelley's Case* where testator clearly intended otherwise; *Plummer v. Shepherd*, 94 Md. 469, 51 Atl. 173; and *Essick v. Caple*, 131 Ind. 209, 30 N. E. 900, construing "heir" to mean "child" where evidently used by testator in that sense.

Cited in footnote to *Wool v. Fleetwood*, 67 L.R.A. 445, which holds that meaning of words "lawful heirs" cannot be restricted as including children only.

Cited in note (10 Eng. Rul. Cas. 758) on creation of estate tail by gift to "heirs of the body" following gift of same subject to the *præpositus*.

Rule in Shelley's case.

Cited in notes (29 L.R.A.(N.S.) 1062, 1068, 1162) on rule in *Shelley's case*; (22 Am. St. Rep. 654) on rule in *Shelley's case*.

9 L. R. A. 170, *STATE v. HIRSCH*, 125 Ind. 207, 24 N. E. 1062.

Interpretation of statutes.

Approved in *State v. Indiana & I. S. R. Co.* 133 Ind. 73, 18 L. R. A. 505, 32 N. E. 817, looking to statute as a whole for its construction, and giving effect to legislative object where reasonable construction of words permit; *Gustave v. State*, 153 Ind. 617, 54 N. E. 123, holding other waters intended by word "waters" in statute prohibiting catching of fish during specified months in any of the streams of the state, or except with hook and line in any of the "waters" of the state.

Distinguished in *Austin v. State*, 22 Ind. App. 230, 53 N. E. 481, holding statute prohibiting selling, bartering, or giving away of intoxicants, to be drunk as beverage, does not apply to person not a dealer giving away champagne as act of hospitality in private office.

"Election Day."

Cited in *Hammond v. King*, 137 Iowa, 553, 114 N. W. 1062, holding school election "election day" under Mulet Law.

"Primary election."

Cited in *State ex rel. Brady v. Bates*, 102 Minn. 108, 112 N. W. 1026, 12 A. & E. Ann. Cas. 105, holding words to mean act of choosing candidates by respective political parties to fill various offices; *Ashford v. Goodwin*, 103 Tex. 495, 131 S. W. 535, holding that statute conferring upon district court original jurisdiction in cases of contested elections conferred jurisdiction in cases of primary elections.

Cited in note (18 L.R.A.(N.S.) 412) on "primary elections" as within constitution or statute relating to elections generally.

9 L. R. A. 173, *WOOD v. WOOD*, 124 Ind. 545, 24 N. E. 751.

Knowledge of intended illegal use of loan.

Cited in *Plank v. Jackson*, 128 Ind. 429, 26 N. E. 568, holding mere knowledge of borrower's intention as to unlawful use of money no bar to recovery.

Verbal agreement to create lien.

Cited in *Christian v. Highlands*, 32 Ind. App. 111, 69 N. E. 266, as to it being void.

9 L. R. A. 176, *McPHEETERS v. WRIGHT*, 124 Ind. 560, 24 N. E. 734.

Purchase of adverse claim by cotenant.

Cited in *Ladd v. Kuhn*, 27 Ind. App. 543, 61 N. E. 747, and *Jennings v. Moore*, 135 Ind. 177, 34 N. E. 996, holding one tenant in common cannot acquire title against another upon foreclosure of lien created by common grantor; *Stevens v. Reynolds*, 143 Ind. 476, 52 Am. St. Rep. 422, 41 N. E. 931, holding cotenant, standing in relation of trust, cannot assert title against another under redemption from tax sale; *Darcey v. Bayne*, 105 Md. 369, 10 L.R.A.(N.S.) 861, 66 Atl. 434, holding where a cotenant has purchased an outstanding title the other cotenant must pay or offer to pay his proportionate share of the purchase price in order to share in the benefits thereof.

Cited in note (19 L.R.A.(N.S.) 591) on right of cotenant to purchase in own right at a sale under encumbrance created by one through whom cotenants derive title.

Distinguished in *Olmstead v. Tracy*, 145 Mich. 301, 116 Am. St. Rep. 299, 108 N. W. 649, holding cotenant could acquire tax title which was outstanding at time cotenancy began.

9 L. R. A. 182, *HERMAN v. PEOPLE*, 131 Ill. 594, 22 N. E. 471.

Right to join counts in indictment.

Cited in *Com. v. Shissler*, 7 Pa. Dist. R. 343, holding good, indictment with four counts, each charging separate larceny, although indorsed as larceny and receiving stolen goods; *State v. Edmunds*, 49 La. Ann. 273, 21 So. 266, holding that count charging attempt to commit murder may be joined with count charging attempt to commit murder in attempt to commit rape; *George v. People*, 167 Ill. 451, 47 N. E. 741, holding that same indictment may join counts for felonies and for misdemeanors, where all relate to same transaction.

Cited in footnote to *State v. Hoskins*, 27 L. R. A. 412, which holds only one offense charged in indictment for libel on more than one person by single writing.

Prosecution by indictment.

Cited in *Paulsen v. People*, 195 Ill. 518, 63 N. E. 144, holding misdemeanor, punishable only by imprisonment in penitentiary, must be prosecuted by indictment.

Election between counts.

Cited in *Looney v. People*, 81 Ill. App. 373, holding right to compel election between counts of indictment arises where distinct charges, not a part of same transaction, are joined; *People v. Weil*, 243 Ill. 213, 134 Am. St. Rep. 357, 90 N. E. 731, holding the right to require the state to elect when more than one offense is charged in different counts in the indictment is confined to cases where the offenses charged in the different counts are actually distinct from each other and do not arise out of same transaction.

Application of indeterminate sentence act.

Cited in *Towne v. People*, 89 Ill. App. 286, holding that indeterminate sentence act does not apply to offense punishable either by imprisonment in penitentiary or by fine alone.

Conviction of lesser crime than acts charged involve.

Cited in *Graff v. People*, 208 Ill. 321, 70 N. E. 299, holding that accused may be convicted of conspiracy although one of the overt acts be a higher crime;

Foglia v. People, 229 Ill. 294, 82 N. E. 262, as to conviction for manslaughter on an indictment for murder.

9 L. R. A. 187, *LEIGHTON v. CAMPBELL*, 17 R. I. 51, 20 Atl. 14.

Liability for corporate debts.

Cited in *Wing v. Slater*, 19 R. I. 600, 33 L. R. A. 567, 35 Atl. 302, holding stockholder not liable on ground of failure to file certificate required by statute, for debt of corporation under contract for goods to be delivered in instalments when certificate filed before delivery of goods; *Savage v. Shaw*, 195 Mass. 573, 122 Am. St. Rep. 272, 81 N. E. 303, 12 A. & E. Ann. Cas. 806, holding judgment against a street railway company for personal injuries is not a debt under statute rendering the directors personally liable for debts of corporation.

Cited in footnote to *Tradesman Pub. Co. v. Knoxville Car-Wheel Co.* 31 L. R. A. 593, which requires consent by directors to creation of indebtedness in excess of corporate assets, to have been given by them as directors, to make them individually liable.

Cited in note (22 L.R.A.(N.S.) 256, 257) as to whether statutory liability for debts of corporation includes liability for torts.

Survival of action.

Cited in *Aylsworth v. Curtis*, 19 R. I. 520, 33 L. R. A. 111, 61 Am. St. Rep. 785, 34 Atl. 1109, holding statutory right of action given to owner of property against one stealing it survives owner's death.

"Debt contracted."

Cited in *Brun v. Mann*, 12 L.R.A.(N.S.) 165, 80 C. C. A. 513, 151 Fed. 158, holding the exemption acquired under homestead laws and timber culture act from any "debt contracted" previous to their acquisition, does not exempt them from liability for torts previously perpetrated.

9 L. R. A. 189, *DENNIS v. MASSACHUSETTS BEN. ASSO.* 120 N. Y. 496, 17 Am. St. Rep. 660, 24 N. E. 843.

Forfeiture of insurance.

Cited in *Sieburg v. Massachusetts Ben. Asso.* 87 Hun, 205, 33 N. Y. Supp. 1064, holding defense of forfeiture waived by insurer renewing policy upon receipt of payment and approval of risk; *Modern Woodmen v. Jameson*, 48 Kan. 722, 30 Pac. 460, holding benefit certificate not void for nonpayment of assessment, where no notice of suspension made, and insured subsequently treated as member; *Greenwald v. United L. Ins. Asso.* 18 Misc. 97, 42 N. Y. Supp. 973, denying forfeiture where insured attempted to pay by check and promptly paid upon learning of omission of signature, where member's intention to terminate, essential element of forfeiture; *Beatty v. Mutual Reserve Fund Life Asso.* 21 C. C. A. 232, 44 U. S. App. 527, 75 Fed. 69, holding insurance not forfeited by delay in paying assessment in accordance with course of dealing; *Mutual Reserve Fund Life Asso. v. Beatty*, 35 C. C. A. 579, 93 Fed. 753, raising, without deciding, question as to forfeiture by delay in paying assessment in accordance with course of dealing; *Grand Lodge A. O. U. W. v. Smith*, 76 Kan. 514, 92 Pac. 710, holding the receipt and retention of money paid to benefit society by one of its members on an overdue assessment is ordinarily sufficient to waive a forfeiture arising from failure to pay assessment when due; *Delaney v. Kelly*, 45 Misc. 288, 92 N. Y. Supp. 265, holding provision that on failure to pay dues the insured should ipso facto stand disconnected with association when read in connection with other provisions became operative only after thirty days.

Cited in notes (17 L.R.A.(N.S.) 248) on necessity of affirmative action to

terminate rights of member in mutual benefit society for nonpayment of dues; (19 Am. St. Rep. 784; 52 Am. St. Rep. 577) on forfeiture of insurance provided by mutual benefit association.

Distinguished in *Kentucky Life & Acci. Ins. Co. v. Kaufman*, 102 Ky. 12, 42 S. W. 1104, holding policy not forfeited by death within time allowed for payment of assessment; *Supreme Commandery of U. O. of G. C. v. Bernard*, 26 App. D. C. 180, 6 A. & E. Ann. Cas. 694, holding where the by-laws of a fraternal benefit association provide for the forfeiture of a benefit and disconnection of the member on failure to pay assessment, and for reinstatement upon payment of same within thirty days, the receipt by the company of overdue assessments within thirty days is not evidence of a waiver of the disconnection; *Delaney v. Kelly*, 103 App. Div. 413, 92 N. Y. Supp. 1021, holding provision in contract making policy void in case of nonpayment of assessments self-executing, and death during period permitted for reinstatement does not revive the policy.

Reinstatement of policy.

Cited in *Teeter v. United Life & Acci. Ins. Asso.* 11 App. Div. 262, 42 N. Y. Supp. 119, holding reinstatement to be a renewal and continuation of policy upon faith of statements then made; *McNeil v. Southern Tier Masonic Relief Asso.* 40 App. Div. 584, 58 N. Y. Supp. 119, holding that insanity is "satisfactory excuse" for nonpayment of dues and assessments.

Cited in notes (14 L.R.A. 284) on reinstatement of policy after death of insured; (40 L.R.A.(N.S.) 150) on judicial control of discretion as to reinstatement of insured.

Arbitrary refusal to be satisfied.

Cited in *Jay v. Wilson*, 91 Hun. 395, 36 N. Y. Supp. 186 (dissenting opinion), majority denying right arbitrarily to object to title under agreement to make loan, if title "satisfactory."

Cited in note (52 Am. St. Rep. 547) on arbitration of mutual or membership life or accident insurance.

9 L. R. A. 193, *CHAVANNES v. PRIESTLY*, 80 Iowa, 316, 45 N. W. 766.

Rights of insane persons.

Cited in *Re Bresee*, 82 Iowa, 578, 48 N. W. 991, holding person not entitled to jury trial upon issue of insanity; *Bumpus v. French*, 179 Mass. 133, 60 N. E. 414, holding appointment of temporary guardian for insane person, without notice, valid; *Re Dowdell*, 169 Mass. 389, 61 Am. St. Rep. 290, 47 N. E. 1033, holding that insane person will not be discharged from asylum to which he has been committed under provisions of statute, on ground that he is deprived of liberty without due process of law; *State v. Linderholm*, 84 Kan. 604, 114 Pac. 857, holding that statute providing for jury, in lunacy proceedings, of four persons one of whom must be physician is constitutional; *Hundley v. Sumrall*, 144 Ky. 76, 137 S. W. 842, holding that under section 2157 of statute, affidavits of two nonresident physicians, may be received to show that it would be unsafe to bring lunatic into court; *People ex rel. Peabody v. Chanler*, 133 App. Div. 163, 117 N. Y. Supp. 322, affirmed in 196 N. Y. 525, 25 L.R.A.(N.S.) 950, 89 N. E. 1109; *Ex parte Scudamore*, 55 Fla. 226, 46 So. 279,—holding the provision in statute requiring personal presence of alleged lunatic is sufficient notice to him to fulfil requirements of federal and state constitutions.

Cited in notes (23 L. R. A. 740) on necessity of notice of lunacy proceeding to alleged lunatic; (64 L. R. A. 526) on right of insane person to institute proceedings by next friend; (43 Am. St. Rep. 536) on due process of law as applied to insane persons.

9 L. R. A. 195, *Re BARRE WATER CO.* 62 Vt. 27, 20 Atl. 109.

Construction of word "other."

Approved in *Cross v. Frost*, 64 Vt. 182, 23 Atl. 916, holding excavations *prima facie* not within covenant not to put upon premises any buildings, timber, trees, or "other" nuisances.

Cited in *Vassey v. Spake*, 83 S. C. 568, 65 S. E. 825, holding nothing in general expression "any other action for damages for torts" which compels an extension of meaning to cover classes of torts unlike those enumerated in statute; *Ex parte Roquemore*, 60 Tex. Crim. Rep. 287, 32 L.R.A.(N.S.) 1189, 131 S. W. 1101, holding that general term "and such other amusements as are exhibited and for which admission fee is charged" as used in statute cannot be applied to base-ball under doctrine of *ejusdem generis*.

What constitutes public use.

Approved in *Smith v. Barre Water Co.* 73 Vt. 312, 50 Atl. 1055, holding use of water for polishing granite not public use.

Cited in *Avery v. Vermont Electric Co.* 75 Vt. 239, 59 L. R. A. 824, 98 Am. St. Rep. 818, 54 Atl. 179, holding generation of electricity by water power for operation of railroad not public use; *Brown v. Gerald*, 100 Me. 366, 70 L.R.A. 479, 109 Am. St. Rep. 526, 61 Atl. 785, holding manufacturing, generating, selling, distributing and supplying electricity for power, manufacturing or mechanical purposes, is not a public use for which private property can be taken against will of owner; *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 447, 5 L.R.A.(N.S.) 647, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182, holding the creation of a water power and a water power plant for purpose of "supplying water power from wheels thereof" to the public is a private enterprise in aid of which the power of eminent domain cannot be exercised; *Doty v. Johnson*, 84 Vt. 22, 77 Atl. 866, holding that legislature cannot authorize taking of private property for private use.

Cited in footnotes to *Fallsburg Power & Mfg. Co. v. Alexander*, 61 L.R.A. 129, which denies right to exercise power of eminent domain of corporation authorized to use water power of river and generate electric light, heat, etc., for itself and other persons; *Gaylord v. Chicago Sanitary Dist.* 63 L.R.A. 582, which denies power of legislature to authorize condemnation of private property for erection of public mills and machinery without anything to give the public an interest in the mill after its erection.

Cited in notes (61 L.R.A. 40) on establishment and regulation of municipal water supply; (21 L.R.A.(N.S.) 412) on furnishing water and water power to public for manufacturing as public purpose; (22 L.R.A.(N.S.) 31, 36, 160) on public uses; (22 Am. St. Rep. 49; 102 Am. St. Rep. 813, 817) on uses for which power of eminent domain cannot be exercised.

Construction of statutes.

Cited in *Ex parte Muckenfuss*, 52 Tex. Crim. Rep. 471, 107 S. W. 1131, holding where general words follow an enumeration of particular thing such words include only such matters or objects as are of the same kind as those specifically enumerated.

9 L. R. A. 198, *STATE, SISTERS OF CHARITY, PROSECUTOR, v. CHATHAM TWP.* 52 N. J. L. 373, 20 Atl. 292.

Exemption from taxation.

Followed in *Cooper Hospital v. Burdsall*, 63 N. J. L. 89, 42 Atl. 853, holding hospital exempt under statute; *Hot Springs School Dist. v. Sisters of Mercy*, 84 Ark. 500, 106 S. W. 954, holding property which is used directly for the purpose

and in the operation of charity is exempt, though it may also be used in a manner to yield some return; *Sisters of Charity v. Thompson*, 72 N. J. L. 427, 61 Atl. 387, holding if a tract of land on which are erected the buildings of a corporation used exclusively for charitable purposes be devoted to the same charitable purposes it is exempt, under statute, from taxation.

Approved in *Paterson Rescue Mission v. High*, 64 N. J. L. 121, 44 Atl. 974, holding association furnishing food and clothing to needy, turning into funds of institution profits of work, exempt.

Cited in *Litz v. Johnston*, 65 N. J. L. 170, 46 Atl. 776, holding society organized to aid missionary priesthood exempt, under statute; *Academy of Sacred Heart v. Irely*, 51 Neb. 757, 71 N. W. 752, holding, under statute, all property used exclusively for school purposes exempt; *State, Long Branch Firemen's Relief Asso., Prosecutor, v. Johnson*, 62 N. J. L. 627, 43 Atl. 573, holding funds of exempt firemen's relief association not taxable, although in excess of needs; *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 142, 23 Atl. 305, holding nontaxable municipal bonds, issued after repeal of tax-exemption law, taxable; *Sisters of Charity v. Cory*, 73 N. J. L. 700, 65 Atl. 500 (dissenting opinion), as to exemption of charitable institutions; *Linton v. Lucy Cobb Institute*, 117 Ga. 685, 45 S. E. 53, holding buildings used as a college may be exempt from taxation even if, in the operation of the institution, income is derived from tuition fees.

Cited in note 16 L.R.A.(N.S.) 844) on effect of devotion of property otherwise nontaxable to purposes of particular society.

Distinguished in *Children's Seashore House v. Atlantic City*, 68 N. J. L. 391, 59 L. R. A. 949, 53 Atl. 399, holding land purchased by charitable institution temporarily occupied by tents and frame kitchen and laundry, not exempt; *Cooper Hospital v. Camden*, 68 N. J. L. 700, 54 Atl. 419, holding lands held by hospital as part of endowment not exempt; *Tippett v. McGrath*, 70 N. J. L. 112, 56 Atl. 134, holding exemptions of property from taxation based not upon the characteristics possessed by such property, or upon the uses to which it is put, but upon personal status of its owner, are in violation of constitutional provision requiring that "property shall be assessed for taxes under general laws and by uniform rules according to its true value."

Disapproved in *Brenau Asso. v. Harbison*, 120 Ga. 936, 48 S. E. 363, 1 A. & E. Ann. Cas. 836, adhering to rule of strict construction of statutes exempting property of educational institutions from taxation.

Power of legislature to change method of taxation.

Cited in *Rosedale Cemetery Asso. v. Linden Twp.* 73 N. J. L. 424, 63 Atl. 904, holding legislature had the power to change method and manner of taxing cemetery corporations.

9 L. R. A. 200, *GALE v. NICKERSON*, 151 Mass. 428, 24 N. E. 400.

Vesting of legacies.

Cited in footnote to *Wengerd's Appeal*, 13 L. R. A. 360, which holds legacies vest at testator's death, under will converting estate into money and directing distribution between children of son.

Cancellation of instruments.

Cited in footnote to *Ada County v. Bullen Bridge Co.* 36 L. R. A. 367, which denies right to maintain equitable action to cancel county warrants.

Cited in note (5 L.R.A.(N.S.) 1056) on jurisdiction of equity to cancel instrument notwithstanding remedy at law.

Right of next of kin to maintain action respecting estate.

Cited in notes (22 L.R.A.(N.S.) 455) on right of next of kin to maintain

action in interest of estate; (112 Am. St. Rep. 732) on right of heir to maintain action in respect to personal property of ancestor.

9 L. R. A. 204, *Re CHUNG TOY HO*, 42 Fed. 398.

Chinese exclusion.

Followed in *United States v. Gue Lim*, 176 U. S. 464, 44 L. ed. 546, 20 Sup. Ct. Rep. 415, Affirming 83 Fed. 137, in similar case.

Cited in *Tsoi Sim v. United States*, 54 C. C. A. 156, 116 Fed. 922, holding Chinese woman not liable to deportation after marriage to American citizen; *United States v. Chin Sing*, 153 Fed. 591, holding no certificates required for wives and children of Chinese merchants residing in this country to entitle them to entry; *United States v. Yee Quong Yuen*, 111 C. C. A. 500, 191 Fed. 29, holding that adopted son of Chinese merchant who was brought here while minor was lawfully in United States although he afterwards became laborer.

9 L. R. A. 205, *BULGER v. EDEN*, 82 Me. 352, 19 Atl. 829.

Municipal liability for negligence of officers.

Cited in *Libby v. Portland*, 105 Me. 375, 26 L.R.A.(N.S.) 144, 74 Atl. 805, holding a municipal corporation holding property for profit or gain is liable for negligence in the management thereof to the same extent that business corporations or individuals.

Cited in footnotes to *Potter v. Jones*, 12 L. R. A. 160, which holds city not liable for negligence in blasting for schoolhouse; *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall; *Wilson v. Mitchell*, 65 L.R.A. 158, which holds that municipality cannot ratify act of waterworks superintendent in wrongfully connecting well with city water mains so as to become liable for water taken from the well.

Cited in notes (19 L.R.A. 454) on distinction between public and private functions of municipalities in respect to liability for negligence; (20 Am. St. Rep. 868) on municipal liability for negligence of officer.

Duty and liability of municipality as to sewers and drainage.

Cited in *Hamlin v. Biddleford*, 95 Me. 311, 49 Atl. 1100, holding officers in constructing sewers act as public officers, and not for municipality; *Gilpatrick v. Biddeford*, 86 Me. 539, 30 Atl. 99, holding town not liable for misconduct of officers constructing sewer; *Brunswick Gaslight Co. v. Brunswick*, 92 Me. 495, 43 Atl. 104, holding village not liable for trespass of officers constructing sewer, acting through contractor; *Bryant v. Westbrook*, 86 Me. 451, 29 Atl. 1109, holding town not responsible for repair of private sewer built before acceptance of street; *Keeley v. Portland*, 100 Me. 263, 61 Atl. 180, holding municipality not liable for injury caused by defective location or plan of sewer; *Kidson v. Bangor*, 99 Me. 143, 58 Atl. 900, holding in order to recover against a municipality for violation of statute requiring proper maintenance and repair of public drains and sewers the plaintiff must establish that he was a person entitled to drainage through it not a mere trespasser, but one who had fulfilled the requirements of law which were conditions precedent to enjoyment of right of drainage; *Atwood v. Biddleford*, 99 Me. 80, 58 Atl. 417, holding it is only when drains have been constructed and persons have paid for connecting with them, that the town becomes responsible in regard to maintaining and keeping them in repair and assumes responsibilities in reference thereto.

Cited in footnotes to *Uppington v. New York*, 53 L. R. A. 551, which denies city's liability for failure to select best possible route or adopt best possible plan for sewer; *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Wil-*

liams v. Greenville, 57 L. R. A. 207, which denies city's liability for sickness, etc., from permitting filth from drainage ditch to flow on adjoining land; Huffmire v. Brooklyn, 48 L. R. A. 421, which sustains city's liability for destruction of oysters by sewage cast on beds; Nevins v. Fitchburg, 47 L. R. A. 312, which denies city's right to discharge sewer into private tailrace.

Cited in notes (61 L.R.A. 674, 710) on duty and liability of municipality with respect to drainage; (1 L.R.A.(N.S.) 953) on municipal liability for injuries to property from sewerage system not constructed according to any adopted plan or upon defective plan.

9 L. R. A. 211, *HILLS v. BARNARD*, 152 Mass. 67, 25 N. E. 96.

Further construction of same will in 152 Mass. 126, 25 N. E. 40.

Who take under designation of classes.

Cited in *Jackson v. Jackson*, 153 Mass. 377, 11 L. R. A. 308, 25 Am. St. Rep. 643, 26 N. E. 1112, holding bequest in trust for benefit of one for life, and then to his issue living, goes to all lineal descendants; *Harrison v. Weatherby*, 180 Ill. 446, 54 N. E. 237, holding devise for benefit of one for life and then to her children surviving, passes fee determinable by her leaving children at her death, and becoming absolute on her death without children; *Townsend v. Townsend*, 156 Mass. 457, 31 N. E. 632, holding grandchildren excluded from bequest of remainder of testator's estate to the "families" of his children; *Bragg v. Carter*, 171 Mass. 328, 50 N. E. 640, holding that great grandchildren will not be included in distribution of estate to "my grandchildren who may be then living;" *Coates v. Burton*, 191 Mass. 182, 77 N. E. 311, construing bequest to lawful issue share and share alike as meaning a distribution per stirpes; *Gray v. Whittemore*, 192 Mass. 377, 10 L.R.A.(N.S.) 1149, 116 Am. St. Rep. 246, 78 N. E. 422, holding the heirs at law of a child of testator to whom testator has made a devise in case of default of issue of such child at time of such child's death are to be determined at time of death of child in question; *Union Safe Deposit & T. Co. v. Dudley*, 104 Me. 309, 72 Atl. 166, holding in construction of will the word "issue" is to be interpreted according to its primary signification as importing descendants unless it appears from the provisions of the will or from extrinsic circumstances proper to be considered, that testator used the word in its secondary or restricted meaning of children.

Cited in footnotes to *Starnes v. Hill*, 22 L. R. A. 598, which holds indefeasible fee not vested in one to whom life estate given with estate in fee to his "heirs;" *Drake v. Drake*, 17 L. R. A. 664, which construes words "lawful issue" as embracing grandchild; *Green v. Grant*, 18 L. R. A. 381, which holds woman's issue without vested interest in land devised to her for life, with direction to convey to such issue as she shall appoint; *McIlhinny v. McIlhinny*, 24 L. R. A. 489, which holds word "issue" one of purchase, and not of limitation; *Schuyler v. Hanna*, 11 L. R. A. 321, which holds that present capacity of taking effect in possession if possession were to become vacant, distinguishes vested from contingent remainder; *Bowen v. Hackney*, 67 L.R.A. 441, which holds that no estate vests in children until widow's death under will giving life estate to widow and providing that at her death that given to her for life shall be equally divided between all the children, the representatives of those having died to stand in place of ancestors.

Cited in notes (11 L.R.A. 85) on rule against perpetuities; (25 Eng. Rul. Cas. 725) on construction of gift over to survivor or survivors of bequest to a class.

Contingent interest under will.

Cited in *Clarke v. Fay*, 205 Mass. 236, 27 L.R.A.(N.S.) 460, 91 N. E. 328, holding the interest of one who, living at death of testator, is beneficiary

in a will giving the income of the property to his father for life, and upon father's death giving property to him, if living, may be reached by creditor's bill.

9 L. R. A. 218, *GARA v. AUSTIN*, 79 Iowa, 178, 44 N. W. 352.

Right of administrator to proceeds of real estate.

Distinguished in *Dexter v. Hayes*, 88 Iowa, 497, 55 N. W. 491, holding administrator not entitled to rents and profits of land occupied by heirs during period of redemption from foreclosure; *Smith v. Smith*, 174 Ill. 59, 43 L. R. A. 407, 50 N. E. 1083, holding proceeds of partition sale not transmissible to administrator in another state to pay creditors.

Ancillary administration.

Cited in footnotes to *McCully v. Cooper*, 35 L. R. A. 492, which sustains right of ancillary administratrix to recover certificate of deposit from domiciliary administrator temporarily within state where former appointed; *Hopper v. Hopper*, 12 L. R. A. 237, which holds foreign executor taking out ancillary letters liable to suit as domestic executor.

Cited in notes (9 L. R. A. 246) on incapacity of foreign executor or administrator; (9 L. R. A. 244) on foreign letters of administration.

Conflict of laws.

Cited in *Caruth v. Caruth*, 128 Iowa, 123, 103 N. W. 103, holding that succession to movables is governed by law of actual domicile of intestate at time of his death.

9 L. R. A. 221, *SCHWENK v. WYCKOFF*, 46 N. J. Eq. 560, 19 Am. St. Rep. 438, 20 Atl. 259.

Contracts against public policy and exemptions.

Cited in *Brooks v. Cooper*, 50 N. J. Eq. 770, 21 L. R. A. 620, 35 Am. St. Rep. 793, 26 Atl. 978, holding agreement to divide public printing between rival papers, lacking required circulation, void.

Distinguished in *Forrest v. Price*, 52 N. J. Eq. 25, 29 Atl. 215, denying that private moneys repaid by government to former purser in Navy are exempt from creditors.

As to salaries of public officers.

Cited in *National Bank v. Fink*, 86 Tex. 304, 40 Am. St. Rep. 833, 24 S. W. 256, holding assignment by public officer to bank, of unearned salary, void; *State v. Williamson*, 118 Mo. 151, 21 L. R. A. 829, footnote p. 827, 40 Am. St. Rep. 358, 23 S. W. 1054, denying mail clerk's guilt of embezzlement by collection of salary after assignment; *State use of Perkins v. Barnes*, 10 S. D. 311, 73 N. W. 80, holding county auditor liable to district attorney for salary warrant paid to mortgage company under assignment; *Chicago v. People*, 98 Ill. App. 521, ordering city officers to pay salary checks to policeman, although same had been assigned by him for debts; *Spencer v. Morris*, 67 N. J. L. 502, 51 Atl. 470, denying authority of judge, under execution act, to require payment of debts with salary earned by public officer; *United States v. Phillips*, 5 App. D. C. 389, holding salary of army officer absent from post assigned by him after it was earned, not recoverable by government from assignee who furnished proof of authority for his absence; *Blake v. Bolte*, 10 Misc. 335, 31 N. Y. Supp. 124, holding that salary of justice, after received by him, may be reached by creditors; *McGowan v. New Orleans*, 118 La. 430, 8 L.R.A.(N.S.) 1121, 43 So. 40, 10 A. & E. Ann. Cas. 633; *First Nat. Bank v. State*, 68 Neb. 482, 94 N. W. 633, 4 A. & E. Ann. Cas. 423,—holding an assignment of salary or fees of a public officer to be earned in the future is contrary to public policy and void; *Serrill v. Wilder*, 77 Ohio St. 358, 14

L.R.A.(N.S.) 988, 83 N. E. 486, holding contract whereby one in anticipation of appointment as county treasurer agreed with parties upon consideration of their becoming sureties on his official bond, he would, if appointed devote and apply all fees, salary and emoluments of said office in excess of a stipulated amount to payment and discharge of certain obligations on which he and they were jointly liable contrary to public policy and void.

Cited in footnotes to *White v. Cook*, 57 L. R. A. 417, which holds void, sale by sheriff to deputy of all work of office in one district and compensation for same; *Edwards v. Randle*, 36 L. R. A. 174, which holds sale by postmaster of postoffice furniture, and agreement to resign office, void; *Cansler v. Penland*, 48 L. R. A. 441, which holds void, contract by which sheriff turns over tax list to another to collect taxes on specified commission; *Re Worthington*, 23 L. R. A. 97, which holds void, assignment of commissions by executor before accounting.

Cited in note (5 L.R.A.(N.S.) 567) on validity of assignment of future wages or salary.

9 L. R. A. 223, *NANZ v. OAKLEY*, 120 N. Y. 84, 24 N. E. 306.

Liability of sureties on bond of administrator, etc.

Approved in *Re Adams*, 30 Misc. 186, 61 N. Y. Supp. 751, holding sureties liable to illiterate administratrix for funds lost by coadministrator through failure of his private bank.

Cited in *McCoun v. Sperb*, 53 Hun, 166, 6 N. Y. Supp. 106, holding surety upon bond of two administrators may call upon either principal for indemnity, although one thereby made liable for other's torts; *Municipal Court v. Whaley*, 25 R. I. 292, 63 L. R. A. 237, 55 Atl. 750, holding action maintainable by legatee who is also an executor, for default of coexecutor on joint and several bond; *Palmer v. Ward*, 91 App. Div. 451, 86 N. Y. Supp. 990, holding that sureties consenting that administratrix take no active part in management of estate cannot hold her liable for devastavit by coadministrator.

Cited in footnotes to *Probate Judge v. Sulloway*, 49 L. R. A. 347, which holds sureties on insolvent executor's bond liable for his personal debt to testator; *Abshire v. Salyer*, 56 L. R. A. 936, which holds sureties on guardian's bond, given to obtain relief from future liabilities of surety on prior bond, liable for past defalcations; *Municipal Court v. Whaley*, 63 L.R.A. 235, which sustains right of legatee who is also executor to enforce liability of sureties on joint and several bond for default of co-executor.

Distinguished in *Sperb v. McCoun*, 110 N. Y. 610, 1 L. R. A. 491, 18 N. E. 441, holding action maintainable by administrator, as such, on joint and several bond given by himself and coadministrator, with sureties, for coadministrator's breach.

Liability of joint administrator, etc.

Approved in *Re Westerfield*, 32 App. Div. 343, 53 N. Y. Supp. 25, holding joint trustee joining in accounts rendered, and accepting commissions for administration, not liable for act of other trustee under division of duty in administration; *Re Johnson*, 42 Misc. 655, 87 N. Y. Supp. 733, holding executor not liable for default of coexecutor in wrongfully using money of estate without former's knowledge.

Cited in *Re Halstead*, 44 Misc. 182, 89 N. Y. Supp. 806; *Cheever v. Ellis*, 144 Mich. 484, 11 L.R.A.(N.S.) 305, 108 N. W. 390,—holding each executor is liable only for his own acts and what he receives and applies, unless he joins in the direction and misapplication of the assets.

Cited in footnote to *Re Osborn*, 11 L. R. A. 264, which holds personally liable, executor leaving matters entirely to coexecutor.

Cited in note (11 L.R.A. (N.S.) 298, 299, 311) on liability of co-executor for default of one permitted to manage estate.

Distinguished in *Meldon v. Devlin*, 31 App. Div. 163, 53 N. Y. Supp. 172, Reversing 20 Misc. 61, 45 N. Y. Supp. 333, holding joint executor liable for illegal acts of other executor so far as he participated therein.

Waiver of objection to capacity.

Cited in *Van Zandt v. Grant*, 67 App. Div. 73, 73 N. Y. Supp. 600, holding objection that infant's action upon administrator's bond can only be maintained by guardian *ad litem* waived by failure to demur.

9 L. R. A. 228, *BIERBOWER v. MILLER*, 30 Neb. 161, 46 N. W. 431, 47 N. W. 1.

Removal of causes.

Cited in *Beach v. Southern R. Co.* 131 N. C. 400, 42 S. E. 856, holding foreign corporation which was "domesticated" under statute cannot remove action against it to Federal court.

Cited in footnote to *Herndon v. Ætna F. Ins. Co.* 10 L. R. A. 53, which holds petition for removal of cause not aided by allegations as to residence in complaint.

Cited in note (11 L. R. A. 568, 572) on removal of cause for prejudice or local influence.

9 L. R. A. 236, *COM. v. MANCHESTER*, 152 Mass. 230, 23 Am. St. Rep. 820, 25 N. E. 113.

Affirmed in effect in 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

Title to land under navigable stream.

Cited in *Shively v. Bowlby*, 152 U. S. 19, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding that donor of land claim, bounded by navigable river, does not hold below high-water mark, as against state; *Com. v. Boston Terminal Co.* 185 Mass. 282, 70 N. E. 125, holding title to land within one marine league from seashore vested in state.

Cited in note (53 Am. St. Rep. 290, 293, 294) on title to land under navigable water.

Fishery rights.

Cited in *State v. Thompson*, 85 Me. 192, 27 Atl. 99, holding jurisdiction of state over shore fisheries not in contravention of authority of United States.

Cited in footnote to *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during close season fish previously caught not an offense.

Cited in notes (9 L. R. A. 807) on fishery rights; (39 L. R. A. 582) on governmental control over right of fishery; (46 L. R. A. 278) on jurisdiction over sea; (60 L.R.A. 503) on right to fish; (5 Eng. Rul. Cas. 975) on jurisdiction over waters within 3-mile limit.

9 L. R. A. 244, *WELCH v. ADAMS*, 152 Mass. 74, 25 N. E. 34.

Jurisdiction over affairs of nonresident decedent.

Cited in *Callahan v. Woodbridge*, 171 Mass. 596, 51 N. E. 176, sustaining jurisdiction of probate court over property of nonresident found in state.

Ancillary administration.

Cited in *Putnam v. Middleborough*, 209 Mass. 458, 95 N. E. 749, to the point that it is only what remains after ancillary administration has been completed that will come into possession of principal executor.

Cited in footnotes to *Hopper v. Hopper*, 12 L. R. A. 237, which holds foreign executor taking out ancillary letters liable to suit as domestic executor; *McCully*

v. Cooper, 35 L. R. A. 492, which sustains right of ancillary administratrix to recover certificate of deposit from domiciliary administrator temporarily within state where former appointed.

Cited in note (9 L. R. A. 218) on ancillary administration of estates.

Right of legatees to interest and income.

Cited in *Re Williams*, 112 Cal. 525; 53 Am. St. Rep. 224, 44 Pac. 808, denying that suspension of payment of legacy till convenient time prevents interest running from year of death of testator; *Re Bartlett*, 163 Mass. 521, 40 N. E. 899, denying that provision extending time of payment of legacies prevents interest running from death of testator; *Forbes v. Allen*, 166 Mass. 574, 44 N. E. 1065, directing that portions of money paid *cestui que trust*, not specially applied, should be applied to interest on fund; *Phelps v. Fitch*, 178 Mass. 453, 59 N. E. 1031, denying interest to those entitled to residue of estate; *Thayer v. Paulding*, 200 Mass. 100, 85 N. E. 868, holding a general legacy is not payable until after a year from time of testator's death, and where the legacy is money, no interest is payable on it for that time, though it is invested and interest is received.

Cited in notes (56 L. R. A. 308) on conflict of laws as to interest by way of damages; (62 L. R. A. 41) on conflict of laws as to date from which legacy carries interest.

Distinguished in *Edwards v. Edwards*, 183 Mass. 585, 67 N. E. 658, holding that upon delay in converting realty into personalty, life tenant is to be allowed only actual income that would have been obtainable by prompt investment; *Loring v. Thompson*, 184 Mass. 105, 68 N. E. 45, holding bequest of income entitles beneficiary to actual income producible upon proper investment.

Rate of interest on legacy.

Cited in *Loring v. Massachusetts Horticulture Soc.* 171 Mass. 404, 50 N. E. 936, holding that trust funds draw interest at statutory rate; *Daniels v. Benton*, 180 Mass. 560, 62 N. E. 960, raising, but not deciding, question as to rate of interest on legacy.

Sufficiency of tender.

Cited in footnote to *Moore v. Norman*, 18 L. R. A. 359, which holds tender, coupled with demand of surrender of notes, ineffectual to discharge chattel mortgage.

Conflict of laws as to construction of wills.

Cited in *Lewis v. Corbin*, 195 Mass. 527, 122 Am. St. Rep. 261, 81 N. E. 248, holding will construed according to law of testator's domicile.

Cited in note (2 L.R.A.(N.S.) 468) on conflict of laws as to wills.

Jurisdiction of equity to construe will.

Cited in note (129 Am. St. Rep. 83) on jurisdiction of equity to construe will.

9 L. R. A. 255, *SANDERS v. BRYER*, 152 Mass. 141, 25 N. E. 86.

When interest recoverable.

Cited in *Morrissey v. Morrissey*, 180 Mass. 483, 62 N. E. 972, holding one advancing money on faith of agreement to devise, entitled to recover interest on advances.

Distinguished in *Holyoke Envelope Co. v. United States Envelope Co.* 186 Mass. 506, 72 N. E. 58, holding where a contract for the sale of a business including both real and personal property provided that the business transacted after December 31, 1897, should be accounted for as the property of buyer, but that the consideration should not be paid until September 1, 1898, the seller

was not entitled to interest on such consideration between December 31, 1897 and August 18, 1898, when the consideration was in fact paid.

Effect of tender.

Cited in *National Mach. & Tool Co. v. Standard Shoe Mach. Co.* 181 Mass. 281, 63 N. E. 900, holding that tender, not kept good, does not stop interest; *Thompson v. Lyon*, 40 W. Va. 98, 20 S. E. 812 (dissenting opinion), majority holding tender, unqualifiedly refused, stops interest.

Cited in footnote to *Moore v. Norman*, 18 L. R. A. 359, which holds tender, coupled with demand of surrender of notes, ineffectual to discharge chattel mortgage.

Cited in note (6 Eng. Rul. Cas. 596) on sufficiency and effect of tender.

9 L. R. A. 258, *KENT v. BOTHWELL*, 152 Mass. 341, 25 N. E. 721.

To whom right of action belongs.

Cited in *Kaul v. Henke*, 2 Pa. Dist. R. 237, holding that equity will not grant restitution of note to administrator, since action at law sufficient remedy; *Seaver v. Weston*, 163 Mass. 204, 39 N. E. 1013, holding that administrator may make contract in his own name for benefit of estate, and sue on it, without defendant being permitted to set off advances to intestate.

Cited in footnote to *Mitchell v. Georgia & A. R. Co.* 51 L. R. A. 622, which holds that possession of property as agent does not authorize action for its conversion.

9 L. R. A. 259, *CASEY v. SMITH*, 152 Mass. 294, 23 Am. St. Rep. 842, 25 N. E. 734.

Imputed negligence.

Cited in *Cotter v. Lynn & B. R. Co.* 180 Mass. 147, 91 Am. St. Rep. 267, 61 N. E. 818, holding negligence of parent imputed to child of four, permitted by mother to play with boy of five in yard with open gate; *Gunn v. Ohio River R. Co.* 42 W. Va. 686, 36 L. R. A. 580, 26 S. E. 546, holding negligence of young children, killed on trestle, cannot be imputed to parents who had sent them on errand by route away from track; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 682, holding negligence of parents in permitting girl of seven to cross railroad tracks at public crossing cannot be imputed to her.

Cited in footnotes to *Bunting v. Hogsett*, 12 L. R. A. 268, which holds carrier's negligence not imputable to passenger; *Smith v. Davenport*, 11 L. R. A. 429, which holds father not liable for wrongful acts of minor son.

Cited in notes (21 L. R. A. 79) on contributory negligence of parent or custodian as bar to action by child for negligent injuries; (37 L. R. A. 74) on imputing negligence in case of servants delegated to perform work contracted for by their master; (10 L. R. A. 653, 654) on obligation of parents to protect children from danger; (49 Am. St. Rep. 407, 413) on imputing negligence of parents to children; (110 Am. St. Rep. 283, 286) on imputed negligence.

Contributory negligence of, or as to, children.

Cited in *Wiswell v. Doyle*, 160 Mass. 43, 39 Am. St. Rep. 451, 35 N. E. 107, holding it not negligence *per se* where little child crossed street in front of horse standing quietly, but which was suddenly started by driver while looking away; *Hayes v. Norcross*, 162 Mass. 548, 39 N. E. 282, holding boy of five attempting to cross street, and knocked under horses feet, after going a few feet, negligent.

Distinguished in *Hewitt v. Taunton Street R. Co.* 167 Mass. 485, 46 N. E. 106, holding it for jury whether due care was exercised by parent leaving child in yard, who crossed street and was struck while returning.

9 L. R. A. 260, *FIFTH NAT. BANK v. PROVIDENCE WAREHOUSE CO.* 17 R. I. 112, 20 Atl. 203.

Warehouse receipt.

Cited in *Providence Warehouse Co. v. Providence & W. R. Co.* 19 R. I. 424, 34 Atl. 739, holding that mere non-negotiability of warehouse receipt does not make carrier liable for storage of goods.

Conversion.

Cited in *Putnam's Sons v. MacLeod*, 23 R. I. 376, 50 Atl. 646, holding it a conversion, to sell single volume of set books not paid for, bought under agreement that title remain in vendor until entire set paid for.

9 L. R. A. 263, *NATIONAL BANK OF COMMERCE v. CHICAGO, B. & N. R. CO.* 44 Minn. 224, 20 Am. St. Rep. 566, 46 N. W. 342, 560.

Negotiable instrument as payment.

Cited in *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 570, 38 Am. St. Rep. 615, 22 S. W. 813, holding giving of worthless check not payment preventing recovery of wheat from subvendee; *Hall v. Missouri P. R. Co.* 50 Mo. App. 183, denying that giving of unhonored check is payment for wheat, preventing replevin; *National L. Ins. Co. v. Goble*, 51 Neb. 8, 70 N. W. 503, denying liability of insurance company for cancellation of policy, where worthless draft remitted in payment of premium; *Baumgardner v. Henry*, 131 Mich. 244, 91 N. W. 169, holding mere mailing of check not payment, under agreement to accept check in payment; *Goodall v. Norton*, 88 Minn. 4, 92 N. W. 445, holding burden upon creditor agreeing to credit amount of check, to show that it was returned or not paid; *Re Brown*, 189 Fed. 436, to the point that procuring delivery of goods on worthless check is fraud; *First Nat. Bank v. McConnell*, 103 Minn. 344, 14 L.R.A.(N.S.) 619, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 A. & E. Ann. Cas. 393; *Dille v. White*, 132 Iowa, 333, 10 L.R.A.(N.S.) 521, 109 N. W. 909,—holding that acceptance of bank check or draft is not payment unless so agreed; *Groomer v. McMillan*, 143 Mo. App. 615, 128 S. W. 285, holding that check is not payment so as to take contract out of Statute of Frauds.

Cited in footnotes to *Bank of Antigo v. Union Trust Co.* 23 L. R. A. 611, which holds that bank takes risk of accepting check in payment of note received for collection; *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment.

Cited in note (12 L. R. A. 492) on effect of certification of checks.

Conditions of cash sale as affecting title.

Cited in *Carter v. Cream of Wheat Co.* 73 Minn. 318, 76 N. W. 55, holding failure of vendee to comply with conditions of cash sale of printing press prevents title from vesting; *Strauss v. Hirsch*, 63 Mo. App. 105, holding title to whiskey not divested by vendee's mortgage, conditions of cash sale being unfulfilled; *Freeman v. Kraemer*, 63 Minn. 246, 65 N. W. 455, holding innocent purchaser acquiring possession before purchase price paid on cash sale holds subject to right of vendor; *People's State Bank v. Brown*, 89 Kan. 523, 23 L.R.A.(N.S.) 826, 103 Pac. 102, holding that acceptance of check by vendor of wheat does not preclude exercise of right of reclamation on its nonpayment on timely presentation; *Johnson v. Lankovetz*, 57 Or. 30, 29 L.R.A.(N.S.) 712, 110 Pac. 398, holding that upon sale for cash if price is not paid at time of delivery of goods, seller may immediately reclaim them.

Cited in note (25 L.R.A.(N.S.) 787) on right of vendor leaving chattels in vendee's possession as against latter's vendees or creditors.

Bills of lading and warehouse receipts.

Cited in *Commercial Bank v. Hurt*, 99 Ala. 140, 19 L. R. A. 705, 42 Am. St. Rep. 38, 12 So. 568, denying that unauthorized transfer of warehouse receipts makes pledgee's title superior to that of true owner; *First Nat. Bank v. Mt. Pleasant Mill Co.* 103 Iowa, 522, 72 N. W. 689, holding bank discounting draft, with bill of lading attached, acquires interest in property shipped superior to that of attaching creditor; *Security Bank v. Minneapolis Cold Storage Co.* 55 Minn. 109, 56 N. W. 582, denying that warehouseman is estopped from collecting "advance" charges, space for charges in receipt being left blank; *Barnum Grain Co. v. Great Northern R. Co.* 102 Minn. 156, 112 N. W. 1030, on negotiability of bill of lading; *Ammon v. Gamble-Robinson Commission Co.* 111 Minn. 455, 127 N. W. 448, holding that delivery of warehouse receipts is equivalent, for certain purposes, to transfer and delivery of property itself; *Penas v. Chicago, M. & St. P. R. Co.* 112 Minn. 217, 30 L.R.A.(N.S.) 633, 140 Am. St. Rep. 470, 127 N. W. 926, to the point that fraudulent bill of lading issued by agent of railroad is not conclusive upon railroad.

Cited in footnote to *Commercial Bank v. J. K. Armsby Co.* 65 L.R.A. 443, which denies right of merchant shipping goods to broker for distribution to others, and sending bill of lading indorsed in blank to him, to recover the goods from a bank which has in good faith taken the bill of lading as security.

Cited in notes (10 L. R. A. 416) on bills of lading; (38 L. R. A. 364) as to whom delivery may be made under bill of lading; (105 Am. St. Rep. 338, 347, 355) on rights and liabilities of assignees of bills of lading.

— Liability of carrier on bill of lading.

Cited in *Missouri, K. & T. R. Co. v. Hutchings S. & Co.* 78 Kan. 767, 99 Pac. 230, holding that carrier is liable for money advanced on bill of lading issued by its agent without actual receipt of property; *Swedish-American Nat. Bank v. Chicago, B. & Q. R. Co.* 96 Minn. 438, 105 N. W. 69; *Roy & Roy v. Northern P. R. Co.* 42 Wash. 576, 6 L.R.A.(N.S.) 304, 85 Pac. 53, 7 A. & E. Ann. Cas. 728,—holding that where no goods were actually received, the carrier may show that bill of lading was fraudulently or erroneously issued, as defense against liability to bona fide purchaser.

Distinguished in *Ratzer v. Burlington, C. R. & N. R. Co.* 64 Minn. 248, 58 Am. St. Rep. 530, 66 N. W. 988, holding carrier liable to innocent pledgee for failure to cancel bill of lading when goods delivered to another; *Thomas v. Atlantic Coast Line R. Co.* 85 S. C. 540, 34 L.R.A.(N.S.) 1180, 64 S. E. 220, 21 Ann. Cas. 223, holding that representations by carrier's agent that certain number of packages were received are conclusive on carrier as between carrier and transferee of bill of lading, where question is one of shortage.

Goods taken from carrier by legal process.

Followed in *Merz v. Chicago & N. W. R. Co.* 86 Minn. 34, 90 N. W. 7, holding removal of goods from carrier by one having paramount title, perfect defense to action for conversion.

9 L. R. A. 270, *F. J. DEWES BREWERY CO. v. MERRITT*, 82 Mich. 198, 46 N. W. 379.

Conditional sales and bailments.

Approved in *Hirsch v. Steele*, 10 Utah, 21, 36 Pac. 49, holding conditional sale of liquors, to be resold by vendee, valid against vendee's attaching creditors.

Cited in *Knights v. Piella*, 111 Mich. 13, 66 Am. St. Rep. 375, 69 N. W. 92, holding jewels sent to dealer with privilege of purchase, bailment requiring ordinary care; *Mishawaka Woolen Mfg. Co. v. Westveer*, 112 C. C. A. 109, 191 Fed. 466, to the point that conditional sales will be sustained and will not be de-

clared different from what parties intended; *Van de Bosch v. Bouwman*, 138 Mich. 626, 110 Am. St. Rep. 336, 101 N. W. 832, holding contract giving seller the right to retake property upon failure of buyer to pay for same and treat the amount paid as payment for its use and "wear and tear" or to seize and sell the same at public or private sale was not a conditional sale and retaking and selling of the property by seller did not discharge buyer from amount due on contract after sale; *Lance v. Butler*, 135 N. C. 422, 47 S. E. 488, holding where owner of goods disposes of them to another under an agreement whereby the owner retains the title and the one receiving them is to sell them, and give owner a certain part of the price for which sold, a mere agency was created, and the transaction was not a conditional sale.

Cited in notes (10 L.R.A. 235) on what constitutes conditional sale; (94 Am. St. Rep. 247) on what constitutes a transaction a sale.

Agreement to resell goods.

Cited in *Triplett v. Mansur & T. Implement Co.* 68 Ark. 234, 82 Am. St. Rep. 284, 57 S. W. 261, holding agreement to resell goods sold vendee, title remaining in vendor until second sale, valid. *Re E. W. Newton & Co.* 83 C. C. A. 23, 153 Fed. 844, holding under law of Arkansas a conditional sale contract is valid though it provides that vendee may sell the property in the usual course of business.

9 L. R. A. 271, *LOW v. STREETER*, 66 N. H. 36, 20 Atl. 247.

Construction of grant of easement of way.

Cited in *Thompson v. Germania L. Ins. Co.* 97 Minn. 92, 106 N. W. 102, holding whether or not an easement of way is exclusive depends upon the nature of the occasion, the use shown, and the terms of the agreement whereby it is created; *Manchester v. Hodge*, 75 N. H. 167, 71 Atl. 864, holding that owner of land abutting upon private way has no right to use half of street adjacent to premises for any purpose incompatible with free use as way.

9 L. R. A. 273, *Re OSHKOSH MUT. F. INS. CO.* 77 Wis. 366, 46 N. W. 441.

Liquidation of affairs of corporation.

Approved in *Gager v. Bank of Edgerton*, 101 Wis. 596, 77 N. W. 920, denying right of creditor to maintain action to settle affairs of insolvent bank, when another action pending.

Cited in *Davis v. Shearer*, 90 Wis. 254, 62 N. W. 1050, denying right to contest validity of appointment of receiver in collateral proceedings.

Cited in footnote to *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 328, which holds corporation in suit to wind it up entitled to object to order directing suits for unpaid stock subscriptions.

Liability as member of mutual insurance company.

Distinguished in *Davis v. Parcher & J. & A. Stewart Co.* 82 Wis. 494, 52 N. W. 771, denying that payment of whole insurance in cash relieves insured from further liability as member of mutual company.

Right of minority stockholders to sue.

Cited in footnote to *Shaw v. Davis*, 23 L. R. A. 294, which denies minority stockholder's right to enjoin legal contract.

9 L. R. A. 277, *WILLIAMSON v. JOHNSON*, 62 Vt. 378, 22 Am. St. Rep. 117, 20 Atl. 279.

Gifts.

Cited in *Re Neiman*, 109 Fed. 116, holding separate property of wife, placed

in husband's hands, not presumed gift; *Chambers v. McCreery*, 45 C. C. A. 326, 106 Fed. 368, holding allowing wife right of access to safe-deposit box containing bonds which husband continued to control not gift of such security; *Goelz v. People's Sav. Bank*, 31 Ind. App. 71, 67 N. E. 232, holding deposit made in bank for and in name of donee, donor retaining pass book until her death, valid gift; *Martin v. Martin*, 202 Ill. 388, 67 N. E. 1, holding legal liability for collections on securities not discharged by gift of other securities; *Fisher v. Ludwig*, 6 Cal. App. 149, 91 Pac. 658, as to necessity of gift being voluntary, gratuitous and absolute; *Shepard v. Shepard*, 164 Mich. 200, 129 N. W. 201, holding that to constitute valid gift it must be voluntary, gratuitous, and absolute.

Cited in note (2 L.R.A.(N.S.) 285) on revocability of gift.

Recovery of money advanced.

Distinguished in *Hudson v. Archer*, 9 S. D. 245, 68 N. W. 541, holding money paid upon performance of preliminary conditions of contract, as agreed, not recoverable on subsequent breach.

9 L. R. A. 279, *DICKINSON'S APPEAL*, 152 Mass. 184, 25 N. E. 99.

Investment of trust funds.

Cited in *State v. Washburn*, 67 Conn. 194, 34 Atl. 1034, holding trustee liable for loss of ward's funds invested in notes secured by mortgage in another state; *Mattocks v. Moulton*, 84 Me. 552, 24 Atl. 1004, holding investment of trust funds in second mortgage, failure to exercise honest judgment; *Re Hall*, 164 N. Y. 200, 58 N. E. 11, denying that will giving trustee discretion over investments authorizes investment in speculative ventures; *Drake v. Crane*, 127 Mo. 106, 27 L. R. A. 659, 29 S. W. 990, upholding donation from trust fund to build hotel, thereby increasing value of trust property; *Pine v. White*, 175 Mass. 590, 56 N. E. 967, denying trustee's liability to estate for failure to purchase property when cheap; *Re Davis*, 183 Mass. 501, 67 N. E. 604, disallowing investment of trust funds in railroad bonds and stock beyond a quarter of whole estate; *Warren v. Pazott*, 203 Mass. 346, 89 N. E. 381; *Thayer v. Dewey*, 185 Mass. 69, 69 N. E. 1074,—holding trustees in making investments of trust funds are bound to act in good faith and exercise a sound discretion.

Cited in notes (132 Am. St. Rep. 384, 385) on investment which trustee may not make without incurring liability in case of loss; (25 Eng. Rul. Cas. 337) on liability of trustee for losses.

9 L. R. A. 282, *MORRISON v. CITIZENS NAT. BANK*, 65 N. H. 253, 23 Am. St. Rep. 39, 20 Atl. 300.

Application of collateral on several obligations.

Cited in *California Nat. Bank v. Ginty*, 108 Cal. 153, 41 Pac. 38, upholding right of creditor holding two notes to apply collateral upon the one less secured; *First Nat. Bank v. Finck*, 100 Wis. 453, 76 N. W. 608, sustaining right of creditor having judgment embracing joint and individual notes to apply proceeds of execution on individual note; *Hutchings v. Reinhalter*, 23 R. I. 524, 28 L. R. A. 683, footnote p. 680, 51 Atl. 429, which sustains mortgagee's right to apply to notes not due, proceeds of sale under mortgage, to obtain benefit of attachment of other property to matured notes.

Cited in note (37 L.R.A.(N.S.) 716) on duty of creditor to surety with respect to application of collateral.

Liability of surety of debt otherwise secured.

Cited in *Bingham v. Mears*, 4 N. D. 440, 27 L. R. A. 259, 61 N. W. 808, holding creditor not bound to resort to security before suing surety; *Bank Comrs.*

v. Security Trust Co. 70 N. H. 538, 49 Atl. 113, holding action against maker of note not prerequisite to action against guarantor; Stevens v. Hood, 70 N. H. 178, 46 Atl. 29, holding failure to present claim against estate of insolvent deceased principal does not bar suit against surety.

Distinguished in Thomas v. Wason, 8 Colo. App. 455, 46 Pac. 1079, holding surety having indemnity bond, released to extent of principal's property levied on and subsequently relinquished.

Right of subrogation.

Cited in notes (68 L.R.A. 529) on subrogation to collateral securities; (68 L.R.A. 569, 587; 99 Am. St. Rep. 486) on right of subrogation.

9 L. R. A. 287, BROCK v. BROCK, 90 Ala. 86, 8 So. 11.

Parol trusts.

Cited in Moore v. Campbell, 102 Ala. 448, 14 So. 780, holding trust in lands devised cannot be established by parol; Tolleson v. Blackstock, 95 Ala. 511, 11 So. 284, holding verbal direction to executors to execute deed to donee not enforceable; Smith v. Smith, 153 Ala. 515, 45 So. 168, holding in the absence of fraud the absolute legal title conveyed on the face of the instrument of conveyance will not be subject to a parol trust.

Cited in note (115 Am. St. Rep. 787, 788) on creation of trusts in land by parol.

Distinguished in Long v. Mechem, 142 Ala. 412, 38 So. 262, holding if purchaser of lands paying the purchase money, takes the conveyance in the name of another the trust of lands results by construction to him from whom purchase money moves and parol declarations are admissible to prove such trust under statute requiring all trusts except those resulting from implication or construction of law to be in writing.

Trusts ex maleficio.

Cited in Brown v. Doane, 86 Ga. 39, 11 L. R. A. 383, 12 S. E. 179, holding land conveyed upon faith of fraudulent oral promise, impressed with constructive trust; Manning v. Pippen, 95 Ala. 541, 11 So. 56, holding that trust *ex maleficio* arises only upon clear proof of fraudulent intent in promise to devise lands conveyed.

Cited in footnote to Stahl v. Stahl, 68 L.R.A. 617, which holds constructive trust created where mother ill in bed at solicitation of children conveys property to one of them on his agreeing to hold it for benefit of all to avoid expense and his conveyance thereof to another child with notice.

Cited in note (39 L.R.A.(N.S.) 910, 912, 914) on grantee's oral promise to grantor as giving rise to constructive trust.

9 L. R. A. 292, BEXAR BLDG. & L. ASSO. v. ROBINSON, 78 Tex. 163, 22 Am. St. Rep. 36, 14 S. W. 227.

Usurious contracts.

Cited in Garza v. Sullivan, 10 Tex. Civ. App. 190, 30 S. W. 240, defining usurious interest as amount in excess of legal rate; Abbott v. International Bldg. & L. Asso. 86 Tex. 474, 25 S. W. 620, holding building and loan association contract usurious, where premium and stipulated interest exceed statutory limit.

Cited in footnote to Lindsay v. United States Sav. & L. Co. 51 L. R. A. 393, which sustains power of equity to compel payment of legal interest as condition of canceling usurious contract.

Recovery of usurious interest paid.

Cited in Baum v. Thoms, 150 Ind. 382, 65 Am. St. Rep. 368, 50 N. E. 357,

holding interest exceeding legal rate, voluntarily paid, recoverable, independent of statute; *Smith v. Stevens*, 81 Tex. 465, 16 S. W. 986, holding interest in excess of legal rate recoverable as counterclaim to another indebtedness; *Melton v. Snow*, 24 Okla. 784, 104 Pac. 40, holding, that under statute in regard to usury party paying excess interest may recover same by suit; *Baum v. Daniels*, 55 Tex. Civ. App. 280, 118 S. W. 754, holding that in action under statute, it is error to direct recovery for interest upon usurious payments between date suit was brought and date of judgment; *Lorentz v. Pinnell*, 55 W. Va. 121, 46 S. E. 796, holding usurious interest voluntarily paid may be recovered.

Distinguished in *Henry v. Sansom*, 2 Tex. Civ. App. 154, 21 S. W. 69, holding usurious interest collected by legal proceeding not recoverable.

9 L. R. A. 295, *LYON v. McDONALD*, 78 Tex. 71, 14 S. W. 261.

For what purposes land may be condemned.

Cited in *Foster v. Chicago*, R. I. & T. R. Co. 10 Tex. Civ. App. 477, 31 S. W. 529, denying right to apply land to other uses than those for which condemned; *Muhle v. New York*, T. & M. R. Co. 86 Tex. 464, 25 S. W. 607, holding land condemned for a depot cannot be appropriated for different use; *Olive v. Sabine* & E. T. R. Co. 11 Tex. Civ. App. 213, 33 S. W. 139, upholding railroad company's right to compel lessee to remove, at expiration of lease, buildings erected upon land conveyed by lessor for right of way, although lessee has purchased; *Buford v. Smith*, 2 Tex. Civ. App. 181, 21 S. W. 168, denying right of private ferry to land passengers upon land condemned for use as public road; *Neitzel v. Spokane International R. Co.* 65 Wash. 110, 36 L.R.A.(N.S.) 528, 117 Pac. 864, holding that fee simple title will not vest in condemning corporation in absence of express statutory direction.

Cited in footnotes to *Ryan v. Louisville & N. Terminal Co.* 45 L. R. A. 303, which holds taking of land for railroad terminal facilities to be for public purpose; *Gurney v. Minneapolis Union Elevator Co.* 30 L. R. A. 534, which holds perpetual easement acquired by railroad condemnation proceedings.

Cited in note (36 L.R.A.(N.S.) 514, 518) on uses to which railroad right of way may be devoted.

Distinguished in *Stevens v. St. Louis Merchants Bridge Terminal R. Co.* 152 Mo. 219, 53 S. W. 1066, holding use of depot by second railroad not new servitude.

Easements.

Cited in *Sanborn v. Van Dyne*, 96 Minn. 224, 96 N. W. 41, holding invalid, lease, for private use, of land deeded city for levee; *Sherman v. Sherman*, 23 S. D. 503, 122 N. W. 439 (dissenting opinion), on release of land to railroad company as limiting release for right of way only.

Cited in note (10 Eng. Rul. Cas. 59) as to when grant of an easement will be implied.

9 L. R. A. 298, *GAINESVILLE, H. & W. R. CO. v. HALL*, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. 259.

Compensation for land taken or injured.

Followed in *Ft. Worth & R. G. R. Co. v. Downie*, 82 Tex. 386, 17 S. W. 620, sustaining right to recover for injury to lots by operation of railroad in front of them, though not in street.

Approved in *Gray v. Dallas Terminal R. & Union Depot Co.* 13 Tex. Civ. App. 164, 36 S. W. 352, holding authorized appropriation by railroad of way over streets not a taking from abutter requiring previous compensation or deposit; *Root v. Butte*, A. & P. R. Co. 20 Mont. 358, 51 Pac. 155, holding one damaged by running of trains, in excess of community at large, has action for special

damages; *Cooper v. Dallas*, 83 Tex. 242, 29 Am. St. Rep. 645, 18 S. W. 565, holding city liable for damages to lots overflowed by reason of change in grade of streets; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 539, 22 S. W. 1059, upholding abutter's right to compensation for damages from excavation in grading highway, which renders his property inaccessible; *Rosenthal v. Taylor*, B & H. R. Co. 79 Tex. 328, 15 S. W. 268, holding railway liable for obstruction of surface water by use of right of way; *Dallas v. Kahn*, 9 Tex. Civ. App. 26, 29 S. W. 98, distinguishing injuries received by property owner in common with others on street, from such as he suffers with community generally.

Cited in *Kayser v. Chicago*, B. & Q. R. Co. 88 Neb. 346, 129 N. W. 554, holding that landowners may recover damage caused by construction and operation of railroad on opposite side of street; *Settegast v. Houston*, O. L. & M. P. Ry. Co. 38 Tex. Civ. App. 631, 87 S. W. 197, holding provision of constitution that property shall not be taken or damaged for public use without payment of just compensation gives right of action for damages to person whose property is injured but does not make condemnation necessary as condition precedent to the public improvement; *Houston & T. C. R. Co. v. Davis*, 45 Tex. Civ. App. 213, 100 S. W. 1013; *Novich v. Trinity & B. V. R. Co.* 45 Tex. Civ. App. 655, 101 S. W. 476,—holding under constitutional provision as to compensation for property taken or damaged for a public use one can recover for smoke, noise and vibrations caused by trains decreasing the value of his property; *Heilbron v. St. Louis Southwestern R. Co.* 52 Tex. Civ. App. 582, 113 S. W. 610, to the point that adjacent owner may recover damages to land caused by operation of railroad, though none of his land is taken; *Texas & P. R. Co. v. Edrington*, 100 Tex. 499, 9 L.R.A.(N.S.) 989, 101 S. W. 441, holding under constitution neither the necessity for the structure nor the manner in which it was used constitute a defense to a claim by the owner for compensation for depreciation in value of his property; *Bingham Bros. v. Port Arthur Channel & Dock Co.* 100 Tex. 202, 13 L.R.A.(N.S.) 660, 97 S. W. 686, holding canal company constructing canal under eminent domain must compensate riparian owner for injuries received by reason of salt water flowing into the body of fresh water which owner used for irrigation purposes and rendering same unfit therefor.

Annotation cited in *Alabama & V. R. Co. v. King*, 93 Miss. 402, 22 L.R.A.(N.S.) 605, 47 So. 857, as to constitutional liability imposed on those having power of eminent domain for consequential damages.

Cited in footnotes to *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders of railroad; *Jacksonville, T. & K. R. Co. v. Adams*, 14 L. R. A. 533, which authorizes condemnation of land irregularly entered upon.

Cited in notes (85 Am. St. Rep. 310) on elements of damages allowable in eminent domain proceedings; (102 Am. St. Rep. 811) on compensation for land condemned; (109 Am. St. Rep. 915) on what constitutes "damage" to property within provision that property shall not be taken or damaged for public use without compensation; (17 L.R.A.(N.S.) 1057) on smoke, noise, etc., incident to ordinary operation of railroad as a "damaging" of property within constitutional provision for compensation; (37 L. ed. U. S. 156) on damages to abutting owners in exercise of right of eminent domain.

Measure of damages for injury to real property.

Cited in *San Antonio v. Mackey*, 14 Tex. Civ. App. 214, 36 S. W. 760, holding that measure of damages for use of lands as dumping ground is loss of rental value and other accrued special damages up to time of trial; *Brown v. Southwestern Teleg. & Teleph. Co.* 17 Tex. Civ. App. 435, 44 S. W. 59, holding that entire damages should be assessed for injury from authorized telephone line.

Cited in note (11 L. R. A. 605) on market price as element of damages in condemnation proceedings.

Distinguished in *Baugh v. Texas & N. O. R. Co.* 80 Tex. 59, 15 S. W. 587, holding depreciation not measure of damages for temporary nuisances.

Prejudicial error.

Approved in *Denison & P. Suburban R. Co. v. O'Malley*, 18 Tex. Civ. App. 203, 45 S. W. 225, holding exclusion of evidence without prejudice, where already admitted in another form; *Dallas v. Kahn*, 9 Tex. Civ. App. 24, 29 S. W. 98, holding ruling upon objection to question not prejudicial where appellant not injured by answer thereto.

Opinions as evidence.

Approved in *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.* 23 Tex. Civ. App. 339, 57 S. W. 575, holding that where witness has stated all facts within his knowledge, his opinion concerning more is properly excluded.

Cited in *Houston & T. C. R. Co. v. Roberts*, 50 Tex. Civ. App. 72, 109 S. W. 982; *Houston & T. C. R. Co. v. Roberts*, 101 Tex. 421, 108 S. W. 808,—holding opinion of witness as to mixed question of law and fact inadmissible.

Nuisances.

Cited in *Schueller v. San Antonio & A. P. R. Co.* 46 Tex. Civ. App. 447, 102 S. W. 922, as to smoke and vibration caused by operating powerful machinery on land being nuisance; *Missouri, K. & T. Ry. Co. v. Anderson*, 36 Tex. Civ. App. 130, 81 S. W. 781, holding the use of property by railway company for private purposes such as yard purposes may become a private nuisance notwithstanding the business is a lawful one; *Hamm v. Briant*, 57 Tex. Civ. App. 615, 124 S. W. 112, holding that if operation of gin and light plant is nuisance to adjacent property, person who conducts it is liable for damages; *Church of Jesus Christ L. D. S. v. Oregon Short Line R. Co.* 36 Utah, 248, 23 L.R.A. (N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243, holding that interference with religious service by noise from operation of railroad is not private nuisance.

Cited in footnotes to *Froelicher v. Oswald Iron Works*, 64 L.R.A. 228, which holds that noise from boiler works, causing physical discomfort to occupants of dwelling, may be enjoined; *Sullivan v. Jones & L. Steel Co.* 66 L.R.A. 712, which holds that manufacturer of pig iron will be enjoined from changing manner of operating furnaces if result is to cast ore dust on neighboring residential property in such quantity as to destroy homes or other property there situated; *Redd v. Edna Cotton Mills*, 67 L.R.A. 983, which holds that blowing of factory whistle will not be enjoined until fact of nuisance has been established; *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Cited in note (1 L.R.A. (N.S.) 67) on effect of legislative authority upon liability for private nuisance.

Distinguished in *Daniel v. Ft. Worth & R. G. R. Co.* 96 Tex. 329, 72 S. W. 578, holding compensation for personal annoyance and discomfort recoverable for coal-hoist nuisance; *Twenty-Second Corp. of Church of Jesus Christ L. D. S. v. Oregon Short Line R. Co.* 36 Utah, 248, 23 L.R.A. (N.S.) 864, 103 Pac. 243, holding the interference with religious services by the annoyance from noises in the rightful operation of a railroad and train yards near a church without any physical interference with the church property is not a private nuisance giving the society a cause of action against the railroad company.

"Damage."

Cited in *Seaboard Air-Line R. Co. v. Smith*, 3 Ga. App. 648, 60 S. E. 353, hold-

ing by "damage" is meant every loss or diminution of that which is a man's own occasioned by the fault of another.

9 L. R. A. 302, GRUBER v. BAKER, 20 Nev. 453, 23 Pac. 853.

Attorney and client; privileged communications.

Cited in Minard v. Stillman, 31 Or. 167, 65 Am. St. Rep. 815, 49 Pac. 976, holding that attorney may be compelled to disclose to what clients he paid funds alleged by another client to have been converted.

Cited in footnotes to Bruley v. Garvin, 48 L. R. A. 839, which holds conversation with attorney without paying fee, asking opinion on contemplated suit, privileged; Koeber v. Somers, 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged.

Evidence of fraud.

Cited in Pederson v. Seattle Consol. Street R. Co. 6 Wash. 205, 33 Pac. 351, holding evidence of fraud must be clear and convincing; Costello v. Scott, 30 Nev. 79, 93 Pac. 1, on the evidence necessary to establish fraud.

Loss of profits as element of damage.

Cited in note (52 L. R. A. 59) on damages for tort as affected by loss of profits.

Real party in interest.

Cited in note (64 L. R. A. 585) as to who is real party in interest, within meaning of statutes defining parties by whom action must be brought.

Assignment of right of action.

Cited in Prosky v. Clark, 32 Nev. 445, 35 L.R.A.(N.S.) 515, 109 Pac. 793, holding that rights of action based on fraud are not assignable.

Cited in note (35 L.R.A.(N.S.) 745) on assignment of equitable interests.

Protection of purchaser under deed intended as mortgage.

Cited in note (32 L.R.A.(N.S.) 1048) on protection of purchaser from apparent vendee under instrument intended as mortgage.

9 L. R. A. 313, PENSO v. McCORMICK, 125 Ind. 116, 21 Am. St. Rep. 211, 25 N. E. 156.

Liability for maintaining premises in dangerous condition.

Cited in Elwood Electric Street Co. v. Ross, 26 Ind. App. 265, 58 N. E. 535, and Citizens' Street R. Co. v. Stoddard, 10 Ind. App. 283, 37 N. E. 723, holding that street car company owes greater care to children than to older persons; Kinchlow v. Midland Elevator Co. 57 Kan. 378, 46 Pac. 703, holding it question for jury whether company used due care in leaving barrel of hot water uncovered; Cincinnati & H. Spring Co. v. Brown, 32 Ind. App. 62, 69 N. E. 197, holding owner of land who knowingly suffered his barbed wire fence on boundary thereof in a populous district to go to ruin and become dangerous to children playing in vicinity thereof, liable to child injured thereby; Indianapolis Water Co. v. Harold, 170 Ind. 173, 83 N. E. 993, holding water company not liable for boy nine years old falling off a floating foot bridge when bridge was not slippery and had a hand rail, in absence of evidence the bridge was especially attractive to children; Driscoll v. Clark, 32 Mont. 183, 80 Pac. 1, holding where child was injured while playing around machine an allegation in complaint in action for damages caused thereby which merely alleges that machine did attract children insufficient.

Cited in note (26 L. R. A. 687) on liability for dangerous condition of private grounds lying open beside highway or frequented path.

— To one entering by invitation.

Cited in Howe v. Ohmart, 7 Ind. App. 36, 33 N. E. 466, upholding recovery by

student attending meeting of literary society by invitation, and falling down unguarded passageway; *North Manchester Tri-County Agri. Asso. v. Wilcox*, 4 Ind. App. 143, 30 N. E. 202, holding owner of race track liable for injury to horse caused by obstruction of track; *Chicago & I. Coal R. Co. v. De Baum*, 2 Ind. App. 284, 28 N. E. 447, upholding liability of carrier to one loading cars, whose horse fell into hole near track; *Indianapolis Street R. Co. v. Dawson*, 31 Ind. App. 607, 68 N. E. 909, holding street railway company liable for not preventing assault upon colored man by persons in park to which it had invited public.

— **To licensees and trespassers.**

Cited in *Carskaddon v. Mills*, 5 Ind. App. 27, 31 N. E. 559, denying right of owner to erect dangerous obstruction on roadway used by public without objection; *Travell v. Bannerman*, 71 App. Div. 445, 75 N. Y. Supp. 866, holding owner liable to boy injured by explosion of powder removed from dumping ground by other boys; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 427, 57 L. R. A. 568, 90 N. W. 95, holding railroad company liable for injury to child inflicted by unguarded turntable near street; *Stalcup v. Louisville, N. A. & C. R. Co.* 16 Ind. App. 588, 45 N. E. 802, holding one riding on train without permission of company not entitled to recover for injuries; *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 580, 39 N. E. 672, denying liability for death of child killed while walking along track without consent of company; *Feehan v. Dobson*, 10 Pa. Super. Ct. 11, 44 W. N. C. 68, denying liability of one depositing cinders on out lot, to child injured while gathering coal; *Faris v. Hoberg*, 134 Ind. 276, 39 Am. St. Rep. 261, 33 N. E. 1028, denying that owner owes protection to one entering storehouse to look for drayman, and falling down elevator shaft; *Thiele v. McManus*, 3 Ind. App. 134, 28 N. E. 327, denying liability of merchant to trespasser falling into hatchway in storeroom; *Rollestone v. Cassirer*, 3 Ga. App. 171, 59 S. E. 442, holding if the proprietor knows that a pitfall or some similar danger lurks on his premises, and sees a licensee about to come in contact therewith, he should give warning; *Ambroz v. Cedar Rapids Electric Light & Power Co.* 131 Iowa, 339, 108 N. W. 540, holding defendant maintaining blow-off pipe on its premises liable to trespasser injured thereby; *Lewis v. Cleveland, C. C. & St. L. R. Co.* 42 Ind. App. 341, 84 N. E. 23; *Chicago & E. R. Co. v. Fox*, 38 Ind. App. 279, 70 N. E. 81,—holding railroad liable for injury to child while playing on unlocked turntable though child was a trespasser; *Smith v. Hayes*, 29 Ont. Rep. 293, holding defendant having horse power machine on his premises not liable for injuries caused to infant playing with same in absence of evidence that it was especially alluring to children or that defendant had knowledge of habit of children playing with same; *San Antonio & A. P. R. Co. v. Morgan*, 92 Tex. 102, 46 S. W. 28, to the point that where person enters on property of another law imposes on owner duty not to intentionally injure him, though such entry be not prima facie lawful; *Brenilson v. Chicago & N. W. R. Co.* 144 Wis. 619, 32 L.R.A.(N.S.) 362, 129 N. W. 664, holding that child of tender age cannot be held, as matter of law, guilty of contributory negligence, in not avoiding hole left by railway company on breakwater covered with planks, where access to breakwater from street was unobstructed.

Cited in footnotes to *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Paolino v. McKendall*, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish to guard young children accustomed to play there, from fire; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Uttermohlen v. Bogg's Run Min. & Mfg. Co.* 55 L. R. A. 911, which denies liability of mine

owner for injury to trespassing child by cable and pulleys hauling coal cars; *Ryan v. Towar*, 55 L. R. A. 310, which denies landowner's duty to make premises safe for attempt to rescue trespassing child caught in water wheel in unused building; *Brinkley Car Works Mfg. Co. v. Cooper*, 57 L. R. A. 724, which denies liability for injury to six year old boy from carelessly walking into pool of hot water.

Cited in notes (49 Am. St. Rep. 417; 32 L.R.A.(N.S.) 562) on duty of property owner to trespassing child; (25 Eng. Rul. Cas. 113) on liability for injury to trespassers by dangerous instrumentalities.

Distinguished in *Stendal v. Boyd*, 73 Minn. 56, 42 L. R. A. 289, 72 Am. St. Rep. 597, 75 N. W. 735, denying that landowner is bound to guard open excavation to prevent injury to children trespassing.

9 L. R. A. 317, *PHENIX INS. CO. v. TOMLINSON*, 125 Ind. 84, 21 Am. St. Rep. 203, 25 N. E. 126.

Avoidance or cancelation of insurance contract.

Cited in *Continental Ins. Co. v. Vanlue*, 126 Ind. 418, 10 L. R. A. 847, 26 N. E. 119, holding mortgage conditioned to secure support of mortgagee during life, encumbrance avoiding policy; *Metropolitan L. Ins. Co. v. McCormick*, 19 Ind. App. 52, 65 Am. St. Rep. 392, 49 N. E. 44, upholding right of insured to enforce contract wrongfully canceled by company; *Supreme Lodge, K. of H. v. Metcalf*, 15 Ind. App. 162, 43 N. E. 893 (dissenting opinion), majority holding that purchaser may recover amount paid for speculative certificate though ineligible for membership; *Tibbits v. Mutual Ben. L. Ins. Co.* 159 Ind. 675, 65 N. E. 1033, holding policy forfeited by failure to pay premium upon day due; *Queen Ins. Co. v. Excelsior Mill. Co.* 69 Kan. 116, 76 Pac. 423; *Farmer's Mut. F. Ins. Co. v. Jackman*, 35 Ind. App. 17, 73 N. E. 730,—holding provisions of policy for forfeiture construed most strongly against company; *Union Mut. L. Ins. Co. v. Adler*, 38 Ind. App. 546, 75 N. E. 1088 (dissenting opinion), as to forfeiture clause being construed most strongly against insurer.

Waiver of forfeiture.

Cited in *Lime City Bldg. Loan & Sav. Asso. v. Black*, 136 Ind. 560, 35 N. E. 829, holding acceptance of dues from delinquent stockholders, waiver of by-law forfeiting stock; *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 628, 33 So. 504, holding insurer estopped by retention of premium from claiming forfeiture for breach of condition as to other insurance; *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 665, 65 N. E. 15, holding that stipulation as to modification of terms of policy may be waived; *Arnold v. Empire Mut. Annuity & L. Ins. Co.* 3 Ga. App. 708, 60 S. E. 470, holding an agent may waive conditions respecting forfeiture for nonpayment of an instalment and agree to give notice when each payment is due and failure of such notice will excuse payment; *St. Paul F. & M. Ins. Co. v. Cooper*, 25 Okla. 41, 105 Pac. 198, holding that acceptance of premium after default in payment and notice of loss operates as waiver of forfeiture, under policy providing that company should not be liable for loss occurring during continuance of default; *Ætna Life Ins. Co. v. Fallow*, 110 Tenn. 739, 77 S. W. 937, holding collection by sub-agent of premium on policy after maturity and loss estopped insurer from asserting forfeiture for failure of payment of premium at maturity.

— Of life insurance policy.

Cited in *Kerlin v. National Acci. Asso.* 8 Ind. App. 633, 35 N. E. 39, holding extension of time to pay premium on life policy waives forfeiture clause; *Michigan Mut. L. Ins. Co. v. Custer*, 128 Ind. 32, 27 N. E. 124, holding mutual agreement extending time of payment of premium waiver of forfeiture incurred by

nonpayment of note; Prudential Ins. Co. v. Sullivan, 27 Ind. App. 39, 59 N. E. 873, holding company waiving payment of premium in advance liable upon death of insured; Union Cent. L. Ins. Co. v. Jones, 17 Ind. App. 600, 47 N. E. 342, holding forfeiture of policy waived by enforcing collection of notes by foreclosure of mortgage; Union Cent. L. Ins. Co. v. Woods, 11 Ind. App. 352, 37 N. E. 180, holding forfeiture of policy waived by execution and sale upon judgment for premium note; Supreme Tent, K. of M. v. Volkert, 25 Ind. App. 640, 57 N. E. 203, holding society estopped from forfeiting policy, by sending blank forms for proof of death to beneficiary.

Cited in footnotes to Stewart v. Union Mut. L. Ins. Co. 42 L. R. A. 147, which holds provision against policy taking effect till first premium paid ineffectual, where premium note given, though unpaid; Kocher v. Supreme Council C. B. L. 52 L. R. A. 861, which denies power of officers of benefit society to waive payment of assessments for death benefits; McQuillan v. Mutual Reserve Fund Life Asso. 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default, without notice of any condition affixed.

— Of fire insurance policy.

Cited in Replogle v. American Ins. Co. 132 Ind. 367, 31 N. E. 947, holding that insurer waived forfeiture of policy by calling for additional proofs of loss; Continental Ins. Co. v. Chew, 11 Ind. App. 331, 54 Am. St. Rep. 506, 38 N. E. 417, holding that acceptance of overdue premium, with knowledge of loss, restores force of policy from beginning; Milkman v. United Mut. Ins. Co. 20 R. I. 12, 36 Atl. 1121; Marshall Farmers' Home F. Ins. Co. v. Liggett, 16 Ind. App. 602, 45 N. E. 1062; Farmers' Mut. Relief Asso. v. Koontz, 4 Ind. App. 544, 30 N. E. 145,—holding acceptance by association of delinquent payments after loss establishes liability under policy; Frasier v. New Zealand Ins. Co. 39 Or. 351, 64 Pac. 814, holding return of ratable portion of premium for part of policy canceled, retaining balance, waiver of condition as to vacancy; Glens Falls Ins. Co. v. Michael, 167 Ind. 704, 8 L.R.A.(N.S.) 708, 79 N. E. 905, holding issuance of policy on oral application without representation on part of assured as to title waiver of right to declare forfeiture for failure of sole and unconditional ownership.

Cited in footnotes to German Ins. Co. v. Shader, 60 L. R. A. 918, which holds provision against loss occurring before premium paid waived by receiving premium after all property destroyed; Johnston v. Phelps County Farmers' Mut. Ins. Co. 56 L. R. A. 127, which holds receipt of delinquent assessment not waiver of forfeiture if any of insured property in existence.

9 L. R. A. 321, DUGAN v. STATE, 125 Ind. 130, 25 N. E. 171.

Followed without discussion in Dorsey v. State, 125 Ind. 600, 25 N. E. 350.

Jurisdiction over boundary waters.

Approved in Welsh v. State, 126 Ind. 75, 9 L. R. A. 665, 25 N. E. 883, and Memphis & C. Packet Co. v. Pikey, 142 Ind. 310, 40 N. E. 527, holding that Indiana courts have concurrent jurisdiction with those of Kentucky of causes arising on Ohio river; Meyler v. Wedding, 107 Ky. 700, 60 S. W. 20 (dissenting opinion), majority holding Indiana process served above low-water mark on Kentucky side of Ohio river void; Roberts v. Fullerton, 117 Wis. 239, 65 L. R. A. 971, 93 N. W. 1111 (dissenting opinion), majority holding officer of Minnesota without authority to destroy fishing nets of citizen of Wisconsin in portion of lake within border of latter state.

Cited in Lemore v. Com. 127 Ky. 486, 105 S. W. 930, holding under act of Congress the states of Kentucky and Missouri have concurrent jurisdiction over the Mississippi river.

Cited in notes (44 Am. St. Rep. 84; 65 L.R.A. 964) on jurisdiction over boundary rivers.

Sunday laws.

Cited in footnotes to *Gross v. Miller*, 26 L. R. A. 605, which holds violation of Sunday law by hunting, no defense to action for negligent injury; *Com. v. Waldman*, 11 L. R. A. 563, which holds keeping barber shop open on Sunday not work of necessity.

Cited in notes (11 L. R. A. 63) on legality of contract made on Sunday; (14 L. R. A. 194) on Sunday labor.

Interstate commerce.

Cited in *State v. Seagraves*, 111 Mo. App. 357, 85 S. W. 925, holding the carrying of a pleasure party on steamboat is not interstate commerce although the boat may touch the shores of different states.

9 L. R. A. 323, *O'BRIEN v. STATE*, 125 Ind. 38, 25 N. E. 137.

Presumption of regularity.

Cited in *Davidson v. State*, 135 Ind. 267, 34 N. E. 972, holding jurisdiction presumed, no irregularity appearing in record; *Rinkard v. State*, 157 Ind. 539, 62 N. E. 14, upholding presumption, in absence of record to contrary, that grand jury was duly impaneled; *Edwards v. Van Cleave*, 47 Ind. App. 351, 94 N. E. 596, holding that in action to review judgment every presumption in favor of such judgment, is indulged.

Cited in note (22 Am. St. Rep. 387) on presumption of correctness of judgments of courts of general jurisdiction.

Change of venue.

Cited in note (11 L. R. A. 75) on criminal practice as to change of venue.

Sufficiency of indictment.

Cited in *Lay v. State*, 12 Ind. App. 366, 39 N. E. 768, holding indictment charging removal of part of cemetery fence sufficient, although not specifying that cemetery was public or private; *Brown v. State*, 14 Ind. App. 26, 42 N. E. 244, holding that indictment charging defendant with acting "knowingly" sufficiently avers guilty knowledge.

Evidence of accused against himself.

Cited in *Davidson v. State*, 135 Ind. 260, 34 N. E. 972, holding defendant's voluntary statements before coroner, written and signed, admissible; *State v. Petty*, 32 Nev. 390, 108 Pac. 934, holding that physical examination of defendant by court order in criminal case where defense was insanity to enable physicians to testify at trial did not compel defendant to testify against himself.

Cited in note (94 Am. St. Rep. 340) on compelling accused to perform acts and submit person to inspection and examination.

Definition of word "testify."

Cited in *Welborn v. Faulconer*, 237 Mo. 305, 141 S. W. 31, to the point that "to testify" is to make solemn declaration, verbal or written, to establish some fact.

9 L. R. A. 326, *MORRIS v. POWELL*, 125 Ind. 281, 25 N. E. 221.

Right of suffrage.

Cited in *Mills v. Green*, 67 Fed. 831, denying power of legislature to add to constitutional qualifications of voters by registration act; *Gougar v. Timberlake*, 148 Ind. 41, 37 L. R. A. 648, 62 Am. St. Rep. 487, 46 N. E. 339, denying women's constitutional right to vote, where state Constitution grants privilege to "male citizens;" *Brewer v. McClelland*, 144 Ind. 426, 17 L. R. A. 846, footnote p. 845,

32 N. E. 299, which holds statute requiring notice of claim to be legal voter from persons residing less than six months in county, void; *Coggeshall v. Des Moines*, 138 Iowa, 737, 128 Am. St. Rep. 221, 117 N. W. 309, holding wherein constitution has prescribed qualifications of electors they cannot be changed by legislature.

Cited in footnote to *Barret v. Taylor*, 36 L. R. A. 129, upholding right to have name registered as voter, of unnaturalized minor who becomes qualified voter before revision of registry.

Cited in notes (25 L. R. A. 481, 482) on how far right to vote is absolute; (10 L.R.A. 225) on registration of voters; (28 Am. St. Rep. 261) on legislative power to fix proof of unregistered elector's right to vote; (45 L. ed. U. S. 215) on validity of registration laws.

Constitutional provision as to apportionment.

Cited in *State ex rel. Lamb v. Cunningham*, 83 Wis. 154, 17 L. R. A. 171, 35 Am. St. Rep. 27, 53 N. W. 35, holding act not in accordance with constitutional requirement for apportionment "according to number of inhabitants" invalid; *Denney v. State*, 144 Ind. 513, 31 L. R. A. 730, 42 N. E. 929, holding act at variance with constitutional provision prescribing time and mode of apportionment of members of legislature, unconstitutional.

Constitutional rights.

Cited in *Shaw v. Marshalltown*, 131 Iowa, 134, 10 L.R.A.(N.S.) 829, 104 N. W. 1121, 9 A. & E. Ann. Cas. 1039, holding law giving preference to old soldiers in public employment not in violation of federal Constitution declaring that no state shall abridge the privilege or immunities of a citizen of the United States.

9 L. R. A. 338, *TYLER v. WILLISTON*, 62 Vt. 269, 20 Atl. 304.

Constructive notice of defect in bridge.

Cited in footnote to *Thomas v. Flint*, 47 L. R. A. 499, which holds mere existence of defect in bridge for two or three days not constructive notice to city.

9 L. R. A. 339, *CHASE'S PATENT ELEVATOR CO. v. BOSTON TOW BOAT CO.* 152 Mass. 428, 28 N. E. 300.

Final determination on merits in 155 Mass. 212, 29 N. E. 470.

Failure of foreign corporation to file documents required by statute.

Cited in *Washburn Mill Co. v. Bartlett*, 3 N. D. 147, 54 N. W. 544, denying that failure of foreign corporation to file copy of charter precludes right to foreclose mortgage; *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 83, 120 Fed. 897, denying that rights under lease are impaired by failure of foreign corporation to file certificate before doing business; *Rogers v. Simmons*, 155 Mass. 260, 29 N. E. 580, holding statute requiring foreign corporation to appoint attorney for service of papers, and to file copy of charter, directory; *Atty. Gen. v. Massachusetts Pipe Line Gas Co.* 179 Mass. 20, 60 N. E. 389, denying that corporation failing to file certificate of paid up capital is relieved from franchise tax; *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 196 Mass. 459, 14 L.R.A.(N.S.) 563, 82 N. E. 671, 13 A. & E. Ann. Cas. 510, as to validity of contracts made before compliance with statute.

9 L. R. A. 341, *HAX v. SEAMAN*, 14 Colo. 536, 24 Pac. 461.

Estoppel.

Cited in *Matless v. Sundin*, 94 Iowa, 114, 62 N. W. 662, holding that owner of two judgments may sell land under junior, without affecting lien of senior, encumbrance.

Cited in footnote to *Gilbert v. American Surety Co.* 61 L. R. A. 253, which L.R.A. An. Vol. II.—17.

holds vendor in possession, after years of service as agent of vendee, estopped to reclaim property on ground that sale was illegal.

9 L. R. A. 343, *SIMMONS v. SPRATT*, 26 Fla. 449, 8 So. 123.

Bill of exceptions.

Approved in *Lovett v. State*, 29 Fla. 382, 11 So. 172, holding failure of record to show presence in court of defendant charged with murder not cured by statement in bill of exceptions.

Cited in note (91 Am. St. Rep. 208) on bill of exceptions containing evidence given on former trial in civil case.

Reversal for erroneous admission of evidence.

Approved in *Pensacola & A. R. Co. v. Anderson*, 26 Fla. 427, 8 So. 127, refusing new trial for admission of improper evidence on point as to which there was no conflict, where fact otherwise shown; *Livingston v. L'Engle*, 27 Fla. 517, 8 So. 728, and *Jacksonville, M. P. R. & Nav. Co. v. Warriner*, 35 Fla. 209, 16 So. 898, holding that judgment will not be reversed for error working no injury to party against whom ruling made; *Hays v. Ernest*, 32 Fla. 26, 13 So. 451, holding exclusion of competent evidence bearing on point on which evidence was conflicting, reversible error.

Cited in *Southern Home Ins. Co. v. Putnal*, 57 Fla. 220, 49 So. 922, holding error being made to appear injury will be presumed; *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 454, 43 So. 318, holding objections are properly sustained to questions which seek to elicit testimony outside issues of an action.

Ejectment by tenant in common against stranger.

Cited in note (6 L.R.A.(N.S.) 713, on extent of recovery in ejectment by tenants in common against stranger.

Certainty of grantee in deed.

Cited in *City Bank v. Plank*, 141 Wis. 658, 124 N. W. 1000, holding when person formerly having name written in deed is known by both parties to be dead the inference is very strong that by the use of that name they meant to designate not the dead man but some existant person or persons.

9 L. R. A. 348, *RICHARDSON v. WOODSTOCK IRON CO.* 90 Ala. 266, 8 So. 7.

Homestead conveyances.

Cited in *Woodstock Iron Co. v. Richardson*, 94 Ala. 630, 10 So. 144, denying on second appeal that deed of homestead, not delivered till another place is purchased, requires acknowledgment of wife; *Parks v. Barnett*, 104 Ala. 442, 16 So. 136, holding deed of homestead, signed by husband and wife, but not acknowledged by wife, a nullity; *Edinburgh American Land Mortg. Co. v. Peoples*, 102 Ala. 244, 14 So. 656, holding mortgage of homestead acknowledged by wife before officer outside of county where commissioned, void; *Horbach v. Tyrrell*, 48 Neb. 534, 37 L. R. A. 441, 67 N. W. 485 (dissenting opinion), majority denying that mortgage to corporation covering homestead, is void because acknowledged before its treasurer; *Havemeyer v. Dahn* (Neb.) 33 L. R. A. 337, 67 N. W. 489 (dissenting opinion), majority denying invalidity of homestead mortgage acknowledged before attorney holding claim for collection; *Pipkin v. Williams*, 57 Ark. 249, 38 Am. St. Rep. 241, 21 S. W. 433, holding void, conveyance of homestead by deed poll, in which wife joins only to release her dower; *Gilbert v. Pinkston*, 167 Ala. 493, 140 Am. St. Rep. 89, 52 So. 442, holding that deed of homestead by husband and wife, void because of defective acknowledgment, is not made effective after husband's death by proper acknowledgment by widow.

Delivery of deed after death of grantor.

Cited in *Kelly v. Richardson*, 100 Ala. 595, 13 So. 785, holding conveyance to be delivered at death of grantor, with use and occupation reserved during life, inoperative as deed.

Cited in note (95 Am. St. Rep. 943) on effect on conveyance of new acknowledgment by wife after husband's death.

Distinguished in *Griswold v. Griswold*, 148 Ala. 241, 121 Am. St. Rep. 64, 42 So. 554, holding delivery of deed by grantor to a third person to hold and deliver to grantee after death of grantor, valid delivery.

9 L. R. A. 349, *MORRIS v. MISSOURI P. R. CO.* 78 Tex. 17, 22 Am. St. Rep. 17, 14 S. W. 228.

Venue of actions for damages to realty.

Cited in *Missouri P. R. Co. v. Cullers*, 81 Tex. 388, 13 L. R. A. 545, 17 S. W. 19, holding action not maintainable for injuries to land located outside of state; *Pittsburgh, C. C. & St. L. R. Co. v. Jackson*, 83 Ohio St. 18, 93 N. E. 260, 21 Ann. Cas. 1313, holding that action for trespass on lands in another state cannot be maintained in this state; *Olympia Min. & Mill. Co. v. Kerns*, 64 Wash. 548, 117 Pac. 260, holding that courts may refuse to entertain jurisdiction, in action between nonresidents upon contract relating to title to land in state of their residence, and to be performed there.

Cited in note (26 L.R.A.(N.S.) 938, 939, 940) on jurisdiction of action for damages for breach of contract, or for tort concerning realty in another state or country.

Venue of transitory actions.

Cited in *Southern P. R. Co. v. Graham*, 12 Tex. Civ. App. 568, 34 S. W. 135, holding that court may take cognizance of action between nonresidents for injury to personal property occurring outside of state; *Western U. Teleg. Co. v. Russell*, 12 Tex. Civ. App. 85, 33 S. W. 708, sustaining jurisdiction of court over action by nonresident against corporation doing business in state, for failure to fulfil contract wholly performable in another state; *Smith v. Empire State Idaho Min. & Development Co.* 127 Fed. 464, holding action arising in Idaho maintainable against New York corporation in Washington, where its principal office located.

Cited in notes (59 Am. St. Rep. 869, 876, 878) on right to prosecute transitory causes of action in other jurisdiction; (85 Am. St. Rep. 926) on jurisdiction of foreign corporations; (70 L.R.A. 543, 548) on locus of cause of action by non-resident against foreign corporation.

Distinguished in *Western U. Teleg. Co. v. Phillips* 2 Tex. Civ. App. 615, 21 S. W. 638, holding that courts will entertain jurisdiction of suit between citizen and domestic corporation for negligence in delivering telegram outside of state; *Eingartner v. Illinois Steel Co.* 94 Wis. 77, 34 L. R. A. 506, 59 Am. St. Rep. 859, 68 N. W. 664, sustaining nonresident's right to maintain transitory action against citizen of another state found within jurisdiction.

9 L. R. A. 351, *BOSQUETT v. HALL*, 90 Ky. 566, 29 Am. St. Rep. 404, 13 S. W. 244.

"Family" within exemption statutes.

Cited in *Louisville Bkg. Co. v. Anderson*, 106 Ky. 749, 44 S. W. 636, holding that married daughter's residence with her father does not constitute them a family within exemption statute as to father's creditors; *Adams v. Clark*, 48 Fla. 211, 37 So. 734, as to what constitutes family; *Fox v. Waterloo Nat. Bank*,

126 Iowa, 485, 102 N. W. 424, holding homestead of man residing with an adult daughter keeping house for him exempt as homestead of head of family. Cited in footnote to *Cross v. Benson*, 64 L. R. A. 560, which holds minor residing with grandparents and dependent upon them, member of their family.

Cited in notes (70 Am. St. Rep. 109) on who is head of family within homestead law; (4 L.R.A.(N.S.) 377) on what constitutes a "family" under homestead and exemption laws.

9 L. R. A. 352, *CARTHAGE v. RHODES*, 101 Mo. 175, 14 S. W. 181.

Dogs as property.

Cited in *Hodges v. Causey*, 77 Miss. 356, 48 L. R. A. 95, 78 Am. St. Rep. 525, 26 So. 945, holding mere notice to keep off not justification for killing trespassing dog.

Cited in notes (40 L.R.A. 506) on property rights in dogs; (67 Am. St. Rep. 289, 291, 298) on property in dogs and remedies for its enforcement.

Dog laws.

Cited in *McGlone v. Womack*, 129 Ky. 283, 17 L.R.A.(N.S.) 858, 111 S. W. 688, holding statute providing for tax on dogs for creation of funds to remunerate owners of sheep for losses arising from killing of sheep by dogs valid exercise of police power; *Fincher v. Collum*, 2 Ga. App. 743, 59 S. E. 22, holding under a general welfare charter clause in usual form, a city council may pass an ordinance requiring owners of dogs to register them, secure tags and pay fees therefor; *Paxton v. Fitzsimmons*, 253 Ill. 357, 39 L.R.A.(N.S.) 155, 97 N. E. 675, holding that statutes and ordinances imposing tax on dogs are authorized by police power, and are not within constitutional provisions relating to taxation for revenue.

Cited in note (39 L.R.A.(N.S.) 155) on character of dog tax.

9 L. R. A. 353, *WARREN v. LYONS*, 152 Mass. 310, 25 N. E. 721.

Renewal of lease as affecting guarantor.

Cited in *Woods v. Doherty*, 153 Mass. 558, 27 N. E. 676, holding that election to renew lease for further term discharges surety; *Hotel Milton Co. v. Powell*, 146 Mo. App. 212, 123 S. W. 953, holding that surety of tenant for fixed term is released from liability where landlord and tenant terminate lease and make new one.

Surrender of lease as affecting guarantor.

Cited in note (39 L.R.A.(N.S.) 739) as to when a guaranty is continuing.

Distinguished in *American Bonding Co. v. Pueblo Invest. Co.* 9 L.R.A.(N.S.) 561, 80 C. C. A. 97, 150 Fed. 21, 10 A. & E. Ann. Cas. 357, holding surrender did not relieve surety from liability for the matured obligations of lessee.

Guarantor of rent.

Cited in *Roth v. Adams*, 185 Mass. 345, 70 N. E. 445, holding guarantor for purpose of performing covenant by his contract, stands in place of tenant, and the collateral undertaking is as broad as terms of contract guaranteed.

Sale of property as affecting guarantor of rent.

Cited in *Stern v. Sawyer*, 78 Vt. 12, 112 Am. St. Rep. 890, 61 Atl. 36, 6 A. & E. Ann. Cas. 356, holding sale of portion of property without consent of surety discharged him from liability.

Change in contract as discharging surety.

Cited in *Germania Fire Ins. Co. v. Lange*, 193 Mass. 69, 78 N. E. 746, holding

substantial change in the conditions to which bond relates made without knowledge and consent of surety, discharges surety.

Tenant at sufferance.

Cited in *Benton v. Williams*, 202 Mass. 192, 88 N. E. 843, holding the mere holding over, without any agreement, expressed or fairly inferable from all the circumstances, by tenant after expiration of a written lease, which contains a stipulation as to payment of rent beyond the term, constitutes him a tenant at sufferance; *Commercial Wharf Corp. v. Boston*, 208 Mass. 487, 94 N. E. 805, to the point that if tenant holds over without further agreement, he becomes tenant at sufferance and liable for rent at rate reserved in lease until premises are vacated.

9 L. R. A. 356, *LOWELL v. MIDDLESEX*, 152 Mass. 372, 25 N. E. 469.

Equality of assessment and just valuation.

Approved in *Louisville R. Co. v. Com.* 105 Ky. 720, 49 S. W. 486, holding assessment of other property at less than cash value no objection to assessment of franchises at value; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 556, 60 U. S. App. 166, 88 Fed. 369, holding assessment of railroad property at full value, and other property at seventy-five per cent less, violation of statute as to equality of taxation; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 648, 33 N. E. 432, and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 537, 18 L. R. A. 740, 33 N. E. 421, holding assessment of railroad property by state board, while other property is assessed by local boards, no violation of constitutional provision as to just valuation; *Carroll v. Alsup*, 107 Tenn. 287, 64 S. W. 193, holding that fraudulent over-valuation opens way to assail assessment.

Cited in *Cochise County v. Copper Queen Consol. Min. Co.* 8 Ariz. 235, 71 Pac. 946, holding finding of trial court that action of board of equalization, in adding to assessed valuation of mines of plaintiff, was not based upon information or evidence and was arbitrary and capricious and taken for purpose of imposing unjust measure of the burden of taxation upon plaintiff, was a sufficient finding of fraudulent misconduct on part of board to call for equitable interposition of court.

Cited in note (60 L. R. A. 369) on constitutional equality in the United States in relation to corporate taxation.

Method of ascertaining value.

Cited in *Haven v. Essex County*, 155 Mass. 471, 29 N. E. 1083, holding value of adjacent property not evidence as to valuation of property assessed; *Tremont & S. Mills v. Lowell*, 163 Mass. 284, 39 N. E. 1028, holding valuation erroneous, where separate values of land and buildings exceed value taken together; *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 269, 59 Atl. 83, holding the value, as distinguished from valuation of other similar property in town, similarly situated as shown by evidence of actual sales, or by opinion of properly qualified witnesses, expressed in court is admissible upon question of true value.

Cited in notes (22 Eng. Rul. Cas. 563) on criterion of taxable value of property.

Remedy for invalid assessment.

Cited in *Kelley v. Barton*, 174 Mass. 397, 54 N. E. 860, holding abatement remedy for assessment on land not owned by taxpayer.

Taxation of appurtenances.

Cited in *Troy Cotton & Woolen Manufactory v. Fall River*, 167 Mass. 522, 46 N. E. 99, holding that machinery used in manufacturing, which by statute

is to be assessed where situated, is not necessarily confined to that so affixed as to become part of realty.

Where water power taxable.

Cited in *Union Water Power Co. v. Auburn*, 90 Me. 66, 37 L. R. A. 653, 60 Am. St. Rep. 240, 37 Atl. 331, denying that water power is assessable where dam is located, power being used elsewhere; *Blackstone Mfg. Co. v. Blackstone*, 200 Mass. 92, 18 L.R.A. (N.S.) 759, 85 N. E. 880, holding waterfall and dam and canal which have been constructed to make it available are to be considered, so far as they are within the state in connection with land on which they are located for purpose of fixing value of land for taxation, although power is utilized across border in another state.

9 L. R. A. 363, *BATES v. RUTLAND*, 62 Vt. 178, 22 Am. St. Rep. 95, 20 Atl. 278.

Municipal liability for defect in street.

Approved in *Daniels v. Hathaway*, 65 Vt. 254, 21 L. R. A. 379, 26 Atl. 970, holding municipality not liable for defect in street, in absence of statute imposing liability.

Cited in *Lynch v. Rutland*, 66 Vt. 573, 29 Atl. 1015, holding that selectmen, in laying out roads, act as officers of state and not as agents of town; *Collier v. Fort Smith*, 73 Ark. 450, 68 L.R.A. 237, 84 S. W. 480, holding city not liable for failure to display signals where street was being repaired.

Cited in footnotes to *Teagar v. Flemingsburg*, 53 L.R.A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians; *Harden v. Jackson*, 66 L.R.A. 986, which holds plank sidewalk not so unsafe as to render city liable to one falling thereon because his cane goes through, although the edges of planks have become so decayed as not to withstand pressure of cane.

Cited in notes (30 Am. St. Rep. 384) on duty respecting streets as public and not municipal; (103 Am. St. Rep. 263) on municipal liability to persons injured by defects in, or want of repair of, streets; (108 Am. St. Rep. 140, 148, 152) as to what municipal corporations are answerable for injuries due to defects in streets and other public places; (6 L.R.A. (N.S.) 1091) on liability of municipality for negligence of employees engaged in repair or construction of highways; (20 L.R.A. (N.S.) 516, 532) on liability of municipality for defects or obstructions in streets; (12 Eng. Rul. Cas. 716) on liability of counties and municipalities for injury due to defect in highway.

Personal liability of municipal officer.

Approved in *Bates v. Horner*, 65 Vt. 474, 22 L. R. A. 827, 27 Atl. 134, holding municipal officer not liable to private person for damages resulting from carrying out plans for improving street.

Cited in note (22 L. R. A. 824) on personal liability of highway officer for negligence.

Liability of municipality for acts done in governmental and in corporate capacity.

Cited in *Lockwood v. Dover*, 73 N. H. 213, 61 Atl. 32, holding city liable for negligence of street and park commissioners in control of sewers and drains; *Stiles v. Newport*, 76 Vt. 166, 56 Atl. 662, as to the distinction between municipal acts done in governmental or in corporate capacity.

9 L. R. A. 366, *ROTHERMEL v. MEYERLE*, 136 Pa. 250, 3 Inters. Com. Rep. 315, 20 Atl. 583.

License tax.

Cited in footnotes to *McLaughlin v. South Bend*, 10 L. R. A. 357, which holds

requirement of peddling license unenforceable against person negotiating for sale of property in another state; *San Bernardino v. Southern P. Co.* 29 L. R. A. 327, which denies power to impose license tax on right to operate branch forming part of interstate railroad; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil.

Cited in notes (14 L. R. A. 579, 582, 583) on constitutional equality of privileges, immunities, and protection; (40 L.R.A.(N.S.) 291) on discrimination against nonresidents, in imposing license or occupation tax; (26 Am. St. Rep. 595) on license tax as interference with interstate commerce.

State tax on earnings, franchise, or business.

Cited in *Reading v. Jones*, 14 Pa. Dist. R. 68, holding statute licensing transient retail dealers valid; *State v. J. W. Kelly & Co.* 123 Tenn. 565, 36 L.R.A. (N.S.) 174, 133 S. W. 1011, holding that state may prohibit sale of liquor within its limits, when not conflicting with interstate or foreign commerce.

Cited in footnotes to *Vermont & C. R. Co. v. Vermont C. R. Co.* 10 L. R. A. 562, which holds state tax on interstate railroad earnings illegal; *San Francisco v. Western U. Teleg. Co.* 17 L. R. A. 301, which holds state tax on telegraph franchise void; *People ex rel. Pennsylvania R. Co. v. Wemple*, 19 L. R. A. 694, which holds state tax on franchise or business of foreign railroad company invalid, as regulation of commerce; *Osborne v. State*, 25 L. R. A. 120, which upholds taxation of local express business, though interstate commerce also carried on.

Interstate commerce.

Cited in *Com. v. Mooney*, 12 Lanc. L. Rev. 210, holding act prohibiting hawking and peddling violation of Federal Constitution relating to interstate commerce.

Equal protection and privileges.

Cited in *Com. v. Percival*, 11 Pa. Super. Ct. 614, and *Com. v. Deinno*, 20 Pa. Co. Ct. 372, upholding act forbidding peddling, excepting from its operation persons selling goods of their own manufacture; *Com. v. Finn*, 11 Pa. Super. Ct. 626, upholding act requiring license for physicians except licensed physicians of other state not opening office within state; *Com. v. Cannon*, 30 Pa. Co. Ct. 641, holding statute directed against nonresidents but not against citizens of other states valid.

Cited in notes (25 Am. St. Rep. 886) on 14th amendment as to special privileges, burdens and restrictions.

Statute unconstitutional in part.

Approved in *State v. Montgomery*, 94 Me. 200, 80 Am. St. Rep. 386, 47 Atl. 165, holding statute not wholly unconstitutional because single provision unconstitutional; *Ancona v. Becker*, 14 Pa. Co. Ct. 79, 3 Pa. Dist. R. 89, holding general tax act not invalidated by unconstitutional provisions as to municipal taxes; *Re Delaware River Road*, 6 Northampton Co. Rep. 218, holding act relating to roads not unconstitutional, if last section produced local results, the remainder being enforceable; *Com. v. Wickert*, 19 Pa. Co. Ct. 252, 6 Pa. Dist. R. 387, holding act in relation to adulteration of food, valid as to portions covered by title when independent of and readily separable from remainder; *South Bethlehem v. Hackett*, 12 Lanc. L. Rev. 198, holding portion of ordinance providing penalty for failure to pay license fee for peddling unconstitutional.

Cited in *Com. v. Edsall*, 9 North. Co. Rep. 99, 13 Pa. Dist. R. 512; *Central R. Co. v. Northampton County*, 11 North Co. Rep. 350, 18 Pa. Dist. R. 147,—holding if part of statute which is unconstitutional in its operation be independent of and separable from that which is constitutional, the latter part may be sustained; *Re Penn & S. Avenues*, 59 Pittsb. L. J. 744; *Fleetwood Water Co.*

v. Fleetwood Borough, 19 Pa. Dist. R. 419; Wood v. Philadelphia, 46 Pa. Super. Ct. 583,—holding that statute may be void in part, that is only so far as its provisions are repugnant to constitution, and valid as to remainder.

Self-executing provision.

Cited in note (16 L. R. A. 281) on self-executing constitutional provisions.

9 L. R. A. 369, MONTGOMERY v. PHILADELPHIA CITY PASS. R. CO. 136 Pa. 96, 20 Atl. 399.

Construction of terms "railroad" and "railway."

Approved in Old Colony Trust Co. v. Allentown & B. Rapid Transit Co. 192 Pa. 604, 44 Atl. 319, holding terms "railroad" and "railway" synonymous; Rafferty v. Central Traction Co. 147 Pa. 589, 30 Am. St. Rep. 763, 23 Atl. 884, Affirming 29 W. N. C. 548, holding "railroad" and "railway" synonymous terms, unless context indicates particular kind of road intended; Cheetham v. Atty. Gen. 38 W. N. C. 125, holding passenger railway a railway corporation in absence of context showing different intent; Com. v. McCaully, 2 Pa. Dist. R. 63, holding statute as to obstruction or injury to railroad includes street railways; Bammel v. Kirby, 19 Tex. Civ. App. 200, 47 S. W. 392, holding that words "any railroad," in statute giving action for death caused by negligence, includes street railroads.

Cited in Railroad Comrs. v. Market Street R. Co. 132 Cal. 682, 64 Pac. 1065, holding words "railroad and other transportation companies" do not, in light of context, include street railways; Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 50, 59 U. S. App. 403, 88 Fed. 592, holding that statutory term "any railway corporation" does not, in view of context, include street railroads; Philadelphia v. Philadelphia Traction Co. 206 Pa. 39, 55 Atl. 762, construing as synonymous, words "railroads" and "railways," as used in statute; Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 419, 61 L. R. A. 251, footnote, p. 249, 43 S. E. 751, holding chartered street railroad a railroad company within statute imposing liability for negligence of fellow servant; Sams v. St. Louis & M. River R. Co. 174 Mo. 89, 61 L. R. A. 485, 73 S. W. 686 (dissenting opinion) majority holding railroad fellow-servant statute not applicable to street railways; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 179 Fed. 244, holding interstate commerce act does not apply to street railways; Riggs v. St. Francois County R. Co. 120 Mo. App. 340, 96 S. W. 707, holding terms railway and railroad synonymous; Pennsylvania R. Co. v. Inland Traction Co. 25 Pa. Super. Ct. 123, as to construction of terms railroad and railway; Leader v. Railways Co. 58 Pittsb. L. J. 218, to the point that first section of article XVII of constitution, which defines rights of those who deal with railroads, does not apply to street railways; Rafferty v. Central Traction Co. 22 Pittsb. L. J. N. S. 19, holding that act authorizing railroads to lease or become lessees does not include street railroads; Kaufman v. Pittsburgh & C. S. R. Co. 37 Pittsb. L. J. N. S. 42, holding that street railway is not within constitutional prohibition against consolidation of competing railroads.

Cited in footnotes to Bloxham v. Consumers' Electric Light & Street R. Co. 29 L. R. A. 507, which holds "street railway" within provision for selling railroad property for delinquent taxes; Vail v. Broadway R. Co. 30 L. R. A. 626, which holds passenger on street car platform not passenger on "any railroad" so as to assume risk of injury; Diebold v. Kentucky Traction Co. 63 L.R.A. 637, which holds an electric railway for carrying of passengers and freight between cities in different states a trunk railway within exception of such railways from constitutional prohibition against granting franchises to other than the highest bidder.

Distinguished in *Trust Co. v. State*, 109 Ga. 754, 48 L. R. A. 527, 35 S. E. 323, holding street railway within constitutional provision affecting "any corporation."

Right to consolidate.

Approved in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 703, 40 L. ed. 860, 16 Sup. Ct. Rep. 714, holding prohibition by statute of consolidation of parallel and competing lines not violation of commerce clause; *Robinson v. Wilkinsburg & E. P. Street R. Co.* 32 Pittsb. L. J. N. S. 370, holding right of street railways to consolidate under Pennsylvania act of 1861 not affected by act of 1889; *Pennsylvania R. Co. v. Inland Traction Co.* 18 Montg. Co. L. Rep. 137, upholding consolidation of street railways under Pennsylvania act of 1861.

Cited in notes (45 L. R. A. 273) on restrictions on consolidation of parallel or competing railroads; (52 L. R. A. 374, 378) on right of corporations to consolidate.

Validity of lease.

Cited in *Watkin v. West Philadelphia Pass. R. Co.* 11 Pa. Co. Ct. 655, 1 Pa. Dist. R. 468, 31 W. N. C. 272, as establishing validity of lease of lines of Philadelphia passenger railway company.

9 L. R. A. 371, *HEALEY v. MUTUAL ACCI. ASSO.* 133 Ill. 556, 23 Am. St. Rep. 637, 25 N. E. 52.

Policy construed in favor of insured.

Approved in *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 646, 52 Am. St. Rep. 355, 43 N. E. 765; *Travelers Preferred Acci. Asso. v. Kelsey*, 46 Ill. App. 373; *Fidelity & C. Co. v. Waterman*, 59 Ill. App. 299; *Metropolitan Acci. Asso. v. Froiland*, 59 Ill. App. 525; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 47, 74 Am. St. Rep. 161, 55 N. E. 139, Affirming 77 Ill. App. 418; *Home Ins. Co. v. Peoria & P. U. R. Co.* 78 Ill. App. 139; *Railway Officials & E. Acci. Asso. v. Coady*, 80 Ill. App. 571; *Ziegler v. Clinton Mut. County F. Ins. Co.* 84 Ill. App. 444; *Fire Asso. v. Short*, 100 Ill. App. 559; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 545; *Terwilliger v. National Masonic Acci. Asso.* 197 Ill. 13, 63 N. E. 1034; *Supreme Lodge O. M. P. v. Meister*, 105 Ill. App. 474; *Northwestern Life Assur. Co. v. Schulz*, 94 Ill. App. 162; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.* 55 Ill. App. 334; *Niagara F. Ins. Co. v. Heenan*, 81 Ill. App. 688; *Teutonia Ins. Co. v. Bonner*, 81 Ill. App. 235; *Berliner v. Travelers' Ins. Co.* 121 Cal. 461, 41 L. R. A. 469, 66 Am. St. Rep. 49, 53 Pac. 918; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L. R. A. 626, 7 C. C. A. 592, 16 U. S. App. 290, 58 Fed. 956,—holding that policy of insurance will be liberally construed in favor of insured; *Traders' Mut. L. Ins. Co. v. Humphrey*, 109 Ill. App. 259, holding person elected, but not initiated, member of fraternity, within meaning of charter of fraternal insurance company.

Cited in *Anson v. New York L. Ins. Co.* 252 Ill. 371, 37 L.R.A.(N.S.) 555, 96 N. E. 846, holding that doubtful provisions in insurance policies are to be construed most favorably for insured; *Central Acci. Ins. Co. v. Rembe*, 220 Ill. 161, 5 L.R.A.(N.S.) 937, 105 Am. St. Rep. 235, 77 N. E. 123, 5 A. & E. Ann. Cas. 155; *Switchmen's Union v. Colehouse*, 227 Ill. 564, 81 N. E. 696; *Concordia F. Ins. Co. v. Bowen*, 121 Ill. App. 43; *Switchmen's Union of N. A. v. Colehouse*, 131 Ill. App. 355; *Jacobson v. Liverpool, L. & G. Ins. Co.* 135 Ill. App. 23; *Williamson v. Warfield P. H. Co.* 136 Ill. App. 185; *Wilkinson v. Ætna L. Ins. Co.* 144 Ill. App. 72; *Ætna L. Ins. Co. v. Fitzgerald*, 165 Ind. 321, 1 L.R.A.(N.S.) 425, 112 Am. St. Rep. 232, 75 N. E. 262, 6 A. & E. Ann. Cas. 551,—holding policy construed in favor of assured; *Coen v. Denver Twp. Mut. F. Ins. Co.* 155 Ill. App. 338; *London Guarantee & Acci. Co. v. Morris*, 156 Ill. App. 537; *Deitz v.*

Dunham & C. Twp. Mut. F. Ins. Co. 160 Ill. App. 184,—holding that insurance policy should be construed liberally in favor of insured in case of doubt as to meaning.

Cause of death or injury.

Cited in *Travelers Ins. Co. v. Ayers*, 217 Ill. 391, 2 L.R.A.(N.S.) 170, 75 N. E. 506, Affirming 119 Ill. App. 407, holding condition in accident insurance policy that insurer should not be liable for death caused by inhalation of gas did not apply to involuntary asphyxiation.

Cited in footnote to *Humphreys v. National Benefit Asso.* 11 L. R. A. 564, which holds loss of sight of only one eye covered by provision for loss of sight of both eyes.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

— Death by external, violent, and accidental means.

Approved in *Metropolitan Acci. Asso. v. Froiland*, 161 Ill. 37, 52 Am. St. Rep. 359, 43 N. E. 766, Affirming 59 Ill. App. 526, holding death due to accidental taking of poison covered by accident policy; *American Acci. Co. v. Reigart*, 94 Ky. 551, 21 L. R. A. 652, 42 Am. St. Rep. 374, 23 S. W. 191, holding death caused by piece of meat lodging in windpipe due to external, violent, and accidental means; *Mutual Acci. Asso. v. Tuggle*, 39 Ill. App. 514, holding death from accidental overdose of laudanum an injury received "through external, violent, and accidental means;" *Fidelity & C. Co. v. Waterman*, 59 Ill. App. 299, holding unintentional death by inhaling of illuminating gas, accidental; *Traveler's Ins. Co. v. Dunlap*, 160 Ill. 645, 52 Am. St. Rep. 355, 43 N. E. 765, Affirming 59 Ill. App. 516, holding accident insurance company, exempted under policy if insured "takes" poison, liable where poison is taken by accident.

Cited in *McGlother v. Provident Mut. Acci. Co.* 32 C. C. A. 323, 60 U. S. App. 705, 89 Fed. 690 (dissenting opinion), majority holding death from poison, accidentally taken, within exemption from liability where death results from poison; *Dezell v. Fidelity & C. Co.* 176 Mo. 288, 75 S. W. 1102, holding death from morphine, prescribed by physician, due to "external, violent, and accidental means;" *Travelers Ins. Co. v. Hunter*, 30 Tex. Civ. App. 493, 70 S. W. 798, holding company liable on accident policy where accident produced rheumatism, which caused heart failure; *Maryland Casualty Co. v. Hudgins*, — Tex. Civ. App. —, 64 L. R. A. 352, 72 S. W. 1047, holding death from eating spoiled oysters within exception of policy excluding liability for injuries "resulting from poison or anything accidentally or otherwise taken or absorbed;" *Jenkins v. Hawyeye Commercial Men's Asso.* 147 Iowa, 116, 30 L.R.A.(N.S.) 1183, 124 N. W. 199, holding that death resulting from swallowing fish-bone which caused inflammation of parts; although death resulted directly from blood poison, was accidental within meaning of accident policy; *Fidelity & C. Co. v. Morrison*, 129 Ill. App. 366, holding an injury or death resulting from violent means is an accident notwithstanding it may have been caused by negligence of person killed or injured; *Tuttle v. Iowa State Traveling Men's Asso.* 132 Iowa, 654, 7 L.R.A.(N.S.) 228, 104 N. W. 1131, holding suicide owing to insane impulse death "through and by external, violent and accidental means," within provisions of an accident policy.

Cited in footnote to *Fidelity & C. Co. v. Lowenstein*, 46 L. R. A. 450, which holds death from accidentally inhaling gas while asleep covered by accident policy.

Cited in notes (13 L. R. A. 265) on external, violent, and accidental means of death of insured; (30 L. R. A. 207) on what constitutes an accident within meaning of accident insurance policy; (52 Am. St. Rep. 364) on effect of insured's taking poison; (14 Eng. Rul. Cas. 25) on death by external, violent and accidental means.

Distinguished in *Early v. Standard Life & Acci. Ins. Co.* 113 Mich. 62, 67 Am. St. Rep. 445, 71 N. W. 500, holding death from poison administered through mistake of druggist, within exception of accident policy exempting company if death results from poison.

Disapproved in *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 323, 60 U. S. App. 705, 89 Fed. 687, holding that exemption from liability for death resulting from poison extends to poison accidentally taken.

Increase of risk.

Cited in note (10 L. R. A. 383) on conditions in policy as to increase of risk by change in occupation.

Notice before forfeiture.

Cited in footnote to *Eury v. Standard Life & Acci. Ins. Co.* 10 L. R. A. 534, which holds notice necessary before forfeiting policy for nonpayment of premium.

9 L. R. A. 373, *HAYS v. JORDAN*, 85 Ga. 741, 11 S. E. 833.

Power of married women to contract.

Cited in *Sams v. Thompson Hiles Co.* 110 Ga. 649, 36 S. E. 104, and *Goodrich v. Atlanta Nat. Bldg. & L. Asso.* 96 Ga. 803, 22 S. E. 585, holding that married woman, with or without separate estate, may contract; *Madden v. Blain*, 86 Ga. 782, 13 S. E. 128, holding that married women may contract, irrespective of separate estate, except as to suretyship; *Sidway v. Nichol*, 62 Ark. 154, 34 S. W. 529, holding married woman, without separate estate, liable for money borrowed.

Cited in note (4 L.R.A.(N.S.) 549) on ownership of separate estate, trade or business as condition of married woman's right to contract.

Construction of contracts.

Cited in *Snelling v. Arbuckle Bros.* 104 Ga. 366, 30 S. E. 863, construing contract, nominally commissioning selling agent, as one of sale.

Distinguished in *National Bank v. Goodyear*, 90 Ga. 728, 16 S. E. 962, holding contract to receive goods on consignment to sell, goods and proceeds to belong to consignor until payment of invoice price, not contract of sale.

— Of contracts of lease as conditional sales.

Followed without special discussion in *Ross v. McDuffie*, 91 Ga. 121, 16 S. E. 648.

Cited in *Blitch v. Edwards*, 96 Ga. 610, 24 S. E. 147, construing contract to pay rent unless purchase money notes paid, as contract of sale; *Cottrell v. Merchants & M. Bank*, 89 Ga. 519, 15 S. E. 944, holding contract which is substantially a conditional sale not changed into bailment for hire by denominating purchase money, "hire," and making it payable in instalments; *Lytle v. Scottish American Mortg. Co.* 122 Ga. 465, 50 S. E. 402, holding stipulations for paying rent during a term for use of land with provision that on making last payment title shall vest in so-called lessee, constitutes a conditional sale; *Rhodes & Son Furniture Co. v. Jenkins*, 2 Ga. App. 478, 58 S. E. 897, holding fact that contract evidencing the purchase, calls it a "rent contract" and payments are designated "rent" does not make it a lease, but it is a conditional sale with title reserved.

Cited in notes (12 L.R.A. 447) on sale of personal property on instalment plan; (94 Am. St. Rep. 250) on construction of lease as sale.

Conditional sale; retaking by vendor.

Cited in *Glisson v. Heggie Bros.* 105 Ga. 33, 31 S. E. 118, holding that retaking of property to which title is reserved rescinds contract of sale; *Turk v. Carnahan*, 25 Ind. App. 128, 81 Am. St. Rep. 85, 57 N. E. 729, and *Perkins v. Grobben*, 116 Mich. 177, 39 L. R. A. 818, 72 Am. St. Rep. 512, 74 N. W. 469, holding that retaking of property sold with reservation of title precludes recovery of pur-

chase price; *Commercial Pub. Co. v. Campbell Printing-Press & Mfg. Co.* 111 Ga. 390, 36 S. E. 756, holding vendor reserving title and bringing action to recover property, bound to account for payment, less reasonable rent; *Mallary Bros. v. Moon*, 130 Ga. 595, 61 S. E. 401, holding if amount paid is found to exceed reasonable hire then defendant would be entitled to recover between the payments and such hire; *Mitchell v. Castlen*, 5 Ga. App. 135, 62 S. E. 731, holding seller upon default in payments had right to bring trover and recover property with its reasonable hire subject to set-off of any sums paid on debt; *Scott v. Glover*, 7 Ga. App. 183, 66 S. E. 380, holding where seller of property to be paid for in installments, rescinds he is liable to account equitably for whatever sum the payments made exceed the hire of the property.

Cited in footnotes to *Puffer & Sons Mfg. Co. v. Lucas*, 19 L.R.A. 682, which denies right to retain payments made on retaking article conditionally sold; *Crompton v. Beach*, 18 L. R. A. 187, which holds that conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

Cited in notes (10 L. R. A. 235) on what constitutes conditional sales; (10 L. R. A. 237) on remedy of vendor on default of purchaser on conditional sale; (32 L. R. A. 465) on rights and liabilities of vendor and purchaser by conditional sale on default of payment; (12 L. R. A. 821) on sales not affected by oral conditions subsequent; (3 L.R.A.(N.S.) 786) on effect of default in payment followed by rescission as forfeiture of payments already made; (38 L.R.A.(N.S.) 893, 894) on right of purchaser on conditional sale to recover back payments where the seller retakes the property.

Distinguished in *Re Cannet Lumber Co.* 178 Fed. 342, holding where deterioration of a traction engine in value exceeded payment made on conditional sale seller may retake machine without repayment of the amount paid down.

Damages for conversion of security.

Cited in *Halliday v. Bank of Stewart County*, 112 Ga. 464, 37 S. E. 721, raising, without deciding, measure of recovery for unauthorized sale of collateral security.

Right to set-off in trover cases.

Cited in *Milltown Lumber Co. v. Carter*, 5 Ga. App. 352, 63 S. E. 270, on allowing set-off in trover cases.

Interference with possession as constituting conversion.

Cited in *Bank of Blakely v. Cobb*, 5 Ga. App. 291, 63 S. E. 24, holding the law treats the taking of property, though made under form of law, as a conversion, when party fails to show that title which justifies interference with another's possession.

9 L. R. A. 376, *LOAIZA v. SUPERIOR COURT*, 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707.

Jurisdiction of courts.

Cited in *Epperly v. Ferguson*, 118 Iowa, 49, 91 N. W. 816, holding action against nonresident for specific performance maintainable in county where land in suit situated; *Morgan v. Mutual Ben. L. Ins. Co.* 16 Cal. App. 93, 116 Pac. 385, to the point that courts of state where contract is made have jurisdiction of action thereon though defendant is nonresident, where assets arising from contract are within its jurisdiction.

Cited in note (69 L.R.A. 694) on jurisdiction of equity over suits affecting realty in another state or country.

Certiorari.

Cited in *White v. Superior Court*, 110 Cal. 64, 42 Pac. 480, holding that only

question involved on certiorari is whether lower court has exceeded its jurisdiction.

Fraud.

Cited in *Craig v. Wade*, 159 Cal. 173, 112 Pac. 891, holding that under certain circumstances misrepresentation of value may be misrepresentation of fact; *Valkenburgh v. Oldham*, 12 Cal. App. 574, 105 Pac. 42, holding void, mortgage, if execution is procured by fraud.

Cited in note (35 L. R. A. 430) on statements as to property at a distance.

Foreign laws.

Cited in *Cuba R. Co. v. Crosby*, 95 C. C. A. 539, 170 Fed. 376, holding in personal injury case in federal court, where laws of foreign country where injuries occurred are not pleaded, court will presume them to be same as place where injuries occurred.

Cited in notes (113 Am. St. Rep. 880) on proof of foreign laws and their effect; (67 L.R.A. 43) on how case determined when proper foreign law not proved; (34 L.R.A.(N.S.) 268) on determination of case properly governed by unproved foreign law.

Nature of process or service required.

Cited in *Tutt v. Davis*, 13 Cal. App. 719, 110 Pac. 690, holding that jurisdiction of action for specific performance of contract to sell land may be gained by substituted service; *Silver Camp Min. Co. v. Dickert*, 31 Mont. 500, 67 L.R.A. 945, 78 Pac. 967, 3 A. & E. Ann. Cas. 1000, holding personal service of summons required in actions in personam, notwithstanding statute providing for publication of summons in civil actions; *Gassert v. Strong*, 38 Mont. 34, 98 Pac. 497, holding where shares of stock are charged with a trust, the courts are not powerless to enforce it, merely because one of parties holding legal title is beyond reach of process of such court; *Robinson v. Kind*, 23 Nev. 342, 47 Pac. 977, holding service by publication against a nonresident may be had in action to cancel deed to real and personal property partly located in county where action is brought; *Knapp v. Supreme Commandery U. O. G. C.* 121 Tenn. 228, 118 S. W. 390, holding in a general sense the term "a proceeding in rem" applies to actions between parties, where the direct object is to reach and dispose of property owned by them.

Rescission of fraudulent contract for sale of land.

Cited in *Morris v. Courtney*, 120 Cal. 65, 52 Pac. 129, holding vendee of a fraudulent contract for purchase of land may either rescind the contract for the fraud, or ratify it and sue for damages.

Offer to restore consideration received.

Cited in *Kelley v. Owens*, 120 Cal. 510, 47 Pac. 369, holding mere statement in complaint of offer to restore stock or willingness to return is not sufficient offer of restoration to support rescission; *Green v. Duvergey*, 146 Cal. 390, 80 Pac. 234, holding prompt notice of rescission upon discovery of fraud, followed by offer to restore consideration entitled party to aid of court in securing the result and fruit of such rescission.

Appointment of receiver.

Cited in note (72 Am. St. Rep. 41, 70) as to when appointment of receiver is proper.

Conclusiveness of judgments.

Cited in notes (23 Am. St. Rep. 115) on collateral attack upon judgment; (94 Am. St. Rep. 552) on conclusiveness of foreign judgments in rem.

9 L. R. A. 382, *STATE ex rel. PENNELL v. ARMSTRONG*, 30 Neb. 493, 46 N. W. 618.

Petition for organization of new county.

Cited in *State ex rel. Childs v. Red Lake County*, 67 Minn. 359, 69 N. W. 1083, holding petitions first filed for organization of new county should be submitted, others refused; *State ex rel. Douglas v. Larson*, 89 Minn. 126, 94 N. W. 226, holding submission of three petitions covering same territory illegal; *State ex rel. Steel v. Fabrick*, 17 N. D. 541, 117 N. W. 860, holding all petitions for a division of a county must be submitted to a vote of the people though it appears by the petitions that there is a conflict as to territory.

9 L. R. A. 385, *STATE ex rel. BOYLE v. BOARD OF EXAMINERS*, 21 Nev. 67, 24 Pac. 614.

Registration of electors.

Cited in *State ex rel. Wilson v. Stone*, 24 Nev. 310, 53 Pac. 497, denying authority of legislature to provide for registration of qualified electors; *Gillesby v. Canyon County*, 17 Idaho, 594, 107 Pac. 71, holding purpose of registration law is to provide a uniform mode of determining qualifications giving right to exercise elective franchise; *Solon v. State*, 54 Tex. Crim. Rep. 293, 114 S. W. 349 (dissenting opinion), on power of legislature to disfranchise voters.

Cited in footnote to *Barret v. Taylor*, 36 L. R. A. 129, upholding right to have name registered as voter, of unnaturalized minor who becomes qualified voter before revision of registry.

Cited in notes (10 L. R. A. 226) on registration of voters; (25 L. R. A. 480, 481) on how far right to vote is absolute; (45 L. ed. U. S. 214) on validity of registration laws.

9 L. R. A. 387, *COMPTON v. HAWKINS*, 90 Ala. 411, 24 Am. St. Rep. 823, 8 So. 75.

Landings and docks.

Cited in *Sullivan Timber Co. v. Mobile*, 110 Fed. 194, to point that riparian owner may construct landing on navigable stream, subject to public easement or servitude; *Sullivan Timber Co. v. Mobile*, 124 Fed. 647, denying right of city to eject owner of uplands from possession of docks, constructed upon navigable river with acquiescence of city.

Presumption of dedication.

Cited in *Harper v. State*, 109 Ala. 69, 19 So. 901, holding dedication of road to public use not presumed unless owner's intent clearly shown, and acceptance by public.

Right of way on shore.

Cited in note (4 L.R.A.(N.S.) 877) on right of way on shore.

9 L. R. A. 388, *ALABAMA G. S. R. CO. v. CARMICHAEL*, 90 Ala. 19, 8 So. 87

Riding in violation of rules or without valid ticket.

Cited in *McGhee v. Reynolds*, 117 Ala. 420, 23 So. 68, denying liability of carrier for ejecting passenger tendering void ticket; *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229, holding one riding on construction car in violation of rules though with conductor's passive consent not a passenger; *Manning v. Louisville & N. R. Co.* 95 Ala. 395, 16 L. R. A. 56, 36 Am. St. Rep. 225, 11 So. 8, holding company justified in ejecting passenger refusing to pay fare for distance ridden without valid ticket.

Duty of carrier to make rules and regulations.

Cited in *Pullman Car Co. v. Krauss*, 145 Ala. 402, 4 L.R.A.(N.S.) 106, 40 So. 398, 8 A. & E. Ann. Cas. 218, holding it the duty of the carrier to make rules and regulations to insure the safety and comfort of its patrons.

— Of passenger to ascertain rules of company.

Cited in *Central R. Co. v. Ashley*, 159 Ala. 156, 38 So. 981, holding if passenger fails to exercise reasonable diligence to ascertain reasonable regulations governing carriage by the carrier, his negligence, and not that of the carrier is proximate cause of injury.

9 L. R. A. 391, *SACKETT v. RUDER*, 152 Mass. 397, 25 N. E. 736.

Peremptory challenges.

Cited in *Waggoner v. Dodson*, 96 Tex. 7, 68 S. W. 813, holding each defendant having independent controversy in common action entitled to six peremptory challenges.

Cited in footnote to *Stevens v. Union R. Co.* 66 L.R.A. 465, which holds that statute allowing peremptory challenge of one in four of "any qualified jurors called" refers to those not subject to challenge for cause including those substituted for persons peremptorily challenged.

Proof of sale within time alleged.

Cited in *Edwards v. Woodbury*, 156 Mass. 26, 30 N. E. 175, upholding right to prove one sale of intoxicating liquor under count alleging sales on divers occasions.

Construction of penal statute as to damages.

Cited in *Doyle v. Fitchburg R. Co.* 162 Mass. 71, 25 L. R. A. 158, 44 Am. St. Rep. 335, 37 N. E. 770, denying that conditions on ticket released carrier from penalty to widow for death of husband through negligence.

9 L. R. A. 395, *TERRITORY v. AH LIM*, 1 Wash. 156, 24 Pac. 588.

Constitutional law; police powers.

Cited in *Ritchie v. People*, 155 Ill. 111, 29 L. R. A. 84, 46 Am. St. Rep. 315, 40 N. E. 454, holding statutory prohibition of employment of women in factories and workshops over eight hours per day invalid; *State v. Buchanan*, 29 Wash. 606, 59 L. R. A. 344, 92 Am. St. Rep. 930, 70 Pac. 52, holding statute prohibiting employment of females in mechanical or mercantile establishments over ten hours per day valid; *State v. Lee*, 137 Mo. 149, 38 S. W. 583, holding statute prohibiting maintenance of place for smoking of opium valid; *Ex parte Mon Luck*, 29 Or. 427, 32 L. R. A. 739, 54 Am. St. Rep. 804, 44 Pac. 693, holding criminal statute prohibiting possession of opium without license or prescription valid.

Cited in note (31 Am. St. Rep. 104) on what is due process of law.

Distinguished in *State v. Williams*, 146 N. C. 634, 17 L.R.A.(N.S.) 306, 61 S. E. 61, 14 A. & E. Ann. Cas. 562, holding a statute prohibiting the carrying in a certain county by one person of more than one half gallon of vinous or malt liquor, is not a valid exercise of the police power.

Disapproved in *Re Morgan*, 26 Colo. 428, 47 L. R. A. 58, 77 Am. St. Rep. 269, 158 Pac. 1071, holding statutory limitation of labor in mines or smelters to eight hours per day invalid.

9 L. R. A. 402, *SPEER v. ATHENS*, 85 Ga. 49, 11 S. E. 802.

Formalities requisite to passage of bill.

Followed in *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232, holding question of preliminary advertisement of local bills one for general assembly to determine.

Cited in *Jennings v. Russell*, 92 Ala. 606, 9 So. 421, holding that courts refuse to look outside of records of legislature on question of notice; *State v. Wray*, 109 Mo. 598, 19 S. W. 86, holding that acts of legislature may be overthrown where journal shows nonconformity with constitutional mandates; *Clarke v. Eve*, 134 Ga. 789, 68 S. E. 598, holding the question whether a local act, requiring publication under provisions of the constitution, has been duly published was a legislative one and will not be inquired into by the courts; *Lee v. Tucker*, 130 Ga. 48, 60 S. E. 164, holding the question of the preliminary advertisement, as a prerequisite to the passage of a local bill, is for the determination by the general assembly before passing the bill.

Cited in notes (11 L.R.A. 491) on passage of bill through legislature; (40 L.R.A.(N.S.) 7) on conclusiveness of enrolled bill.

Distinguished in *De Loach v. Newton*, 134 Ga. 755, 69 S. E. 708, holding an act of the legislature cannot be shown to be invalid by reference to the journals.

Assessment as tax.

Cited in *Denver v. Knowles*, 17 Colo. 209, 17 L. R. A. 141, 30 Pac. 1041, holding assessment for local improvement not a tax within meaning of constitutional provision; *Atlanta v. First Presby. Church*, 86 Ga. 737, 12 L. R. A. 854, 13 S. E. 252, denying that churches are exempt from taxation for pavement of street.

Due process of law.

Followed in *Bacon v. Savannah*, 86 Ga. 305, 12 S. E. 580, as to constitutional questions involved in affidavit.

Cited in *Bacon v. Savannah*, 86 Ga. 304, 12 S. E. 580, sustaining right of property owner to contest assessment by filing affidavit which gives opportunity to review law and facts; *Brumby v. Harris*, 107 Ga. 259, 33 S. E. 49, holding levy and sale of property other than that improved by pavement, for nonpayment of tax, void; *Atlanta v. Hamlein*, 96 Ga. 383, 23 S. E. 408, holding assessments for improvements, amounting to virtual confiscation of property, void; *Denver v. Knowles*, 17 Colo. 212, 17 L. R. A. 141, 30 Pac. 1041, approving assessment for improvement apportioned upon basis of frontage; *Lanham & Sons Co. v. Rome*, 136 Ga. 402, 71 S. E. 770, holding that requirement of due process of law was satisfied in making assessment for grading street, where charter provided for notice to abutters affected, and also provided for judicial determination as to validity of assessment.

Cited in footnotes to *Brown v. Markham*, 30 L. R. A. 84, which holds valid, statute authorizing logger's lien without notice to owner, but giving subsequent opportunity to intervene; *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice, for highway repairs, valid; *State v. Sponaugle*, 43 L. R. A. 727, which sustains forfeiture of land for five years' failure to enter for taxation.

Judicial interference with assessment for improvement.

Cited in *Bacon v. Savannah*, 105 Ga. 66, 31 S. E. 127, and *Burckhardt v. Atlanta*, 103 Ga. 309, 30 S. E. 32, holding necessity for repavement of streets question for city to determine, and courts will refuse to interfere, in absence of fraud; *Morse v. Westport*, 136 Mo. 288, 37 S. W. 932 (dissenting opinion), majority raising, without deciding, question whether court may declare paving ordinance void, because unreasonable.

9 L. R. A. 408, **HALLGREN v. CAMPBELL**, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381.

Trial of title to office.

Cited in *Pariseau v. Board of Education*, 96 Mich. 307, 55 N. W. 799, holding

that acting officer, not a party, cannot be ousted by mandamus; *Keeler v. Deo*, 117 Mich. 5, 75 N. W. 145, holding mandamus to compel payment of school funds not maintainable where, in effect, it would oust assessor *de facto*, not a party; *Barendt v. McCarthy*, 160 Cal. 688, 118 Pac. 228 (dissenting opinion), on actual possession of office from occupant as obtainable by his surrender, or abandonment of office or by ouster in legal proceedings.

Removal from office.

Cited in *Trainor v. Wayne County*, 89 Mich. 169, 15 L. R. A. 101, 50 N. W. 809, upholding power of supervisors, under statute, to remove officer without charges, notice, or hearing; *Speed v. Detroit*, 97 Mich. 210, 56 N. W. 570, upholding, pending quo warranto, mandamus to compel approval of bond of officer removed without notice; *Hartigan v. West Virginia University*, 49 W. Va. 51, 38 S. E. 698 (dissenting opinion), majority upholding removal of professor by board of regents, without notice or hearing; *State ex rel. Gallagher v. Brown*, 57 Mo. App. 204, and *Townsend v. Kurtz*, 83 Md. 350, 34 Atl. 1123, holding that general power of removal carries right to remove without notice of charges; *Todd v. Dunlap*, 99 Ky. 461, 36 S. W. 541, holding that mayor, authorized to remove on giving reasons therefor, cannot arbitrarily remove officers appointed for definite term; *Pratt v. Police & Fire Comrs.* 15 Utah, 12, 49 Pac. 747, holding chief of police, holding office during good behavior, not removable without charges and opportunity for hearing; *Hayden v. Memphis*, 100 Tenn. 588, 47 S. W. 182, holding, in absence of statute to contrary, municipal officer entitled to notice and fair hearing before removal; *Kimball v. Olmstead*, 20 Wash. 634, 56 Pac. 377 (dissenting opinion), majority holding health commissioner removable under statute, without charges or hearing; *State ex rel. Hitchcock v. Hewitt*, 3 S. D. 195, 16 L. R. A. 417, 44 Am. St. Rep. 788, 52 N. W. 875, holding trustee for definite term, removable for specified causes, entitled to specification of charges, and hearing; *State ex rel. Hastings v. Smith*, 35 Neb. 32, 16 L. R. A. 797, 52 N. W. 700, holding officers appointed for definite term, removable only for specified causes, entitled to notice and hearing; *State ex rel. Hamilton v. Grant*, 14 Wyo. 58, 1 L.R.A.(N.S.) 595, 116 Am. St. Rep. 982, 81 Pac. 795, holding officers may be removed without notice where the statute gives such authority and where there is no constitutional provision prohibiting it; *State ex rel. Mosconi v. Maroney*, 191 Mo. 549, 90 S. W. 141, holding the right to hold office during a fixed term can only be overcome by an express grant of power to remove at pleasure; *Yerger v. State*, 91 Miss. 823, 45 So. 849, holding where terms of office are fixed by statute and office is not held at pleasure of appointing power, the power of removal cannot be exercised without notice and hearing; *Hagerty v. Shedd*, 75 N. H. 396, 74 Atl. 1055, holding that statute providing for removal of municipal officers for cause confers judicial powers, and contemplates removal for legal cause after notice and hearing.

Cited in notes (15 L.R.A. 97) on right to remove officer summarily; (35 L.R.A. (N.S.) 867) on public officer: may power to remove at pleasure be restricted by attempt to appoint for fixed term; (68 Am. St. Rep. 112) on removal of officers.

Acts of de facto officers.

Cited in *State ex rel. Baker v. Hobgood*, 126 N. C. 151, 35 S. E. 253, holding that in contest between rival appointees of *de facto* boards, the one named by board, afterward declared *de jure*, holds title; *Powers v. Com.* 110 Ky. 436, 53 L. R. A. 257, 61 S. W. 735 (dissenting opinion), majority holding pardon by one receiving certificate of election as governor void, on title being adjudged invalid; *State ex rel. Wells v. Cline*, 29 Okla. 159, 35 L.R.A.(N.S.) 531, 116 Pac. 767,

to the point that there cannot be de facto officer when de jure officer is in possession of office and performing its functions.

Cited in note (140 Am. St. Rep. 189, 190, 202) on de facto officers.

9 L. R. A. 411, *BUSHNELL v. BUSHNELL*, 77 Wis. 435, 46 N. W. 422.

Remedies of cosureties and coguarantors.

Cited in *Faurot v. Gates*, 86 Wis. 574, 57 N. W. 294, holding guarantor of note may recover at law from solvent coguarantors, same contributions as if they were the only guarantors; *Faires v. Cockerell*, 88 Tex. 436, 28 L. R. A. 531, 31 S. W. 190, holding cosurety, upon payment of debt, has action against the others upon implied promise of reimbursement; *Sparks v. Childers*, 2 Ind. Terr. 195, 47 S. W. 316, upholding upon theory of subrogation, action of surety against principal, barred as to contribution; *Smith v. Mason*, 44 Neb. 621, 63 N. W. 41, holding surety, in action for contribution, only entitled to legal rate of interest from time of payment; *Faires v. Cockerell*, 88 Tex. 437, 28 L. R. A. 531, 31 S. W. 190, holding that right of action of co-obligor or surety satisfying debt for contribution rests upon implied promise raised by law, and not on subrogation; *Payne v. Payne*, 129 Wis. 454, 109 N. W. 105, holding right to contribution exists where one of several contractors to support a woman during her life discharges the obligation alone; *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 373, 111 N. W. 527, holding right to contribution exists where an obligation to pay another's debt results from signing an appeal bond.

Cited in footnote to *Pace v. Pace*, 44 L. R. A. 459, which sustains right of surety, paying obligation, to receive dividend on entire debt from cosurety's insolvent estate.

Limitations as bar to surety's right to subrogation.

Cited in *Burrus v. Cook*, 117 Mo. App. 406, 93 S. W. 888 (dissenting opinion), on period of limitation as against a surety.

Cited in notes (21 Eng. Rul. Cas. 635; 18 L.R.A.(N.S.) 585) as to when statute commences to run to bar action by surety against co-surety for contribution.

Distinguished in *Burrus v. Cook*, 215 Mo. 510, 114 S. W. 1065, holding the surety's right to subrogation by statute is not an effective obligation unless asserted within five years.

9 L. R. A. 413, *GILLILAND v. FENN*, 90 Ala. 230, 8 So. 15.

Validity of voluntary conveyance.

Cited in *Howard v. Corey*, 126 Ala. 290, 28 So. 682, holding transfer of stock, in fraud of creditors, no obstacle to levy and sale under execution; *Lehman v. Gunn*, 154 Ala. 371, 45 So. 620, holding in absence of fraud those creditors whose claims accrued after issuance of policy cannot complain that proceeds were voluntarily diverted from estate of the assured.

Notice as affecting subsequent creditors.

Approved in *Echols v. Peurrung Bros.* 107 Ala. 665, 18 So. 250, denying that notice to subsequent creditor of prior fraudulent conveyance bars right to avoid deed.

Cited in *Echols v. Orr*, 106 Ala. 240, 17 So. 677, denying that record of deed is defense to action by subsequent creditors to set aside same as fraudulent.

9 L. R. A. 421, *Re OLIVER*, 136 Pa. 43, 20 Am. St. Rep. 894, 20 Atl. 527.

Partnership.

Cited in *Morris v. Metalline Land Co.* 164 Pa. 330, 27 L. R. A. 307, 35 W. N. C. 189, 44 Am. St. Rep. 614, 30 Atl. 240, to point that unincorporated company, organized on joint-stock plan, is a partnership; *Cronkrite v. Trexler*, 20 Pa. Co. Ct. 470, 7 Pa. Dist. R. 65, to point that unincorporated joint stock company,

organized to trade in land, is a partnership; *Spotswood v. Morris*, 12 Idaho, 385, 6 L.R.A.(N.S.) 675, 85 Pac. 1094, holding a share holder or officer of a joint stock association has no authority in regard to state of association land except such as is granted by the articles of association.

Cited in notes (27 L. R. A. 449, 481) as to when real estate will be considered partnership property; (28 L. R. A. 168) on rights and position of creditors, purchasers, and other third parties in partnership.

Capital or income.

Approved in *Knapp's Estate*, 17 Lanc. L. Rev. 326, 9 Pa. Dist. R. 718, 24 Pa. Co. Ct. 123, holding that purchase money of land, forfeited on failure to fulfil terms of sale, is principal and not income; *Wright's Estate*, 18 Pa. Co. Ct. 198, 5 Pa. Dist. R. 346, holding dividends arising from converting stock into cash and stock of new company, income to which life tenant is entitled; *Thomson's Estate*, 48 Phila. Leg. Int. 147, 20 Phila. 126, 28 W. N. C. 232, 9 Pa. Co. Ct. 640, holding that rise in value after testator's death, due to fact not known in his lifetime, constitutes income to which tenant for life is entitled; *Smith's Estate*, 140 Pa. 355, 23 Am. St. Rep. 237, 21 Atl. 438, holding life tenant of stock entitled to dividends made after testator's death, but not to surplus profits accumulated in testator's lifetime; *Thompson's Estate*, 153 Pa. 337, 31 W. N. C. 571, 26 Atl. 652, holding that shares in joint stock company, organized to trade in land, represent interest in venture, and that dividends declared are profits, if capital stock remains unimpaired; *Park's Estate*, 173 Pa. 195, 37 W. N. C. 447, 33 Atl. 884, holding profits arising from mortgage foreclosure and resale, income and profits to which life tenant is entitled.

Cited in *Ex parte Humbird*, 114 Md. 639, 80 Atl. 209, holding that dividends paid from sale of land of corporation is not paid from income or earnings where corporate business was confined to lumber business, though it had power to buy and sell land; *Waln's Estate*, 26 Montg. Co. L. Rep. 20, holding that dividends received by trustee under will are to be treated as income; *Bryce's Estate*, 59 Pittsb. L. J. 356, holding that whether dividends are income or corpus depends on whether at time dividends were declared, there was impairment of principle, or result of earnings or whether profits were on hand at testator's death.

Cited in note (12 L.R.A.(N.S.) 778, 793, 804) on right, as between life tenant and remainderman, in dividends or distributions by corporations.

Distinguished in *Re Smith*, 25 Pittsb. L. J. N. S. 308, holding profits arising from sale of land purchased on foreclosure, capital and not income; *Thomson's Estate*, 11 Pa. Co. Ct. 200, 1 Pa. Dist. R. 140, 30 W. N. C. 24, holding proceeds of sale of options to subscribe to stock of new company guaranteed by old company, principal which does not go as income to life tenant of stock in guaranteeing company.

Shares in association as personality.

Cited in *Re Jones*, 172 N. Y. 585, 60 L. R. A. 480, footnote p. 476, 65 N. E. 570, holding shares in joint stock company owning real estate only, personality in applying transfer tax law.

Ownership of income on stock after death of holder.

Cited in *Crosman's Estate*, 31 Pa. Co. Ct. 153, 14 Pa. Dist. R. 41, holding dividend of surplus earnings of corporation during life time, although not declared until after death of testator, belongs to the corpus of his estate.

9 L. R. A. 424, *WINCHESTER v. GLAZIER*, 152 Mass. 316, 25 N. E. 728.

Partner's compensation for services.

Cited in *McDowell v. North*, 24 Ind. App. 443, 55 N. E. 789, holding answer

merely alleging refusal of one partner to devote time to business insufficient to establish right of other partner to compensation; *Hoag v. Alderman*, 184 Mass. 219, 68 N. E. 199, holding partner entitled to compensation for sale of real estate, although no express agreement to that effect; *Hoag v. Alderman*, 184 Mass. 219, 68 N. E. 199, holding partnership may be of such a peculiar kind, and dealing of the partners in regard to it such as to show an expectation and understanding that compensation shall be made.

Cited in note (17 L.R.A.(N.S.) 412) on right of partner to compensation for services to partnership.

Partnership accounting.

Cited in *Lockwood v. Roberts*, 171 Mass. 110, 50 N. E. 517, denying interest on surviving partner's share of assets; *McMurtrie v. Guiler*, 183 Mass. 454, 67 N. E. 358, holding partner entitled to accounting, although agreement is silent as to his share in profits; *McMurtie v. Guiler*, 183 Mass. 454, 67 N. E. 358, holding where contract is silent as to division of profits equity will adjust the rights of the partners on the basis of what their intention was as shown from all the facts.

Construction of instruments by parties thereto.

Cited in *Grubb v. Burford*, 98 Va. 558, 37 S. E. 4, holding admission of parol evidence as to construction of unambiguous contract by parties, error; *Atty. Gen. v. Algonquin Club*, 153 Mass. 452, 11 L. R. A. 502, 27 N. E. 2, holding that courts may properly consider construction of deed by parties where it allows "usual projections;" *Humphreys v. Old Colony R. Co.* 160 Mass. 328, 35 N. E. 859, holding that existence of beaten track and maintenance of planks between rails, prove that parties to deed considered place as highway crossing; *Menage v. Rosenthal*, 175 Mass. 361, 56 N. E. 579, holding evidence of voluntary act of salesman inadmissible to add to rights under contract; *Nash v. Webber*, 204 Mass. 424, 90 N. E. 872, holding where there is room for doubt as to proper scope and intent of stipulation in lease, evidence of conduct of parties and practical construction put upon it by parties was competent; *Fairfield v. Lowry*, 207 Mass. 358, 93 N. E. 598, to the point that when meaning of contract is in doubt interpretation by parties themselves may be conclusive as to meaning.

Interest on advances by partners.

Cited in *Ice v. Kilworth*, 84 Kan. 459, 35 L.R.A.(N.S.) 222, 114 Pac. 857, holding that interest is not chargeable on advances made to partnership by member until balance has been struck.

9 L. R. A. 428, *CONNELLY v. MASONIC MUT. BEN. ASSO.* 58 Conn. 552, 18 Am. St. Rep. 296, 20 Atl. 671.

Decisions of voluntary associations affecting membership.

Cited in *Farmer v. Board of Trade*, 78 Mo. App. 565, holding that board of trade cannot arbitrarily and in bad faith dismiss member in violation of its own rules; *Sanborn v. Black*, 67 N. H. 539, 35 Atl. 942, holding that voluntary benefit association cannot withhold consent so as to defeat insured's right to change beneficiary; *Brandenburger v. Jefferson Club Asso.* 88 Mo. App. 166, upholding expulsion of member of political club, made in good faith, after hearing; *Froelich v. Musicians Mut. Ben. Asso.* 93 Mo. App. 389, refusing relief to member, wrongfully expelled from voluntary association, where no property rights involved; *Mead v. Stirling*, 62 Conn. 595, 23 L. R. A. 230, 27 Atl. 591, holding that court will not interfere in removal from office in lodge, until remedies provided by the order are pursued; *Kelly v. Grand Circle W. of W.* 40 Wash. 695, 82 Pac. 1007, holding action of a mutual benefit association in ex-

PELLING a member under its rules will not be reversed by the courts where action is not irregular and in violation of rules of the land.

Cited in footnotes to *Lavalle v. Société St. Jean Baptiste*, 16 L. R. A. 392, which holds member unlawfully expelled from benefit society no right of action for damages; *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 18 L. R. A. 191, which holds that chancery will not force member on corporation not engaged in commercial business.

Cited in notes (49 L.R.A. 355) on conclusiveness of decisions of tribunals of associations or corporations; (59 Am. St. Rep. 209) on effect as *res judicata* of decisions within association; (68 Am. St. Rep. 859, 867, 870) on jurisdiction of courts over voluntary unincorporated associations.

Right to reinstatement as affected by death.

Cited in *Jackson v. Northwestern Mut. Relief Asso.* 78 Wis. 473, 47 N. W. 733, holding right to reinstatement fixed by mailing of application and money, so as not to be defeated by death of insured before receipt by association.

Distinguished in *Butler v. Grand Lodge, A. O. U. W.* 146 Cal. 178, 79 Pac. 861, holding there can be no reinstatement after death where suspended member dies before first meeting at which reinstatement could have taken place.

Dissolution of voluntary association.

Cited in footnote to *Industrial Trust Co. v. Green*, 17 L. R. A. 202, which holds illegal deposition of president not ground for subsequent dissolution of benevolent association.

Custom as part of contract.

Cited in footnote to *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* 65 L.R.A. 388, which holds marine policy providing that no risk shall attach until amount and description is approved and indorsed thereon, not changed into open and unrestricted policy covering all property assured elects to report, by adopting agreement fixing uniform premium, supplying blanks on which to report risks, and a long continued custom of reporting risks by assured when convenient, and their uniform acceptance by insurer.

9 L. R. A. 431, *METZ v. CALIFORNIA SOUTHERN R. CO.* 85 Cal. 329, 20 Am. St. Rep. 228, 24 Pac. 610.

Carrier's liability for loss of baggage.

Cited in *Southern Kansas R. Co. v. Clark*, 52 Kan. 402, 34 Pac. 1054, holding carrier not liable for loss of agent's sample case, checked as baggage without carrier's knowledge of contents.

Cited in footnotes to *Oakes v. Northern P. R. Co.* 12 L.R.A. 318, which holds articles carried for business purposes not baggage; *Yazoo & M. V. R. Co. v. Blackmar*, 67 L.R.A. 646, which holds papers of employer pertaining to business of an insurance agent not baggage of the latter.

Cited in notes (11 L.R.A. 760) on carrier's liability for loss of baggage; (99 Am. St. Rep. 350) on liability for loss of baggage.

9 L. R. A. 433, *BLACK v. HENRY G. ALLEN CO.* 42 Fed. 618.

Motion to compel complainants to amend bill, in 43 Fed. 680.

Injunction granted on final hearing, in 56 Fed. 767.

Protection of copyright.

Followed in *Black v. Henry G. Allen Co.* 56 Fed. 771, which holds copyright of single article bound up in volume, bulk of which is *publici juris*, valid against unpermitted reprint of copyrighted book.

Cited in *Encyclopedia Britannica Co. v. Werner Co.* 135 Fed. 844, holding an

act for protection of exhibitors of foreign literary works, "at the Louisiana Purchase Exposition," giving a copyright for two years, does not apply to works previously republished in this country by American publishers.

Cited in note (66 L.R.A. 446) on effect of omitting notice of copyright from licensed publication.

Injunction against infringement.

Cited in *Ockenholdt v. Frohman*, 60 Ill. App. 303, holding bill for injunction not alleging exclusive ownership of play, insufficient to enjoin production of it; *United States Mitis Co. v. Detroit Steel & Spring Co.* 122 Fed. 865, holding verification, upon information and belief, of bill not intended to be used as evidence on motion for temporary injunction, sufficient.

Ownership of copyright.

Cited in *Werekmeister v. Springer Lithographing Co.* 63 Fed. 810, holding well-known trade name sufficient designation of party by whom copyright is taken out.

Cited in note (51 L. R. A. 359) on common-law rights of authors and others in intellectual productions.

Assignability of copyright.

Followed in *Black v. Henry G. Allen Co.* 56 Fed. 771, holding copyright assignable to nonresident foreigner.

Cited in *Davis v. Vories*, 141 Mo. 240, 42 S. W. 707, holding copyright assignable for the whole or any part of the country.

Right of assignee to sue in his own name.

Cited in *City Amusement Co. v. Wilton*, 134 Fed. 134, holding an assignee "of the exclusive right to dramatize" is a mere licensee, and so cannot sue in his own name.

Right to ask alternative relief.

Cited in *Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co.* 117 App. Div. 225, 102 N. Y. Supp. 122 (dissenting opinion), on effect to be given pleading in equity asking alternative relief.

Necessity of verifying a bill in equity.

Cited in *Fitchel v. Barthel*, 173 Fed. 491, holding the only consequence of not verifying the bill is that it cannot be used as an affidavit; *Chase Electric Constr. Co. v. Columbia Constr. Co.* 136 Fed. 699, holding there is no imperative rule requiring verification of bill at time it is signed where affidavit is required, even where an injunction is prayed for.

Right of foreign executor to sue.

Cited in *Leahy v. Haworth*, 4 L.R.A.(N.S.) 661, 73 C. C. A. 84, 141 Fed. 854, holding the filing of his bill by a foreign executor before appointment as ancillary executor in the local jurisdiction is not material if made before trial.

49 L. R. A. 438, *ROBERTS v. STUYVESANT SAFE DEPOSIT CO.* 123 N. Y. 57, 20 Am. St. Rep. 718, 25 N. E. 294.

Bailee's duty as to bailment.

Followed in *Glass v. Hauser*, 38 Misc. 780, 78 N. Y. Supp. 830, denying that failure of warehouseman to return bailment is excusable on mere ground of replevin.

Cited in *Spiegel v. Pacific Mail S. S. Co.* 26 Misc. 416, 56 N. Y. Supp. 171, holding it to be duty of carrier to resist replevin or notify consignee of action; *Mayer v. Brensinger*, 180 Ill. 114, 72 Am. St. Rep. 196, 54 N. E. 159, holding that safety-deposit proprietor must use ordinary care in protecting money in vaults; *Cussen v. Southern California Sav. Bank*, 133 Cal. 536, 85 Am. St.

Rep. 221, 65 Pac. 1099, and *Lockwood v. Manhattan Storage & Warehouse Co.* 28 App. Div. 70, 50 N. Y. Supp. 974, holding warehouseman prima facie liable as bailee for loss of money from safe-deposit vault; *Glass v. Hauser*, 40 Misc. 662, 83 N. Y. Supp. 177, holding redelivery to bailor by bailee excused by seizure of goods under valid legal process; *Loomis v. Reimers*, 119 Iowa, 172, 93 N. W. 95, holding bailee failing to defend replevin action on advice of attorney, not liable for loss of property, although action was barred; *McDonnell v. Buffalo Loan Trust & Safe Deposit Co.* 193 N. Y. 106, 85 N. E. 801, holding when property is taken out of custody of bailee by valid, legal process, he must within a reasonable time give notice to the bailor; *Morris Storage & Transfer Co. v. Wilkes*, 1 Ga. App. 758, 58 S. E. 232, holding bailee for hire liable for damages in pointing out goods and permitting their removal under a void attachment without exercising reasonable diligence in ascertaining validity of the levy; *Niagara F. Ins. Co. v. Campbell Stores*, 101 App. Div. 412, 92 N. Y. Supp. 208 (dissenting opinion), on liability of bailee for goods taken from his possession.

Cited in notes (136 Am. St. Rep. 221, 253) on duty of warehousemen in care of property; (33 L.R.A.(N.S.) 687, 688, 689, 692, 693) on right of bailee to assert against bailor, hostile, adverse, paramount title to third person; (3 Eng. Rul. Cas. 582) on duty of bailee to restore property to bailor.

Distinguished in *Lee v. Maxwell*, 98 Mich. 504, 57 N. W. 581, denying junior creditors' liability as trespasser, for levying on wrongfully attached goods, after commencement of conversion suit by mortgagee against senior creditors; *Macaulay v. Palmer*, 125 N. Y. 744, 4 Silv. Ct. App. 342, 26 N. E. 912, denying liability of agent for proceeds of sale of cotton received by him but returned to vendee because of inability to deliver cotton.

Defense to action.

Distinguished in *Dyett v. Hyman*, 129 N. Y. 359, 26 Am. St. Rep. 533, 29 N. E. 261, holding unavailable, in action by assignee for conversion, defense that goods were subsequently applied to benefit of assignor.

Question for jury.

Cited in *Goldenson v. Lawrence*, 6 Misc. 232, 26 N. Y. Supp. 541, holding that question of ownership of goods converted should be submitted to jury.

Safe deposit company as bailee.

Cited in *National Safe Deposit Co. v. Stead*, 250 Ill. 595, 95 N. E. 973, Ann. Cas. 1912 B, 430, holding that relation of bailor and bailee exists between safety deposit company and lessee placing property in deposit box.

9 L. R. A. 442, *ALABAMA G. S. R. CO. v. HILL*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 So. 90.

Review on appeal.

Approved in *Alabama G. S. R. Co. v. Hill*, 93 Ala. 518, 30 Am. St. Rep. 65, 9 So. 722, holding denial of application for new trial not reviewable; *Carr v. State*, 104 Ala. 14, 16 So. 150, holding denial of continuance by trial court not reviewable on appeal.

Physical examination of plaintiff.

Approved in *South Bend v. Turner*, 156 Ind. 426, 54 L. R. A. 400, 83 Am. St. Rep. 200, 60 N. E. 271, holding defendant entitled to order for physical examination of plaintiff to determine extent of injury, where it may be made without pain or injury; *Ottawa v. Gilliland*, 63 Kan. 173, 88 Am. St. Rep. 232, 65 Pac. 252, holding that trial court has power, in action for personal injury, to require plaintiff to submit to examination by physicians selected by court; *Belt Electric Line Co. v. Allen*, 102 Ky. 554, 80 Am. St. Rep. 374, 44 S. W. 89, holding

defendant entitled to demand physical examination of plaintiff, in action for permanent injuries; *Graves v. Battle Creek*, 95 Mich. 270, 19 L. R. A. 642, 35 Am. St. Rep. 561, 54 N. W. 757, holding that court has power to compel plaintiff to exhibit injured arm to physician in presence of jury; *McGovern v. Hope*, 63 N. J. L. 82, 42 Atl. 830, granting order for physical examination of plaintiff before trial, in action for injuries sustained on defective walk; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 120, 46 L. R. A. 154, 75 Am. St. Rep. 821, 57 Pac. 367, upholding order for examination of woman by medical experts appointed by court in action for personal injuries; *O'Brien v. La Crosse*, 99 Wis. 425, 40 L. R. A. 833, 75 N. W. 81, holding that right of defendant to have surgical examination made of plaintiff, rests, in the absence of statute, in the sound discretion of the trial court.

Cited in *Chicago, R. I. & T. R. Co. v. Langston*, 19 Tex. Civ. App. 578, 47 S. W. 1027 (dissenting opinion), majority holding defendant entitled to have plaintiff's injured leg, which had been exhibited to jury, examined by defendant's experts; *Atchison, T. & S. F. R. Co. v. Palmore*, 68 Kan. 555, 64 L.R.A. 94, footnote p. 90, 75 Pac. 509, holding defendant entitled to expert examination of plaintiff's injured eyes where it would not produce serious discomfort or deleterious consequence; *Mutual L. Ins. Co. v. Giresa*, 156 Fed. 402, holding court has right to compel exposure of person for a physical examination; *Johnston v. Southern P. Co.* 150 Cal. 542, 89 Pac. 348, 11 A. & E. Ann. Cas. 841; *Western Glass Mfg. Co. v. Schoeninger*, 42 Colo. 362, 15 L.R.A.(N.S.) 668, 126 Am. St. Rep. 165, 94 Pac. 342,—holding court has power to order physical examination of plaintiff, in a suit for personal injuries; *Murphy v. Southern P. Co.* 31 Nev. 141, 101 Pac. 322, 21 Ann. Cas. 502, holding that discretion of trial judge in granting or denying order for physical examination of plaintiff in personal injury action will be disturbed in absence of gross abuse; *Best v. Columbia Street R. Light & P. Co.* 85 S. E. 429, 67 S. E. 1 (dissenting opinion), on power of court to order physical examination of plaintiff in personal injury action; *Gray v. State*, 55 Tex. Crim. Rep. 111, 22 L.R.A.(N.S.) 525, 114 S. W. 635, holding court may order that body of deceased be exhumed and examination of wounds be made where the ends of justice calls for such examination; *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 70, 102 Am. St. Rep. 564, 95 N. W. 153, holding when it becomes a question of possible violence to the delicate feelings of plaintiff, on one side, and possible injustice on the other, the law cannot hesitate in ordering the examination; *Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 134, 48 So. 28, on right of defendant to demand physical examination.

Cited on footnote to *Atchison, T. & S. F. R. Co. v. Palmore*, 64 L.R.A. 90, which sustains right to compel physical examination of injured eyes, though involving use of drugs for dilating pupils.

Cited in notes (14 L.R.A. 469) on power to compel to submit to physical examination; (2 L.R.A.(N.S.) 387) on waiver of right to object to physical examination or exhibition of person; (15 L.R.A.(N.S.) 667) on refusal of order for physical examination as abuse of discretion; (41 Am. St. Rep. 394; 68 Am. St. Rep. 244, 248, 249) on physical examination of parties by order of court.

Distinguished in *Terre Haute & I. R. Co. v. Bruner*, 128 Ind. 554, 26 N. E. 178, holding refusal to direct surgical examination not reversible error, where application made after plaintiff rested and without affidavit showing its necessity; *Austin & N. W. R. Co. v. Cluck*, 97 Tex. 176, 64 L.R.A. 496, 104 Am. St. Rep. 863, 77 S. W. 403, 1 Ann. Cas. 261, holding court without power, in absence of statute, to direct plaintiff to submit to physical examination.

Disapproved in *Union P. R. Co. v. Botsford*, 141 U. S. 255, 35 L. ed. 739, 11 Sup. Ct. Rep. 1000, refusing to order plaintiff, in action for personal injuries, to

submit to surgical examination in advance of trial; *May v. Northern P. R. Co.* 32 Mont. 532, 70 L.R.A. 215, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, holding in absence of legislative authority the district court cannot compel physical examination in personal injury case.

Punitive damages.

Approved in *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 427, 8 So. 708, holding that act of conductor in starting train when he knows passenger is stepping upon cars may be such gross negligence as authorizes punitive damages; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 526, 30 Am. St. Rep. 65, 9 So. 722, holding evidence that old rails were used to repair track imputes recklessness or wantonness of company authorizing punitive damages.

Cited in notes (28 Am. St. Rep. 878) on exemplary or punitive damages; (59 Am. St. Rep. 596, 598; 37 L. ed. U. S. 99) on liability of railroad or other corporation for punitive or exemplary damages.

Qualified in *Richmond & D. R. Co. v. Vance*, 93 Ala. 148, 30 Am. St. Rep. 41, 9 So. 574, holding existence of defective cross-ties of which railroad company was ignorant simply negligence not authorizing punitive damages.

Contributory negligence as defense to wanton negligence.

Approved in *McGhee v. Campbell*, 42 C. C. A. 101, 101 Fed. 943, holding contributory negligence not defense where evidence tends to show wanton negligence on part of defendant.

Cited in *Lacey v. Louisville & N. R. Co.* 81 C. C. A. 352, 152 Fed. 136, holding question of wilful or wanton negligence for the jury where railroad company kicked cars across a public crossing without anyone to control movements.

Instructions tending to mislead.

Cited in *Birmingham R. Light & P. Co. v. King*, 149 Ala. 510, 42 So. 612, holding misleading instructions are properly refused.

Admissibility of declarations as part of res gestae.

Cited in note (11 Eng. Rul. Cas. 294) on admissibility of declarations as part of the res gestae.

9 L. R. A. 445, *MORGAN v. KENDALL*, 124 Ind. 454, 24 N. E. 143.

Injuries provable under allegations of complaint.

Cited in *Heltonville Mfg. Co. v. Fields*, 138 Ind. 61, 36 N. E. 529, holding instruction to include mental disability as element of damage resulting from injury, proper although not specifically pleaded; *Kelley v. Kelley*, 8 Ind. App. 614, 34 N. E. 1009, holding shame, humiliation, loss of honor, reputation, and social position proper elements of damages in assault and battery action without being pleaded; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 60, 29 L. R. A. 291, 61 N. W. 543, holding under allegation that plaintiff was seriously hurt, injury to lung provable; *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 91, 78 N. E. 325, holding aggravation of an existing malady may be shown under a comprehensive allegation of general damages; *Terre Haute Electric Co. v. Watson*, 33 Ind. App. 126, 70 N. E. 993, holding an averment of permanent injuries is sufficient to admit evidence of impairment of earning capacity.

Damages recoverable for wilful tort.

Cited in *Walbridge v. Walbridge*, 80 Kan. 569, 103 Pac. 89, holding a defendant answerable for all injuries resulting as natural or probable consequence of his unlawful assault without regard to his intent.

Cited in footnote to *Warner v. Talbot*, 66 L.R.A. 337, which holds insufficient allowance of \$500 as damages for mental anguish, terror, and distress resulting from body of citizens taking young man suspected of arson into woods without

warrant, illtreating him for a number of hours, placing rope around his neck and threatening to hang him with view of extorting confession of crime or accusation against some other person.

Cited in note (11 L. R. A. 690) on rule of damages for negligent acts or omissions.

9 L. R. A. 449, *DUNTLEY v. BOSTON & M. R. CO.* 66 N. H. 263, 49 Am. St. Rep. 610, 20 Atl. 327.

Duties and liabilities of carrier of freight.

Cited in *Illinois S. R. Co. v. Nelson*, 139 Ky. 458, 97 S. W. 652, holding that cotton seed meal and hulls are not of such character as to put carrier on notice that their prompt delivery was necessary to avoid loss on cattle being fed by shipper.

Cited in footnotes to *Illinois C. R. Co. v. Harris*, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported; *Chicago, B. & Q. R. Co. v. Williams*, 55 L. R. A. 289, which holds carrier liable for failure properly to provide for live stock knowingly taken without caretaker; *Betts v. Chicago, R. I. & P. R. Co.* 26 L. R. A. 248, which holds carrier liable for injuries to live stock by breaking of slats; *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 50 L. R. A. 729, which holds carrier negligently delaying delivery of goods, liable to penalty for delay to which shipper known to be subject.

Cited in notes (12 L.R.A. 746) on duty of railway company to furnish proper cars; (2 L.R.A.(N.S.) 774) on amount of carrier's liability for loss of goods; (23 L.R.A.(N.S.) 747) on effect of shipper's misrepresentation as to character, quantity, or value, on right to recover for loss; (62 Am. St. Rep. 524) on relation of express companies and their employees to other carriers.

Limitation of liability by contract.

Approved in *Durgin v. American Exp. Co.* 66 N. H. 279, 9 L. R. A. 455, 20 Atl. 328, and *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 613, 94 Am. St. Rep. 279, 64 N. E. 647, holding carrier's liability limited to amount stipulated in contract of shipment; *Alair v. Northern P. R. Co.* 53 Minn. 167, 19 L. R. A. 767, 39 Am. St. Rep. 588, 54 N. W. 1072, holding carrier's liability for loss from negligence limited to stipulated value of property; *Pacific Exp. Co. v. Foley*, 46 Kan. 468, 12 L. R. A. 802, 26 Am. St. Rep. 107, 26 Pac. 665, holding carrier's liability for loss through slight negligence limited to stipulated amount; *Baltimore & O. S. W. R. Co. v. Ragsdale*, 14 Ind. App. 426, 42 N. E. 1106 (dissenting opinion), majority holding that carrier cannot, by contract, limit liability for negligence.

Cited in *Ætna L. Ins. Co. v. Smith*, 31 C. C. A. 579, 60 U. S. App. 88, 88 Fed. 443, holding guaranty not implied by acceptance of receipt for premium with printed condition that policy revives when guaranty of good health furnished; *Baker v. Boston & M. R. Co.* 74 N. H. 112, 124 Am. St. Rep. 937, 65 Atl. 386, 12 A. & E. Ann. Cas. 1072, holding a common carrier cannot relieve itself from the consequences of its own wrongful acts by special contract.

Cited in notes (10 L.R.A. 420) on limitation of carrier's liability by contract; (1 L.R.A.(N.S.) 986) on limiting valuation of property as affecting amount of recovery for loss by carrier's negligence; (23 Am. St. Rep. 594) on limitation of amount of carrier's liability; (88 Am. St. Rep. 107, 110) on limitation of carrier's liability in bills of lading.

Distinguished in *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for mistake in transmission and delivery, notwithstanding printed stipulation to contrary.

9 L. R. A. 453, *DURGIN v. AMERICAN EXP. CO.* 66 N. H. 277, 20 Atl. 328.

Limitation of carrier's liability.

Approved in *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 157, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, sustaining limitation of carrier's liability for damage not caused by negligence or lawful misfeasance, in consideration of special freight rate; *Pacific Exp. Co. v. Foley*, 46 Kan. 468, 12 L. R. A. 804, 26 Am. St. Rep. 107, 26 Pac. 665, sustaining limitation of liability to specified amount unless true value stated, when loss results only from slight negligence; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 613, 94 Am. St. Rep. 279, 64 N. E. 647, holding carrier's liability limited to stipulated amount.

Cited in *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 283, 29 Am. St. Rep. 436, 49 N. W. 183, and *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 375, 58 N. W. 968, holding contractual limitation of liability for carrier's negligence, invalid; *Peerless Mfg. Co. v. New York, N. H. & H. R. Co.* 73 N. H. 329, 61 Atl. 511; *Baker v. Boston & M. R. Co.* 74 N. H. 112, 124 Am. St. Rep. 937, 65 Atl. 386, 12 A. & E. Ann. Cas. 1072,—holding common carrier cannot relieve itself from the consequences of its own negligence by special contract; *Baltimore & O. R. Co. v. Hubbard*, 72 Ohio St. 321, 74 N. E. 214, holding carrier may limit liability by contract to a valuation placed upon property upon which valuation freight charges are made.

Cited in notes (14 L. R. A. 434) as to carrier's power to limit liability for negligence; (18 L. R. A. 527) as to right of common carrier to limit liability by contract in absence of negligence; (1 L.R.A.(N.S.) 987) on limiting valuation of property as affecting amount of recovery for loss by carrier's negligence; (2 L.R.A.(N.S.) 773) on amount of carrier's liability for loss of goods; 28 L.R.A. (N.S.) 645, 646) on effect of limitation of liability in receipt prepared by shipper; (23 Am. St. Rep. 594) on limitation of amount of carrier's liability; (61 Am. St. Rep. 363, 365, 366) on limitation of liability by express companies; (88 Am. St. Rep. 82, 107, 110) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 347) on special limitations of liability of carrier.

Distinguished in *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for failure correctly to transmit and deliver message, notwithstanding printed agreement to contrary.

Presumption of knowledge of terms of contract.

Cited in *Piper v. Boston & M. R. Co.* 75 N. H. 448, 75 Atl. 1041, holding that person who executes written contract is conclusively presumed to understand its terms in absence of fraud.

9 L. R. A. 455, *REED v. MEAGHER*, 14 Colo. 335, 24 Pac. 681.

When partnership exists.

Approved in *Hodgson v. Fowler*, 24 Colo. 282, 50 Pac. 1034, holding persons jointly interested in a lease of mining land which they work under an agreement as to the interest of each, partners; *Abbott v. Smith*, 3 Colo. App. 270, 32 Pac. 843, holding existence of partnership not dependent upon compliance by each partner with his agreement, but upon contribution of property and labor and commencement of business; *Flower v. Barnekoff*, 20 Or. 138, 11 L. R. A. 151, 25 Pac. 370, holding that valid contract of partnership to speculate in real estate may be made by parol.

Cited in *Sabel v. Savannah Rail & Equipment Co.* 135 Ala. 383, 33 So. 663, holding partnership not created by purchase by one party under agreement to sell on joint account, where other party refused to pay his part of purchase price; *Bentley v. Brossard*, 33 Utah, 412, 94 Pac. 736, holding a mining partnership

may exist between persons although all of them may not have a direct or present interest in and to the properties themselves if they have an interest in the carrying on of the mining operations; *Walker v. Bruce*, 44 Colo. 113, 97 Pac. 250, holding where several owners of a mine co-operate in operating it partnership exists.

Cited in footnotes to *Childers v. Neely*, 49 L. R. A. 468, which holds mining partnership created where cotenants of oil lease or mine unite in working it; *Shrum v. Simpson*, 49 L. R. A. 792, which holds no partnership created by contract for working farm and dividing proceeds; *Brandon v. Connor*, 63 L.R.A. 260, which holds partnership as to third persons constituted by agreement with contractors for construction of railroad to furnish services and part of necessary animals for use.

Cited in notes (91 Am. St. Rep. 857) on partnership in operation of mine; (18 L.R.A.(N.S.) 965, 1077; 19 Eng Rul. Cas. 322) on agreement to share profits and losses in business as a partnership.

Dissolution by transfer of interest.

Approved in *Patrick v. Weston*, 22 Colo. 49, 43 Pac. 446, holding that member of mining partnership may convey his interest to stranger without dissolving partnership.

Cited in *G. V. B. Min. Co. v. First Nat. Bank*, 35 C. C. A. 514, 95 Fed. 39, to point that transfer of interest in mining partnership will not work its dissolution.

Loss of interest.

Approved in *Continental Divide Min. Invest. Co. v. Bliley*, 23 Colo. 164, 46 Pac. 633, holding interest of mining partner under lease surrendered by his copartners, continued under new lease executed to one of them; *Continental Divide Min. Invest. Co. v. Bliley*, 23 Colo. 165, 46 Pac. 633, holding that failure of partner to pay his share of expenses of working lease does not forfeit his interest in mining partnership.

Cited in *Wright v. Amann*, 192 Fed. 654, to the point that action at law lies for damages for excluding partner from participation in partnership so that no business is transacted.

Cited in note (28 L. R. A. 100) on effect of conveyance by partner of partnership real estate.

Statute of frauds.

Cited in *Waterbury v. Fisher*, 5 Colo. App. 372, 38 Pac. 846, holding memorandum acknowledging receipt of money and its investment in land for party advancing it, sufficient to establish trust under statute of frauds; *Beulah Marble Co. v. Mattice*, 22 Colo. 557, 45 Pac. 432, holding that agreement between three persons to buy land, the title of which is to be taken in the name of one for the benefit of the others, is within the statute of frauds; *Garth v. Davis*, 120 Ky. 110, 117 Am. St. Rep. 571, 85 S. W. 692, holding an agreement to become partners in dealing in real estate, if to be begun and may end within a year need not be in writing; *Rice v. Parrott*, 76 Neb. 504, 107 N. W. 840, holding an oral contract, upon sufficient consideration, to divide the profits of a purchase and sale of land is not affected by the statute of frauds; *Bond v. Taylor*, 68 W. Va. 327, 69 S. E. 1000; holding that verbal contracts of partnership to deal in real estate are not within statute of frauds; *Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 213, holding agreement between two or more persons to explore, discover and locate mineral claims for the joint benefit of the contracting parties, does not fall within statute of frauds; *Jones v. Patrick*, 140 Fed. 406, holding it is not essential to the validity of an agreement made by parties to share in the profits of a contemplated speculation in real estate that it should be in writing.

Cited in notes (16 L.R.A. 750) on validity of parol partnership for dealing in lands; (4 L.R.A.(N.S.) 428) on same point.

Appellate review; reversal.

Approved in *Abbott v. Smith*, 3 Colo. App. 272, 32 Pac. 843, holding that judgment will be set aside where verdict is clearly against the evidence.

Cited in *Beulah Marble Co. v. Mattice*, 22 Colo. 558, 45 Pac. 432, holding that appellate court will review the evidence if the findings of the trial court are the result of prejudice or mistake.

9 L. R. A. 467, *PRICE v. LUSH*, 10 Mont. 61, 24 Pac. 749.

Mandatory or directory provisions in election law.

Cited in *State ex rel. Casper v. Piper*, 50 Neb. 41, 69 N. W. 383, holding statutory requirement that objection to nomination certificates be filed within three days, mandatory; *Re Cuddeback*, 3 App. Div. 107, 39 N. Y. Supp. 388, holding statutory requirement as to time before election nominating certificate must be filed, mandatory; *State ex rel. Bennett v. Barber*, 4 Wyo. 85, 32 Pac. 14, holding provision requiring filing of nomination certificates, mandatory; *Kulp v. Railey*, 99 Tex. 318, 89 S. W. 957, holding mistake, or even wilful misconduct of election officers should not be means of disfranchisement of innocent voters.

Cited in note (90 Am. St. Rep. 60) on irregularities in nomination of candidates avoiding election.

Disapproved in *Stackpole v. Hallahan*, 16 Mont. 48, 28 L. R. A. 505, footnote, p. 502, 40 Pac. 80, holding provisions of ballot law not mandatory to extent of invalidating election; *State ex rel. Brooks v. Fransham*, 19 Mont. 289, 48 Pac. 1, holding that if no objection to nomination be made before election, provisions of statute should be treated as directory; *Bowers v. Smith*, 111 Mo. 58, 16 L. R. A. 759, 33 Am. St. Rep. 491, 20 S. W. 101, holding that erroneous addition of a name to official list of nominees does not invalidate election; *Baker v. Scott*, 4 Idaho, 602, 43 Pac. 76, holding objection that name of successful candidate was improperly placed in ballot, too late when made after election; *Blackmer v. Hildreth*, 181 Mass. 33, 63 N. E. 14, holding election of selectman not invalidated by irregularities in nomination papers; *Payne v. Hodgson*, 34 Utah, 275, 97 Pac. 132, holding the validity of the proceedings in making nominations cannot be inquired into in an election contest; *Ogg v. Glover*, 72 Kan. 256, 83 Pac. 1039, holding an election otherwise legally and fairly conducted is not invalidated by reason of an irregularity in the preparation of the ballot; *Earl v. Lewis*, 28 Utah, 122, 77 Pac. 235, holding it the mandatory duty of town clerk to place names of nominees upon the official ballot, no objection having been made by the contestees; *State ex rel. Dithmar v. Bunnell*, 131 Wis. 204, 110 N. W. 177, 11 A. & E. Ann. Cas. 560, holding fact of wrongful alteration of candidates nomination papers does not in itself call for rejection of votes cast for him at the election.

Adoption of construction of foreign statute.

Cited in *Bowers v. Smith*, 111 Mo. 78, 16 L. R. A. 765, 33 Am. St. Rep. 491, 20 S. W. 101 (dissenting opinion), majority holding construction foreign statute has received not adopted with it.

Distinguished in *State ex rel. Bennett v. Barber*, 4 Wyo. 95, 32 Pac. 14, holding construction of foreign courts not adopted upon enactment of foreign statute.

Delegation of power to nominate.

Cited in *State ex rel. Pigot v. Benton*, 13 Mont. 330, 34 Pac. 301 (dissenting opinion), majority holding that political convention may delegate to committee power to make nominations for office.

Form of ballot.

Cited in notes (10 L.R.A. 150, 151) on form of ballot; (91 Am. St. Rep. 686) on right of elector to vote for candidate not named on official ballot.

What ballots cannot be counted.

Cited as modified in *Slaymaker v. Phillips*, 5 Wyo. 474, 47 L. R. A. 849, 40 Pac. 971 (dissenting opinion), majority holding that ballot not indorsed with official stamp and initials of judge of election, cannot be counted.

Cited in footnote to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

9 L. R. A. 471, *JOHNSON v. HESS*, 126 Ind. 298, 25 N. E. 445.

Record as notice.

Approved in *Hutchinson v. Gorham*, 37 Or. 353, 61 Pac. 431, holding certified transcript and docket thereof not notice of judgment not shown expressly or by inference to be docketed where obtained; *Boos v. Morgan*, 130 Ind. 312, 30 Am. St. Rep. 237, 30 N. E. 141, holding judgment creditor purchasing at sale, bound by his record of prior sale and satisfaction; *Osborn v. Hocker*, 160 Ind. 3, 66 N. E. 42, holding record showing, by mistake, smaller mortgage than that actually existing, binding as between purchaser and mortgagee.

Cited in *Wicker v. Jenkins*, 49 Tex. Civ. App. 369, 108 S. W. 188, holding record does not create a lien where creditor fails to have correct name of the plaintiff in the suit given in the abstract of judgment in another county.

Cited in notes (14 L.R.A. 394) on index as part of records of title; (7 L.R.A. (N.S.) 417) on certainty and accuracy necessary in respect to Christian names or initials in record or index, to impart constructive notice; (87 Am. St. Rep. 669, 670) on docketing judgments.

— Effect of identity or lack of identity of name.

Approved in *Fincher v. Hanegan*, 59 Ark. 155, 24 L. R. A. 545, 26 S. W. 821, holding mistake in mortgagor's middle initial not fatal to record as notice; *Davis v. Steeps*, 87 Wis. 475, 23 L. R. A. 820, 41 Am. St. Rep. 51, 58 N. W. 769, holding docket entry of judgment against Edward Davis not notice of encumbrance against E. A. Davis or Edward A. Davis; *Fisher v. Bush*, 133 Ind. 321, 32 N. E. 924, holding record showing that O'Brien & Graham were administrator's attorneys procuring order for sale of real estate, and that Robert Graham was purchaser thereat, gives notice of identity of persons and illegality of sale; *Bankers Loan & Invest. Co. v. Blair*, 99 Va. 611, 86 Am. St. Rep. 914, 39 S. E. 231, holding docketing and indexing judgment against Mrs. T. Frank not notice of lien on realty in name of May M. S.

Cited in notes (17 L. R. A. 825) on presumption of identity of person from identity of name; (24 L. R. A. 544) on form of Christian name required by recording acts.

Distinguished in *Glenovich v. Zurich*, 19 S. D. 41, 101 N. W. 1103, holding variations between Jacob Zurich the true name and "Jack Zujic" Jack Zulich, Jack Zurch, were such as to require examination of both name and numerical indexes, which would have revealed want of title.

Judgment liens and sales.

Cited in *McAfee v. Reynolds*, 130 Ind. 38, 18 L. R. A. 214, 30 Am. St. Rep. 194, 28 N. E. 423, holding judgment plaintiff deprived of lien by expiration of statutory period therefor; *Old Nat. Bank v. Findley*, 131 Ind. 227, 31 N. E. 62, holding ineffective, judgment sale of land in which debtor has no equitable interest.

9 L. R. A. 477, *McCLURE v. RABEN*, 125 Ind. 139, 25 N. E. 179.

Conveyance of expectant interests.

Approved in *Habig v. Dodge*, 127 Ind. 39, 25 N. E. 182, holding that heir's warranty deed to third person of expectant reversion in widow's estate, does not defeat title of heir's children to same where widow survives such heir; *Chambers v. Chambers*, 139 Ind. 120, 38 N. E. 334, holding that encumbrance by life estate does not diminish necessity for adequate consideration to sustain transfer of expectant reversionary interest; *McClure v. Raben*, 133 Ind. 507, 36 Am. St. Rep. 558, 33 N. E. 275, holding on second appeal that quitclaim deed of expectant interest does not pass after acquired estate of inheritance; *Mally v. Mally*, 121 Iowa, 171, 96 N. W. 735, holding evidence of contingent verbal assignment of contingent interest in estate, insufficient proof of valid assignment; *Wells v. Houston*, 29 Tex. Civ. App. 632, 69 S. W. 183, holding conveyance of absolute and expectant estate for inadequate consideration properly set aside.

Cited in *Layton v. Herr*, 45 Ind. App. 206, 90 N. E. 645, holding that grantee in conveyance of expectancy must show that it was made in good faith, and upon receipt of full value.

Cited in notes (33 L.R.A. 272) on validity of sale of expectancy by prospective heir; (35 L.R.A.(N.S.) 1183, 1185) on effect of quitclaim upon after-acquired title; (56 Am. St. Rep. 350, 351, 356) on assignment of expectancies; (23 Eng. Rul. Cas. 119; 24 Eng. Rul. Cas. 769, 772) on validity and enforceability of assignment of expectancy.

Distinguished in *Brown v. Brown*, 139 Ind. 658, 39 N. E. 152, holding settlement by ancestor with expectant heirs of full age by advancement in full for all expectant interest, valid, where made without fraud; *McAdams v. Bailey*, 169 Ind. 526, 13 L.R.A.(N.S.) 1009, 124 Am. St. Rep. 240, 82 N. E. 1057, holding a deed by a son of an interest or right fixed by law is not void as against public-policy and cannot be impeached for fraud in same manner as in case of mere expectancy dependent upon will of another; *Eissler v. Hoppel*, 158 Ind. 85, 62 N. E. 692, upholding a contract by which an expectancy is released, in compromise and settlement of a suit pending.

Disapproved in *Hale v. Hollon*, 90 Tex. 434, 36 L. R. A. 80, 59 Am. St. Rep. 819, 39 S. W. 287, Affirming 14 Tex. Civ. App. 108, 35 S. W. 843, sustaining conveyance of expectancy of inheritance from insane person without latter's consent where transaction is fair and upon adequate consideration.

9 L. R. A. 481, *BALLEW v. ROLER*, 124 Ind. 557, 24 N. E. 976.

Conclusiveness of judgment.

Cited in *Maynard v. Waidlich*, 156 Ind. 575, 60 N. E. 348, holding pleadings found sufficient on demurrer binding, though erroneous, until vacated or set aside; *Gilmore v. McClure*, 133 Ind. 576, 33 N. E. 351, holding judgment conclusive as to all matters that might have been litigated; *Maynard v. Waidlich*, 156 Ind. 571, 60 N. E. 348, holding judgment of foreclosure, even by default, conclusive as to execution of mortgage and right to foreclose and sell; *Dixon v. Eikenberry*, 161 Ind. 318, 67 N. E. 915, holding right to assert tax claim as against parties to foreclosure, lost by failure to set it up; *Dixon v. Eikenberry*, 161 Ind. 318, 68 L.R.A. 333, 67 N. E. 915, holding a mortgage estopped to assert tax claim after foreclosure of his mortgage as against parties to the decree or those claiming under them.

Priority and enforcement of liens.

Cited in *Whetstone v. Baker*, 140 Ind. 215, 39 N. E. 868, holding beneficiaries

of contract for purchase of land may enforce vendor's lien for unpaid part of purchase money.

Cited in note (12 L. R. A. 35) on priority of mechanics' liens over subsequent liens.

Right of subrogation.

Cited in notes (99 Am. St. Rep. 490) on right of subrogation; (37 L.R.A.(N.S.) 1206) on right of one advancing purchase price to subrogation to vendor's lien.

9 L. R. A. 482, *Re KUBACH*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737.

Constitutionality of restrictions on business.

Approved in *Re Morgan*, 26 Colo. 449, 47 L. R. A. 66, 77 Am. St. Rep. 269, 58 Pac. 1071, holding statutory limitation upon work in mines and smelters to eight hours per day, void; *Seattle v. Smyth*, 22 Wash. 329, 79 Am. St. Rep. 939, 60 Pac. 1120, holding ordinance restricting hours of labor for contractors upon public works, invalid; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 222, 59 L. R. A. 782, 93 Am. St. Rep. 670, 65 N. E. 885, holding statute restricting hours of labor upon public work for state or political subdivisions, and providing for insertion of stipulation in contracts for such work, invalid; *Johnson v. Good-year Min. Co.* 127 Cal. 12, 47 L. R. A. 342, 78 Am. St. Rep. 17, 59 Pac. 304, holding preferential lien for wages on property of corporations, without even requiring description of property or notice, and imposing attorney's fees in case of action, class legislation; *State v. Buchanan*, 29 Wash. 607, 59 L. R. A. 344, 92 Am. St. Rep. 930, 70 Pac. 52, upholding constitutionality of act limiting hours of employment of females in mechanical and mercantile establishments.

Cited in *Frer v. People*, 141 Ill. 184, 16 L.R.A. 496, 31 N. E. 395; *State v. Muller*, 48 Or. 253, 120 Am. St. Rep. 805, 85 Pac. 855, 11 A. & E. Ann. Cas. 88,—holding right to labor, or employ labor, on such terms as may be agreed upon by the interested parties, cannot be arbitrarily interfered with by the legislature; *Keefe v. People*, 37 Colo. 321, 8 L.R.A.(N.S.) 135, 87 Pac. 791, holding an act making it a criminal offense for officers of any public corporation to employ laborers for more than eight hours a day, cannot be upheld; *Ritchie v. People*, 155 Ill. 109, 29 L.R.A. 84, 46 Am. St. Rep. 315, 40 N. E. 454, holding unconstitutional an act prohibiting employment of women for more than an eight hour day; *Low v. Rees Printing Co.* 41 Neb. 147, 24 L.R.A. 710, 43 Am. St. Rep. 670, 59 N. W. 362, holding the legislature cannot, under pretense of the exercise of the police power, prohibit harmless acts which do not concern the health, safety and welfare of society; *Dennis v. Moses*, 18 Wash. 592, 40 L.R.A. 314, 52 Pac. 333 (dissenting opinion), on constitutionality of a statute requiring appraisal of property sold under execution; *State v. Peel Splint Coal Co.* 36 W. Va. 857, 17 L.R.A. 403, 15 S. E. 1000 (dissenting opinion), on constitutionality of an act regulating payment of wages.

Cited in footnote to *State v. Ray*, 60 L. R. A. 634, which holds unauthorized, ordinance for closing stores at 7:30 p. m. except Saturdays.

Cited in notes (13 L. R. A. 588) on unconstitutional and void municipal ordinances; (19 L. R. A. 142) on statutory limitation of hours of labor; (32 L. R. A. 854) on police power to protect health of employees; (65 L.R.A. 51) on legislative limitation of hours of labor; (8 L.R.A.(N.S.) 134) on limitation of hours of labor on public work; (25 Am. St. Rep. 880) on restrictions on pursuit of lawful business; (62 Am. St. Rep. 182) on protection of corporations from special and hostile legislation; (78 Am. St. Rep. 244, 273) on acts which legislature may declare criminal; (48 L. ed. U. S. 151) on validity of legislation regulating hours of labor.

9 L. R. A. 483, *ALPERS v. HUNT*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846.

Champertous contracts.

Cited in *Langdon v. Conlin*, 67 Neb. 247, 60 L.R.A. 431, footnote, p. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834, holding void, contract to procure employment of attorney by third persons for share of fees received; *Holland v. Sheehan*, 108 Minn. 366, 23 L.R.A.(N.S.) 512, 122 N. W. 1, 17 A. & E. Ann. Cas. 687, holding against public policy, a contract between an attorney and a layman for a division of fees on all cases for personal injuries brought to the attorney by the other contracting party.

Cited in note (83 Am. St. Rep. 183) on contracts between attorneys and clients; (119 Am. St. Rep. 1040) as to when attorneys contract of employment is void as against public policy because procured by solicitation; (9 L.R.A.(N.S.) 283) on right of attorney to solicit business.

Distinguished in *Ingersoll v. Coal Creek Coal Co.* 117 Tenn. 289, 9 L.R.A. (N.S.) 290, 119 Am. St. Rep. 1003, 98 S. W. 178, 10 A. & E. Ann. Cas. 829, holding a contract of retainer procured by solicitation of attorney who visits scene of explosion to procure the contract is illegal and will not be upheld; *State Electro-Medical Institute v. Platner*, 74 Neb. 27, 121 Am. St. Rep. 706, 103 N. W. 1079, holding a corporation may recover on contract for services of duly qualified physicians furnished by it from among its own members.

Review of pleadings on motion for new trial.

Cited in *Naylor v. Lewiston & S. E. Electric R. Co.* 14 Idaho, 795, 96 Pac. 573, holding this court will not consider or review the sufficiency of a complaint on an appeal from an order denying a new trial; *Ayotte v. Nadeau*, 32 Mont. 509, 81 Pac. 145, holding where sufficiency of the pleadings are challenged during progress of trial by objection to introduction of evidence, it may be examined on motion for new trial.

9 L. R. A. 487, *WALDRON v. WALDRON*, 85 Cal. 251, 24 Pac. 649, 858.

Cruelty as ground for divorce.

Cited in *Ring v. Ring*, 118 Ga. 194, 62 L.R.A. 884, footnote, p. 878, 44 S. E. 861, holding habitual and intemperate use of morphine not cruel treatment authorizing divorce; *Wolff v. Wolff*, 102 Col. 437, 36 Pac. 767, holding testimony as to cruelty has been sufficiently corroborated to constitute extreme cruelty where harsh and abusive treatment during pregnancy of wife causes physical suffering, and affects her health.

Cited in footnote to *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling-house, clothing, and food.

Cited in notes (29 Am. St. Rep. 127; 65 Am. St. Rep. 69, 70, 79) on cruelty as ground for divorce; (18 L.R.A.(N.S.) 307) on making charges of adultery as ground for divorce.

Disapproved in *Barnes v. Barnes*, 95 Cal. 175, 16 L.R.A. 661, 30 Pac. 298, holding unjustifiable conduct on part of either spouse which so wounds the feelings of the other as to seriously impair the health or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.

9 L. R. A. 493, *McLEAN v. JEPHSON*, 123 N. Y. 142, 25 N. E. 409.

Property subject to taxation.

Cited in *People ex rel. Lemmon v. Feitner*, 167 N. Y. 10, 82 Am. St. Rep. 698, 60 N. E. 265, Affirming 56 App. Div. 283, 67 N. Y. Supp. 893, holding money paid for seat in stock exchange not capital invested, subject to taxation; *Bowe v.*

McNab, 11 App. Div. 391, 42 N. Y. Supp. 938, holding assessors without power to assess executors for property not under their control; *New York v. McLean*, 170 N. Y. 384, 63 N. E. 380, holding board of taxes without authority to enforce by judgment, payment of taxes on bank stock owned by nonresident; *Portland University v. Multnomah County*, 31 Or. 502, 50 Pac. 532, upholding right of college to contest assessment of property, although assessors deny exemption; *Mercur Gold Min. & Mill. Co. v. Spry*, 16 Utah, 234, 52 Pac. 382, holding tax on proceeds of mine for period when there were no net proceeds, void.

Validity of tax.

Cited in *People ex rel. Pike v. Barker*, 86 Hun, 285, 33 N. Y. Supp. 1132, affirming 11 Misc. 264, 32 N. Y. Supp. 485, denying that designation of taxpayers "as executors" invalidate tax; *Re McLean*, 25 N. Y. S. R. 539, 6 N. Y. Supp. 230, denying that tax is subject to collateral attack in proceedings to enforce collection; *People ex rel. First Nat. Bank v. Button*, 43 N. Y. S. R. 80, 17 N. Y. Supp. 315, upholding reassessment of surplus among stockholders not against bank.

Recovery of illegal taxes paid.

Cited in *Ætna Ins. Co. v. New York*, 7 App. Div. 153 note, 14 Misc. 149, 35 N. Y. Supp. 857, upholding right of foreign corporation to recover taxes illegally collected on bank stock and paid by bank.

Distinguished in *United States Trust Co. v. New York City*, 77 Hun, 187, 28 N. Y. Supp. 344, denying right to recover tax erroneously assessed and paid without protest.

Judicial acts of taxing officers.

Cited in *Re Hull*, 109 App. Div. 249, 95 N. Y. Supp. 819, holding the taxing officer or board acts judicially in determining the value of property assessed, and the extent of claims to exemption.

9 L. R. A. 497, *ALLEN v. LA FAYETTE*, 89 Ala. 641, 8 So. 30.

Municipal liability on contract.

Approved in *Thompson v. Elton*, 109 Wis. 595, 85 N. W. 425, holding town liable for money used by it for lawful municipal purposes but to which it had no legal right; *Witter v. Polk County*, 112 Iowa, 389, 83 N. W. 1041, holding that under express power given county to purchase real estate, it may create an indebtedness therefor.

Cited in *Bluthenthal v. Headland*, 132 Ala. 252, 90 Am. St. Rep. 904, 31 So. 87, holding that municipal corporation may be liable on implied assumpsit for goods purchased under *ultra vires* contract and used by it; *McGillivray v. Joint School Dist. No. 1*, 112 Wis. 359, 58 L. R. A. 103, footnote p. 100, 88 Am. St. Rep. 969, 88 N. W. 310, holding school district which contracted for material in excess of constitutional restriction on indebtedness, liable in part and up to constitutional limit; *Ensley v. Hollingsworth & Co.* 170 Ala. 403, 54 So. 95, to the point that where money has been received under *ultra vires* contract and beneficially applied to authorized objects, action of implied assumpsit lies; *Butts County v. Jackson Bkg. Co.* 129 Ga. 807, 15 L.R.A.(N.S.) 573, 121 Am. St. Rep. 244, 60 S. E. 149, holding counties and municipal corporations liable for money had and received and applied beneficially to authorized objects, although the contract by which money was obtained was unauthorized by law.

Distinguished in *Cleveland School Furniture Co. v. Greenville*, 146 Ala. 564, 41 So. 862, holding neither the making of an *ultra vires* contract nor the receiving of its benefits estops the corporation from setting up its invalidity.

Disapproved in *McCurdy v. Shiawassee*, 154 Mich. 565, 118 N. W. 625, holding

money borrowed and used by board of supervisors of county without authority of law, cannot be recovered against county on a count for money had and received.

Power of municipality to borrow money.

Cited in *Luther v. Wheeler*, 73 S. C. 90, 4 L.R.A.(N.S.) 750, 52 S. E. 874, 6 A. & E. Ann. Cas. 754, holding the power to borrow money is not a necessary incident of municipal life and hence does not exist unless expressly given.

Injunction against misappropriation of public funds.

Cited in *Kumpe v. Bynum*, 158 Ala. 313, 48 So. 55, holding court of equity has power and jurisdiction on a bill by a taxpayer to enjoin the misappropriation of public funds by public officers.

Cited in note (36 L.R.A.(N.S.) 26) on taxpayer's right to enjoin unlawful municipal expenditures.

9 L. R. A. 501, SUPREME COUNCIL, O. C. F. v. FORSINGER, 125 Ind. 52, 21 Am. St. Rep. 196, 25 N. E. 129.

Pleading.

Cited in *Grand Lodge A. O. U. W. v. Hall*, 31 Ind. App. 108, 67 N. E. 272, holding complaint of beneficiary, failing to show full performance of conditions imposed by certificate, defective.

Contract of member with benefit association.

Cited in *Gibson v. Megrew*, 154 Ind. 281, 48 L. R. A. 366, 56 N. E. 674, holding that member of relief association cannot be compelled by suit to pay mortuary assessment.

Cited in notes (38 L.R.A. 34, 56) on whether benefit association is an insurance company; (52 Am. St. Rep. 544, 545) on contract of member with benefit association.

Conclusiveness of decisions of agreed tribunals or arbitrators.

Cited in *Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 531, holding an agreement to submit question to a private party for his decision in advance of the arising of controversy over question of right of way is void.

Cited in notes (49 L.R.A. 373, 378, 382, 383) on conclusiveness of decisions of tribunals of associations or corporations; (2 L.R.A.(N.S.) 672) on validity of rule of board of trade requiring arbitration of disputes.

— Of architect or engineer.

Cited in *Munk v. Kanzler*, 26 Ind. App. 110, 58 N. E. 543, holding failure to obtain architect's certificate not condition precedent to proceedings for mechanic's lien when contract does not, expressly or impliedly, make it such; *McCoy v. Able*, 131 Ind. 423, 30 N. E. 528, holding estimate of engineer as to amount of claim for constructing road not conclusive, though so provided in contract; *New Teleph. Co. v. Foley*, 28 Ind. App. 419, 63 N. E. 56, holding measurement by city engineer condition precedent to right of action for paving street under contract; *Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 528, 56 Am. St. Rep. 307, 43 N. E. 156, holding engineer's estimate of work performed not conclusive, but presumed correct until contrary shown; *Fulton County v. Gibson*, 158 Ind. 488, 63 N. E. 982, holding invalid, provision in contract providing for arbitration of disputes by one party thereto and his architect; *Maitland v. Reed*, 37 Ind. App. 471, 77 N. E. 290, holding a contract which assumes in advance of dispute to oust jurisdiction of court by providing decision of architect shall be final is void.

— Of benevolent association.

Cited in *Cotter v. Grand Lodge A. O. U. W.* 23 Mont. 91, 57 Pac. 650, holding by-law of benefit society requiring claims to be heard by society and appeal taken within it, conditions precedent to action; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 231, 49 L. R. A. 386, 60 Am. St. Rep. 745, 46 N. E. 577, holding that where there has been what is equivalent to an appeal provided for by by-law, resort to the court is not barred; *McMahon v. Supreme Council, O. C. F.* 54 Mo. App. 472, holding review by supreme council on its own motion, of decision of its officers, waiver of right to require an appeal by member; *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 522, holding that by-law requiring submission of claim to arbitration, if society require it, is not condition precedent to bringing action; *Supreme Lodge, O. S. F. v. Raymond*, 57 Kan. 651, 49 L. R. A. 378, 47 Pac. 533, holding that by-law that no claim shall be paid until requisite proof of its justness has been made, does not preclude resort to courts; *Prudent Patricians of Pompeii v. Marr*, 20 App. D. C. 375, holding beneficiary of certificate of benefit society not precluded from suing, by by-law of society; *Eighmy v. Brotherhood of Railway Trainmen*, 113 Iowa, 683, 83 N. W. 1051, holding decision of officers in brotherhood as to total disability of member is condition precedent to recovery on his certificate; *Voluntary Relief Department v. Spencer*, 17 Ind. App. 128, 46 N. E. 477, holding part of rule of department which makes decision of its committee final and conclusive without appeal, void; *People's Mut. Ben. Soc. v. Werner*, 6 Ind. App. 618, 34 N. E. 105, holding that society cannot abridge member's right to share in pool for payment of death losses, by arbitrary assertion that claim is invalid; *Sourwine v. Supreme Lodge, K. of P.* 12 Ind. App. 451, 54 Am. St. Rep. 532, 40 N. E. 646, holding that member of one class of benefit association cannot be arbitrarily refused admission to another class the right to which by-laws give him; *Modern Woodmen v. Taylor*, 67 Kan. 374, 71 Pac. 806, holding that remedy by appeal, provided member of fraternal insurance association, must be exhausted before resort can be had to courts; *Supreme Lodge, K. P. v. Andrews*, 39 Ind. App. 3, 77 N. E. 361, holding where the assured is entitled to a transfer from one risk to another on proof of good health, motive of medical examiner causing rejection of application is immaterial; *McGuinness v. Court Elm City, No. 1*, F. A. 78 Conn. 47, 60 Atl. 1023, 3 A. & E. Ann. Cas. 209, holding failure to exhaust the remedies provided by the laws of the order, for the redress of injuries due to suspension, is a bar to relief for such injury in the courts; *Supreme Council, C. B. L. v. Grove*, — Ind. —, 36 L.R.A.(N.S.) 917, 96 N. E. 159, holding that provision in mutual benefit certificate making decision of association conclusive upon question whether member is entitled to benefit is void.

Cited in notes (52 Am. St. Rep. 546, 547, 558, 559; 59 Am. St. Rep. 204, 206) on effect as res judicata of decisions within association.

9 L. R. A. 503, CINCINNATI; *I. ST. L. & C. R. CO. v. DAVIS*, 126 Ind. 99, 25 N. E. 878.

Care of injured employees.

Cited in *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 495, 60 Am. St. Rep. 172, 46 N. E. 1022, sustaining superintendent's authority to employ surgeon to attend injured employee; *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 442, 33 N. E. 135, holding that conductor may bind company for medical care of brakeman; *Bedford Belt R. Co. v. McDonald*, 12 Ind. App. 622, 40 N. E. 821, raising, without deciding, question as to validity of contract between railroad company and surgeon to furnish services to injured employees; *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 563, 116 S. W. 461, holding an emergency

power incident to the office of president of a corporation to employ a surgeon to attend employees injured by a catastrophe in its factory; *Evans v. Marion Min. Co.* 100 Mo. App. 674, 75 S. W. 178, holding president was acting within duties in doing that which was lessening the damages for which he found corporation had become liable.

Cited in notes (20 L.R.A. 696) on authority of agent to employ medical services for servant; (4 L.R.A.(N.S.) 59) on duty to provide medical assistance for servant; (20 L.R.A. 696) on authority to employ medical services for employee or other person.

Distinguished in *Chicago & E. R. Co. v. Behrens*, 9 Ind. App. 577, 37 N. E. 26, denying liability of company for board and articles furnished injured employee; *Spelman v. Gold Coin Min. & Mill. Co.* 26 Mont. 84, 55 L. R. A. 643, 91 Am. St. Rep. 402, 66 Pac. 597, denying authority of general manager to bind mining company for medical service furnished employees injured without fault of company.

Liability of principal for acts of agent.

Cited in *Parrot v. Mexican C. R. Co.* 207 Mass. 190, 34 L.R.A.(N.S.) 273, 93 N. E. 590, to the point that secret instructions to general agent are not binding upon person dealing with him, in reliance upon his ostensible authority.

Cited in note (88 Am. St. Rep. 783, 785) on effect of secret instructions on liability of principal for unauthorized acts of agent.

9 L. R. A. 505, *LEWIS v. LEWIS*, 44 Minn. 124, 20 Am. St. Rep. 559, 46 N. W. 323.

Dissolution of marriage.

Cited in *Di Lorenzo v. Di Lorenzo*, 71 App. Div. 515, 75 N. Y. Supp. 878, denying husband's right to annul marriage contracted through false representations; *Ridgely v. Ridgely*, 79 Md. 305, 25 L. R. A. 805, 29 Atl. 597, holding court of equity without jurisdiction to annul marriage in absence of fraud; *Lyon v. Lyon*, 230 Ill. 370, 13 L.R.A.(N.S.) 1000, 82 N. E. 850, 12 A. & E. Ann. Cas. 25, holding that misrepresentations as to being permanently cured of epilepsy, and of having had no attack for a number of years is not such fraud as will justify annulment of marriage.

Cited in footnote to *Di Lorenzo v. Di Lorenzo*, 63 L.R.A. 92, which upholds right to annul marriage contract procured by fraudulent representations that a child has been born to woman of which the man is the father.

Cited in notes (40 L.R.A. 738) on marriage of person while insane; (30 L.R.A.(N.S.) 301) on misrepresentation as to disposition or character as ground for annulling marriage; (79 Am. St. Rep. 371, 372, 373, 377) on what marriages are void; (89 Am. St. Rep. 388, 389) on kleptomania as ground for annulment of marriage.

9 L. R. A. 506, *ANHEUSER-BUSCH BREWING ASSO. v. MASON*, 44 Minn. 318, 20 Am. St. Rep. 580, 46 N. W. 558.

Illegal purpose as affecting contract.

Approved in *Illinois Trust & Sav. Bank v. Pacific R. Co.* 117 Cal. 344, 49 Pac. 197, holding bondholders not affected by *ultra vires* contract for which proceeds of bond issue were used.

Cited in *Hollenberg Music Co. v. Berry*, 85 Ark. 12, 122 Am. St. Rep. 17, 106 S. W. 1172, holding mere knowledge of unlawful purpose in use of music sold does not render contract void; *Washington Liquor Co. v. Shaw*, 38 Wash. 400, 80 Pac. 536, 3 A. & E. Ann. Cas. 153; *Frankel v. Hiller*, 16 N. D. 395, 113 N. W. 1067, 15 A. & E. Ann. Cas. 265,—holding mere knowledge insufficient;

Harbison v. Shirley, 139 Iowa, 608, 19 L.R.A. (N.S.) 665, 117 N. W. 963, holding mere knowledge or suspicion of unlawful intent, without active participation in wrongful purpose, insufficient to avoid contract; Sawyer v. Sanderson, 113 Mo. App. 247, 88 S. W. 151, holding sale of articles prohibited by positive law void, regardless of knowledge of intent in its use; Mitchell v. Branham, 104 Mo. App. 489, 79 S. W. 739, on invalidity of contract which contravenes provisions of penal statutes; Stewart v. Wright, 77 C. C. A. 499, 147 Fed. 349 (dissenting opinion), on right to recover purchase price where vendor knows of unlawful purpose in their use; Cunningham v. Pettigrew, 94 C. C. A. 457, 169 Fed. 349 (dissenting opinion), on lender of money to enable accomplishment of fraudulent scheme to sell interest in mine as particeps criminis.

Cited in footnotes to Gray v. Western U. Teleg. Co. 14 L. R. A. 95, which holds company liable for delay in delivering telegram relating to illegal transaction; Waters v. Richmond & D. R. Co. 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday.

Cited in notes (11 L.R.A. 589) as to partnership share of profits illegally acquired; (117 Am. St. Rep. 502, 509) on contracts, consideration for which has partly failed or is partly illegal.

9 L. R. A. 508, JACOBSON v. SULLIVAN, 152 Mass. 480, 25 N. E. 973.

Sale where buyer is to specify goods to be delivered.

Cited in Kirwan v. Roberts, 99 Md. 350, 58 Atl. 32, holding buyer guilty of a breach of contract in refusing to make specification where by terms of contract he accepts offer and agrees to specify styles of goods to be delivered.

9 L. R. A. 509, KENDALL v. GLEASON, 152 Mass. 457, 25 N. E. 838.

Descent of property.

Cited in Mullen v. Reed, 64 Conn. 248, 24 L. R. A. 666, 42 Am. St. Rep. 174, 29 Atl. 478, defining heirs at law mentioned in benefit certificate as those taking under statute of distribution; Lawrence v. Crane, 158 Mass. 393, 33 N. E. 605, holding that will contemplating change of real estate into money before going to heirs refers to those taking under statute of distribution; Thomas v. Covert (Thomas v. Supreme Lodge K. of H.) 126 Wis. 598, 3 L.R.A. (N.S.) 907, 105 N. W. 922, 5 A. & E. Ann. Cas. 456, holding unless contrary intent is indicated, all persons designated as distributees by the statutes for distribution of property of intestates are meant by words "legal heirs;" Gray v. Whittemore, 192 Mass. 381, 10 L.R.A. (N.S.) 1150, 116 Am. St. Rep. 246, 78 N. E. 422, on meaning to be given the word heirs.

Cited in footnote to Wool v. Fleetwood, 67 L.R.A. 445, which holds that meaning of words "lawful heirs" cannot be restricted as including children only.

Distinguished in Proctor v. Clark, 154 Mass. 48, 12 L. R. A. 724, 27 N. E. 673, denying that sale of property by trustee prevents proceeds descending to heirs according to will; Gardner v. Skinner, 195 Mass. 167, 80 N. E. 825, holding it is only those who would take the real estate if the ancestor were intestate who can be considered heirs at law.

Termination of trust.

Cited in Robbins v. Smith, 72 Ohio St. 20, 73 N. E. 1051, holding where objects of trust have not been fully accomplished and accomplishment has not been made possible trust will not be decreed terminated.

9 L. R. A. 510, ATTY. GEN. *ex rel.* MANN v. REVERE COPPER CO. 152 Mass. 444, 25 N. E. 605.

Protection of public rights.

Cited in Atty. Gen. v. Williams, 174 Mass. 484, 47 L. R. A. 319, 55 N. E. 77, sustaining right of attorney general to maintain suit in equity for protection of public against violation of building law; McQuesten v. Atty. Gen. 187 Mass. 186, 72 N. E. 965, holding the attorney general may in proceedings in which commonwealth is party, authorize an attorney at law not connected with his office, to enter and take appeal for commonwealth.

Water rights and rights of way.

Cited in Heald v. Kennard, 180 Mass. 522, 63 N. E. 4, denying abutting owner's right to prescriptive easement to great pond for irrigation purposes; Slater v. Gunn, 170 Mass. 514, 41 L. R. A. 273, 49 N. E. 1017, denying that use for one hundred years of road between street and great pond establishes prescriptive right of way; Gardner Water Co. v. Gardner, 185 Mass. 194, 69 N. E. 1051, holding the water of a great pond may, by reason of power given a private corporation by the legislature, be sold to inhabitants of a town; Percy Summer Club v. Astle, 90 C. C. A. 527, 163 Fed. 6, on annulment of ordinance of 1647 pertaining to fresh water ponds of less than ten acres.

Cited in footnotes to Concord Mfg. Co. v. Robertson, 18 L. R. A. 679, as to abutter's rights in public water and land under same; Watuppa Reservoir Co. v. Fall River, 13 L. R. A. 255, which holds right of private persons in great pond not affected by ordinance of 1647; Auburn v. Union Water Power Co. 38 L. R. A. 188, which holds taking 1/15 water supply of great pond for city not unreasonable as to owners of mill privileges.

Cited in notes (12 L. R. A. 634) on rights in great ponds as public highways; (50 L.R.A. 746) on state and Federal ownership of waters; (93 Am. St. Rep. 717) on prescriptive title to water; (23 Eng. Rul. Cas. 791) on prescriptive right to take seaweed, etc.

Distinguished in Atty. Gen. v. Herrick, 190 Mass. 310, 76 N. E. 1045, holding title to a great pond is in no case held by city or town in absence of prior grant by the legislature.

Territorial limits of commonwealth.

Cited in Com. v. Boston Terminal Co. 185 Mass. 282, 70 N. E. 125, holding territorial limits of the commonwealth extends one marine league from its seashore at the line of extreme low water.

Statute of limitations as defense.

Cited in Schneider v. Hutchinson, 35 Or. 256, 76 Am. St. Rep. 474, 57 Pac. 324, holding that title to state lands may be acquired by adverse possession; Smith v. Adams, 206 Mass. 515, 92 N. E. 760, to the point that abutter on highway who has maintained as of right for forty years building within highway where boundaries can be located by records or monuments thereby acquires against public prescriptive right to permanent continuance.

Cited in footnote to Osborne v. Lindstrom, 46 L. R. A. 715, which holds invalid, statute shortening period of limitation without leaving reasonable time to sue.

Cited in notes (45 L.R.A. 609) on vested right of defense of statute of limitations; (76 Am. St. Rep. 485) on adverse possession of public property.

Prescriptive right to maintain nuisance.

Cited in Holyoke v. Hadley Water-Power Co. 174 Mass. 426, 54 N. E. 889, denying right of one to acquire prescriptive privilege to discharge water into street, creating nuisance.

Cited in notes (53 L.R.A. 892, 899, 902, 904) on prescriptive right to maintain public nuisance; (19 Eng. Rul. Cas. 306) as to when injunction against nuisance will be granted.

Distinguished in *Com. v. Sisson*, 189 Mass. 251, 1 L.R.A.(N.S.) 755, 109 Am. St. Rep. 630, 75 N. E. 619, holding a riparian owner cannot, as against the commonwealth, acquire a right to discharge saw dust in stream and thereby kill eatable fish, but the legislature may at any time prohibit such use of property.

9 L. R. A. 514, *RENIHAN v. WRIGHT*, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. 822.

Parties to action for money lost in gaming.

Cited in *Ervin v. State*, 150 Ind. 342, 48 N. E. 249, holding wife not proper party plaintiff in action by state to recover money lost in gaming.

Disposition of corpse.

Cited in *Enos v. Snyder*, 131 Cal. 71, 53 L. R. A. 222, 82 Am. St. Rep. 330, 63 Pac. 170, holding widow entitled to custody of corpse as against personal representative and next of kin of deceased; *Hackett v. Hackett*, 18 R. I. 157, 19 L. R. A. 559, 49 Am. St. Rep. 762, 26 Atl. 42, upholding widow's right to remove husband's body from place selected by next of kin; *Burney v. Children's Hospital*, 169 Mass. 60, 38 L. R. A. 415, 61 Am. St. Rep. 273, 47 N. E. 401, holding that father, as guardian, may maintain action against hospital for autopsy performed upon body of child without consent; *Pettigrew v. Pettigrew*, 207 Pa. 316, 64 L. R. A. 181, 99 Am. St. Rep. 795, 56 Atl. 878, upholding right of widow to designate burial place of husband; *Koerber v. Patek*, 123 Wis. 459, 68 L.R.A. 959, 102 N. W. 40, holding there vests in the nearest relative of one dying, the legal right to perform the duty of ceremonious burial; *Butterworth v. Teale*, 54 Wash. 18, 102 Pac. 768, holding if the obligation of burial rests upon the marriage relation then the wife may be charged personally with the expenses of burial; *Phillips v. Montreal General Hospital*, Rap. Jud. Quebec, 33 C. S. 488, holding widow may sue for unlawful autopsy on husband's body.

Cited in notes (14 L.R.A. 86) on right to control disposition of corpse; (75 Am. St. Rep. 425, 426, 430) on rights in and to dead bodies and remedies for their enforcement; (78 Am. St. Rep. 184) on right of executor to possession of body of decedent.

Mental suffering as element of damages.

Cited in *Vanderberg v. Connolly*, 18 Utah, 126, 54 Pac. 1097, holding mental suffering element of damages in action for wrongful arrest; *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 434, 33 N. E. 800, and *Western U. Teleg. Co. v. Cline*, 8 Ind. App. 365, 35 N. E. 564, upholding right to damages for mental suffering for nondelivery of message announcing death; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 79, 54 L. R. A. 851, 60 N. E. 1080 (dissenting opinion) majority holding damages for mental suffering due to failure of telegraph company promptly to deliver message, not recoverable; *Western U. Teleg. Co. v. Rowell*, 153 Ala. 319, 45 So. 73, holding that mental suffering was natural result of failure to deliver telegram as to sickness of wife; *Louisville & N. R. Co. v. Wilson*, 123 Ga. 66, 51 S. E. 24, 3 A. & E. Ann. Cas. 128, holding an action for mental suffering exists in favor of a wife by reason of negligent act of common carrier in allowing corpse of husband to remain outside several hours in the rain while waiting for second train to arrive; *Barnes v. Western U. Teleg. Co.* 27 Nev. 445, 65 L.R.A. 679, 103 Am. St. Rep. 776, 76 Pac. 931, 1 A. & E. Ann. Cas. 346, holding damages for mental suffering caused by a tort, though unaccompanied with physical suffering, are recoverable; *Kyles v. Southern R. Co.* 147 N. C. 399, 16 L.R.A.(N.S.) 407, 61 S. E. 278, holding where rights of one

legally entitled to the custody of a dead body are violated by mutilation the party injured may in an action recover damages for mental suffering caused by the injury; *Carter v. Oster*, 134 Mo. App. 158, 112 S. W. 995, holding a trade union is liable for damages for mental suffering caused by reason of threats of personal violence and repeated acts of coercion whereby workman repeatedly lost his position; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 658, 142 S. W. 775, to the point that recovery for mental anguish may be had in action for breach of contract concerning handling of corpse; *Kurpgeweit v. Kirby*, 88 Neb. 77, 33 L.R.A.(N.S.) 102, 129 N. W. 177, to the point that recovery may be had for mental anguish caused by being deprived of remains by undertaker to whose care dead body of daughter had been committed.

Cited in footnote to *Louisville & N. R. Co. v. Hull*, 57 L. R. A. 771, which authorizes consideration of mental anguish in assessing damages for breach of contract to transport corpse.

Cited in notes (19 L.R.A.(N.S.) 566) on mental anguish as element of damages in action for breach of contract relative to corpse; (24 Am. St. Rep. 308) on mental anguish as element of damages.

Disapproved in *Beaulieu v. Great Northern R. Co.* 103 Minn. 47, 19 L.R.A.(N.S.) 569, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, holding in absence of wilful or malicious misconduct there can be no recovery for mental anguish caused by railroad company's act in negligently carrying a corpse to a point other than place of destination.

Accord and satisfaction.

Cited in *Barnum v. Green*, 13 Colo. App. 259, 57 Pac. 757, denying that payment of a smaller sum liquidates larger debt, in absence of accord and satisfaction; *Sheets v. Russell*, 12 Ind. App. 680, 40 N. E. 30, holding allegation that maker of note employed payee at extra compensation as part consideration for discharge of note, insufficient plea of accord and satisfaction.

Cited in notes (100 Am. St. Rep. 420) on accord and satisfaction; (1 Eng. Rul. Cas. 402) on part payment of claim for unliquidated damages as a satisfaction.

9 L. R. A. 517, *COLEMAN v. WHITNEY*, 62 Vt. 123, 20 Atl. 322.

Right of third person to sue on contract for his benefit.

Cited in note (71 Am. St. Rep. 204) on right of third person to sue on contract made for his benefit.

Effect of statute of limitations on a continuing contract.

Cited in *Flege v. Covington & C. Elev. R. & Transfer & Bridge Co.* 122 Ky. 354, 121 Am. St. Rep. 463, 91 S. W. 738, holding a covenant, in deed of right of way, to repair and renew when necessary, is a continuing contract, unaffected by the statute of limitations; *Lowrey v. Hawaii*, 215 U. S. 577, 54 L. ed. 335, 30 Sup. Ct. Rep. 209, holding that where breach of covenant of use entails either forfeiture or payment of specified sum, grantee has right of election until disavowal on his part and denial of alternative obligation and until statute does not run.

Laches.

Cited in *Wilder v. Wilder*, 82 Vt. 128, 72 Atl. 203, holding laches does not arise from delay alone but from delay that works a disadvantage to another.

Payment by commercial paper.

Cited in note (35 L.R.A.(N.S.) 87) on payment by commercial paper.

9 L. R. A. 521, PHILLIPS v. MILWAUKEE & N. R. CO. 77 Wis. 349, 46 N. W. 543.

Presumption of care.

Approved in Union Stock Yards Co. v. Conoyer, 41 Neb. 625, 59 N. W. 950, holding one killed at crossing presumed free from negligence, circumstances being consistent with presumption; Ames v. Waterloo & C. F. Rapid Transit Co. 120 Iowa, 656, 95 N. W. 161 (dissenting opinion) majority holding evidence that deceased used due care in crossing railroad track not supplied by presumption of exercise of instinct of self-preservation.

Cited in Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 380, 121 N. W. 830, holding that law presumes that person suffering death by accident was, at time, in exercise of ordinary care and diligence.

Cited in notes (16 L.R.A. 261) on presumption as to exercise of due care of person found to have been killed by alleged negligence of another; (33 L.R.A. (N.S.) 1108) on burden of proof as to contributory negligence.

Duty to look and listen.

Cited in Vance v. Ravenswood, S. & G. R. Co. 53 W. Va. 346, 44 S. E. 461, holding injured person stopping and looking, not negligent in crossing railroad track at night after passage of engine, although familiar with practice of making flying switches; Toledo, St. L. & W. R. Co. v. Bartley, 96 C. C. A. 570, 172 Fed. 87, holding a plaintiff, injured while crossing track within ten feet of string of stationary freight cars through bumping of the cars by an engine without required notice, was not negligent as matter of law in failing to look and listen before attempting to cross.

Cited in footnotes to Woehrle v. Minnesota Transfer R. Co. 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman absent not negligence *per se*; Oleson v. Lake Shore & M. S. R. Co. 32 L. R. A. 149, which holds it negligent to attempt to cross track immediately after passage of train whose smoke obstructs view; Keenan v. Union Traction Co. 58 L. R. A. 217, which holds failure to look for train within 35 feet of track, negligence; Western & A. R. Co. v. Ferguson, 54 L. R. A. 803, which holds that failure to look within 30 feet of track will not prevent recovery; Lorenz v. Burlington, C. R. & N. R. Co. 56 L. R. A. 753, which holds negligence of one pursuing cow in not looking and listening before crossing railroad track, question for jury; Colorado & Southern R. Co. v. Thomas, 70 L.R.A. 681, which holds failure to look and listen before crossing track not excused by existence of building adjoining highway which would obstruct view of tracks and by noise created therein which would prevent hearing approaching train.

Question for jury as to negligence at crossing.

Cited in Winchell v. Abbot, 77 Wis. 374, 46 N. W. 665, holding it question for jury whether woman, unfamiliar with city, should listen for trains before approaching tracks at night; York v. Maine C. R. Co. 84 Me. 125, 18 L. R. A. 62, 24 Atl. 790, holding it question for jury to determine whether traveler, seeing section of severed train pass crossing, should listen for rear section; Baltimore & O. S. W. R. Co. v. Rosborough, 40 Ind. App. 23, 80 N. E. 869, holding the question of contributory negligence of motorman of street car in failing to act when plaintiff by reason of fright of his team was placed in peril, was for the jury; Nichols v. Baltimore & O. S. W. R. Co. 33 Ind. App. 241, 71 N. E. 170, holding there is no presumption of contributory negligence from mere fact that the accident happened at a crossing; Scott v. St. Louis, I. M. & S. R. Co. 79 Ark. 142, 116 Am. St. Rep. 67, 95 S. W. 490, 9 A. & E. Ann. Cas. 212, holding question whether plaintiff was guilty of contributory negligence in stepping on main track after seeing part of train backing toward him on spur track was for the jury.

Negligence as to flying switches.

Cited in note (18 L. R. A. 67) on negligence of railroad company as to flying switches or detached cars moving by their own momentum.

9 L. R. A. 523, STEVENS v. CARSON, 27 Neb. 501, 20 Am. St. Rep. 681, 43 N. W. 361.

Property exempt from claims of creditors.

Cited in *Giles v. Miller*, 36 Neb. 351, 38 Am. St. Rep. 730, 54 N. W. 551, holding that vendee of lands, occupied as homestead at time of conveyance, acquires same clear from judgment docketed prior to purchase; *Noyes v. Belding*, 5 S. D. 622, 59 N. W. 1069, denying that action is maintainable against sheriff for releasing exempt property, although sold to defeat creditors; *Johnson v. Bartek*, 56 Neb. 424, 76 N. W. 878, denying that judgment sustaining attachment determines question of exemption as homestead.

Cited in note (102 Am. St. Rep. 103) on exemption of wages, salaries, and earnings.

Distinguished in *Farmers & M. Bank v. Hoffman*, 5 Neb. (Unof.) 16, 96 N. W. 1044, holding that husband, after deserting his wife, could mortgage growing crops as security for antecedent debt though mortgagee knew that the wife claimed the property as exempt.

9 L. R. A. 526, HOBBS v. CLARK, 53 Ark. 411, 14 S. W. 652.

Separate valuation of articles replevied.

Cited in *Byrne v. Lynn*, 18 Tex. Civ. App. 258, 44 S. W. 311, holding court without power to require jury to set separate values on articles replevied, proof of separate value being lacking; *Dunlap & Taylor v. Flowers*, 21 Okla. 606, 96 Pac. 643, holding right to separate valuation waived if not demanded before verdict is rendered.

Official survey.

Cited in *Sawyer & A. Lumber Co. v. State*, 75 Ark. 311, 87 S. W. 431, on survey of county surveyor as being prima facie correct.

9 L. R. A. 527, GAMBLE v. QUEENS COUNTY WATER CO. 123 N. Y. 91, 25 N. E. 201.

Shareholder's interest as affecting right to vote.

Cited in *Bjorngaard v. Goodhue County Bank*, 49 Minn. 487, 52 N. W. 48; *Cumberland Valley R. Co. v. Gettysburg & H. R. Co.* 177 Pa. 541, 35 Atl. 952; *Nye v. Storer*, 168 Mass. 55, 46 N. E. 402,—sustaining stockholder's right to vote upon transaction between corporation and himself; *Windmuller v. Standard Distilling & Distributing Co.* 114 Fed. 494, holding that interest adverse to others does not affect stockholder's right to vote; *Merz v. Interior Conduit & Insulation Co.* 87 Hun. 435, 34 N. Y. Supp. 215, holding that stockholder, also a creditor, may vote on proposition to increase or reduce capital stock; *Socorro Mountain Min. Co. v. Preston*, 17 Misc. 220, 40 N. Y. Supp. 1040, upholding right of stockholders personally interested as defendants to vote on resolution to discontinue action; *Blinn v. Riggs*, 110 Ill. App. 48, holding that stockholder may vote upon measure notwithstanding personal interest; *Camden Land Co. v. Lewis*, 101 Me. 101, 63 Atl. 523, on question whether stockholder may vote to ratify contract between himself and the corporation; *Clark v. Memphis Street R. Co.* 123 Tenn. 248, 130 S. W. 751, holding that owner of stock has right to vote for directors and to vote stock upon all questions in which owner has interest.

Rights of stockholders as to protection against corporate action.

Cited in *Watkins v. North America Land & Timber Co.* 107 La. 111, 31 So.

683, and *Jacobus v. American Mineral Water Mach. Co.* 38 Misc. 372, 77 N. Y. Supp. 898, sustaining minority stockholder's right to equitable relief from oppressive action by majority; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 528, 62 U. S. App. 49, 91 Fed. 311, holding action of majority stockholders unfair to minority reviewable by courts; *Oelbermann v. New York & N. R. Co.* 14 Misc. 134, 36 N. Y. Supp. 1096, and *Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 323, 35 N. Y. Supp. 566, — holding that only flagrant violation by majority of rights of minority stockholders justifies interference of equity; *Du Puy v. Transportation & Terminal Co.* 82 Md. 426, 33 Atl. 889, holding that equity will protect stockholder from fraudulent acts of officers; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 334, 33 Am. St. Rep. 315, 30 N. E. 667, holding that majority stockholder cannot authorize sale of corporate property to himself against protest of minority; *Weckerly v. Fell*, 22 Pa. Co. Ct. 210, 8 Pa. Dist. R. 89, denying right of majority stockholders to authorize payment to themselves of baseless claims; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 508, 53 N. E. 520, holding action maintainable to set aside lease approved by majority stockholders in fraud of minority; *Content v. Metropolitan Street R. Co.* 37 Misc. 624, 76 N. Y. Supp. 151, denying right of minority stockholder to enjoin lease at adequate rental; *Flynn v. Brooklyn City R. Co.* 9 App. Div. 278, 41 N. Y. Supp. 566, upholding lease of railroad, approved by majority of stockholders, where fraud not clearly inferable; *McLeary v. Erie Teleg. & Teleph. Co.* 38 Misc. 7, 76 N. Y. Supp. 712, granting injunction to minority to restrain clearly detrimental action by majority stockholders; *Lewisohn Bros. v. Anaconda Copper Min. Co.* 23 Misc. 33, 50 N. Y. Supp. 263, granting injunction at suit of stockholder against sale of corporation property to lower of two bidders; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 426, 34 L. R. A. 82, 55 Am. St. Rep. 689, 44 N. E. 1043, Reversing 78 Hun, 219, 28 N. Y. Supp. 933, holding corporation controlling another cannot enforce defaulted obligations to injury of minority stockholders; *Phelan v. Edison Electric Illuminating Co.* 24 Misc. 112, 53 N. Y. Supp. 305, holding that minority stockholder cannot enjoin proposed purchase of majority stock by another corporation; *Jacobus v. Diamond Soda Water Mfg. Co.* 94 App. Div. 378, 88 N. Y. Supp. 302, holding bonds and mortgage issued by majority stockholders to enable president of another company to obtain control of corporation, fraud upon rights of minority; *Polhemus v. Polhemus*, 43 Misc. 144, 88 N. Y. Supp. 273, holding that stockholder must show fraud or waste to set aside sale by director to company; *Hyde v. Equitable Life Assur. Soc.* 61 Misc. 525, 116 N. Y. Supp. 219; *Colby v. Equitable Trust Co.* 124 App. Div. 267, 108 N. Y. Supp. 978, Reversing 55 Misc. 357, 106 N. Y. Supp. 801; *Figge v. Bergenthal*, 130 Wis. 616, 109 N. W. 581; *Gilchrist v. Highfield*, 140 Wis. 478, 123 N. W. 102, 17 A. & E. Ann. Cas. 1257, — holding that court will not interfere with acts of corporation in pursuance of business policy adopted in good faith by a majority of stockholders; *Mills v. United States Printing Co.* 99 App. Div. 617, 91 N. Y. Supp. 185, on same point; *Siegman v. Electric Vehicle Co.* 72 N. J. Eq. 410, 65 Atl. 910, holding that courts may interfere with internal management of corporations as to acts that are ultra vires or are prohibited by law; *South & N. A. R. Co. v. Gray*, 160 Ala. 513, 49 So. 347, on holder of majority of stock being entitled to vote it as he pleases so long as not oppressive or fraudulent as against minority; *Schwab v. E. G. Potter Co.* 194 N. Y. 415, 87 N. E. 670, Affirming 129 App. Div. 36, 113 N. Y. Supp. 439, on courts as not interfering with internal management of corporation while acting within its powers, in the absence of fraud.

When minority stockholder may maintain action.

Approved in *Buker v. Leighton Lea Asso.* 18 App. Div. 558, 46 N. Y. Supp. 35, holding that syndicate agreement, giving certain stockholders a bonus, will not

be declared fraudulent at suit of shareholders, as against stockholders who have approved corporate settlement of the matter.

Cited in *Lewisohn Bros. v. Anaconda Copper Min. Co.* 26 Misc. 623, 56 N. Y. Supp. 807, holding that minority stockholder may maintain action to protect corporate interests where application to directors would be futile; *Hallenborg v. Greene*, 66 App. Div. 592, 73 N. Y. Supp. 403, holding that stockholder may maintain suit in company's behalf where directors act in hostility to corporation's interest; *Erny v. G. W. Schmidt Co.* 197 Pa. 484, 47 Atl. 877, denying right of stockholder to maintain action against directors for mismanagement, without attempt to obtain authority from corporation; *Oelbermann v. New York & N. R. Co.* 14 Misc. 138, 36 N. Y. Supp. 1096, holding complaint in action by minority to restrain majority stockholders must set forth unlawful acts disclosing alleged fraud; *Kessler & Co. v. Ensley Co.* 129 Fed. 409, holding that minority stockholders may maintain action on behalf of corporation to set aside fraudulent transaction, upon refusal of directors to sue; *Niles v. New York C. & H. R. R. Co.* 176 N. Y. 126, 68 N. E. 142, holding that individual stockholder cannot bring action for damages from conspiracy to wreck corporation; *Fletcher v. Alpena Circuit Judge*, 136 Mich. 514, 99 N. W. 748, holding stockholder not entitled as a matter of law to enjoin a usurious contract under all circumstances; *Dunbar v. American Teleph. & Teleg. Co.* 224 Ill. 29, 115 Am. St. Rep. 132, 79 N. E. 423, 8 A. & E. Ann. Cas. 57; *Robinson v. New York W. & B. R. Co.* 123 App. Div. 341, 108 N. Y. Supp. 91,—holding that courts should interfere at instance of minority stockholders where act of majority would be a fraudulent destruction of the rights of the minority; *Continental Ins. Co. v. New York & H. R. Co.* 103 App. Div. 297, 93 N. Y. Supp. 27, on same point; *Von Au v. Magenheimer*, 126 App. Div. 263, 110 N. Y. Supp. 629, on remedy in case of bad faith, where wrongdoers are in control being a representative action in behalf of the corporation.

Valuation of property purchased by corporation.

Cited in *McClure v. Paducah Iron Co.* 90 Mo. App. 582; *Berwind-White Min. Co. v. Ewart*, 11 Misc. 496, 32 N. Y. Supp. 716, holding fair value of property to company, considering proposed use, correct basis of valuation; *Rathbone v. Ayer*, 121 App. Div. 360, 105 N. Y. Supp. 1041, holding that fair value of property purchased by corporation, and the good faith of the purchase, are inferences to be drawn from the evidence.

Issue of stock for money or property.

Cited in *First Nat. Bank v. Cornell*, 8 App. Div. 431, 40 N. Y. Supp. 850, holding that corporation cannot take note in payment for stock; *White Corbin & Co. v. Jones*, 45 App. Div. 246, 61 N. Y. Supp. 21, and *Kelly v. Clark*, 21 Mont. 323, 42 L. R. A. 628, 69 Am. St. Rep. 668, 53 Pac. 959, holding owner of stock issued for over-valued property liable for difference between actual value of property and nominal value of stock; *Turner v. Bailey*, 12 Wash. 644, 42 Pac. 115, denying liability to creditors of holders of stock issued for property at bona fide valuation, which subsequently depreciates; *Donald v. American Smelting & Ref. Co.* 61 N. J. Eq. 462, 48 Atl. 786, holding issue of stock for property not enjoicable in absence of evidence of conscious over-valuation; *Lincoln v. Lincoln Street R. Co.* 67 Neb. 479, 93 N. W. 766, holding that company authorized to construct and equip a street railway line, may purchase one already built.

Cited in notes (42 L. R. A. 596, 615) on how far payment for stock in corporation by transfer of property will protect shareholders against corporate creditors; (38 L.R.A. 490) on bonus stock of corporations; (7 Eng. Rul. Cas. 402) on power of corporation to issue fully paid up stock and debentures at a discount.

Issue of corporate bonds.

Cited in *Hudson River & W. County Midland R. Co. v. Hanfield*, 36 App. Div. 610, 55 N. Y. Supp. 877, upholding issue of stock at par and bonds at market value to pay for constructing railroad; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 846, holding that corporation may pledge bonds for debt less in amount than their par value; *The Vigilancia*, 19 C. C. A. 530, 38 U. S. App. 563, 73 Fed. 455, holding defense of usury not available to corporations issuing bonds below par; *Macquoid v. Queens Estate*, 143 App. Div. 137, 127 N. Y. Supp. 867, holding that issue of corporate bonds for price less than par value does not violate section 55 of Stock Corporation Law.

Cited in note (111 Am. St. Rep. 328) on right of corporation to sell bonds for less than face value.

Contracts between corporation and officer or stockholder.

Cited in *Strobel v. Brownell*, 16 Misc. 660, 40 N. Y. Supp. 702, sustaining contract between corporation and director; *Genesee Valley & W. R. Co. v. Retsof Min. Co.* 15 Misc. 195, 36 N. Y. Supp. 896, holding contract made in good faith between corporations having common directors, valid; *Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 321, 35 N. Y. Supp. 566, holding contract between corporations having common directors cannot be disaffirmed by minority stockholders of either; *Stanley v. Luse*, 36 Or. 33, 58 Pac. 75, holding purchase by managing director of property in which he owns interest, voidable; *Nathan v. Whitehill*, 67 Hun, 400, 22 N. Y. Supp. 63, holding that trustee may deal with corporations; *Robertson v. H. E. Bucklen & Co.* 107 Ill. App. 378, refusing to set aside deed of real estate from majority stockholder to corporations; *Farwell v. Babcock*, 27 Tex. Civ. App. 170, 65 S. W. 509, holding contracts made by corporation with minority of its directors not void.

Cited in note (139 Am. St. Rep. 610, 622) on validity of contracts between director and corporation.

Criticized in *Beers v. New York L. Ins. Co.* 66 Hun, 86, 20 N. Y. Supp. 788, holding contract of corporation with officer presiding at meeting and superintending vote authorizing it, invalid.

Duty of corporate trustee.

Cited in *Rutgers Female College v. Tallman*, 2 Misc. 563, 24 N. Y. Supp. 771, holding it no part of duty of corporation trustee to advance personal money.

Transfer of corporate property.

Approved in *Lewisohn Bros. v. Anaconda Copper Min. Co.* 26 Misc. 626, 56 N. Y. Supp. 807, holding that failure of directors or majority stockholders to accept highest bid for property sold does not justify inference of bad faith, as matter of law.

Cited in *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 771, holding that disposition of corporate property by majority for their own gain as against the minority, entitles the latter to relief from court.

Cited in note (103 Am. St. Rep. 563) on necessity for sale of corporate property to be free from fraud.

9 L. R. A. 534, *LUHRS v. LUHRS*, 123 N. Y. 367, 20 Am. St. Rep. 754, 25 N. E. 388.

Changing beneficiary.

Cited in *Masonic Benev. Asso. v. Bunch*, 109 Mo. 581, 19 S. W. 25, holding designation in will of change of beneficiary effectual, by-laws prescribing no different method; *Smith v. Harman*, 28 Misc. 686, 59 N. Y. Supp. 1044, denying that incomplete attempt to change beneficiary takes away interest of heirs of original

beneficiary; *McGowan v. Supreme Court*, 104 Wis. 181, 80 N. W. 603, holding that equity will uphold rights of substituted beneficiary, assured having performed all conditions possible; *Donnelly v. Burnham*, 86 App. Div. 230, 83 N. Y. Supp. 659, holding change in beneficiary made, where insured had fully complied with requirements of society therefor; *Freund v. Freund*, 117 Ill. App. 568; *Wandell v. Mystic Toolers*, 130 Iowa, 643, 105 N. W. 448,—holding that where insured has done all required of him to effect change of beneficiary, the change is made though he die before the society act thereon; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 405, 126 N. W. 949, holding that change of beneficiary is effected where member does all that is necessary to effect change, even though member dies before issuance of new certificate; *Holden v. Modern Brotherhood*, 151 Iowa, 681, 132 N. W. 329, holding that substitution of new beneficiary will be effected where insured complied with all rules for change except to surrender old certificate which was in hands of original beneficiary who refused to surrender it; *Ancient Order of Gleaners v. Bury*, 165 Mich. 4, 34 L.R.A.(N.S.) 281, 130 N. W. 191, holding that change of beneficiary was not effected by insured directing local secretary in writing to make change, without paying fee required, when directions were not mailed to supreme secretary until death of insured; *Tolson v. National Provident Union*, 60 Misc. 462, 115 N. Y. Supp. 534, holding new beneficiary entitled to insurance, where insured had absolute right to name a new beneficiary, did so, but died before new certificate was issued; *Tidd v. McIntyre*, 116 App. Div. 605, 101 N. Y. Supp. 867, holding that where benefit society has paid the insurance money into court, an equitable assignment of the certificate may be recognized though change of beneficiary is not made according to rules of the society.

Cited in notes (15 L. R. A. 353) on changing designation in benefit certificate otherwise than in prescribed method; (49 L. R. A. 755) on power of insured to destroy rights of beneficiary; (34 L.R.A.(N.S.) 278) on effect of assured's death before contemplated change of beneficiary complete; (52 Am. St. Rep. 569) on change of beneficiary of mutual or membership life or accident insurance.

Distinguished in *Fink v. Fink*, 171 N. Y. 624, 64 N. E. 506, Reversing 57 App. Div. 514, 68 N. Y. Supp. 80, denying that change in beneficiary was made where notice of purpose to change did not reach insurer till after death of insured; *Lahey v. Lahey*, 174 N. Y. 152, 61 L. R. A. 794, 95 Am. St. Rep. 554, 66 N. E. 670, denying that retention of certificate by beneficiary deprives substituted beneficiary of payment, insured complying with all conditions possible; *Thomas v. Thomas*, 131 N. Y. 210, 27 Am. St. Rep. 582, 30 N. E. 61, Affirming 60 Hun, 383, 15 N. Y. Supp. 15, denying wife's right to benefit under policy where name inserted without consent of company; *Coyne v. Bowe*, 23 App. Div. 264, 48 N. Y. Supp. 937, holding no change in beneficiary effected where insured failed to comply with conditions on certificate; *Independent Foresters v. Keliher*, 36 Or. 508, 78 Am. St. Rep. 785, 59 Pac. 324, holding failure to comply with regulations by neglecting to file written petition, makes attempted change of beneficiary ineffectual; *Kemper v. Modern Woodmen of America*, 70 Kan. 124, 78 Pac. 452, holding beneficiary not changed by the mailing of notice thereof where rules of order provided that change should be effective when new certificate was delivered to insured; *Knights of Maccabees v. Sackett*, 34 Mont. 367, 115 Am. St. Rep. 532, 86 Pac. 423, holding beneficiary not changed where change was to be made upon delivery of written notice to the clerk, and insured mailed the notice but died before it was delivered to the clerk.

Vested right of beneficiary in certificate.

Cited in *Steinhausen v. Preferred Mut. Acci. Asso.* 59 Hun, 339, 13 N. Y. Supp. 36, holding that beneficiary has no vested interest in certificate; *Eagan v. Eagan*,

58 App. Div. 256, 68 N. Y. Supp. 777, holding delivery of insurance certificate to wife vests no rights in her, brother being named as beneficiary.

Time when contract of insurance is consummated.

Cited in *Rancipher v. Women of Woodcraft*, 50 Wash. 72, 96 Pac. 829, holding that where insured is entitled to new certificate upon compliance with certain condition, the new insurance takes effect when conditions are complied with, though new certificate has not been received.

Cited in footnotes to *Hicks v. British America Assur. Co.* 48 L.R.A. 424, which holds rights of one whose property was destroyed after oral contract to insure it, but before policy was issued, subject to provisions of standard policy prescribed by law; *Summers v. Mutual Life Ins. Co.* 66 L.R.A. 812, which holds contract for present insurance not made by applicant giving note for first premium in consideration that a policy shall be issued where his examination is to be made in future and he expressly stipulates that note shall not be negotiated until policy has been delivered and accepted.

9 L. R. A. 537, *DICKSON v. FIELD*, 77 Wis. 439, 46 N. W. 668.

Proof of consideration for conveyance.

Approved in *Beckman v. Beckman*, 86 Wis. 661, 57 N. W. 1117, holding admissible, parol evidence of consideration for conveyance of homestead by parents to son, where mortgage back showed inadequate consideration.

Conveyances in consideration of support and burial.

Cited in *Morgan v. Loomis*, 78 Wis. 600, 48 N. W. 109, setting aside conveyance by crippled widow, in consideration of support and Christian burial on refusal of grantee's heirs to furnish grantor with necessities.

Cited in note (129 Am. St. Rep. 1059) on personal liability of devisees for charges imposed by the will for support of relative.

9 L. R. A. 540, *MORGAN v. HUGGINS*, 42 Fed. 869.

Action for accounting by administrator, in 48 Fed. 4.

Meaning of "estate."

Cited in *Harper v. Harper*, 148 N. C. 458, 62 S. E. 553, on "estate" as including both real and personal property.

Passing of title to after-acquired realty by will.

Cited in footnote to *Mueller v. Buenger*, 67 L.R.A. 648, which holds that will may pass title to after-acquired real estate.

9 L. R. A. 544, *ATKINSON v. MILLER*, 34 W. Va. 115, 11 S. E. 1007.

Effect of legally inoperative conveyance.

Cited in *Bogges v. Scott*, 48 W. Va. 321, 37 S. E. 661, holding that deed, without seal, passes equitable title; *Bensimer v. Fell*, 35 W. Va. 30, 29 Am. St. Rep. 774, 12 S. E. 1078, holding deed of trust, wanting formal party, valid, as equitable mortgage; *Holley v. Curry*, 58 W. Va. 72, 112 Am. St. Rep. 944, 51 S. E. 135, holding deed of trust to secure debt but not sealed to be an equitable mortgage; *McFarland v. Cornwell*, 151 N. C. 432, 66 S. E. 454, holding that purchaser at sale under void mortgage obtains no right of possession; *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 471, holding that unrecorded contract for trust deed to secure debt, will not sustain trust deed executed less than four months before bankruptcy; *Moore v. Green*, 76 C. C. A. 242, 145 Fed. 479, holding that oral promise to execute a mortgage does not create an equitable mortgage.

Cited in note (18 Eng. Rul. Cas. 25) on agreement by which property is made a security for a debt due or a present advance as an equitable mortgage.

9 L. R. A. 547, CLARE v. LOCKARD, 122 N. Y. 263, 25 N. E. 391.

When action deemed commenced; within rule as to limitations.

Followed, without discussion, in Farrington v. Muchmore, 53 App. Div. 640. 66 N. Y. Supp. 1131.

Cited in Riley v. Riley, 64 Hun, 499, 19 N. Y. Supp. 522, raising, without deciding, question whether action barred by statute of limitations where defendant dies before service of summons, delivered to sheriff before action barred; Harkow v. New York City R. Co. 121 App. Div. 196, 105 N. Y. Supp. 689, holding action for penalty under railroad law commenced when summons are actually served, as to matters other than limitations.

9 L. R. A. 548, ENGELHORN v. REITLINGER, 122 N. Y. 76, 25 N. E. 297.

Oral agreements relating to written contracts.

Cited in Interstate S. B. Co. v. First Nat. Bank, 87 Hun, 95, 33 N. Y. Supp. 966, holding that oral agreement cannot vary written contract as to vesting of title to personal property; Stowell v. Greenwich Ins. Co. 20 App. Div. 191, 46 N. Y. Supp. 802, upholding collateral, supplementary parol agreement not varying or contradicting written agreement; Hall v. Beston, 16 Misc. 529, 38 N. Y. Supp. 979; Van Derhoef v. Hartmann, 63 App. Div. 421, 71 N. Y. Supp. 552; Hall v. Beston, 26 App. Div. 110, note, 49 N. Y. Supp. 811 (special term opinion, affirmed in general term) — holding prior parol promise to make repairs merged in written lease; Hanes v. Sackett, 56 App. Div. 615, 67 N. Y. Supp. 843, holding separate parol agreement, collateral to deed and relating to consideration thereof, enforceable; Case v. Phoenix Bridge Co. 134 N. Y. 81, 31 N. E. 254, holding oral agreement previous to written contract, not a part thereof, not enforceable; Waldorf v. Simpson, 15 App. Div. 300, 44 N. Y. Supp. 921, holding vendee of stove bound by bill of sale, so that note not invalidated by unauthorized alteration by agent; Kingsland v. Haines, 62 App. Div. 149, 70 N. Y. Supp. 873, holding that new terms and covenants cannot be engrafted on written agreement under guise of varying the consideration; Southard v. Arkansas Valley & W. R. Co. 24 Okla. 420, 103 Pac. 750, holding that no contemporaneous parol condition may be ingrafted into written contract, in absence of fraud or mistake.

Oral evidence as to writing.

Cited in Thomas v. Scutt, 127 N. Y. 140, 27 N. E. 961, holding contradictory parol evidence inadmissible to show assignment intended as security; Emmett v. Penoyer, 151 N. Y. 568, 45 N. E. 1041, Reversing 76 Hun, 555, 28 N. Y. Supp. 234, holding parol evidence proper to explain real consideration for sale under written agreement; Woodard v. Foster, 64 Hun, 148, 18 N. Y. Supp. 834, holding parol evidence inadmissible to show agreement that grantor of fee was to retain life use of premises; Powers v. Knapp, 71 Hun, 377, 25 N. Y. Supp. 19, holding written contract to purchase stock of corporation not variable by parol evidence; Beagle v. Harby, 73 Hun, 313, 26 N. Y. Supp. 375, holding rule as to inadmissibility of parol evidence not applicable to collateral undertakings; Jackson v. Helmer, 73 App. Div. 136, 77 N. Y. Supp. 835, holding oral evidence of negotiations preceding written contract of sale inadmissible; House v. Walch, 144 N. Y. 421, 39 N. E. 327; Moores v. Glover, 37 N. Y. S. R. 397, 13 N. Y. Supp. 565, holding parol evidence inadmissible to explain or vary unambiguous written contract relating to sale of real estate; Bagley & S. Co. v. Saranac River Pulp & Paper Co. 41 N. Y. S. R. 866, 16 N. Y. Supp. 657, holding parol evidence admissible to show capacity of machines named in written contract, such capacity being material; Boehm v. Lies, 46 N. Y. S. R. 28, 18 N. Y. Supp. 577, holding parol evidence inadmissible to fix definite time of performance where written contract

is silent as to it; *Gerard v. Cowperthwait*, 2 Misc. 378, 21 N. Y. Supp. 1092, holding bond to secure payment of premiums not variable by proof of oral agreement to forbear suit as consideration therefor; *Morowsky v. Rohrig*, 4 Misc. 169, 23 N. Y. Supp. 880, holding that on plaintiff's allegation of written contract only, oral explanatory declarations inadmissible; *Cartledge v. Crespo*, 5 Misc. 352, 25 N. Y. Supp. 515, holding parol evidence admissible to show written contract not binding until performance of parol condition precedent; *Globe Soap Co. v. Liss*, 36 Misc. 200, 73 N. Y. Supp. 153, holding order for goods signed by vendee making complete contract not contradictable by parol evidence; *Gordon v. Parke & L. Machinery Co.* 10 Wash. 21, 38 Pac. 755, holding inadmissible, proof of oral contract not to discontinue business not mentioned in written contract of sale of stock; *Chicago Lumber Co. v. Comstock*, 18 C. C. A. 209, 34 U. S. App. 414, 71 Fed. 479, holding parol evidence as to time and manner of performance immaterial, where delay was not caused by defendant's fault; *McGarrigle v. McCosker*, 83 App. Div. 187, 82 N. Y. Supp. 494, holding evidence insufficient to establish independent parol contract to pay bonus in addition to compensation specified in subsequent written agreement; *Uihlein v. Matthews*, 172 N. Y. 159, 64 N. E. 792, holding parol evidence inadmissible to show that restriction as to use of premises was not intended to be removed by quitclaim deed without reservation as to it; *Finnigan v. Shaw*, 184, Mass. 115, 68 N. E. 35, holding parol evidence inadmissible to show absolute sale evidenced by written note, was conditional; *Sturmdorf v. Saunders*, 117 App. Div. 766, 102 N. Y. Supp. 1042, holding parol evidence explanatory of consideration in written contract inadmissible where it is a substantive part of the contract.

9 L. R. A. 551, *JACOB v. WOOLFOLK*, 90 Ky. 426, 14 S. W. 415.

Dedication of land for public use.

Cited in *Hamby v. Dawson Springs*, 126 Ky. 454, 12 L.R.A.(N.S.) 1166, 104 S. W. 259, holding that one owning land adjoining a street owns to the centre thereof, and may enjoin the city from putting down a well in the street to reach valuable vein of water.

Cited in footnotes to *Campbell v. Kansas City*, 10 L. R. A. 593, which holds dedication for graveyard shown by marking it on plat; *Hogue v. Albina*, 10 L. R. A. 673, which holds acts showing clear intent to dedicate necessary.

Cited in note (24 L.R.A.(N.S.) 541) on effect of bounding grant on private way to carry title thereto.

9 L. R. A. 553, *ARMSTRONG v. BOYERTOWN NAT. BANK*, 90 Ky. 431, 14 S. W. 411.

Collections by banks.

Cited in *Henderson v. O'Connor*, 106 Cal. 391, 39 Pac. 786, holding agency of collecting bank not terminated by notice of collection of draft by its correspondent and credit to depositor on books; *Midland Nat. Bank v. Brightwell*, 148 Mo. 365, 71 Am. St. Rep. 608, 49 S. W. 994, and *National Bank of Commerce v. Johnson*, 6 N. D. 184, 69 N. W. 49, holding that bank receiving paper for collection holds it in capacity of agent; *American Exch. Nat. Bank v. Loretta Gold & Silver Min. Co.* 165 Ill. 110, 56 Am. St. Rep. 236, 46 N. E. 202, holding that purpose of special deposit to be forwarded to another bank, being defeated by latter's insolvency, such deposit must be held for depositor; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 57, 37 L. ed. 366, 13 Sup. Ct. Rep. 533, holding relation between banks as to uncollected paper that of principal and agent.

Cited in footnote to *Tyson v. Western Nat. Bank*, 23 L. R. A. 161, which holds that title does not pass by "indorsing for collection."

Cited in notes (32 L.R.A. 717) on trust in proceeds of collection made by bank when insolvent; (86 Am. St. Rep. 785, 800) on title of bank to money deposited with or collected by it; (37 L. ed. U. S. 365) on liability of bank for collections.

9 L. R. A. 555, GRIDLEY v. BROOKS-WATERFIELD CO. 12 Ky. L. Rep. 391, 14 S. W. 407.

9 L. R. A. 556, SIMRALL v. COVINGTON, 90 Ky. 444, 29 Am. St. Rep. 398, 14 S. W. 369.

License tax.

Approved in Stull v. De Mattos, 23 Wash. 74, 51 L. R. A. 895, 62 Pac. 451, holding license tax of \$25 per day for selling stock of merchandise at auction, not authorized as regulation of business, but valid as exercise of power to license for purposes of regulation and revenue.

Cited in Hager v. Walker, 128 Ky. 17, 15 L.R.A.(N.S.) 201, 129 Am. St. Rep. 238, 107 S. W. 254, holding unconstitutional, act taxing real estate dealers where the tax was graded with reference to population of city where business was carried on; Fiscal Ct. v. F. & A. Cox Co. 132 Ky. 746, 21 L.R.A.(N.S.) 85, 117 S. W. 296, holding license tax act unconstitutional where it imposed four times as large tax upon four horse vehicles for hire as upon three horse vehicles; McKnight v. Hodge, 55 Wash. 292, 40 L.R.A.(N.S.) 1211, 104 Pac. 504, holding constitutional peddlers license act though it excepted peddlers, of agricultural and farm products, and of books and periodicals, from its provisions.

Cited in footnotes to Harrodsburg v. Renfro, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; Knisely v. Cotterel, 50 L. R. A. 86, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; Com. use of Titusville v. Clark, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real estate dealers, but not others, whose business less than \$1,000.

Cited in notes (60 L.R.A. 350) on constitutional equality in the United States in relation to corporate taxation; (40 L.R.A.(N.S.) 280, 284) on discrimination against nonresidents, in imposing license or occupation tax; (104 Am. St. Rep. 640) on municipal regulations of street railways for protection of public; (129 Am. St. Rep. 257, 281) on constitutional limitations on power to impose license or occupation taxes.

Distinguished in Evers v. Mayfield, 120 Ky. 76, 85 S. W. 697, holding valid license tax on resident attorneys at law and physicians though it was not made applicable to nonresidents temporarily in the city on professional business.

Foreign corporations.

Cited in Zacher v. Fidelity Trust & Safety Vault Co. 109 Ky. 454, 59 S. W. 493, holding creditor of foreign corporation not bound by appointment of foreign receiver.

9 L. R. A. 558, MORGAN v. EAST, 126 Ind. 42, 25 N. E. 867.

Executory contracts.

Cited in Nickey v. Zonker, 22 Ind. App. 213, 53 N. E. 478, holding purchaser and his vendee liable for conversion where possession taken against original owner on his refusal to comply with terms of executory sale contract; Platter v. Acker, 13 Ind. App. 420, 45 N. E. 832, holding that replevin will not lie for goods purchased under unexecuted sale agreement; Mattix v. Leach, 16 Ind. App. 119, 43 N. E. 969, holding sale of negotiable instrument executory, where not transferred, though partial payment of consideration made; Farmers' Nat. Bank v.

Coyner, 44 Ind. App. 339, 88 N. E. 856, holding that title to personal property does not pass so long as any act remains to be done before completion of sale; Meyer v. Redmond, 141 App. Div. 126, 125 N. Y. Supp. 1052, holding that where personal property is by agreement deliverable upon payment of price, title does not pass until payment is made.

Cited in note (131 Am. St. Rep. 494) on passing of title to buyer at auction sale.

9 L. R. A. 560, BEDFORD BANK v. ACOAM, 125 Ind. 584, 21 Am. St. Rep. 258, 25 N. E. 713.

Bank's right to set off indebtedness against deposit.

Cited in State v. Beach, 147 Ind. 90, 36 L. R. A. 185, 46 N. E. 145, holding that bank may apply deposit to payment of matured debt of depositor; Bollenbacher v. First Nat. Bank, 8 Ind. App. 19, 35 N. E. 403, raising without passing on bank's right to apply deposit on indebtedness; Goldberg v. Harlan, 33 Ind. App. 473, 67 N. E. 707, on right of bank to deduct from depositor's account, amount paid on his note, due and payable at the bank.

Cited in footnotes to Gardner v. First Nat. Bank, 10 L. R. A. 45, which holds authority given to bank to apply deposits to notes before maturity terminates with death of depositor; First Nat. Bank v. Peltz, 36 L. R. A. 832, which holds bank not bound to apply to payment of note, deposit account of first indorser for whose accommodation note made.

Title to deposit in bank.

Cited in Union Nat. Bank v. Citizens Bank, 153 Ind. 52, 54 N. E. 97, holding that no trust attaches to proceeds of collection mingled by collecting bank with its own funds.

Sufficiency of tender.

Cited in Dillingham v. Parks, 30 Ind. App. 70, 65 N. E. 300, holding offer of bank, having on deposit money to credit of transferee of mortgaged property, to pay mortgage note, upon certain condition, not a sufficient tender.

9 L. R. A. 561, CRAWFORD v. WITHERBEE, 77 Wis. 419, 46 N. W. 545.

Right to abandon contract.

Cited in note (30 L. R. A. 45) on right to rescind or abandon contract because of other party's default.

Covenants running with land.

Cited in Doty v. Chattanooga Union R. Co. 103 Tenn. 577, 48 L. R. A. 165, footnote, p. 160, 53 S. W. 944, holding that covenant to operate passenger trains in consideration of conveyance of land to railroad runs with land against successor of road.

Cited in footnotes to Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 29 L. R. A. 423, which holds intention of parties controlling, in determining whether covenant runs with land; Mott v. Oppenheimer, 17 L. R. A. 409, which construes, as running with the land, agreement for party wall expressly declared to run with land.

Cited in note (82 Am. St. Rep. 674, 690) on what covenants run with land.

Recording act.

Cited in Boyden v. Roberts, 131 Wis. 672, 111 N. W. 701, holding that agreement at time of conveyance of land, restricting the use of land conveyed and adjoining property is a "conveyance" entitled to record.

Objection to evidence.

Cited in Graves v. Bonness, 97 Minn. 283, 107 N. W. 163, holding general ob-

jection to admission of evidence insufficient as basis of an appeal; *Enid & A. R. Co. v. Wiley*, 14 Okla. 315, 78 Pac. 96, holding that objection to evidence as "incompetent" without stating any grounds is insufficient.

9 L. R. A. 564, *SHEEHY v. BLAKE*, 77 Wis. 394, 46 N. W. 537.

Liability of religious corporation.

Cited in notes (38 L.R.A. 689) on liability for salary of pastor; (109 Am. St. Rep. 375; 69 L.R.A. 257) on liability of member of religious society for debts.

9 L. R. A. 566, *MULLIN v. PEOPLE*, 15 Colo. 437, 22 Am. St. Rep. 414, 24 Pac. 880.

Contempt proceedings and change of venue.

Cited in *Le Hane v. State*, 48 Neb. 113, 66 N. W. 1017, holding summary conviction of attorney for contempt for use of libelous matter on motion for change of venue not authorized; *Re Murphy*, 73 Vt. 118, 50 Atl. 817, denying that mittimus must state facts constituting violation of injunction; *Bloom v. People*, 23 Colo. 418, 48 Pac. 519, holding review on appeal of conviction for contempt limited to question of jurisdiction; *Wyatt v. People*, 17 Colo. 256, 28 Pac. 961, denying that provision of Code, declaring judgment in contempt conclusive, precludes inquiry into jurisdiction; *Re Stidger*, 37 Colo. 421, 86 Pac. 219, holding writ of error to be proper remedy for review of contempt proceedings; *People ex rel. Atty. Gen. v. News-Times Pub. Co.* 35 Colo. 435, 84 Pac. 912 (dissenting opinion), on truth of publication as defense in contempt proceeding.

Cited in footnote to *Thomas v. People*, 9 L. R. A. 569, which holds judge not empowered to punish for contempt for allegations in petition without verified statement.

Cited in notes (11 L.R.A. 75) on criminal practice as to change of venue; (15 Eng. Rul. Cas. 158) on power of courts to punish for contempt; (40 Am. St. Rep. 36) on questions reviewable upon certiorari in contempt cases; (87 Am. St. Rep. 179, 181, 200) on release of prisoner on habeas corpus after judgment and sentence for contempt.

9 L. R. A. 569, *THOMAS v. PEOPLE*, 14 Colo. 254, 23 Pac. 326.

Affidavit in contempt proceedings.

Cited in *Mullin v. People*, 15 Colo. 440, 9 L. R. A. 568, 22 Am. St. Rep. 414, 24 Pac. 880, holding verified information sufficient affidavit on which to base contempt proceedings; *Le Hane v. State*, 48 Neb. 110, 66 N. W. 1017, denying right to convict attorney of contempt without information and trial for use of libelous matter on motion; *State ex rel. Harvey v. Newton*, 16 N. D. 154, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding affidavit upon information and belief insufficient as a basis for constructive criminal contempt proceedings; *State ex rel. Register v. McGahey*, 12 N. D. 547, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, on same point.

Jurisdiction of contempt proceedings.

Cited in *Herdman v. State*, 54 Neb. 629, 74 N. W. 1097, holding that affidavit in contempt proceedings must show jurisdiction; *State v. Sweetland*, 3 S. D. 506, 54 N. W. 415, holding affidavit must state facts showing jurisdiction, not mere presumptions; *Freeman v. Huron*, 8 S. D. 439, 66 N. W. 928, denying that allegations on information and belief in affidavit in contempt proceedings give jurisdiction; *Wyatt v. People*, 17 Colo. 256, 28 Pac. 961, denying that statute against review, on ground of error in trial, bars inquiry into jurisdiction; *Bloom v. People*, 23 Colo. 418, 48 Pac. 519, holding review on appeal of conviction for contempt limited to question as to jurisdiction of lower court; *Re Stidger*, 37 Colo.

421, 86 Pac. 219, holding writ of error to be the proper mode for obtaining review of contempt proceedings.

Cited in note (9 L. R. A. 566) on contempt of court.

Disapproved in *People ex rel. Atty. Gen. v. News-Times Pub. Co.* 35 Colo. 374, 84 Pac. 912, holding proceedings for criminal contempt not governed by code of civil procedure.

9 L. R. A. 571, *BARNES v. BOARDMAN*, 152 Mass. 391, 25 N. E. 623.

Fiduciary relations of tenants in common.

Cited in *Harris v. Lloyd*, 11 Mont. 402, 28 Am. St. Rep. 475, 28 Pac. 736, holding cotenant of mining property under no obligation to disclose to others larger offer for his interest; *Coburn v. Page*, 105 Me. 462, 134 Am. St. Rep. 575, 74 Atl. 1026, holding that cotenant purchasing outstanding title holds it in trust for his cotenants subject to their duty to make contribution; *Eisenberg v. Goldsmith*, 42 Mont. 579, 113 Pac. 1127, holding that cotenant who purchases adverse interest will be held trustee ex malificio for cotenants to extent of interest acquired.

Annotation in *Coleman v. Coleman*, 71 S. C. 524, 51 S. E. 250, holding that where one cotenant conveys the entire estate to a grantee and her children, and said grantee again conveys the entire fee to a third party who goes into possession for twenty years, the latter cannot set up presumption of grant from original cotenants against the children of the grantee of the first conveyance.

Cited in note (19 L.R.A.(N.S.) 527), on laches as affecting cotenant's right to benefit of purchase of outstanding title; (19 L.R.A.(N.S.) 592) on right of cotenant to purchase in own right at a sale under encumbrance created by one through whom cotenants derive title.

Distinguished in *Houghton v. Butler*, 166 Mass. 549, 44 N. E. 624, denying existence of trust relation between naked trustee and equitable owners.

Right of one redeeming from mortgage.

Cited in *Kerse v. Miller*, 169 Mass. 47, 47 N. E. 504, holding life tenant of portion redeeming entire estate from mortgage entitled to possession until repayment of amount above proportionate share; *Wilder v. Wilder*, 75 Vt. 183, 53: Atl. 1072, holding life tenant paying off mortgage to protect estate entitled to subrogation against remainderman; *Morrison v. Roehl*, 215 Mo. 556, 114 S. W. 981, holding life tenants purchase of outstanding title in fee valid, subject to right of remaindermen to benefit thereby upon making contribution, and citing annotation also on this point.

Effect of judgment on non-parties.

Cited in footnote to *Allred v. Smith*, 65 L.R.A. 924, which holds judgment in action quasi in rem binding on the parties only.

9 L. R. A. 573, *KNIGHT v. MAHONEY*, 152 Mass. 523, 25 N. E. 971.

Conditional devises.

Approved in *Fuller v. Wilbur*, 170 Mass. 507, 49 N. E. 916, holding that gift by will to wife of use and benefit of real estate so long as she remains grantor's widow, creates life estate determinable on her marrying again; *Mann v. Jackson*, 84 Me. 404, 16 L. R. A. 709, 30 Am. St. Rep. 358, 24 Atl. 886, holding grant of life estate unless grantee shall be married, not void as restraint on marriage where intention was to provide support until such event.

Cited in *Sink v. Sink*, 150 N. C. 446, 64 S. E. 193, holding that devise to wife "during her widowhood" is an estate for life subject to be divested in case of her marriage; *Harlow v. Bailey*, 189 Mass. 212, 75 N. E. 259, holding that devise,

to one "as long as she shall remain unmarried" with power to sell and reinvest proceeds and receive the income, creates a life estate terminable by marriage; *Appleby v. Appleby*, 100 Minn. 424, 10 L.R.A. (N.S.) 597, 117 Am. St. Rep. 709, 111 N. W. 305, 10 A. & E. Ann. Cas. 563, sustaining validity of antenuptial contract providing that in case of death of wife, husband was to have annual income of \$10,000 so long as he should remain unmarried.

Cited in notes (28 L.R.A. (N.S.) 1102) on effect of testamentary provision restricting widow to enjoyment during widowhood, upon quantum of estate taken; (84 Am. St. Rep. 151; 25 Eng. Rul. Cas. 637) on validity of condition in restraint of marriage.

9 L. R. A. 576, *KOEHLER v. SANDERS*, 122 N. Y. 65, 25 N. E. 235.

Trademark and unfair competition.

Cited in *Columbia Mill Co. v. Alcorn*, 150 U. S. 465, 37 L. ed. 1147, 14 Sup. Ct. Rep. 151, holding word "Columbia" not subject to exclusive use as trademark; *York Card & Paper Co. v. York Wall Paper Co.* 15 Pa. Co. Ct. 555, 4 Pa. Dist. R. 128, 35 W. N. C. 575, holding that no such exclusive right to words "York," "paper," and "company" exists as warrants refusal to charter company with similar name; *Church & D. Co. v. Russ*, 99 Fed. 278, holding that use of trademark for compound of baking soda and saleratus, on product called baking powder, is infringement; *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 370, 55 N. Y. Supp. 298, holding party entitled to manufacture under his own name, in spite of prior authorized use thereof by company assigning its right on insolvency; *Germer Stove Co. v. Art Stove Co.* 80 C. C. A. 9, 150 Fed. 146, on "Twentieth Century" as not being subject to appropriation as a trade name; *Reymer & Bros. v. Huyler's*, 190 Fed. 85, holding that word "Metropolitan" when used on boxes of chocolates constitutes trade mark, which is infringed by use by another in same city and vicinity; *Re Hopkins*, 29 App. D. C. 119, holding that "Oriental" is a geographical term and cannot be registered as a trade mark; *Travelers' Ins. Mach. Co. v. Travelers' Ins. Co.* 142 Ky. 531, 134 S. W. 877, holding that term "travelers insurance" is generic term, and no one has exclusive right to its use; *Frohman v. Morris*, 68 Misc. 464, 123 N. Y. Supp. 1090, holding that word "Chanticleer" as applied to play has not such descriptive character as to preclude its exclusive appropriation; *Reymer & Bros. v. Huyler's*, 59 Pittsb. L. J. 636, holding that word "Metropolitan" used on boxes of chocolates was valid trade mark.

Cited in footnote to *Bolander v. Peterson*, 11 L. R. A. 350, which holds words "Svenska Snusmagasinet" cannot be exclusively claimed as trademark.

Cited in notes (10 L. R. A. 833) on trademark and trade name; (11 L. R. A. 524) on trademark; method of bronzing; (19 L. R. A. 56) on invalidity of deceptive trademark; (17 L. R. A. 130) on court's refusal to aid deception and fraud in trademark; (26 L.R.A. (N.S.) 86) on right to protection in use of geographical name; (35 L.R.A. (N.S.) 252) on territorial extent of right in trademark or name used in limited locality; (85 Am. St. Rep. 107, 108) on what words or phrases may constitute a valid trademark; (25 Eng. Rul. Cas. 257) on right to trademark in invented words.

Distinguished in *Prince Mfg Co. v. Prince's Metallic Paint Co.* 39 N. Y. S. R. 495, 15 N. Y. Supp. 249, holding that mortgagor giving order on printer for delivery of "trademarks, wood cuts, and electrotypes" passes to mortgagee exclusive right to use same.

Infringement of trademark, label, or trade name.

Cited in *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 565, 18 U. S. App. 372, 58 Fed. 886, holding maker of "Bull's Cough Syrup" entitled to injunction against deceptive use of name, "Dr. B. L. Bull's Celebrated Cough

Syrup;" *Fischer v. Blank*, 138 N. Y. 249, 33 N. E. 1040, holding merchant entitled to injunction against fraudulent imitator though no exclusive right to name, label, color, and shape of package; *Von Mumm v. Frash*, 56 Fed. 834, enjoining manufacturer from dressing product so as to enable retail dealers to deceive customers; *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 5 Misc. 83, 24 N. Y. Supp. 890, enjoining use of common name on product not embracing essential feature of system for which name stands; *De Youngs v. Jung*, 25 N. Y. Supp. 480, issuing injunction against use of name "The Youngs" where assumed in business, advertisement, etc., for evident purpose of fraudulent usurpation of plaintiff's trade; *Gebbie v. Stitt*, 82 Hun, 96, 31 N. Y. Supp. 102, enjoining use of name of place in fraud of plaintiff's product, though competing goods actually made there; *Investor Pub. Co. v. Dobinson*, 72 Fed. 609, overruling demurrer to bill alleging publication of journal of similar name and purpose, causing confusion in business and diversion of trade; *Investor Pub. Co. v. Dobinson*, 82 Fed. 62 refusing, in absence of actual damage, to enjoin publication of similarly named journal where issued in distant state, with distinguishing characteristics; *W. J. Johnston Co. v. Electric Age Pub. Co.* 38 N. Y. S. R. 777, 14 N. Y. Supp. 803, refusing injunction *pendente lite*, on affidavit, where fraudulent resemblance of title pages not established; *Continental Ins. Co. v. Continental Fire Asso.* 96 Fed. 848, refusing to enjoin use of name, "Continental Ins. Co. of Ft. Worth, Texas," at suit of similarly named corporation of New York; *Von Mumm v. Frash*, 56 Fed. 834, enjoining use of labels closely imitating those employed by manufacturer of established brand of champagne; *Pettes v. American Watchman's Clock Co.* 89 App. Div. 347, 85 N. Y. Supp. 900, upholding injunction restraining corporation from doing business under corporate name wrongfully appropriated; *Perlberg v. Smith*, 70 N. J. Eq. 647, 62 Atl. 442, denying injunction to restrain use of label "Eagle Shoes" to one who had filed the label with the United States and used it upon all shoes sold by him of whatever make or brand; *World's Dispensary Medical Asso. v. Pierce*, 138 App. Div. 404, 122 N. Y. Supp. 818, holding that person named Pierce but without title of doctor, should be enjoined from making and selling remedies under name of Dr. Pierce's where corporation had acquired trade mark consisting of such name; *Car Advertising Co. v. New York City Car Advertising Co.* 57 Misc. 107, 107 N. Y. Supp. 547, denying "Car Advertising Company" injunction to restrain use of name "New York City Car Advertising Company."

Cited in notes (15 L.R.A.(N.S.) 630) on relief against infringement of trade name not used in connection with manufactured article; (25 Eng. Rul. Cas. 223) on infringement of trademark.

9 L. R. A. 579, *ROGERS v. BUFFALO*, 123 N. Y. 173, 25 N. E. 274.

Power of legislature over municipalities.

Cited in *State ex rel. Thompson v. McAllister*, 38 W. Va. 491, footnote p. 343, 24 L. R. A. 346, 18 S. E. 770, upholding validity of statute requiring members of common council to be freeholders; *People ex rel. Devery v. Coler*, 173 N. Y. 118, 65 N. E. 956, holding provision rendering any incumbent who may be removed from office of police commissioner ineligible for reappointment, unconstitutional; *People ex rel. Bishop v. Palen*, 74 Hun, 292, 26 N. Y. Supp. 225, holding statute requiring excise commissioner to take oath that he is not interested in liquor traffic, unconstitutional; *People ex rel. Price v. McGaw*, 38 Misc. 193, 77 N. Y. Supp. 241, holding charter provision forbidding pensioners to hold office, unconstitutional.

Cited in note (48 L. R. A. 485) on power of legislature to impose burdens on municipalities and to control their administration and property.

Oaths and tests for office.

Cited in *Re David*, 44 Misc. 195, 89 N. Y. Supp. 812, holding valid provision requiring highway commissioners to take oath of office; *Scott v. Saratoga Springs*, 131 App. Div. 350, 115 N. Y. Supp. 796, holding valid provision that member appointed to board of highway commissioners must be a tax payer; *State ex rel. Buell v. Frear*, 146 Wis. 303, 34 L.R.A.(N.S.) 489, 131 N. W. 832, holding that statute looking to purpose of ascertaining whether candidate for appointive office is possessed of proper qualifications are constitutional.

Constitutionality of civil-service laws.

Cited in *People ex rel. Akin v. Kipley*, 171 Ill. 59, 41 L. R. A. 780, footnote, p. 775, 49 N. E. 229, upholding statute imposing civil-service system upon municipal appointment; *Re Balcom*, 28 Misc. 3, 58 N. Y. 1097, upholding statute requiring probationary appointment of party passing highest civil-service examination; *People ex rel. Akin v. Loeffler*, 175 Ill. 599, 51 N. E. 785, holding examinations under Illinois civil-service law not "tests" within prohibition of Constitution; *Kitterman v. Wapello County*, 137 Iowa, 280, 115 N. W. 13, holding statute providing that veterans of the Civil war cannot be removed except for incompetency or misconduct and after hearing, is valid.

Cited in footnotes to Opinion of the Justices, 34 L. R. A. 58, which sustains act preferring veterans to all persons except women in civil service; *Re Keymer*, 35 L. R. A. 447, which holds exemption of veterans from competitive examination unconstitutional.

Cited in notes (79 Am. St. Rep. 561, 562; 34 L.R.A.(N.S.) 484, 486) on constitutionality of civil service laws.

Discrimination between political parties.

Cited in *Pearce v. Stephens*, 18 App. Div. 105, 79 N. Y. S. R. 425, 45 N. Y. Supp. 422, holding statute forbidding appointment of two police commissioners of Richmond county of same political opinion constitutional; *State ex rel. Churchill v. Bemis*, 45 Neb. 737, 64 N. W. 348, upholding charter provision for bipartisan fire and police board; *Rathbone v. Wirth*, 150 N. Y. 475, 34 L. R. A. 414, 45 N. E. 15 (distinguished in dissenting opinions), Affirming 6 App. Div. 317, 40 N. Y. Supp. 535, holding statute providing for bipartisan police board of four, two members only being selected by common council, void; *State ex rel. Jones v. Sargent*, 145 Iowa, 309, 27 L.R.A.(N.S.) 727, 139 Am. St. Rep. 439, 124 N. W. 339, holding that statute authorizing mayor of cities of first class to appoint fire commissioners from two leading political parties is not objectionable as unreasonable classification of those who are entitled to appointment; *McCarter v. McKelvey*, 78 N. J. L. 8, 138 Am. St. Rep. 583, 74 Atl. 316, holding that statute prohibiting appointment to municipal board of more than certain proportion of members of same political party does not prescribe qualifications for holding office.

Appointments in disregard of civil-service law.

Cited in *People ex rel. McClelland v. Roberts*, 148 N. Y. 367, 31 L. R. A. 401, 42 N. E. 1082, declaring appointments not complying with requirements of Constitution in regard to civil service, illegal.

— Taxpayer's right of action.

Cited in *Peck v. Belknap*, 130 N. Y. 399, 29 N. E. 977, holding taxpayer entitled to injunction against employment by city official of party not having taken requisite civil-service examination; *Chittenden v. Wurster*, 152 N. Y. 367, 37 L. R. A. 816, 46 N. E. 857 (dissenting opinion), majority holding taxpayers' action to restrain payment of salaries not proper procedure to test validity of mayor's classification of civil-service positions; *Forman v. Bostwick*, 139 App.

Div. 335, 123 N. Y. Supp. 1048, holding that taxpayer's action lies to prevent payment of salary to officer on ground that he is not lawfully an officer, where facts are solely matters of record and are indisputable.

Distinguished in *Greene v. Knox*, 175 N. Y. 436, 67 N. E. 910, holding that title of officers under appointments, valid in form, cannot be assailed in taxpayer's action to restrain payment of salaries.

Statutes limiting hours of labor.

Cited in *People v. Lochner*, 177 N. Y. 159, 69 N. E. 373, upholding constitutionality of statute limiting hours of labor in bakeries and confectionery establishments.

Power of appointment to office.

Cited in *Richardson v. Young*, 122 Tenn. 498, 125 S. W. 664, holding that power of appointment to office is political power, not inherently legislative, executive, or judicial, but which may be vested in either.

Unauthorized payments of claims against municipalities.

Cited in *Annis v. McNulty*, 51 Misc. 128, 100 N. Y. Supp. 95, on payments by supervisor, of claims against township before audited and allowed as being unauthorized and illegal.

9 L. R. A. 584, *DAVIDSON v. COON*, 125 Ind. 497, 25 N. E. 601.

Construction of wills.

Cited in footnote to *Baleh v. Pickering*, 14 L. R. A. 125, which holds literal construction of will resulting in intestacy will not prevail against evident intention of testator.

Legacies and charges.

Cited in *American Cannel Coal Co. v. Clemens*, 132 Ind. 166, 31 N. E. 786, holding money bequests chargeable upon residuary real estate; *Stuart v. Robinson*, 80 Miss. 297, 92 Am. St. Rep. 603, 31 So. 903, holding money legacy of testator without personal property, charge on realty; *Hutchins v. Hutchins*, 18 Misc. 635, 42 N. Y. Supp. 601, holding that direction to devisee of land to pay legacies charges them thereon; *Clark v. Marlow*, 149 Ind. 43, 48 N. E. 359, holding claim for support of devisee of use of real estate with power to sell and use proceeds for support, lien thereon; *Coulter v. Bradley*, 30 Ind. App. 423, 66 N. E. 184, holding complaint in action to enforce legacy, failing to show personalty or intention to charge realty, defective; *Coulter v. Bradley*, 163 Ind. 316, 71 N. E. 903, holding legacy charged upon entire estate where will provides for legacy and then disposes of the "remainder of the estate;" *Clark v. Worrall*, 33 Ind. App. 56, 68 N. E. 699, holding legacies and expenses of administration payable from proceeds of sale of real estate, where will so provided though the will made no disposition of testator's personal estate.

Cited in footnotes to *Re Lutz*, 50 L. R. A. 847, which holds legacies properly charged on land where testator had no personalty from which to pay them; *Case v. Hall*, 25 L. R. A. 766, which holds acceptance of devise with direction to pay legacies renders devisee personally liable.

Complaint in action to charge legacy on real estate.

Cited in *Longacre v. Stiver*, 135 Ind. 587, 35 N. E. 900, holding that complaint in action to charge legacies on real estate should show why not paid out of personalty.

Cited in note (30 L.R.A.(N.S.) 823, 825) on remedies for enforcement of legacy charged upon devise.

Effect of quitclaim deed.

Cited in *Smith v. McClain*, 146 Ind. 83, 45 N. E. 41, holding that quitclaim deed passes grantor's entire estate; *Hancock v. Wiggins*, 28 Ind. App. 456, 63 N. E. 242, holding that quitclaim deed conveys grantor's existing interest.

Cited in note (105 Am. St. Rep. 860) on quitclaim deeds.

Effect of deed in partition.

Cited in note (57 L. R. A. 334, 335, 338) on effect of deed in partition as distinguished from ordinary deeds.

9 L. R. A. 589, *FERGUSON v. GIES*, 82 Mich. 358, 21 Am. St. Rep. 576, 46 N. W. 718.

Civil rights.

Cited in *Fruchey v. Eagleson*, 15 Ind. App. 102, 43 N. E. 146, holding offer of accommodation on condition that meals be not taken in guests' dining room, unlawful discrimination; *McPherson v. McCarriek*, 22 Utah, 236, 61 Pac. 1004, holding that no action in favor of colored man against white juror exists by reason of written protest against sitting in same box; *Brown v. J. H. Bell Co.* 146 Iowa, 96, 27 L.R.A.(N.S.) 407, 123 N. W. 231, Ann. Cas. 1912 B, 852, to the point that statutes forbidding carriers and hotel keepers to discriminate between patrons is declaratory of common law; *Aaron v. Ward*, 203 N. Y. 356, 38 L.R.A.(N.S.) 204, 96 N. E. 736, holding that person refused accommodations in bathhouse, for which she held ticket is entitled to damages for indignity inflicted upon her.

Cited in footnote to *Cecil v. Green*, 32 L. R. A. 566, which holds soda-water fountain in drug store not a place of public accommodation within civil-rights act.

Cited in note (1 L.R.A.(N.S.) 1189) on right of manager to impose restrictions upon admission to theater.

Distinguished in *Younger v. Judah*, 111 Mo. 310, 16 L. R. A. 561, footnote p. 558, 33 Am. St. Rep. 527, 19 S. W. 1109, holding theatre regulation limiting colored people to balcony violates no constitutional right; *Brown v. J. H. Bell Co.* 146 Iowa, 96, 27 L.R.A.(N.S.) 410, 123 N. W. 231, holding that merchant leasing space in pure food show for demonstration purposes, may refuse to serve negroes at his booth.

Liability for violation of statute.

Cited in *Kinney v. Koopman* 116 Ala. 332, 37 L. R. A. 504, 67 Am. St. Rep. 119, 22 So. 593, holding party keeping gunpowder in violation of statute liable for injury to person intended to be protected by statute.

Distinguished in *VanWyck v. Dickinson*, 148 Mich. 421, 111 N. W. 1033, holding that where violation of statute is the basis of the alleged negligence facts showing such violation must be pleaded.

9 L. R. A. 593, *SUAU v. CAFFE*, 122 N. Y. 308, 25 N. E. 488.

Validity of married woman's contract.

Cited in *Blaechinska v. Missouri & Home for Little Wanderers*, 130 N. Y. 500, 15 L. R. A. 217, 29 N. E. 755, holding that married woman cannot contract with husband to do tailoring for him for wages; *Hulse v. Bacon*, 40 App. Div. 92, 57 N. Y. Supp. 537, Affirming 26 Misc. 457, 57 N. Y. Supp. 537, upholding deed from wife to husband in 1858 of land which had come to her from husband as a gift; *Wronkow v. Oakley*, 16 L. R. A. 211, 31 N. E. 521, Reversing 64 Hun, 223, 19 N. Y. Supp. 51, holding that married woman can appoint her own husband attorney to release her inchoate right of dower; *Hoaglin v. Henderson*, 119 Iowa, 725, 61 L. R. A. 758, 97 Am. St. Rep. 335, 94 N. W. 247, upholding right of wife to form business partnership with husband; *Norwood v. Francis*, 25 App. D. C. 475, 4

A. & E. Ann. Cas. 865, holding that wife cannot enter into a copartnership with her husband.

Cited in notes (31 Am. St. Rep. 935, 936; 34 Am. St. Rep. 340) on power of married women to be partners; (115 Am. St. Rep. 412) on right of wife to enter into partnership with husband.

Distinguished and criticized in *Fuller & F. Co. v. McHenry*, 83 Wis. 581, 18 L. R. A. 514, 53 N. W. 896, holding that married woman cannot form partnership with husband under statute giving her right to contract.

Disapproved in *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 296, 16 L. R. A. 529, 35 Am. St. Rep. 105, 19 S. W. 747, holding that married woman cannot enter into mercantile partnership with her husband; *Haggett v. Hurley*, 91 Me. 556, 41 L. R. A. 366, 40 Atl. 561, holding married woman not liable as a partner with husband under statute which makes her contracts binding when "in her own name;" *Board of Trade v. Hayden*, 4 Wash. 272, 16 L. R. A. 534, 31 Am. St. Rep. 919, 30 Pac. 87, holding that married woman cannot form partnership with her husband in mercantile business under statute giving her right to contract as if unmarried.

9 L. R. A. 597, *STAMM v. BOSTWICK*, 122 N. Y. 48, 25 N. E. 233.

Inheritance by aliens.

Cited in *Callahan v. O'Brien*, 72 Hun, 221, 25 N. Y. Supp. 410, holding nonresident alien heirs not entitled to share in property inherited by deceased citizen; *Smith v. Reilly*, 31 Misc. 702, 66 N. Y. Supp. 40, holding that alien daughter takes fee where alien father, entitled to inherit on filing declaration of intention to become citizen, dies before will proved, and without filing intention; *Daly v. Beer*, 32 N. Y. S. R. 1065, 10 N. Y. Supp. 893, holding alien heirs entitled to fee in land acquired by deceased through devise; *Branagh v. Smith*, 46 Fed. 518, holding that inheritance statute applies only to titles acquired by resident aliens or naturalized citizens, through grant or devise; *Stewart v. Russell*, 91 App. Div. 314, 86 N. Y. Supp. 625, holding devise of real estate a "purchase" within meaning of statute relating to holding of property by aliens; *Clark v. Strong*, 105 App. Div. 183, 93 N. Y. Supp. 514, holding devisees of real property to be purchasers within meaning of Real Property Law; *Stappenbeck v. Mather*, 73 Misc. 442, 133 N. Y. Supp. 482, holding that alien heir of nonresident alien cannot take real property.

Cited in note (31 L. R. A. 101) on effect of state constitutions and statutes on question of inheritance by or from an alien.

9 L. R. A. 599, *HAYCRAFT v. BLAND*, 90 Ky. 400, 29 Am. St. Rep. 390, 14 S. W. 423.

Spendthrift trusts.

Cited in *Raynolds v. Hanna*, 55 Fed. 797, holding beneficiary's interest subject to payment of his debts where no express provision to contrary; *Bull v. Kentucky Nat. Bank*, 90 Ky. 457, 12 L. R. A. 39, footnote p. 37, 14 S. W. 425, holding only income accruing on trust fund prior to court's decision available to creditors, where principal made transferrable on decision; *Fidelity Trust & S. V. Co. v. Walker*, 116 Ky. 396, 76 S. W. 131, holding income under trust deed liable for beneficiary's debts where vested in him in fee; *Montgomery v. Offutt*, 136 Ky. 160, 123 S. W. 676, holding estate subject to beneficiary's debts, where left in trust for him, proceeds in whole or in part payable to him at discretion of trustee, and beneficiary having power of disposition by will; *Ratliff v. Com.* 139 Ky. 541, 101 S. W. 978, holding that beneficial interest in trust property is liable for debts of beneficiary although trust instrument provides that it shall

not be liable therefor; *Smith v. Smith*, 115 Ky. 333, 73 S. W. 1028, holding title of devisee of land subject to his debts though provision in will restricted his alienation thereof until a certain time.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary; *Requa v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest accepted by husband, not trust beyond reach of creditors.

Cited in notes (13 L. R. A. 213) on limitation in trust estates; (11 L. R. A. 565) on spendthrift trusts; (24 Am. St. Rep. 697) on spendthrift trusts.

Distinguished in *Bottom v. Fultz*, 124 Ky. 309, 98 S. W. 1037, holding profits of estate not subject to debts of husband where left to him in trust for his children with provision that if declared liable for his debts the profits should be paid directly to the children.

9 L. R. A. 601, *BOULWARE v. DAVIS*, 90 Ala. 207, 8 So. 84.

Sufficiency of allegations as to corporations.

Cited in *Nelms v. Edinburgh American Land Mortg. Co.* 92 Ala. 162, 9 So. 141, holding failure of corporations to allege right to loan money in bill to foreclose mortgage, not demurrable; *Arrington v. Savannah & W. R. Co.* 95 Ala. 437, 11 So. 7, holding it unnecessary in contractor's action against railroad for construction work, to allege authorization by proper resolution of directors; *Torrent Fire Engine Co. No. 5 v. Mobile*, 101 Ala. 564, 14 So. 557, holding bill to re-establish lost deed not demurrable for failure to allege plaintiff corporation had power to acquire land; *St. Louis, A. & T. R. Co. v. Fire Asso.* 55 Ark. 173, 18 S. W. 43, holding allegations of compliance with statutes unnecessary, it not appearing where foreign corporation's contract of insurance was made.

Presumption as to validity of corporate acts.

Cited in *Allen v. West Point Min. & Mfg. Co.* 132 Ala. 295, 31 So. 462, holding burden of showing invalidity of corporation's note upon corporation; *Perryman & Co. v. Farmers' Union Ginning & Mfg. Co.* 167 Ala. 420, 52 So. 644; *Touart v. Jett Bros. Contracting Co.* 169 Ala. 643, 53 So. 751,—holding that burden of showing invalidity of corporate acts rests upon impeaching party.

Comity as to foreign officers and corporations.

Cited in *Rogers v. Haines*, 96 Ala. 590, 11 So. 651, upholding dissolution of temporary injunction obtained by foreign receiver on denial by defendants that their claims against corporation were without merit; *Fitts v. National Life Asso.* 130 Ala. 416, 30 So. 374, holding action on contract not maintainable against foreign corporation after its legal dissolution; *Howarth v. Angle*, 39 App. Div. 169, 57 N. Y. Supp. 187, and *Small v. Smith*, 14 S. D. 624, 86 Am. St. Rep. 807, 86 N. W. 649, upholding right of foreign receiver to maintain action for recovery of realty; *Castleman v. Templeman*, 87 Md. 553, 41 L. R. A. 370, 67 Am. St. Rep. 363, 40 Atl. 275, upholding foreign receiver's action to collect unpaid subscription to capital stock; *Iowa & C. Land Co. v. Hoag*, 132 Cal. 629, 64 Pac. 1073, upholding foreclosure action by trustee appointed by foreign court; *Lewis v. American Naval Stores Co.* 119 Fed. 397, holding that receiver will be permitted to sue outside his own jurisdiction, there being no conflicting claims of creditors there; *Jenkins v. Purcell*, 29 App. D. C. 218, 9 L.R.A.(N.S.) 1079,

holding rights of foreign receiver bringing property into another jurisdiction, superior to right of creditors within that jurisdiction.

Cited in notes (12 L. R. A. 366, 13 L. R. A. 585) on law of comity as to foreign corporations; (23 L. R. A. 55) on rights of receiver as to property outside of jurisdiction in which he is appointed; (24 L. R. A. 296) on recognition or exclusive of foreign corporations; (4 L.R.A.(N.S.) 825) on power of receiver to sue out of jurisdiction of appointment.

Statutes relating to business of foreign corporations.

Cited in *Maine Guarantee Co. v. Cox*, 146 Ind. 109, 42 N. E. 915, holding foreign corporation prohibited from doing particular kind of business in state, not precluded from general business.

Cited in footnote to *Fort v. State*, 23 L. R. A. 86, which upholds right of guarantee and Accident Lloyds, consisting of nonresidents, to transact business without license.

9 L. R. A. 604, *ST. LOUIS, I. M. & S. R. CO. v. YONLY*, 53 Ark. 503, 14 S. W. 800, 13 S. W. 333.

Liability for negligence of independent contractor.

Cited in *Cameron v. Oberlin*, 19 Ind. App. 147, 48 N. E. 386, holding landowner liable for damage naturally and probably ensuing from performance of contract to burn over land; *St. Louis, A. & T. R. Co. v. Knott*, 54 Ark. 427, 16 S. W. 9, denying railroad company's liability for trespass by servants of independent contractor; *Martin v. St. Louis, I. M. & S. R. Co.* 55 Ark. 522, 19 S. W. 314, holding railroad not liable for negligence of independent compress company in storing cotton; *St. Louis, I. M. & S. R. Co. v. Gillihan*, 77 Ark. 553, 92 S. W. 793, holding that railroad is not liable for negligence of independent contractor employed in constructing its road; *Rogers v. Parker*, 159 Mich. 282, 34 L.R.A.(N.S.) 957, 123 N. W. 1109, 18 Ann. Cas. 753, holding that owner of land who agrees with tenant to pay specified sum for clearing land, is not liable for damage done by tenant in negligently permitting fire to escape to adjoining property; *Missouri, K. & O. R. Co. v. Ferguson*, 21 Okla. 273, 96 Pac. 755, holding railroad company not liable for negligence of independent contractor constructing fence along its right of way; *Anderson v. Tug River Coal & Coke Co.* 59 W. Va. 309, 53 S. E. 713, holding mining company not liable for negligence of contractor employed to procure timbers for it, from its lands at a stipulated price per piece.

Cited in footnotes to *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Uppington v. New York*, 53 L. R. A. 551, which denies city's liability for negligence of independent contractor constructing sewer; *Hoff v. Shockley*, 64 L. R. A. 538, which holds owner not liable to traveler in street for injuries due to negligence of independent contractor.

Cited in notes (13 L. R. A. 329) on imputing employee's negligence to employer; (9 L. R. A. 825) on railroad company's liability for loss by fire originating in sparks, cinders, etc.; (65 L.R.A. 452) as to who are independent contractors; (65 L.R.A. 654) on general rules as to absence of liability of employer for torts of independent contractor; (17 L.R.A.(N.S.) 789) on liability for acts of independent contractor in setting out fire; (22 Am. St. Rep. 463) as to when relation of master and servant exists; (24 Am. St. Rep. 343) on negligence of independent contractors; (76 Am. St. Rep. 411, 414) on liability for negligence and torts of independent contractors.

Distinguished in *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 214, 12 L. R. A. 191, 15 S. W. 610, holding railroad liable for negligently failing to

restore fastenings of sign cut by independent contractor; *White River R. Co. v. Batesville & W. Teleph. Co.* 81 Ark. 201, 98 S. W. 721, holding that master is liable for acts of independent contractor where acts contracted for must necessarily result in injury to another.

9 L. R. A. 606, *STATE v. BRADY*, 44 Kan. 435, 21 Am. St. Rep. 296, 24 Pac. 948.

Criminal libel.

Cited in *State v. Clyne*, 53 Kan. 19, 35 Pac. 789, holding information alleging publication of article imputing knowledge of intended larceny to complainant, sufficient charge of criminal libel; *People v. Eastman*, 188 N. Y. 481, 81 N. E. 459, 11 A. & E. Ann. Cas. 302, on action for criminal libel being maintainable where no civil action would lie.

Cited in footnote to *Fenstermaker v. Tribune Pub. Co.* 35 L. R. A. 611, which authorizes action for defamation by any member of family libeled.

Cited in notes (70 Am. St. Rep. 755) on libel or slander of a class or number of persons; (9 Eng. Rul. Cas. 15) on distinction between libel and slander.

9 L. R. A. 607, *TARKINGTON v. PURVIS*, 128 Ind. 182, 25 N. E. 879.

Rescission of contract for fraud.

Cited in *Taylor v. National Bank*, 6 S. D. 517, 62 N. W. 99, upholding right to rescind purchase of stock induced by fraud; *Green v. Duvergey*, 146 Cal. 389, 80 Pac. 234, holding that equity will grant rescission for fraud though parties cannot be placed in statu quo if justice between the parties can thus be done; *Stelter v. Fowler*, 62 Wash. 350, 113 Pac. 1096, holding that condonation of part of fraud does not forbid rescission for fraud discovered later and not condoned.

Cited in footnote to *Springfield F. & M. Ins. Co. v. Hull*, 25 L. R. A. 37, which upholds right to maintain suit for balance due on policy without tendering back less sum accepted under threats of groundless prosecution.

Cited in notes (21 L. R. A. 206) on necessity of returning consideration before bringing replevin for property obtained by fraudulent purchase; (12 L. R. A. 245) on rights and remedies of vendee.

Waiver of fraud.

Cited in *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. 494, 62 N. W. 899, holding that mere lapse of time will not bar right to rescind fraudulent transaction; *Ingram v. Abbott*, 14 Tex. Civ. App. 589, 38 S. W. 626, holding attempt to sell notes with knowledge of part of fraud inducing purchase, no waiver; *Green v. Duvergey*, 146 Cal. 391, 80 Pac. 234, holding that acts constituting waiver must be clearly established; *Ward v. Marvin*, 78 Vt. 145, 62 Atl. 46, holding that continued use of a horse after full knowledge of fraud in its sale, was a waiver of the fraud; *St. Louis & S. F. R. Co. v. Gorman*, 79 Kan. 653, 28 L.R.A.(N.S.) 644, 100 Pac. 647, holding that use by shipper of stock of a return pass for transportation, was not an affirmance of a voidable contract of shipment pursuant to which it was issued.

Cited in note (36 L.R.A.(N.S.) 468) on sales: use as waiver of right to rescind for breach of warranty or noncompliance with contract.

Rights of purchaser in consideration of antecedent debt.

Cited in *Orb v. Coapstick*, 136 Ind. 317, 36 N. E. 278, holding person taking conveyance for antecedent debt not bona-fide purchaser, as against possessor of prior equity; *Citizens' Nat. Bank v. Judy*, 146 Ind. 330, 43 N. E. 259, holding mortgage for pre-existing debt subject to prior equities.

Cited in note (36 L. R. A. 161) on pre-existing debt as consideration for bona-fide purchase of property not negotiable.

Distinguished in *Adams v. Vanderbeck*, 148 Ind. 96, 62 Am. St. Rep. 497, 45 N. E. 645, holding grantee of land in consideration of pre-existing debt bona-fide purchaser.

Disapproved in *Pugh v. Highley*, 152 Ind. 258, 44 L. R. A. 396, 71 Am. St. Rep. 327, 53 N. E. 171, holding land purchased by creditor on own judgment not subject to prior unknown equities.

Review of sufficiency of evidence to sustain special finding.

Cited in *Baldwin v. Heil*, 155 Ind. 684, 58 N. E. 200, and *White v. Beal & F. Grocer Co.* 65 Ark. 285, 45 S. W. 1060, holding motion for new trial proper mode of reviewing sufficiency of evidence to sustain special findings.

Amendment of special findings.

Cited in *Barner v. Bayless*, 134 Ind. 605, 33 N. E. 907, holding that court cannot change special finding after filing.

Cited as overruled in effect in *Apple v. Smith*, 26 Ind. App. 660, 60 N. E. 456, holding that amendment to special findings may be made before final judgment.

Laches.

Cited in footnote to *Old Times Distillery Co. v. Casey*, 42 L. R. A. 466, which holds right to enjoin use of trademark lost by ten years' delay.

9 L. R. A. 612, *VOISIN v. COMMERCIAL MUT. INS. CO.* 123 N. Y. 120, 25 N. E. 325.

Review of order granting or denying new trial.

Approved in *Williams v. Delaware, L. & W. R. Co.* 127 N. Y. 645, 3 Silv. Ct. App. 453, 27 N. E. 404; *Chapman v. Comstock*, 134 N. Y. 512, 31 N. E. 876; *Caponigri v. Altieri*, 164 N. Y. 479, 58 N. E. 667; *Bank of China v. Morse*, 168 N. Y. 471, 56 L. R. A. 144, 85 Am. St. Rep. 676, 61 N. E. 774,—holding order of appellate division granting new trial in action tried before jury upon conflicting evidence where order may have been upon facts, not reviewable in court of appeals unless record shows that order was affirmed as to facts or appeal was dismissed; *Matthews v. Herdtfelder*, 60 Hun. 522, 15 N. Y. Supp. 165, holding that entry of judgment after denial of motion for new trial does not preclude court from recalling decision and granting new trial at same term; *Whitman v. Johnson*, 10 Misc. 726, 31 N. Y. Supp. 805, holding that appeal may be taken from order denying new trial although judgment remains unappealed from and time limited therefor has expired; *Taylor v. Smith*, 24 App. Div. 527, 49 N. Y. Supp. 41, holding order denying new trial though made before judgment not an intermediate order, but outside of, and not connected with, the judgment.

Cited in *Whitman v. Johnson*, 12 Misc. 24, 33 N. Y. Supp. 60, to point that order denying new trial made at trial term is reviewable by general term of common pleas; *Callahan v. Munson S. S. Line*, 141 App. Div. 793, 126 N. Y. Supp. 538, holding that appeal may be entertained from order denying new trial and incidentally denying motion made for reversal of direction of verdict, although no appeal is taken from judgment; *Howe v. Noyes*, 48 Misc. 357, 95 N. Y. Supp. 542, holding that appeal may be taken from order denying new trial, though time to appeal from the judgment has expired; *Iaquinto v. Bauer*, 104 App. Div. 58, 93 N. Y. Supp. 388, on appeal from order denying motion for new trial; *James McCreery Realty Corp. v. Equitable Nat. Bank*, 54 Misc. 519, 104 N. Y. Supp. 959, Affirming 52 Misc. 301, 102 N. Y. Supp. 975, on history of law of New York in relation to the granting of new trials.

9 L. R. A. 616, SMITH v. NATIONAL BEN. SOC. 123 N. Y. 85, 25 N. E. 197.

Change of beneficiary.

Approved in *Grimbley v. Harrold*, 125 Cal. 29, 73 Am. St. Rep. 19, 57 Pac. 558, holding that insured cannot change designation where he has agreed not to do so in consideration of payment of assessments by beneficiary; *Maynard v. Vanderwerker*, 30 Abb. N. C. 137, 24 N. Y. Supp. 932, holding that payment of assessments by beneficiary under agreement confers vested interest precluding change of beneficiary; *Benard v. Grand Lodge*, A. O. U. W. 13 S. D. 137, 82 N. W. 404, holding designation of voluntary beneficiary invalid, as against prior beneficiaries, who, by agreement, had paid assessments; *Anderson v. Groesbeck*, 26 Colo. 10, 55 Pac. 1086, holding beneficiary may, by contract, acquire vested interest in certificate which insured cannot, even with consent of association, divest; *Webster v. Welch*, 57 App. Div. 561, 68 N. Y. Supp. 55, holding one made beneficiary in certificate in consideration of surrender of interest in another acquires vested interest precluding change of beneficiary; *Carpenter v. Knapp*, 101 Iowa, 729, 38 L. R. A. 133, 70 N. W. 764, holding beneficiary acquires no vested interest until death of insured where latter reserved right to change the beneficiary; *Lawler v. National Life Assn.* 83 Hun, 395, 31 N. Y. Supp. 875, holding that beneficiary has no vested interest in fund during life of insured where latter has power to revoke designation; *Sofge v. Supreme Lodge K. of H.* 98 Tenn. 452, 39 S. W. 853, holding beneficiary without vested interest in certificate so long as right of cancelation and disposal remains in insured; *Armstrong v. Warren*, 83 Hun, 218, 31 N. Y. Supp. 665, holding that, under statute, assent of beneficiary whose designation is mere gift, not necessary to change of payee; *Southwell v. Gray*, 35 Misc. 744, 72 N. Y. Supp. 342, holding interest of beneficiary under certificate a mere expectancy which may be defeated by change of designation.

Cited in *McCormick v. Supreme Council C. B. L.* 6 App. Div. 177, 39 N. Y. Supp. 1010, to point that insured has right to change beneficiaries unless designated in pursuance of some contract or for value; *Simon v. O'Brien*, 87 Hun, 164, 35 N. Y. Supp. 815, to point that interest of beneficiary is no more a vested one than that of legatee before death of testator; *Bull v. Case*, 41 App. Div. 393, 58 N. Y. Supp. 774, to point that insured cannot change beneficiary in certificate issued to secure payment to creditor; *Kimball v. Lester*, 43 App. Div. 32, 59 N. Y. Supp. 540, holding assignment of certificate to insure payment of debt, valid although certificate not surrendered for cancelation and issue of new one, as required by laws of association; *Grand Lodge A. O. U. W. v. O'Malley*, 114 Mo. App. 201, 89 S. W. 68, holding that beneficiary of fraternal benefit certificate has no vested interest therein; *Supreme Council, R. A. v. Heitzman*, 140 Mo. App. 113, 120 S. W. 628, holding that as against subsequently appointed beneficiary only an equity exists in favor of beneficiary who agreed to pay assessments in consideration for irrevocable appointment; *Grand Lodge A. O. U. W. v. McFadden*, 213 Mo. 285, 111 S. W. 1172, holding that payment of dues by beneficiary gives him no vested interest; *Spengler v. Spengler*, 65 N. J. Eq. 179, 55 Atl. 285, holding that insured may change the beneficiary though the certificate has been delivered to original beneficiary who has paid premiums thereon; *Tidd v. McIntyre*, 116 App. Div. 606, 101 N. Y. Supp. 867, holding that equity would enforce an intended change of beneficiary though not made according to rules of the order where money was paid into court and contest was between beneficiaries; *Great Camp K. O. T. M. v. Savage*, 135 Mich. 463, 98 N. W. 26; *Stronge v. Supreme Lodge K. of P.* 189 N. Y. 353, 12 L.R.A.(N.S.) 1213, 121 Am. St. Rep. 902, 82 N. E. 433, 12 A. & E. Ann. Cas. 941,—holding that insured cannot change beneficiary where the latter has acquired rights under the cer-

tificate for a valuable consideration; *Ptacek v. Pisa*, 231 Ill. 527, 14 L.R.A. (N.S.) 540, 83 N. E. 221; *Carter v. Carter*, 35 Ind. App. 78, 72 N. E. 187,—on same point; *Bunnell v. Shilling*, 28 Ont. Rep. 345, holding that beneficiary of life insurance policy cannot be changed without beneficiary's consent, where based upon an agreement between such beneficiary and the insured; *Coleman v. Anderson*, 98 Tex. 576, 86 S. W. 730, on beneficiary of certificate in benefit society as having only an "expectancy" depending upon the will of the insured.

Cited in note (49 L. R. A. 750, 755) on power of insured to destroy rights of beneficiary.

Distinguished in *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 223, 54 U. S. App. 290, 82 Fed. 519, and *Nix v. Donovan*, 46 N. Y. S. R. 22, 18 N. Y. Supp. 435, holding that voluntary payment of assessments does not, in absence of agreement, confer vested interest or prevent change of beneficiary; *Moan v. Normile*, 37 App. Div. 617, 56 N. Y. Supp. 339, holding that provision authorizing change of beneficiary, upon surrender of certificate, may be waived by association; *Lahey v. Lahey*, 174 N. Y. 153, 61 L. R. A. 794, 95 Am. St. Rep. 554, 66 N. E. 670, holding member of benefit association not prevented from changing beneficiary by refusal of original beneficiary to give up certificate.

Criticized in *Jory v. Supreme Council A. L. of H.* 105 Cal. 28, 26 L. R. A. 735, 45 Am. St. Rep. 17, 38 Pac. 524, holding that beneficiary may, by agreement, acquire equities which insured cannot defeat, but that his interest is not a vested one.

Proof of fraud or conspiracy.

Approved in *Sommer v. Oppenheim*, 19 Misc. 611, 44 N. Y. Supp. 396, holding transactions between one, alleged to have purchased goods from plaintiff by fraud, and other creditors, admissible to show general scheme of fraud; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 46 C. C. A. 679, 107 Fed. 845, holding acts and declarations of one of the conspirators while some of them were engaged in executing the conspiracy, competent evidence; *People v. McKane*, 143 N. Y. 470, 38 N. E. 950, holding acts and declarations of conspirators in furtherance of conspiracy, competent.

Cited in *Summers v. Metropolitan L. Ins. Co.* 90 Mo. App. 699, to point that insurance obtained by fraud may be avoided on proof of facts constituting fraud.

Admissibility of declarations.

Approved in *Supreme Conclave K. of D. v. O'Connell*, 107 Ga. 100, 32 S. E. 946, holding admissions or declarations of insured made before issuance of policy admissible against beneficiary without vested interest; *Terwilliger v. Industrial Ben. Asso.* 83 Hun, 323, 31 N. Y. Supp. 938, holding declarations of insured as to age, made prior to time beneficiary's interest vested, competent on behalf of benefit association.

Cited in *Fidelity Mut. L. Asso. v. Winn*, 96 Tenn. 227, 33 S. W. 1045, holding declarations of insured against his interest competent against beneficiary, where insured was real party in interest; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 218, 47 L. ed. 451, 23 Sup. Ct. Rep. 294, holding declarations of alleged conspirators as to plans admissible upon prima facie proof of conspiracy to defraud insurance company; *Langdeau v. John Hancock Mut. L. Ins. Co.* 194 Mass. 66, 18 L.R.A.(N.S.) 1193, 80 N. E. 452, holding record of plea of guilty by insured to charge of drunkenness admissible on question of fraud in obtaining policy, in action thereon by beneficiary; *Taylor v. Grand Lodge, A. O. U. W.* 101 Minn. 76, 11 L.R.A.(N.S.) 98, 118 Am. St. Rep. 606, 111 N. W. 919, 11 A. & E. Ann. Cas. 260, holding statements in prior application for insurance in another company admissible against beneficiary in action upon mutual benefit

certificate; *Foster v. McAlester*, 3 Ind. Terr. 314, 58 S. W. 679, holding declarations connected with fraudulent transaction and tending to throw light upon it admissible.

Cited in note (19 L. R. A. 751) on how near main transaction, declarations must be made, to constitute part of the *res gestæ*.

Distinguished in *Phillips v. Lindner*, 61 Hun, 489, 16 N. Y. Supp. 367, holding letter of maker of note to alleged indorser, written shortly before note fell due, confessing indorsement and forgery, not admissible in action by bona fide holder.

— **As to intent to commit suicide.**

Approved in *Merchants' Life Asso. v. Treat*, 98 Ill. App. 65, holding admissible, statements of insured made before issuance of policy tending to show intent to commit suicide.

Cited in *Ætna L. Ins. Co. v. Florida*, 30 L. R. A. 89, 16 C. C. A. 622, 32 U. S. App. 753, 69 Fed. 935, holding proof of contemplated suicide admissible, under statute, only when intent existed at time of application for policy.

Distinguished in *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 551, 68 N. W. 182, holding declarations as to intent to commit suicide made two years before death, inadmissible; *Ross-Lewin v. Germania L. Ins. Co.* 20 Colo. App. 270, 78 Pac. 305, holding acts and declarations of insured after an assignment of his policy inadmissible on question of suicide unless a part of the *res gestæ*.

Effect of suicide.

Approved in *Campbell v. Supreme Conclave I. O. H.* 66 N. J. L. 280, 54 L. R. A. 579, 49 Atl. 550, holding that suicide will not defeat recovery unless contract so provides in express terms.

Cited in *Shipman v. Protected Home Circle*, 174 N. Y. 409, 63 L. R. A. 351, 67 N. E. 83, denying right of beneficiary to proceeds of certificate upon suicide of insured; *Mooney v. Ancient Order*, U. W. Grand Lodge, 114 Ky. 960, 72 S. W. 288, holding that where policy is silent, suicide while insane is no defense to recovery thereon; *Mutual L. Ins. Co. v. Durden*, 9 Ga. App. 803, 72 S. E. 295, to the point that to procure insurance with intent to commit suicide is fraud that should defeat recovery at option of insurer.

Cited in notes (8 L.R.A.(N.S.) 1127) on suicide while sane as defense to action on policy or certificate containing no provision as to effect thereof; (84 Am. St. Rep. 555) on self-destruction as defense to life insurance.

9 L. R. A. 617, *STEDMAN v. UNITED STATES MUT. ACCI. ASSO.* 123 N. Y. 304, 20 Am. St. Rep. 748, 25 N. E. 399.

Cause of death of insured.

Cited in *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 541, 70 Am. St. Rep. 212, 78 N. W. 252, holding that death is not accidental merely because of rupture of artery caused by reaching out to close window; *Dozier v. Fidelity & C. Co.* 13 L. R. A. 116, 46 Fed. 449, holding sunstroke a disease, within accident policy excepting "any disease or bodily infirmity;" *Thornton v. Travelers Ins. Co.* 116 Ga. 127, 94 Am. St. Rep. 99, 42 S. E. 287, upholding recovery for accident aggravating hernia, under policy exempting company in case of injury resulting from hernia; *Garvey v. Phoenix Preferred Acci. Ins. Co.* 123 App. Div. 109, 108 N. Y. Supp. 186, holding conditions which inevitably or ordinarily are the effect of a disability covered by the policy are within its compass; *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 171, 78 S. W. 320, holding kidney disease, due to handling infected rags, is an injury "accidentally contracted" within terms of a liability policy.

Cited in notes (30 L. R. A. 209) on what constitutes an accident within meaning of accident insurance policy; (9 L. R. A. 685) on meaning of "accidental"

in insurance policy; (8 L.R.A.(N.S.) 1017) on condition resulting from accident as within restriction of liability in accident policy, for disability arising from such condition; (14 Eng. Rul. Cas. 25) on death from accidental means.

Distinguished in *H. P. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 226, 30 L.R.A.(N.S.) 1196, 138 Am. St. Rep. 379, 92 N. E. 329, holding that policy insuring employer against liability "imposed by law accidentally suffered by employee" covered amount paid on judgment recovered by the latter against him for injury resulting from working with horse which was suffering with glanders; *Sullivan v. Modern Brotherhood*, 167 Mich. 531, — L.R.A.(N.S.) —, 133 N. W. 486, holding that accident insurance company is liable where loss of eye resulted from gonorrheal infection caused by water in which she was washing clothes splashing in her eye; *Cady v. Fidelity & C. Co.* 134 Wis. 333, 17 L.R.A.(N.S.) 272, 113 N. W. 967, holding an organic stricture does not constitute a local disease within the meaning of the policy unless the affection is so far developed and has become so serious as to have some bearing on general health.

— Inhalation of gas.

Cited in *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 600, 31 L. R. A. 688, 51 Am. St. Rep. 716, 43 N. E. 54, holding accident insurance company liable for death by accidental inhaling of gas; *Fidelity & C. Co. v. Waterman*, 161 Ill. 635, 32 L. R. A. 655, 44 N. E. 283, holding that accident policy covers asphyxiation while asleep by illuminating gas although injuries resulting from "poison absorbed or inhaled" are excepted; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 93, 13 L. R. A. 663, 28 W. N. C. 460, 27 Am. St. Rep. 618, 22 Atl. 871, holding death by asphyxiation in bottom of well in which insured had gone to fix pump covered by policy excepting inhalation of gas; *Lowenstein v. Fidelity & C. Co.* 88 Fed. 476, holding death by asphyxiation caused by involuntary inhalation of illuminating gas covered by accident policy excepting injuries resulting from "anything accidentally or otherwise inhaled;" *Fidelity & C. Co. v. Lowenstein*, 46 L. R. A. 452, 38 C. C. A. 31, 97 Fed. 18, holding insurer liable for death due to accidental inhaling of gas while asleep because policy issued in same form after construction by court that exception meant voluntary and intelligent act.

— Poison.

Cited in *McGlother v. Provident Mut. Acci. Co.* 32 C. C. A. 323, 60 U. S. App. 705, 89 Fed. 691 (dissenting opinion), majority holding that accident policy, excepting "death resulting from poison," does not include death from poison taken under belief it was harmless.

Distinguished in *Meehan v. Traders & Travelers Acci. Co.* 34 Misc. 160, 68 N. Y. Supp. 821, holding that policy, excepting accident "by poison" in any form, does not cover accident by carbolic acid thrown upon insured; *Dent v. Railway Mail Asso.* 183 Fed. 842, holding that recovery for death of insured under accident policy may be had where death resulted from coming in contact with poison ivy, although policy provided against liability for death from "poison, taken or administered accidentally or otherwise."

— Blood poisoning.

Cited in *Martin v. Equitable Acci. Asso.* 61 Hun, 471, 16 N. Y. Supp. 279, holding death from blood poisoning, as result of accidental wound, within accident policy.

Cited in note (5 L.R.A.(N.S.) 928) on liability on accident policy for sickness or death caused by blood poisoning.

Distinguished in *Bailey v. Interstate Casualty Co.* 8 App. Div. 132, 40 N. Y. Supp. 513, holding question whether blood poisoning of physician, was the im-

mediate result of accidental deep thrust of hyperdermic needle into himself, one for jury; *Martin v. Manufacturers' Acci. Indemnity Co.* 60 Hun, 542, 15 N. Y. Supp. 309, raising question as to right to recover for death from blood poisoning following injury to finger; *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 656, 29 C. C. A. 226, 56 U. S. App. 393, 85 Fed. 405, holding that abrasion of skin of toe by new shoe resulting in blood poisoning and death is accidental; *Delaney v. Modern Acci. Club*, 121 Iowa, 536, 63 L. R. A. 606, 97 N. W. 91, holding accidental, death from erysipelas and blood poisoning following cut on finger.

9 L. R. A. 621, *MOREY v. MORNING JOURNAL ASSO.* 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. 161.

What constitutes slander or libel.

Cited in *Winchell v. Argus Co.* 69 Hun, 360, 23 N. Y. Supp. 650, holding printed and published words exposing person to disgrace and obloquy, actionable *per se*; *Howell v. Press Pub. Co.* 48 App. Div. 321, 62 N. Y. Supp. 908, holding published article tending to disgrace woman and bring her into contempt and ridicule, libelous *per se*; *Hanchett v. Chiatovich*, 41 C. C. A. 651, 101 Fed. 745, Affirming 88 Fed. 876, holding error in leaving to jury question whether spoken words were defamatory, when presumed defamatory, harmless; *Van Ingen v. Mail & Exp. Pub. Co.* 14 Misc. 329, 35 N. Y. Supp. 838, holding publication that person was engaged in collecting large sum of money to influence election, libelous *per se*; *Hartman v. Morning Journal Asso.* 46 N. Y. S. R. 182, 19 N. Y. Supp. 398, holding publication imputing immoral and disgraceful complicity in swindle and culpable misbehavior in business management, libelous *per se*; *Rider v. Rulison*, 74 Hun, 241, 26 N. Y. Supp. 234, holding words in letter charging man with being "perfectly unreliable," libelous both as to veracity and payment of debts; *Clark v. Anderson*, 33 N. Y. S. R. 867, 11 N. Y. Supp. 729, holding direction of verdict for defendant improper where plaintiff was charged with being blackleg and scoundrel and with false representation or swearing; *Martin v. Press Pub. Co.* 93 App. Div. 533, 87 N. Y. Supp. 859, holding article stating that one is poverty stricken and starving because overeducated, libelous *per se*; *Triggs v. Sun Printing & Pub. Asso.* 91 App. Div. 263, 86 N. Y. Supp. 486 (dissenting opinion), majority holding articles ridiculing opinions of teacher on certain subjects not libelous *per se*; *Morrison v. Smith*, 177 N. Y. 369, 69 N. E. 725, Reversing 83 App. Div. 210, 82 N. Y. Supp. 166, holding advertisement of "experience of a giddy type-writer girl" accompanied by complainant's picture, libelous *per se*; *Triggs v. Sun Printing & Pub. Asso.* 179 N. Y. 153, 66 L.R.A. 617, 103 Am. St. Rep. 841, 71 N. E. 739, 1 A. & E. Ann. Cas. 326; *Van Heusen v. Argenteau*, 124 App. Div. 777, 109 N. Y. Supp. 238,—holding an article tending to disgrace or bring into ridicule and contempt the person to whom it relates is libelous *per se*; *Morse v. Times-Republican Printing Co.* 124 Iowa, 713, 100 N. W. 867, holding same where it tends to degrade or injure him, to render him odious, or to bring him into public hatred or contempt or ridicule, or injure in business or trade or lead to exclusion from social privileges.

Cited in footnotes to *Welch v. Tribune Pub. Co.* 11 L. R. A. 233, which holds charge that jurors have perjured themselves in rendering verdict, libelous; *Cerveny v. Chicago Daily News Co.* 13 L. R. A. 864, which holds false charge that person is "an anarchist" libelous; *Hollenbeck v. Hall*, 39 L. R. A. 734, which holds publication that trader was dishonest in pleading statute of limitations, not libelous; *Cherry v. Des Moines Leader*, 54 L. R. A. 855, which holds not actionable, article ridiculing in exaggerated terms, extremely ridiculous entertainment; *Ekert v. Van Pelt*, 66 L.R.A. 266, which holds newspaper publication stating that man is a eunuch actionable *per se*.

Cited in notes (13 L. R. A. 98) on fair criticism of public men; (16 L. R. A. 625) on libel by filing lien; (116 Am. St. Rep. 811) on what words are libelous *per se*; (9 Eng. Rul. Cas. 15) on distinction between libel and slander.

Distinguished in *Hughes v. New York Evening Post Co.* 115 App. Div. 614, 100 N. Y. Supp. 982, holding a newspaper article charging a magistrate with giving a lawyer a jail sentence on complaint of a single person without a chance to present his side of story, is not libelous *per se*.

— Charging lewdness, etc.

Cited in *Gates v. New York Recorder Co.* 155 N. Y. 232, 49 N. E. 769, holding statement that woman "is said to have been a concert-hall singer and dancer at Coney Island," libelous *per se*; *Gray v. Baker*, 47 N. Y. S. R. 375, 19 N. Y. Supp. 940, holding article charging married woman being detected in hotel room with another man, and being registered as husband and wife, libelous; *Woodruff v. Woodruff*, 36 Misc. 17, 72 N. Y. Supp. 39, holding it question for jury whether charge that married woman communicated loathsome disease to her husband, imputes unchastity; *Johnson v. Synett*, 89 Hun, 193, 35 N. Y. Sup. 79, holding article reporting colored minister's arrest and intimating that he was too much of a family man, libelous *per se*.

Evidence as to hurtful tendency of libelous publication.

Cited in *Tallmadge v. Press Pub. Co.* 39 N. Y. S. R. 30, 14 N. Y. Supp. 331, holding it proper, in action for libel, for plaintiff to give evidence of his social position; *Stafford v. Morning Journal Asso.* 68 Hun, 471, 22 N. Y. Supp. 1008, holding evidence of insulting letters and visits of men at plaintiff's house at night competent as showing way libelous advertisement was understood; *Parish v. Sun Printing & Pub Asso.* 6 App. Div. 587, 39 N. Y. Supp. 540, holding that plaintiff had right to prove affirmatively, nature of his profession and surrounding circumstances, on question of damage; *Saunders v. Post-Standard Co.* 107 App. Div. 88, 94 N. Y. Supp. 993; *Bingham v. Gaynor*, 135 App. Div. 427, 119 N. Y. Supp. 1010,—holding for purpose of showing standing in community, as bearing upon hurtful tendency of the libel, plaintiff entitled to show position he held at time of libel; *Dennison v. Daily News Pub. Co.* 82 Neb. 678, 23 L.R.A. (N.S.) 364, 118 N. W. 568, holding evidence that plaintiff was a married man is admissible "as bearing on general damages to which he was exposed;" *Post Pub. Co. v. Butler*, 71 C. C. A. 309, 137 Fed. 728, holding evidence of facts which induced press association to send out story are immaterial when unknown to defendant prior to publication.

Evidence to rebut malice or mitigate damages.

Cited in *Van Alstyne v. Rochester Printing Co.* 25 App. Div. 284, 49 N. Y. Supp. 523, holding question whether writer of libelous article had any malice against plaintiff properly excluded; *Robinson v. Evening Post Pub. Co.* 39 App. Div. 526, 57 N. Y. Supp. 303 (Reversing 25 Misc. 245, 55 N. Y. Supp. 62), holding proof that libelous publication was prepared by experienced reporter of reputable news agency incompetent on question of vindictive damages, without also showing that it was believed to be true; *Palmer v. New York News Pub. Co.* 31 App. Div. 213, 52 N. Y. Supp. 539, holding fact that libelous article was published on authority of press association, not a defense; *Ward v. Deane*, 32 N. Y. S. R. 273, 10 N. Y. Supp. 421, holding evidence of plaintiff's reputation where she lived, not known to defendant, and not pleaded in mitigation, inadmissible; *Witcher v. Jones*, 43 N. Y. S. R. 152, 17 N. Y. Supp. 491, holding contemporaneous publication by other papers of same libel not admissible to disprove malice; *Edwards v. San Jose Printing & Pub. Soc.* 99 Cal. 439, 37 Am. St. Rep. 70, 34 Pac. 128, holding proof of previous particular acts of plaintiff, unknown to de-

fendant inadmissible, on libelous charge of purpose to corrupt voters; *Courier-Journal Co. v. Sallee*, 104 Ky. 341, 47 S. W. 226, holding competency of evidence as to correspondent's sources of information, doubtful, in case of libelous publication *per se*, made without knowledge or inquiry; *Baldwin v. Boulware*, 79 Mo. App. 9, holding evidence that slanderous words were spoken under authority of persons whose names were given, inadmissible when not pleaded; *Hess v. Gansz*, 90 Mo. App. 445, holding general reputation of plaintiff in matters concerning libel admissible in mitigation of damages; *Palmer v. Mahin*, 57 C. C. A. 51, 120 Fed. 747, holding facts not known to publisher at time of libel not provable in mitigation of damages; *Palmer v. Matthews*, 29 App. Div. 157, 51 N. Y. Supp. 839 (dissenting opinion), majority holding cross-examination of plaintiff as to other suits for same libel, proper.

Cited in note (23 L.R.A.(N.S.) 362) on admissibility of evidence of family relations of plaintiff on question of damages in defamation action.

Mistake as excuse for libelous publication.

Cited in *Griebel v. Rochester Printing Co.* 60 Hun, 321, 14 N. Y. Supp. 848, holding publication charging obtaining of goods under false pretenses libelous *per se*, although made by mistake.

Damages for libel.

Cited in *Graybill v. De Young*, 140 Cal. 328, 73 Pac. 1067, holding exemplary damages recoverable for false defamatory publication made without regard to whether it was true or false.

Cited in footnote to *Morning Journal Asso. v. Rutherford*, 16 L. R. A. 803, which authorizes punitive damages against newspaper reprinting stories of elopement without inquiry.

9 L. R. A. 625, *LE BARRON v. BABCOCK*, 122 N. Y. 153, 19 Am. St. Rep. 488, 25 N. E. 253.

Cotenant's liability for conversion.

Cited in *Felts v. Collins*, 46 App. Div. 334, 61 N. Y. Supp. 482, holding tenant in common, forcibly taking one half of cattle, not liable for conversion.

Cited in note (12 L. R. A. 265) on liability of tenant in common to action of trover.

Rights of cotenants in common estate.

Cited in *Rich v. Rich*, 50 Hun, 201, 2 N. Y. Supp. 770, holding tenant in common occupying premises, receiving no income, not liable for use; *Adams v. Bristol*, 126 App. Div. 662, 111 N. Y. Supp. 231, holding, in absence of agreement to the contrary, a tenant in possession of real property is liable to account to his cotenant only for what he actually receives, and then is entitled to allowance for taxes paid and repairs made; *Foster v. Foster*, 71 Misc. 266, 129 N. Y. Supp. 1108, holding that widow of former owner and child occupying land in which widow is entitled to dower, child having no general guardian, is not required to account to other heirs for rental value of premises.

Annotation cited in *Schultz v. Dennison*, 159 Mich. 262, 25 L.R.A.(N.S.) 1251, 123 N. W. 1094, on right of a joint owner in possession to crops.

Cited in notes (52 Am. St. Rep. 926) on liability to cotenant for rents, profits and expenditures; (1 Eng. Rul. Cas. 456) on accounts between tenants in common.

Distinguished in *Mott v. Underwood*, 148 N. Y. 469, 32 L. R. A. 272, 51 Am. St. Rep. 711, 42 N. E. 1048, Affirming 73 Hun, 511, 26 N. Y. Supp. 307, holding right of cotenant to take natural oysters not affected by planting of seed-oysters

in oyster bed; *Cosgriff v. Dewey*, 21 App. Div. 131, 47 N. Y. Supp. 255, holding that tenant in common must account for rock quarried.

Title to emblements.

Cited in footnote to *Goodwin v. Smith*, 17 L. R. A. 284, which holds purchaser on foreclosure entitled to wheat sown by tenant after judgment.

9 L. R. A. 627, *COTTINGHAM v. FIREMAN'S FUND INS. CO.* 90 Ky. 439, 14 S. W. 417.

Change of title avoiding insurance.

Cited in *German F. Ins. Co. v. Duncan*, 140 Ky. 32, 130 S. W. 804, to the point that real property sold becomes property of vendee on delivery and acceptance of written contract of sale.

Cited in footnote to *Blackwell v. Miami Valley Ins. Co.* 14 L. R. A. 431, which holds taking partner in business not sale avoiding policy.

Insurable interest.

Cited in note (11 L. R. A. 599) on what are insurable interests.

Change of interest.

Cited in *Grunauer v. Westchester F. Ins. Co.* 72 N. J. L. 294, 3 L.R.A.(N.S.) 111, 62 Atl. 418, holding an agreement to convey property in fee caused such a change in interest, title and possession as to avoid a policy stipulating against any change other than by death of assured; *Manning v. North British & M. Ins. Co.* 123 Mo. App. 462, 99 S. W. 1095, holding a valid contract of sale changes the interest of the seller and brings him within terms of stipulation against change of title and avoids the policy; *Finkbohner v. Glens Falls Ins. Co.* 6 Cal. App. 383, 92 Pac. 318, holding where the assured divests himself of all interest in the property except a vendor's lien for the purchase money, his title is changed so as to avoid the policy.

Cited in note (11 L. R. A. 293) on condition in policy against transfer and alienation of interest.

9 L. R. A. 629, *LOUISVILLE v. LOUISVILLE BD. OF TRADE*, 90 Ky. 409, 14 S. W. 408.

Exemption from taxation.

Cited in *Thomas v. Snead*, 99 Va. 617, 39 S. E. 586, holding municipality without inherent power to exempt from taxation; *Owensboro v. Com.* 105 Ky. 355, 44 L. R. A. 205, 49 S. W. 320 (dissenting opinion), majority holding public parks exempt, under statute exempting property used for public purposes; *Broadway Christian Church v. Com.* 112 Ky. 453, 66 S. W. 32, holding church parsonage not occupied by the minister, not exempt; *Gymnastic Asso. v. Milwaukee*, 129 Wis. 437, 109 N. W. 109, holding under statutes limiting exemptions to property, "used for," "devoted to" or "used exclusively for" there must be the primary physical use therefor of the very property for which exemption is claimed.

Cited in footnote to *Springfield v. Smith*, 37 L. R. A. 446, which denies implied exemption from license tax by contract giving street railway company right to operate road for term of years.

Cited in note (29 L.R.A.(N.S.) 184) on power of municipality to exempt property from taxation.

— Prerequisite to claim of exemption.

Cited in *Alexander v. Aud*, 121 Ky. 116, 88 S. W. 1103, holding under tax lien partly valid and partly invalid party must show tender of valid portion before he will be heard in objection to the invalid part; *Bell v. Lexington*, 120 Ky. 210, 85 S. W. 1081, holding one seeking to interpose irregularities as de-

fense, must as a condition precedent to receiving aid of equity, show a meritorious defense to the tax claim he assails.

9 L. R. A. 631, *DE LA CUESTA v. INSURANCE CO. OF N. A.* 136 Pa. 62, 20 Atl. 505.

Followed without comment, in *Huffington v. Insurance Co. of N. A.* 136 Pa. 84, 9 L. R. A. 631, 20 Atl. 508.

Protest against payment.

Cited in *Hazelton v. McGroarty*, 6 Kulp, 536, 2 Pa. Dist. R. 290, holding protest necessary to show payment not voluntary; *Lippincott v. Supreme Council A. L. H.* 130 Fed. 484, holding voluntary, payment of amended rate of benefit insurance, under protest; *South Bethlehem v. Weiland*, 11 North. Co. Rep. 124, holding that words "paid under protest" in record of justice imposing fine are equivalent to voluntary payment.

What constitutes duress.

Cited in *Pace v. Plymouth*, 7 Kulp, 241, holding payment of fine for violating invalid ordinance, involuntary; *Peters v. Kraft*, 9 Lanc. L. Rev. 36, holding threat of legal process not such duress as to make payment of claim involuntary.

Cited in footnotes to *Flack v. National Bank of Commerce*, 17 L. R. A. 583, which holds threat by bank to institute proceedings to collect unmatured note, not duress; *Galusha v. Sherman*, 47 L. R. A. 417, which holds threats making person incapable of exercising free will, duress.

Cited in note (16 L. R. A. 376) on duress by lien on real property.

Recovery back of money paid.

Cited in *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 169, holding money paid under agreement with city solicitor for business license, not recoverable; *Canfield Salt & Lumber Co. v. Manistee Twp.* 100 Mich. 470, 59 N. W. 164, holding money paid after improper seizure of property to satisfy tax lien, not recoverable; *Easton Power Co. v. Sterlingworth R. Supply Co.* 22 Pa. Super. Ct. 545, holding overpayment for power not recoverable, where voluntarily made, "after tests; *Lauer Brewing Co. v. Chmielewski*, 28 Pa. Co. Ct. 632, holding attorney's commission, paid to sheriff as part of execution debt, not recoverable; *New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co.* 109 La. 26, 94 Am. St. Rep. 393, 33 So. 51, holding not recoverable, illegal wharfage fees paid by one having opportunity to test their legality; *Shenango Furnace Co. v. Fairfield Twp.* 229 Pa. 369, 78 Atl. 937, holding that taxes voluntarily paid without protest cannot be recovered back; *Mallie v. Yeadon*, 10 Del. Co. Rep. 529, holding that undertaker cannot recover back fine paid for first violation of ordinance, where he subsequently made an agreement concerning all his violations; *Re Rahm*, 32 Pittsb. L. J. N. S. 283, holding that trustee cannot recover money paid to legatee by preceding trustee, because of deficit in trust fund from dishonesty of preceding trustee; *Lowenstein v. Bache*, 41 Pa. Super Ct. 557, Reversing 17 Pa. Dist. R. 554, holding that money paid while under duress may be recovered if such payment is made under protest.

Cited in footnotes to *Springfield F. & M. Ins. Co. v. Hull*, 25 L. R. A. 37, which upholds right to maintain suit for balance due on policy without tendering back less sum accepted under threats of groundless prosecution; *First Nat. Bank v. Sargent*, 59 L. R. A. 296, which sustains right to recover back money paid under duress.

Cited in note (94 Am. St. Rep. 411, 422) on recovery back of voluntary payment.

Distinguished in *Hazelton v. McGroarty*, 6 Kulp, 540, 2 Pa. Dist. R. 293, holding excess of legal liquor-license fee, paid under protest, recoverable.

Right of stockholder in issue of new stock.

Cited in *Stokes v. Continental Trust Co.* 186 N. Y. 294, 12 L.R.A.(N.S.) 975, 78 N. E. 1090, 9 A. & E. Ann. Cas. 738, holding a holder of original stock has right in a new issue of stock, in proportion to the amount of his interest in the old stock.

9 L. R. A. 637, *BURR v. LAMASTER*, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015.

Party-wall agreements.

Cited in *Stehr v. Raben*, 33 Neb. 440, 50 N. W. 327, holding that party-wall agreement runs with and is charge upon land; *Garmire v. Willy*, 36 Neb. 344, 54 N. W. 562, holding that party-wall agreement binds subsequent purchaser; *Ensign v. Colts*, 75 Conn. 119, 52 Atl. 829, holding permanent divisional wall partly on land conveyed, an encumbrance; *Loyal Mystic Legion v. Jones*, 73 Neb. 345, 102 N. W. 621, holding an agreement or covenant by the lot owner to pay for party wall runs with the land where language shows such was the intention of the parties; *Rugg v. Lemley*, 78 Ark. 69, 115 Am. St. Rep. 17, 93 S. W. 570, 8 A. & E. Ann. Cas. 291, holding agreement to pay part of cost of wall, when he commenced use of it, became a charge in the nature of an equitable lien upon the lot; *Ferguson v. Wortall*, 125 Ky. 627, 9 L.R.A.(N.S.) 1263, 101 S. W. 966, holding agreement between adjoining owners whereby one builds party wall for which the other agrees to pay one half the cost, constitutes a covenant running with the land; *Percival v. Colonial Invest. Co.* 140 Iowa, 280, 24 L.R.A.(N.S.) 294, 115 N. W. 941, holding where adjoining owner makes use of a party wall so as to become personally liable, his lessee is not bound to pay same.

Cited in note (82 Am. St. Rep. 680) as to whether covenants as to party walls run with the land.

Distinguished in *Cook v. Paul*, 4 Neb. (Unof.) 94, 66 L.R.A. 677, 93 N. W. 430, holding a contract between an adjoining lot owner and the builder of a party wall that compensation will be made for the use thereof is personal and does not run with the land.

Effect of purchasers' knowledge of easement on breach of covenant.

Cited in note (4 L.R.A.(N.S.) 315) on effect of purchaser's knowledge of easement in action for breach of covenant.

9 L. R. A. 640, *GORDON v. CUMMINGS*, 152 Mass. 513, 23 Am. St. Rep. 846, 25 N. E. 978.

Liability for injury on dangerous premises.

Cited in *Foren v. Rodick*, 90 Me. 279, 38 Atl. 175, holding owner of office building liable for injury to party entering on business with tenant, due to misleading and defective cellar entrance; *Kann v. Meyer*, 88 Md. 550, 41 Atl. 1065, holding question of negligence for jury where defendant employing one to repair elevator in dark shaft, without warning him of danger through continued operation of adjoining elevator, one for jury; *Wright v. Perry*, 188 Mass. 270, 74 N. E. 328, holding one lawfully upon premises for purpose of business with one of defendant's servants, had the right to have the premises reasonably safe; *Burner v. Higman & S. Co.* 127 Iowa, 590, 103 N. W. 802, holding landlord leasing portions of building to tenants who are all required to use same elevator may be liable to injured party in building at invitation of a tenant; *Stevens v. United Gas & Electric Co.* 73 N. H. 170, 70 L.R.A. 125, 60 Atl. 848, holding owner liable to one injured who comes upon premises upon implied invitation and in prose-

cution of his special business though injured one is there also upon invitation and for benefit of contractor; *Buchanan v. Central R. Co.* 79 N. J. L. 591, 77 Atl. 50, holding that liability of railroad was for jury where person was injured by falling through opening in passageway at station, such passageway not being lighted.

Cited in footnotes to *Redigan v. Boston & M. R. Co.* 14 L. R. A. 276, which denies right of recovery to licensee falling through open trap door in station platform; *Benson v. Baltimore Traction Co.* 20 L. R. A. 714, which denies right of recovery to student falling into uncovered vat while class is inspecting power house under permission; *Sterger v. Van Sicken*, 16 L. R. A. 640, which holds property owner not required to have stairways safe as to person on premises in search of child; *Hart v. Cole*, 16 L. R. A. 557, which holds risk of unsafe outside steps in tenement building assumed by one attending wake; *Ryerson v. Bathgate*, 57 L. R. A. 308, which denies liability of owner for injury to one using premises for purpose not authorized by invitation; *Malloy v. New York Real Estate Asso.* 41 L. R. A. 487, which denies owner's liability for injury to one falling into elevator shaft, insufficient railing for which had been left out of place by third person; *Gibson v. Leonard*, 17 L. R. A. 588, which holds fire insurance patrolman entering burning building to save property, a mere licensee, towards whom owner owes no duty as to condition of elevator; *Manning v. Chesapeake & O. R. Co.* 16 L. R. A. 271, which holds one making friendly call on telegraph operator a mere voluntary licensee; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L. R. A. 181, which holds that order to trespasser not to leave premises by way he entered does not make him other than trespasser.

Cited in notes (23 L. R. A. 155) on landlord's liability as to condition of part of premises not controlled by tenant; (46 L. R. A. 85, 94) on liability of owner of premises of which he is not in possession; (15 L.R.A.(N.S.) 786) on liability of master to servant injured by elevators not inclosed as required; (17 L.R.A. (N.S.) 918, 920) on duty of owner of premises to protect licensee against hidden dangers; (92 Am. St. Rep. 523) on liability of lessor to licensees, guests, etc., of tenant, where lessor retains control of portion of premises; (19 Eng. Rul. Cas. 101) on liability to licensee for injury by defective or dangerous premises.

Distinguished in *Beehler v. Daniels*, 19 R. I. 52, 31 Atl. 582, Affirming 18 R. I. 566, 27 L. R. A. 514, 49 Am. St. Rep. 790, 29 Atl. 6, denying liability for injuries received by fireman through fall into unguarded elevator well of hotel on fire; *Plummer v. Dill*, 156 Mass. 427, 32 Am. St. Rep. 463, 31 N. E. 128, denying liability to party entering building merely for his own convenience for purpose of inquiry; *Henson v. Beckwith*, 20 R. I. 167, 38 L. R. A. 718, 78 Am. St. Rep. 847, 37 Atl. 702, holding landlord not liable for injury to party at unprotected freight elevator shaft, while delivering goods to tenant; *Campbell v. Abbott*, 176 Mass. 246, 57 N. E. 462, holding that party entering strange building at night without making presence known, cannot recover for injury on stairs; *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 538, 32 L. R. A. 533, 50 Am. St. Rep. 124, 34 Atl. 491, holding railway liable for negligent injury to party crossing tracks to factory, whether by license or implied invitation; *Creeden v. Boston & M. R. Co.* 193 Mass. 283, 79 N. E. 344, 9 A. & E. Ann. Cas. 1121, holding a constable who enters upon a train at a station to search and apprehend criminals thought to be escaping is a mere licensee and company owes him the duty owed to a licensee only; *Speck v. Northern P. R. Co.* 108 Minn. 439, 24 L.R.A.(N.S.) 252, 122 N. W. 497, 17 A. & E. Ann. Cas. 460, holding where passenger in day time opens door in depot and without looking steps within and falls, where it appears she had previously been in building she cannot recover for injuries sustained.

Contributory negligence.

Cited in *Humphreys v. Portsmouth Trust & Guarantee Co.* 184 Mass. 424, 68 N. E. 836, holding that new workman used due care, although walking through wrong door into elevator well; *New York L. Ins. Co. v. Savage*, 7 C. C. A. 264, 19 U. S. App. 197, 58 Fed. 342, holding failure to see elevator opening in sidewalk on dark night while hastening for car, not negligence *per se*, on part of one who had no previous knowledge of it; *Broek v. St. Louis Transit Co.* 107 Mo. App. 116, 81 S. W. 219, holding company's servants bound to use ordinary care for safety of one, who knowing cars make extra trips for extra pay, boards car for purpose of negotiating for passage.

Cited in notes (11 L.R.A. 130) on recovery for injury defeated by passenger's contributory negligence; (24 L.R.A. (N.S.) 248) on negligence in walking through doorway leading to place of danger; (39 L.R.A. (N.S.) 899) on forgetfulness of obstacle or defect as contributory negligence.

Conduct sufficient to infer invitation to enter building.

Cited in *Mallock v. Derby*, 190 Mass. 210, 76 N. E. 721, holding an implied invitation to enter to be inferred from words "you will have to see John" and "he is upstairs."

9 L. R. A. 645, *MOBILE SAV. BANK v. McDONNELL*, 89 Ala. 434, 18 Am. St. Rep. 137, 8 So. 137.

Consideration for transfer by insolvent.

Cited in *Heard v. Murray*, 93 Ala. 131, 9 So. 514, holding that discrepancy of \$3,000 between value of property and purchase price avoids transfer; *Fargason v. Hall*, 99 Ala. 214, 13 So. 302, sustaining transfer of goods where purchase price nearly equaled value of property; *Best v. Fuller & F. Co.* 185 Ill. 48, 56 N. E. 1077, Affirming 85 Ill. App. 509, holding conveyance absolute on face but intended as security, void as to creditors; *G. Ober & Sons Co. v. Phillips-Burtoff Mfg. Co.* 145 Ala. 628, 40 So. 278, holding if debt is materially less than the value of the property conveyed in settlement thereof the law stamps the transaction fraudulent as against the other creditors.

Burden of proving consideration for transfer by insolvent.

Cited in *Caldwell v. Pollak*, 91 Ala. 358, 8 So. 546, holding onus on grantee to show adequate consideration, as against creditor whose debt is reduced to judgment before conveyance; *Robinson v. Moseley*, 93 Ala. 73, 9 So. 372; *Miller v. Rowan*, 108 Ala. 100, 19 So. 9; *Chipman v. Glennon*, 98 Ala. 265, 13 So. 822, — holding obligation upon vendee to show adequate and valuable consideration for transfer from insolvent grantor; *Ezzell v. Brown*, 121 Ala. 153, 25 So. 832, holding burden of showing consideration not on vendee until one assailing deed shows debt antedates conveyance; *Sides v. Scharff Bros.* 93 Ala. 108, 9 So. 228, holding more satisfactory proof of good faith demanded, where relations between parties intimate.

Cited in note (36 L. R. A. 363) on burden of proof to show consideration.

Estoppel by recitals in deed.

Distinguished in *Vincent v. Walker*, 93 Ala. 168, 9 So. 382, denying that married woman is estopped from showing want of consideration for deed of her statutory estate.

Preferences by insolvent.

Cited in *First Nat. Bank v. Smith*, 93 Ala. 99, 9 So. 548, upholding right of debtor to pay some creditors in full, neglecting others, when transaction bona fide.

Cited in note (36 L. R. A. 346) on parties preferred by insolvent.

Assumption of debt by grantee.

Cited in *Harmon v. McRae*, 91 Ala. 410, 8 So. 548, upholding conveyance from insolvent to surety who assumed to pay debt of principal; *Loucheim v. First Nat. Bank*, 98 Ala. 525, 13 So. 374, holding trust deed of insolvent to creditor, with power to sell and repay balance to debtor, valid.

Argumentative charges.

Cited in *Eastis v. Montgomery*, 93 Ala. 300, 9 So. 311, holding that charge unduly emphasizing particular facts, should not be given; *Rice v. Schloss*, 90 Ala. 420, 7 So. 802, condemning argumentative charges to jury.

Parol evidence as to consideration.

Cited in *Buford v. Shannon*, 95 Ala. 211, 10 So. 263, upholding admission of parol evidence to show actual consideration for conveyance.

Declarations of person in possession of property.

Cited in *Boozar v. Jones*, 169 Ala. 486, 53 So. 1018, holding that in action for recovery of mule against bailee, it was competent to show that witness had asked person in possession if he had bought mule from bailor, plaintiff, such evidence being part of *res gestæ*.

9 L. R. A. 650, *MACK v. DE BARDELEBEN COAL & I. CO.* 90 Ala. 396, 8 So. 150.

Rights of minority stockholders.

Cited in *Roman v. Woolfolk*, 98 Ala. 238, 13 So. 212, denying minority stockholder's right to receivership without previous application to board of directors for redress; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 539, 59 Am. St. Rep. 140, 21 So. 315, denying right to judicial interference with management of corporation before relief sought within body itself; *George v. Central R. & Bkg. Co.* 101 Ala. 624, 14 So. 752, and *Steiner v. Parsons*, 103 Ala. 221, 13 So. 771, holding that stockholder must exhaust remedies within corporation before application to court; *Pittsburg, C. C. & St. L. R. Co. v. Dodd*, 115 Ky. 197, 72 S. W. 822, holding where it appears the majority of stockholders are also officers and directors of corporation acquiring pecuniary benefits by reason of breach of its contract, the minority of stockholders may sue to enforce the contract; *Edmunds v. Illinois C. R. Co.* 2 Ill. C. C. 459, on right to restrain voting of stock at corporate meeting.

Cited in footnotes to *Shaw v. Davis*, 23 L. R. A. 294, which denies minority stockholder's right to enjoin legal contract; *Grant v. Lookout Mountain Co.* 27 L. R. A. 98, which sustains right of successful minority stockholders to expenses including attorneys' fees from corporation; *Kidd v. New Hampshire Traction Co.* 66 L.R.A. 574, which upholds right of stockholders whose officers have fraudulently transferred its assets to another corporation to maintain suit in equity against latter for rescission of contract or for damages without joining former corporation as defendant; *Hearst v. Putnam Min. Co.* 66 L.R.A. 784, which denies right of holders of stock in corporation whose property has been sold to maintain suit to enforce trust in such property for their own benefit.

Cited in notes (15 L.R.A. 684) on voting trusts of corporate stock; (24 Am. St. Rep. 644) on suit by stockholders against directors for mismanagement; (97 Am. St. Rep. 36) on actions by stockholders in behalf of corporations.

Right to amend an injunction bill.

Cited in *Montgomery Light & Water Power Co. v. Citizens' Light, Heat & P. Co.* 147 Ala. 362, 40 So. 981, on right to amend an injunction bill.

9 L. R. A. 657, JACKSON v. CITY NAT. BANK, 125 Ind. 347, 25 N. E. 430.

Knowledge, by lender, of purpose for which money borrowed.

Cited in First Nat. Bank v. Dovetail Body & Gear Co. 143 Ind. 557, 52 Am. St. Rep. 435, 40 N. E. 810, holding mortgage by insolvent corporation to discharge indebtedness valid, although president personally liable and mortgagee knew purpose for which money borrowed.

Contracts connected with illegal transactions.

Cited in footnotes to Gray v. Western U. Teleg. Co. 14 L. R. A. 95, which holds company liable for delay in delivering telegram relating to illegal transaction; Waters v. Richmond & D. R. Co. 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday; Martin v. Richardson, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to proceeds from one fraudulently obtaining it after prize drawn; Irvin v. Irvin, 29 L. R. A. 292, which holds wife's recovery of consideration of contract to release dower rights not lost by invalidity of contemporaneous agreement for divorce; Fuller v. Berger, 65 L.R.A. 381, which holds that equity will not refuse relief against infringement of patent because owner has devoted it wholly to an immoral use.

— Gambling transactions.

Approved in Singleton v. Bank of Monticello, 113 Ga. 530, 38 S. E. 947, denying right to recover money loaned when lender participated in purchase of "margins."

Cited in Plank v. Jackson, 128 Ind. 425, 26 N. E. 568, denying right of lender to recover money loaned to deal in futures when he becomes *particeps criminis*.

Cited in footnotes to Appleton v. Maxwell, 55 L. R. A. 93, which denies right of action for money loaned to be used in gambling; Olson v. Sawyer Goodman Co. 53 L. R. A. 648, which holds void, agreement to debit and credit on accounts due employees, their winnings at card games with each other; Drinkall v. Movius State Bank, 57 L. R. A. 341, which holds title to cashier's check acquired by payee's indorsement to gambler in payment for chips to be used in gambling, defective; Ullman v. St. Louis Fair Asso. 56 L. R. A. 606, which denies right to abandon partly executed illegal bookmaking contract for specified period, and recover back *pro rata* amount of money paid; Central Stock & Grain Exchange v. Bendinger, 56 L. R. A. 875, which holds broker liable to refund to principal money illegally taken from agent as margins on gambling transaction; Booth v. People, 50 L. R. A. 762, which sustains statute making unlawful options for sale of commodities which have been subject of gambling operations; Baxter v. Deneen, 64 L. R. A. 949, which refuses to enjoin broker from withdrawing money deposited in bank on stock gambling transaction; Baxter v. Deneen, 64 L.R.A. 949, which holds that broker with whom margins have been deposited in a stock gambling transaction will not be enjoined from violating agreement to keep them on deposit in a specified bank until the transaction is closed.

9 L. R. A. 660, JOHNSON v. ALEXANDER, 125 Ind. 575, 25 N. E. 706.

Assignment of life insurance.

Cited in State *ex rel.* Wright v. Tomlinson, 16 Ind. App. 677, 59 Am. St. Rep. 335, 45 N. E. 1116, holding assignment of insurance to wife by insolvent husband, valid as against creditors; Barbour v. Larue, 106 Ky. 558, 51 S. W. 5, holding policies without pecuniary value at time of general assignment, not transferred to assignee under provision for "property" not specifically mentioned.

Cited in footnotes to Spencer v. Myers, 34 L. R. A. 175, which sustains right to assign policy on husband's life issued for wife's benefit; Steinback v. Diepenbrock, 44 L. R. A. 417, which authorizes assignment of policy to one having no

insurable interest; *Chamberlain v. Butler*, 54 L. R. A. 338, which sustains right to assign policy on own life to one without insurable interest; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which authorizes assignment of policy payable to "legal representatives" of insured; *Hewlett v. Home for Incurables*, 17 L. R. A. 447, which holds assignee of interest in policy on third person's life entitled to recover though assignor died before insured; *Steele v. Gatlin*, 59 L. R. A. 129, which holds complete gift not made by verbal assignment of life policy accompanied with words indicating intent to give, and delivery of policy; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which sustains right to provide that assigned policy shall be void as to all above debt due assignee; *American Mut. L. Ins. Co. v. Bertram*, 64 L. R. A. 935, which holds recoverable, premiums paid by assignee on invalid policy, on assurance by office of company that it was valid; *Opitz v. Karel*, 62 L. R. A. 982, which holds that valid gift of proceeds of policy payable to personal representative of insured, may be made by delivery of policy; *Hinton v. Mutual Reserve Fund L. Asso.* 65 L.R.A. 161, which holds insurance company not liable on policy issued to wife of mortgagor and assigned by her to mortgagee as security for the debt; *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, which holds assignment of life policy immediately on its issue to evade rule against issuing policy to one without insurable interest renders assignment void.

Cited in note (87 Am. St. Rep. 488) on assignment of life insurance policies.

Insurance as fraud on creditors.

Cited in note (29 Am. St. Rep. 364, 366) on insurance on life as fraud on creditors.

9 L. R. A. 664, *WELSH v. STATE*, 126 Ind. 71, 25 N. E. 883.

What liquors deemed intoxicating.

Cited in *Douglas v. State*, 21 Ind. App. 304, 52 N. E. 238, holding verdict that liquor sold was beer, sufficient to support conviction under indictment for sale of "intoxicating liquors, to wit, beer;" *People v. Anderson*, 159 Mich. 186, 25 L.R.A.(N.S.) 447, 123 N. W. 605, holding proof of sale of "beer" will warrant a conviction without showing of intoxicating qualities.

State jurisdiction over boundary waters.

Cited in *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 310, 40 N. E. 527, holding that state has jurisdiction for enforcement of its civil and criminal laws on navigable river forming part of boundary; *Meyler v. Wedding*, 107 Ky. 700, 60 S. W. 20 (dissenting opinion), majority holding judgment rendered in Indiana upon service of process on Ohio river beyond low-water mark, void; *Roberts v. Fullerton*, 117 Wis. 239, 65 L. R. A. 971, 93 N. W. 1111 (dissenting opinion), majority holding out of state officer not authorized to destroy nets found in border lake within boundaries of state; *State v. Faudre* (W. Va.) 63 L. R. A. 881, 46 S. E. 269, upholding right of Ohio to fix Ohio ferry rates from Ohio to West Virginia; *Lemore v. Com.* 127 Ky. 486, 105 S. W. 930, holding by reason of concurrent jurisdiction of Missouri and Kentucky over the Mississippi River, a conviction under laws of one state may be had where party crosses to opposite shore and there purchases liquor in violation of laws of state; *Com. v. Louisville & E. Packet Co.* 117 Ky. 940, 80 S. W. 154, holding magisterial districts of counties of state of Kentucky bordering on the Ohio River extend to the state line which is to the opposite shore at low-water mark; *State v. Nielsen*, 51 Or. 592, 131 Am. St. Rep. 765, 95 Pac. 720, 16 A. & E. Ann. Cas. 1113, holding right to exercise concurrent jurisdiction over rivers forming state boundaries does not depend upon the acquiescence or concurrence of the adjoining state;

State v. Seagraves, 111 Mo. App. 357, 85 S. W. 925, holding transactions on a boat on the Mississippi River might lawfully be dealt with by the courts of either state according to its laws.

Cited in notes (44 Am. St. Rep. 84) on place of commission of crime on boundary river; (65 L.R.A. 957, 966) on jurisdiction over boundary rivers.

Status of liquor business.

Cited in Campbell v. Jackman Bros. 140 Iowa, 486, 27 L.R.A.(N.S.) 292, 118 N. W. 755, holding sale of intoxicants was recognized as a legitimate business at common law; Sopher v. State, 169 Ind. 184, 14 L.R.A.(N.S.) 177, 81 N. E. 913, 14 A. & E. Ann. Cas. 27, holding at common law an ordinary saloon was not a public nuisance though it may become such where kept in an unlawful way.

Distinguished in State ex rel. Galle v. New Orleans, 113 La. 379, 67 L.R.A. 74, 36 So. 999, 2 A. & E. Ann. Cas. 92, holding the right to sell intoxicating liquors is conferred by the written law of the state, subject to such conditions only as may be imposed by the general assembly.

Exercise of police power.

Cited in Haggart v. Stehlin, 137 Ind. 50, 22 L. R. A. 581, 35 N. E. 997, holding statutes regulating sale of intoxicating liquors by licensing of saloons, not unconstitutional; State v. Gerhardt, 145 Ind. 469, 33 L. R. A. 324, 44 N. E. 469, holding statute making it unlawful to issue license to sell intoxicating liquors, if remonstrance be signed by majority of voters in township or ward, valid; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 566, 12 L. R. A. 656, 3 Inters. Com. Rep. 617, 28 N. E. 76, holding statute regulating mode of procuring, transporting, and using natural gas, valid exercise of police power; State v. Richcreek, 167 Ind. 229, 5 L.R.A.(N.S.) 881, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899, sustaining a law requiring one member or an individual of a firm conducting a banking business to be a resident of the state within which business is done; State v. Dudley, 33 Ind. App. 642, 71 N. E. 975, holding agent of licensed retailer of intoxicating liquors is not liable to prosecution for selling without a license; McClanahan v. Breeding, 172 Ind. 462, 88 N. E. 695, holding power of regulation of the liquor business is referable to the police power, and cannot be surrendered; De Grazier v. Stephens, 101 Tex. 196, 16 L.R.A.(N.S.) 1034, 105 S. W. 992, 16 A. & E. Ann. Cas. 1059, holding a legislative requirement that licensee to sell intoxicants shall have been a resident for two years in the county where sales are to be made is constitutional; Foster v. Speed, 120 Tenn. 476, 22 L.R.A.(N.S.) 951, 111 S. W. 925, 15 A. & E. Ann. Cas. 1066, holding fact that a business is prohibited and a license could not be obtained authorizing it, is no defense to an action to collect tax imposed from one engaged in such business; State v. Baker, 50 Or. 385, 13 L.R.A.(N.S.) 1040, 92 Pac. 1076, upholding a law making it an offense to permit females under 21 years to enter and remain in a saloon; State v. McIlvenna, 21 S. D. 493, 113 N. W. 878, to the point that statute prohibiting sale of liquor without license, prohibited sale on boats on navigable water within state.

Cited in notes (78 Am. St. Rep. 253) on power of legislature to regulate sale of intoxicating liquors; (1 L.R.A.(N.S.) 641) on regulating sale of intoxicants on vessels engaged in interstate commerce; (16 L.R.A.(N.S.) 1033) on constitutionality of requirement that holder of liquor license be resident of state.

Equality of privileges.

Cited in Woodford v. Hamilton, 139 Ind. 485, 39 Atl. 47, upholding statute limiting issue of licenses to sell intoxicating liquors to "male inhabitants;" Adams v. Cronin, 29 Colo. 498, 69 Pac. 590, holding ordinance prohibiting saloon keepers from maintaining wine room for use of women, not unconstitutional;

Adams v. Cronin, 29 Colo. 498, 63 L. R. A. 66, 69 Pac. 590, upholding constitutionality of act forbidding keepers from allowing women to enter saloons; Boomershire v. Uline, 159 Ind. 504, 65 N. E. 513, holding constitutional, law permitting majority of voters of township or ward, to prevent, by remonstrance, granting of liquor license; McPherson v. State, 174 Ind. 69, 31 L.R.A.(N.S.) 193, 90 N. E. 610, holding that prohibitory law must become effective to interdict sale of liquors throughout all parts of jurisdiction of lawmaking power; State v. Roberts, 74 N. H. 478, 16 L.R.A.(N.S.) 1116, 69 Atl. 722, holding statutes commonly spoken of as license laws are not, strictly speaking, grants of special privileges, but rather restrictions upon the exercise of previously existing rights.

Cited in notes (49 L. R. A. 111) on constitutionality of discrimination against women in police regulations; (14 L. R. A. 582) on constitutional equality of privileges, immunities, and protection; (25 Am. St. Rep. 890) on 14th amendment as to special privileges, burdens and restrictions.

Requests for instructions.

Cited in Leeper v. State, 12 Ind. App. 639, 40 N. E. 1113, holding that defendant in criminal case, desiring further instructions, must prepare same, and request their submission; Eacock v. State, 169 Ind. 507, 82 N. E. 1039, holding there is no error in courts refusing to give instructions not signed and delivered to the court as required by the statute.

Presumptions arising from record on appeal.

Cited in Lofland v. Goben, 16 Ind. App. 69, 44 N. E. 553, holding instructions refused, presumed not tendered in time, unless record shows contrary; Campbell v. State, 148 Ind. 529, 47 N. E. 221, holding continuance presumed to have been properly granted, in absence of record showing error; Burrell v. State, 129 Ind. 294, 28 N. E. 699, holding record showing continuance in criminal case by "consent of parties," raises presumption that defendant was in court at time; State v. Daugherty, 63 Kan. 479, 65 Pac. 695, holding record showing presence of defendant upon arraignment and at sentence, raises presumption that he was present during entire trial; Bond v. State, 63 Ark. 509, 58 Am. St. Rep. 129, 39 S. W. 554, holding defendant chargeable with bailable offense, absent when verdict rendered, presumed voluntarily absent on bail, or present in fact, when record silent.

Extent court may assess costs.

Cited in Cameron v. State, 37 Ind. App. 383, 76 N. E. 1021, holding in absence of showing that prosecuting attorney acted in bad faith in subpoenaing more witnesses than necessary court may assess costs to a defendant pleading guilty without trial.

Verdict in prisoner's absence.

Cited in Gaussin v. State, 174 Ind. 588, 92 N. E. 651, holding that defendant was not put twice in jeopardy where verdict was handed to clerk in defendant's absence, but upon discovery of his absence, returned to jury after which jury retired and subsequently presented verdict in defendant's presence.

Sufficiency of indictment for unlawful sale of liquor.

Cited in State v. Ely, 22 S. D. 491, 118 N. W. 687, 18 Ann. Cas. 92, holding that it is unnecessary in indictment for selling liquor without license, to allege that business could be engaged in in the county.

9 L. R. A. 667, HERRON v. HERRON, 47 Ohio St. 544, 21 Am. St. Rep. 854, 25 N. E. 420.

Transfer of title by act of law.

Cited in Deem v. Risinger, 27 Ohio L. J. 156, 11 Ohio S. & C. P. Dec. 495, L.R.A. Au. Vol. II.—22.

holding that one who murders his ancestor for the purpose of inheriting his estate, is not thereby prevented from inheriting such estate, since the title passes to him by act of law.

9 L. R. A. 669, *YOUNG v. WESTERN U. TELEG. CO.* 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044.

Action for breach of public duty.

Cited in *Guardian Trust & D. Co. v. Greensboro Water Supply Co.* 115 Fed. 190, upholding right of one injured by fire because of failure of water supply to sue water company in tort, or for breach of contract.

Cited in note (10 L. R. A. 516) on liability for neglect to deliver telegram.

Who may maintain action.

Cited in *Hood v. Sudderth*, 111 N. C. 221, 16 S. E. 397, holding action for seduction maintainable by woman seduced; *Snider v. Newell*, 132 N. C. 619, 44 S. E. 354, holding action maintainable by parent for seduction of daughter, without showing actual loss of services; *McLeod v. Pacific Teleph. Co.* 52 Or. 25, 15 L.R.A.(N.S.) 811, 94 Pac. 568, 16 A. & E. Ann. Cas. 1239; *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 96,—holding the person to whom a telegram is sent, where it is intended for his benefit or information has a right of action against the company for negligent delay in its transmission and delivery; *Helms v. Western U. Teleg. Co.* 143 N. C. 393, 8 L.R.A.(N.S.) 253, 118 Am. St. Rep. 811, 55 S. E. 831, 10 A. & E. Ann. Cas. 64 (dissenting opinion), on right of undisclosed beneficiary to recover damages for negligent failure to deliver message.

Cited in notes (30 L.R.A.(N.S.) 1117, 1124, 1143, 1144) on right of addressee of telegram to sue for delay in delivery; (24 Eng. Rul. Cas. 783, 785) on addressee's right of action for mistake in telegram.

Damages for nondelivery of telegram.

Cited in *Hansley v. Jamesville & W. R. Co.* 117 N. C. 573, 32 L. R. A. 553, 53 Am. St. Rep. 600, 23 S. E. 443, upholding sendee's right to exemplary damages for nondelivery of telegram announcing severe illness of near relative; *Rosser v. Western U. Teleg. Co.* 130 N. C. 254, 41 S. E. 378, holding it not error to omit word "great" in connection with word "care" in charging jury to distinguish between suffering from nondelivery of message and inability to attend funeral; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 362, 43 L. R. A. 218, 70 Am. St. Rep. 205, 78 N. W. 63, holding damages for nondelivery of message may include loss of reward for inability to arrest fugitive; *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 467, 35 L. R. A. 550, holding receiver may sue on case as for tort for actual damages resulting from negligent alteration of message; *Walser v. Western U. Teleg. Co.* 114 N. C. 446, 19 S. E. 366, upholding right to nominal damages for nondelivery of message; *McMillan v. Western U. Teleg. Co.* 60 Fla. 142, 29 L.R.A.(N.S.) 896, 53 So. 329 (dissenting opinion), on liability of telegraph company for delay in delivery of message; *Dayvis v. Western U. Teleg. Co.* 139 N. C. 83, 51 S. E. 898, holding company liable for negligent failure to deliver message where informed of fact that anxiety and mental anguish will result as consequence of act.

Cited in note (117 Am. St. Rep. 311) on elements of damages recoverable for failure to transmit and deliver telegrams.

Mental suffering, as element of damages.

Followed in *Thompson v. Western U. Teleg. Co.* 107 N. C. 455, 12 S. E. 427, upholding right to damages for mental suffering for nondelivery of telegram, though no physical pain result; *Havener v. Western U. Teleg. Co.* 117 N. C. 543,

23 S. E. 457, upholding right to recover for mental suffering where importance of immediate delivery appears on face.

Cited in *Sherill v. Western U. Teleg. Co.* 117 N. C. 358, 23 S. E. 277, sustaining decisions on former appeals in 109 N. C. 533, 14 S. E. 94, 116 N. C. 658, 21 S. E. 429, upholding right to damages for mental pain caused by nondelivery of telegram; *Cashion v. Western U. Teleg. Co.* 123 N. C. 270; *Lyne v. Western U. Teleg. Co.* 123 N. C. 133, 31 S. E. 350; *Meadows v. Western U. Teleg. Co.* 132 N. C. 43, 43 S. E. 512; *Graham v. Western U. Teleg. Co.* 109 La. 1075, 34 So. 91, — sustaining right to damages awarded for mental pain caused by nondelivery of message announcing illness of near relative; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 756, 28 L. R. A. 73, 57 Am. St. Rep. 294, 62 N. W. 1, upholding recovery by addressee for mental anguish, sender failing to deliver message announcing death of mother; *Kennon v. Western U. Teleg. Co.* 126 N. C. 234, 35 S. E. 468, denying damages for mental suffering for nondelivery of telegram: "Meet me tomorrow, 12 o'clock;" *Morton v. Western U. Teleg. Co.* 130 N. C. 302, 41 S. E. 484, holding injury to person includes acts causing mental suffering; *Young v. Gormley*, 120 Iowa, 380, 94 N. W. 922, holding damages for mental suffering and humiliation recoverable in action for illegal arrest; *Western U. Teleg. Co. v. Raines*, 78 Ark. 551, 94 S. W. 700, holding telegraph company not liable for mental suffering from delay in telegram, unless it had notice of circumstances; *Cates v. Western U. Teleg. Co.* 151 N. C. 506, 24 L.R.A.(N.S.) 1293, 66 S. E. 592, holding the doctrine of "mental anguish" firmly established in our jurisprudence; *Green v. Western U. Teleg. Co.* 136 N. C. 496, 67 L.R.A. 988, 103 Am. St. Rep. 955, 49 S. E. 165, 1 A. & E. Ann. Cas. 349, holding courts of state recognize mental suffering apart from sickness and death; *Barnes v. Western U. Teleg. Co.* 27 Nev. 444, 65 L.R.A. 670, 103 Am. St. Rep. 776, 76 Pac. 931, 1 A. & E. Ann. Cas. 346, holding damages for mental suffering unaccompanied by physical injury are allowable; *Hancock v. Western U. Teleg. Co.* 137 N. C. 501, 69 L.R.A. 404, 49 S. E. 952, holding right to recover damages for purely mental anguish, not connected with or growing out of a physical injury, is the settled law of the state; *Woods v. Western Union Teleg. Co.* 148 N. C. 10, 128 Am. St. Rep. 581, 61 S. E. 653, holding anguish caused by reason of failure to deliver death message promptly will support action in damages; *Shaw v. Western U. Teleg. Co.* 151 N. C. 642, 66 S. E. 668, holding negligence in failing to deliver message, mental anguish and damages proximately caused thereby, support an action in damages; *Western U. Teleg. Co. v. Chouteau*, 28 Okla. 666, — L.R.A.(N.S.) —, 115 Pac. 879, holding that in absence of statute damages are not recoverable for mental anguish alone, caused by failure to deliver telegram; *Indiana R. Co. v. Orr*, 41 Ind. App. 430, 84 N. E. 32; *Harrison v. Western U. Teleg. Co.* 143 N. C. 151, 55 S. E. 435, 10 A. & E. Ann. Cas. 476,—holding argument that damages for mental suffering should not be allowed because there is no exact standard of measurement is without merit.

Cited in footnote to *Getty v. Peters*, 10 L. R. A. 464, which holds damages for mental anguish alone from delay in delivering telegram not recoverable.

Cited in notes (13 L.R.A. 860) on recovery for mental anguish alone; (24 Am. St. Rep. 308; 68 Am. St. Rep. 826) on damages for mental suffering.

Distinguished in *Chappell v. Ellis*, 123 N. C. 262, 68 Am. St. Rep. 822, 31 S. E. 709, denying that right to damages for mental suffering is applicable to action for wrongful seizure; *Sparkman v. Western U. Teleg. Co.* 130 N. C. 449, 41 S. E. 881, denying right of recovery for nondelivery of message intended to relieve sender of mental anxiety; *Hunter v. Western U. Teleg. Co.* 135 N. C. 472, 47 S. E. 745 (dissenting opinion), majority holding damages for mental suffering recoverable for failure to deliver message announcing death of second cousin.

Disapproved in effect in *Connell v. Western U. Teleg. Co.* 116 Mo. 50, 20 L. R. A. 178, footnote, p. 172, 38 Am. St. Rep. 575, 22 S. W. 345, denying liability to damages for nondelivery of message although company knew mental pain would result; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 79, 54 L. R. A. 851, 60 N. E. 1080, and *Newman v. Western U. Teleg. Co.* 54 Mo. App. 440, denying sender's right to damages for mental suffering alone resulting from nondelivery of telegram; *Butner v. Western U. Teleg. Co.* 2 Okla. 238, 4 Inters. Com. Rep. 771, 37 Pac. 1087, denying right to damages for mental pain alone for negligence in delivery of message announcing death of relative; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 442, 21 L. R. A. 814, footnote, p. 810, 14 So. 148; *Chapman v. Western U. Teleg. Co.* 88 Ga. 765, 17 L. R. A. 431, footnote, p. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Kester v. Western U. Teleg. Co.* 55 Fed. 604; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, footnote, p. 706, 6 C. C. A. 450, 13 U. S. App. 317, 57 Fed. 477; *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 466, 43 S. W. 965, denying right to damages for mental suffering for failure to deliver telegram announcing illness or death; *Gahan v. Western U. Teleg. Co.* 59 Fed. 433, and *Connelly v. Western U. Teleg. Co.* 100 Va. 57, 56 L. R. A. 667, 93 Am. St. Rep. 919, 40 S. E. 618, denying right to damages for mental pain for non-delivery of message, either at common law or under statute imposing penalties; *Rowan v. Western U. Teleg. Co.* 149 Fed. 552, holding mere negligence in failing to deliver a death message, which prevents attendance at funeral will not support an action in damages.

9 L. R. A. 674, *HUNT v. RUMSEY*, 83 Mich. 136, 47 N. W. 105.

Defenses against indorsee with notice.

Cited in *Conrad v. Manning*, 125 Mich. 79, 83 N. W. 1038, holding want of consideration of note defense against indorsee with notice.

Option contracts.

Cited in footnote to *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations.

Parol evidence as to consideration of note.

Cited in note (4 Eng. Rul. Cas. 208) on parol evidence as to consideration of note or bill of exchange.

9 L. R. A. 676, *HORN v. INDIANAPOLIS NAT. BANK*, 125 Ind. 381, 21 Am. St. Rep. 231, 25 N. E. 558.

Proof of publication of notice of sale.

Cited in *Curry v. State*, 131 Ind. 440, 31 N. E. 86, holding proof of publication sufficient, affidavit of printer showing first publication on 11th and third on 25th of month.

Fixtures.

Cited in *McFarlane v. Foley*, 27 Ind. App. 487, 87 Am. St. Rep. 264, 60 N. E. 357, upholding mechanic's lien on chandeliers, attached to ceilings with intention of annexing same to realty.

Cited in notes (19 L.R.A. 445) on effect of agreement to prevent fixtures from becoming part of realty; (84 Am. St. Rep. 892) on fixtures retaining by agreement the character of personal property.

Redemption by encumbrancer.

Cited in *Robertson v. Van Cleave*, 129 Ind. 224, 15 L. R. A. 71, 26 N. E. 899, holding that owner of sheriff's certificate on execution sale has right to redeem, as lienor, from subsequent foreclosure; *Scobey v. Kinningham*, 131 Ind. 554, 31

N. E. 355, holding that mortgagee, redeeming land from foreclosure of prior mortgage, may enforce lien; *Anderson v. Anderson*, 129 Ind. 574, 28 Am. St. Rep. 211, 29 N. E. 35, denying right of mortgagee buying land at foreclosure sale to enforce payment of balance of debt, after redemption by junior encumbrancer; *Merritt v. Gibson*, 129 Ind. 179, 15 L. R. A. 285, 27 N. E. 136 (dissenting opinion), majority holding that receiver may be appointed after foreclosure to act till right to redeem expires, land being inadequate to pay debt; *Keithley v. Interstate Bank & Trust Co.* 154 Ill. App. 447, to the point that party cannot redeem from his own sale in foreclosure.

Cited in footnote to *Fields v. Danehower*, 43 L. R. A. 519, which holds lien of mortgage not restored on redemption from foreclosure, though part of mortgage debt unpaid.

Cited in notes (35 L.R.A.(N.S.) 417) on right of mortgagee securing deficiency decree, to redeem.

Nature of tender of payment.

Cited in *Ætna L. Ins. Co. v. Stryker*, 38 Ind. App. 329, 78 N. E. 245, holding where lienholder has credits in his hands which should be applied in discharge of lien, complaint for equitable redemption offering to pay sum which shall be found due on taking of account is sufficient tender; *Bowen v. Gerhold*, 32 Ind. App. 617, 102 Am. St. Rep. 257, 70 N. E. 546, holding it was not necessary that complaint show a strict legal tender, kept good by bringing money into court.

Illegal foreclosure sale.

Cited in *Houston v. National Mut. Bldg. & L. Asso.* 80 Miss. 45, 92 Am. St. Rep. 565, 31 So. 540, upholding right of quitclaim grantee of mortgagor, after voidable foreclosure sale, to avoid conveyance of property to mortgagee.

Power of court to correct its records.

Cited in *Boonville Nat. Bank v. Blakey*, 166 Ind. 435, 76 N. E. 529, holding up to time the cause ceases to be in fieri it is within the power of the court to make its records speak the truth.

Waiver of false return.

Cited in note (38 L.R.A.(N.S.) 293) on recognition of return, or of decree rendered thereon, as affecting liability for making false return.

Rights of mortgagee in possession.

Cited in note (31 Am. St. Rep. 180) on duties and liabilities of mortgagee in possession.

9 L. R. A. 683, *ULLMAN v. DUNCAN*, 78 Wis. 213, 47 N. W. 266.

Rights of creditors at large as to encumbered property.

Cited in *Union Nat. Bank v. Oium*, 3 N. D. 208, 44 Am. St. Rep. 533, 54 N. W. 1034, denying that one holding pre-existing debt and attaching mortgaged chattels, has lien superior to mortgagee; *Nix v. Wiswell*, 84 Wis. 340, 54 N. W. 620, denying that statute requires refile of chattel mortgage to preserve force as against one purchasing within two years; *Weber v. Weber*, 90 Wis. 475, 63 N. W. 757, denying right of creditor at large to attack validity of judgments, for fraud; *Gregory v. Rosenkrans*, 78 Wis. 455, 47 N. W. 832, denying right of mortgagee and purchaser on foreclosure to assail lessee's interest for fraud; *Re Antigo Screen Door Co.* 59 C. C. A. 254, 123 Fed. 255, holding unfiled chattel mortgage validated as to general creditors by mortgage taking possession before filing of bankruptcy petition; *Eastman v. Parkinson*, 133 Wis. 391, 13 L.R.A.(N.S.) 932, 113 N. W. 649, holding in absence of fraud trustee in bankruptcy acquired no better right to impeach chattel mortgage than creditors of mortgagor had at the time of the adjudication in bankruptcy.

Record of chattel mortgage.

Cited in *Re Standard Teleph. & Electric Co.* 157 Fed. 110, on effect of failure to file affidavit of renewal of chattel mortgage.

9 L. R. A. 685, *SHEANON v. PACIFIC MUT. L. INS. CO.* 77 Wis. 618, 20 Am. St. Rep. 151, 46 N. W. 799.

Report of second appeal in 83 Wis. 511, 53 N. W. 878.

Accident and life insurance.

Cited in footnote to *Eury v. Standard Life & Acci. Ins. Co.* 10 L. R. A. 534, which holds notice necessary before forfeiting policy for nonpayment of order given for premium.

Cited in note (13 L. R. A. 264) on accident insurance.

— Extent of injury.

Cited in *Lord v. American Mut. Acci. Asso.* 89 Wis. 23, 26 L. R. A. 743, footnote, p. 742, 46 Am. St. Rep. 815, 61 N. W. 293, which holds it question for jury whether without amputation above wrist, entire loss of hand caused by injury; *Sneek v. Travellers' Ins. Co.* 81 Hun, 334, 30 N. Y. Supp. 881 (dissenting opinion), majority holding loss of fingers and portion of thumb and palm not "severance of entire hand," within policy.

Cited in note (14 Eng. Rul. Cas. 23) on rules for construing insurance policies as to extent of injury.

Distinguished in *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 122 Mich. 550, 48 L. R. A. 87, footnote p. 86, 80 Am. St. Rep. 598, 81 N. W. 326, denying right to whole amount of insurance for amputation of "limb (whole hand or foot)," on amputation of part of foot.

— What covered by policy.

Cited in *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 354, 17 L. R. A. 755, 30 N. E. 1013, holding insurer liable under accident policy for fall causing fatal attack of peritonitis to which insured was predisposed.

Cited in footnotes to *Stedman v. United States Mut. Acci. Asso.* 9 L. R. A. 617, which holds death from malignant pustule caused by contact with putrid animal matter, not accidental; *Humphreys v. National Ben. Asso.* 11 L. R. A. 564, which holds loss of sight of only eye covered by provision for loss of sight of both eyes; *Mogé v. Société De Bienfaisance St. Jean Baptiste*, 35 L. R. A. 736, which holds total blindness resulting from accident, covered by policy; *Dailey v. Preferred Masonic Mut. Acci. Asso.* 26 L. R. A. 171, which holds risk of getting on and off moving train by passenger conductor covered by accident policy; *Duran v. Standard Life & Acci. Ins. Co.* 13 L. R. A. 637, which holds injury by slipping, while hunting on Sunday, not covered by insurance policy; *Dozier v. Fidelity & C. Co.* 13 L. R. A. 114, which holds sun stroke not bodily injury sustained through external, violent and accidental means; *Travelers Ins. Co. v. McCarthy*, 11 L. R. A. 297, which holds accident insurance company not liable for intentional injury by third person; *Peterson v. Modern Brotherhood of America*, 67 L.R.A. 631, which holds a Pott's fracture not covered by policy providing indemnity in case of breaking of shafts of both bones between knee and ankle joints; *Supreme Lodge K. of P. v. Bradley*, 67 L.R.A. 770, which holds clause in policy relieving insurer from liability for death due to violation of any criminal law inapplicable where insured was shot while attempting in good faith to escape from a personal difficulty brought on by himself.

Cited in notes (13 L. R. A. 265) on intentional injuries within meaning of policy; (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

— Voluntary exposure to risk.

Cited in footnotes to *Follis v. United States Mut. Acci. Asso.* 28 L. R. A. 78, which holds attempt to cross bridge on ties voluntary exposure to danger; *Shevlin v. American Mut. Acci. Asso.* 36 L. R. A. 52, which holds jumping in dark from moving freight train unnecessary exposure to danger; *Wells v. New England Mut. L. Ins. Co.* 53 L. R. A. 327, which denies right to recover on policy for death of one voluntarily submitting to abortion to get rid of illegitimate child.

Cited in note (13 L. R. A. 266) on voluntary exposure to unnecessary risks.

— More hazardous occupation.

Cited in footnote to *Wilkey Casualty Co. v. Sheppard*, 47 L. R. A. 650, which holds barber not engaged in more hazardous occupation while hunting rabbits as incident to daily life.

Cited in note (10 L. R. A. 383) on conditions in policy as to increase of risk by change of occupation.

Construction of terms of contract.

Cited in *Wiedner v. Standard Life & Acci. Ins. Co.* 130 Wis. 19, 110 N. W. 246, holding the ordinary meaning of words employed in contract must be enforced; *Sisson v. Supreme Court of Honor*, 104 Mo. App. 60, 78 S. W. 297, holding term "accidentally" in a policy is held to be used in its ordinary and popular sense; *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 186, 121 Am. St. Rep. 782, 106 N. W. 168, holding if hand was injured so as to become useless as a hand, then the company became liable for its loss under the contract; *Fishburn v. Burlington & N. W. R. Co.* 127 Iowa, 500, 103 N. W. 481, holding word "destruction" used where nervous system was seriously impaired, as meaning an impairment which would mark condition through life; *Peterson v. Modern Brotherhood*, 125 Iowa, 571, 67 L.R.A. 635, 101 N. W. 289 (dissenting opinion), on liberal construction of insurance policies.

9 L. R. A. 688, *CARSTEN v. NORTHERN P. R. CO.* 44 Minn. 454, 20 Am. St. Rep. 589, 47 N. W. 49.

Wrongful treatment or ejection of passenger.

Cited in *Sloane v. Southern California R. Co.* 111 Cal. 677, 32 L. R. A. 195, 44 Pac. 320, holding action in tort for wrongful ejection from car maintainable, although no personal violence was used or displayed; *Pittsburgh, C. C. & St. L. R. Co. v. Berryman*, 11 Ind. App. 653, 36 N. E. 728, holding carrier bound to accept ticket issued by agent where authority has been revoked without notice to passenger; *Walker v. Price*, 9 Kan. App. 729, 59 Pac. 1102, holding carrier liable for expulsion of passenger having unlimited ticket; *Gleason v. Willamette Valley*, 71 Fed. 713, holding owner of vessel liable for refusal to furnish passenger first-class accommodations on return excursion ticket entitling him thereto.

Cited in footnotes to *Wardwell v. Chicago, M. & St. P. R. Co.* 13 L. R. A. 596, which authorizes ejection for refusal to make up deficiency of one from whom less than full fare was mistakenly received; *Gulf, C. & S. F. R. Co. v. Henry*, 16 L. R. A. 318, which holds that ticket, good for continuous passage, does not entitle holder to stop at intermediate points.

Cited in note (22 Am. St. Rep. 498) on ejection of passenger.

Distinguished in *Mahoney v. Detroit Street R. Co.* 93 Mich. 614, 18 L. R. A. 336, 32 Am. St. Rep. 528, 53 N. W. 793, holding that passenger on street car cannot recover for ejection, not having furnished conductor with evidence of payment of fare.

Assignability of tickets.

Cited in *Nichols v. Southern P. Co.* 23 Or. 130, 18 L. R. A. 59, 37 Am. St. Rep.

664, 31 Pac. 296, holding reduced rate partly used coupon ticket transferable, unless prohibited on face thereof; *Hoffman v. Northern P. R. Co.* 45 Minn. 53, 47 N. W. 312, holding return part of round-trip ticket transferable, in absence of contrary conditions; *The Willamette Valley*, 71 Fed. 713, holding holder entitled thereto when there is nothing on its face to indicate it is not transferable.

Cited in footnote to *Schubach v. McDonald*, 65 L.R.A. 136, which holds that assignee of nontransferable railroad ticket sold at reduced rate cannot acquire any assignable right therein.

Cited in notes (18 L.R.A. 55) on assignability of railroad ticket; (61 Am. St. Rep. 103) on same point.

Measure of damages.

Cited in *O'Neill v. Johnson*, 53 Minn. 442, 39 Am. St. Rep. 615, 55 N. W. 601, holding injury to business not proximate result of garnishment in action maliciously prosecuted.

Cited in note (36 Am. St. Rep. 850) as to when injuries to business are proximate result of tort.

— For wrongful expulsion.

Cited in *Lucas v. Michigan C. R. Co.* 98 Mich. 4, 39 Am. St. Rep. 517, 56 N. W. 1039, holding injury to feelings proper element of damages recoverable for wrongful ejection; *Serwe v. Northern P. R. Co.* 48 Minn. 81, 50 N. W. 1021, holding indignity and injury to health by exposure, proximately resulting from wrongful expulsion from railroad train proper elements of compensatory damages; *Willson v. Northern P. R. Co.* 5 Wash. 625, 32 Pac. 468, holding feeling of humiliation and disgrace suffered from wrongful expulsion from car, proper element of damages; *Hoffman v. Northern P. R. Co.* 45 Minn. 53, 47 N. W. 312, holding exemplary damages not recoverable for wrongful expulsion of passenger in absence of malice; *Zion v. Southern P. Co.* 67 Fed. 503, holding verdict of \$1,700 for wrongful expulsion, without violence, excessive.

9 L. R. A. 689, *MANCHESTER & L. R. CO. v. CONCORD R. CO.* 66 N. H. 100, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

Estoppel to plead invalidity of agreement under which property acquired.

Cited in *Abbott v. Wolfeborough Sav. Bank*, 68 N. H. 292, 38 Atl. 1050, holding bank receiving deposit, *ultra vires*, liable therefor; *Blue Mountain Forest Asso. v. Borrowe*, 71 N. H. 77, 51 Atl. 670, holding that in action for assessment, that delinquent stockholder cannot allege invalidity of agreement under which stock was acquired; *Lyon, P. Co. v. First Nat. Bank*, 29 C. C. A. 48, 55 U. S. App. 747, 85 Fed. 122, holding corporation receiving payment of debt out of note, cannot deny validity of accommodation indorsement; *International Trust Co. v. Davis & F. Mfg. Co.* 70 N. H. 119, 46 Atl. 1054, holding plea of *ultra vires* not available to corporation receiving proceeds of mortgage; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 89, 82 Fed. 135, and *Beach v. Wakefield*, 107 Iowa, 586, 76 N. W. 688, holding that corporation cannot avoid indebtedness, exceeding statutory limit, by pleading *ultra vires*; *Hunt v. Hauser Malting Co.* 90 Minn. 286, 96 N. W. 85, holding corporation receiving dividends on purchased bank stock estopped from pleading *ultra vires* to avoid liability as stockholder; *State L. Ins. Co. v. Nelson*, 46 Ind. App. 139, 92 N. E. 2, holding that corporation cannot, after performance by other party, set up its want of power to execute contract.

Cited in footnote to *Bath Gaslight Co. v. Claffy*, 36 L. R. A. 664, which denies right of lessee of corporation to escape payment of rent on ground that law *ultra vires*.

Cited in notes (20 L.R.A. 772) on estoppel of corporation to set up plea of *ultra vires*; (70 Am. St. Rep. 168, 174) on estoppel to plead invalidity of *ultra vires* contracts of private corporation.

Right of railroads to contract in relation to business.

Cited in *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 84, 4 Inters. Com. Rep. 451, 7 C. C. A. 78, 19 U. S. App. 36, 58 Fed. 72, upholding validity of association of railroads for mutual protection by establishing reasonable rates; *Hedding v. Gallagher*, 72 N. H. 386, 64 L. R. A. 817, 57 Atl. 225, Overruling 69 N. H. 662, 76 Am. St. Rep. 204, 45 Atl. 96, upholding right of railroad company to grant exclusive privilege to one person of entering premises to solicit carriage of baggage.

Cited in notes (45 L. R. A. 272, 273, 275) on restrictions on consolidation of parallel or competing railroads; (52 L. R. A. 377, 381, 388) on right of corporations to consolidate; (74 Am. St. Rep. 251) on railroad combinations constituting unlawful trusts.

Recovery of property transferred under *ultra vires* contract.

Cited in *Municipal Secur. Co. v. Baker County*, 39 Or. 399, 65 Pac. 369, holding property for which *ultra vires* county warrants issued, recoverable; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 164 Mass. 224, 49 Am. St. Rep. 454, 41 N. E. 268, holding funds expended on railroad by another under *ultra vires* traffic agreement, recoverable; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 151, 43 L. ed. 114, 18 Sup. Ct. Rep. 808, Modifying 65 Fed. 164, holding lessee liable for value of property transferred under lease *ultra vires* lessor's charter; *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* 127 Iowa, 360, 69 L.R.A. 973, 109 Am. St. Rep. 387, 101 N. W. 742, holding when a corporation has received benefits growing out of contract, such contract will be enforced against it, unless it be entered into through fraud or persuasive considerations of public policy be involved; *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* 38 Ind. App. 258, 70 N. E. 843 (dissenting opinion), on enforcement of *ultra vires* contract.

Rights under invalid contract.

Cited in *Edgerly v. Hale*, 71 N. H. 147, 51 Atl. 679, holding sums paid to sheriff in excess of legal fees, recoverable; *Turner v. Merchants Bank*, 126 Ala. 411, 28 So. 469, holding action not maintainable to cancel usurious mortgage, without tender of loan with legal interest; *Scott v. Scott*, 68 N. H. 9, 38 Atl. 567, holding illegal purpose of transfer of stock no defense to action on promise to retransfer to transferor's administratrix; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462, 44 Atl. 600, holding action maintainable on agreement to make restitution of funds acquired in illegal business; *Gilbert v. American Surety Co.* 61 L. R. A. 258, 57 C. C. A. 623, 121 Fed. 503, denying right to reclaim property sold to illegal combination after vendor has been in possession for three years as agent for vendee, on ground that contract for sale was in restraint of trade; *Overholt v. Burbridge*, 28 Utah, 418, 79 Pac. 561, holding a bucket shop cannot assert illegality as between seller and buyer when sued for a margin accepted to protect short sale of stock to a third person who paid the bucket shop for the seller; *Stockwell v. Stockwell*, 72 N. H. 70, 54 Atl. 701, holding that reconveyance may be decreed to one alleging conveyance for self-protection pending divorce suit; *Stewart v. Pierce*, 116 Iowa, 749, 89 N. W. 234, holding valid portion of separable contract enforceable.

Cited in notes (17 L.R.A. 115) on relief to less guilty party to illegal contract; (1 Eng. Rul. Cas. 438) on rights under invalid contract.

Disapproved in *Storz v. Finklestein*, 46 Neb. 580, 30 L. R. A. 645, 65 N. W. 195, denying right of recovery for beer furnished for illegal traffic.

Privilege of witness as to incriminating testimony.

Cited in note (75 Am. St. Rep. 344) on privilege of witness as to incriminating testimony.

9 L. R. A. 696, *HEROLD v. HEROLD*, 47 N. J. Eq. 210, 20 Atl. 375.

Divorce on ground of desertion.

Cited in *Van Wart v. Van Wart*, 57 N. J. Eq. 600, 41 Atl. 965, holding wife's desertion not obstinate, her husband standing by and not asking her to stay; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 202, 45 Atl. 261, holding decree of wilful desertion by wife not justified, where husband apparently approved of the separation; *Hall v. Hall*, 60 N. J. Eq. 470, 46 Atl. 866, holding husband not bound to make efforts at reconciliation after desertion by wife, where such efforts would be plainly unavailing; *Ogilvie v. Ogilvie*, 37 Or. 182, 61 Pac. 627, holding that in case of wilful desertion, injured party need not make first advances toward reconciliation; *Bordeaux v. Bordeaux*, 43 Mont. 111, 115 Pac. 25, holding that separation of husband and wife by mutual agreement will be presumed to continue until one or other revokes consent and seeks reconciliation; *Bacon v. Bacon*, 68 W. Va. 750, 70 S. E. 762, holding that husband cannot obtain divorce on ground of desertion where he has agreed to or acquiesces in wife's separation from him.

Cited in footnotes to *Williams v. Williams*, 14 L. R. A. 220, which holds wife's refusal to live with husband on condition that she shall not visit her mother not desertion preventing divorce for his desertion; *Hardie v. Hardie*, 25 L. R. A. 697, which holds divorce for desertion not authorized, by wife, on receiving blow from husband, leaving house without intent to remain away permanently; *Danforth v. Danforth*, 31 L. R. A. 608, which authorizes divorce for wife's desertion though husband visited her for a few days during statutory period; *Tirrell v. Tirrell*, 47 L. R. A. 750, which holds that mere payment of allowance to abandoned wife under order of court does not prevent divorce for desertion.

Cited in notes (119 Am. St. Rep. 621) on desertion as ground for divorce; (39 L.R.A.(N.S.) 1123) on effort by one spouse to induce other to return as condition of desertion.

Uncorroborated testimony of complainant.

Cited in *Hires v. Hires*, 61 N. J. Eq. 495, 48 Atl. 598, holding that divorce will not be decreed where any necessary element in proofs depends upon uncorroborated testimony of complainant; *Garcin v. Garcin*, 62 N. J. Eq. 205, 50 Atl. 71, refusing divorce for cruelty on uncorroborated testimony of wife.

9 L. R. A. 700, *FRIEDLANDER v. HEWITT*, 30 Neb. 783, 47 N. W. 83.

Right of tenant to remove fixtures.

Cited in *Fuller v. Brownell*, 48 Neb. 150, 67 N. W. 6; *Free v. Stuart*, 39 Neb. 226, 57 N. W. 991; *Morey v. Hoyt*, 62 Conn. 549, 19 L. R. A. 615, 26 Atl. 127; *Stevens v. Burnham*, 62 Neb. 673, 87 N. W. 546,—holding that without special agreement, right to remove severable fixtures under lease, perishes on expiration of tenancy; *Mueller v. Chicago, M. & St. P. R. Co.* 111 Wis. 303, 87 N. W. 239, holding lean-to, put up by servant on master's premises not removable by servant after discharge; *Zabriskie v. Greater America Exposition Co.* 67 Neb. 587, 62 L.R.A. 376, 93 N. W. 958, 2 A. & E. Ann. Cas. 687, holding failure to remove building during term of lease renders it the property of lessor though right to remove was reserved or the duty to remove was imposed.

Cited in footnotes to *Demby v. Parse*, 12 L. R. A. 87, which holds buildings erected by third person on land in life tenant's possession not removable against remainderman's objection; *Wright v. Du Bignon*, 57 L. R. A. 669, which denies right of tenant to remove fixtures annexed by him to freehold; *Baker v. McClurg*,

59 L. R. A. 131, which holds oven, engine, boilers and shafting put in building by tenant for use in bakery business, removable; *Radey v. McCurdy*, 67 L.R.A. 359, which holds insertion in renewal lease of provision entitling tenant to remove trade fixtures not necessary to enable him to remove such fixtures before termination of extended period; *Bergh v. Herring-Hall-Marvin Safe Co.* 70 L.R.A. 756, which holds boilers, engines, shafting, and heating apparatus placed in building by tenant to carry on business therein and capable of easy removal without injury to building removable as trade fixtures.

Cited in notes (10 L. R. A. 724) on what are fixtures; (64 L. R. A. 662) on tenant's duty to leave the premises in good condition, as to fixtures; (12 Eng. Rul. Cas. 226) on what constitutes a fixture removable by tenant.

Right of third person to remove fixtures.

Cited in *Free v. Stuart*, 39 Neb. 226, 57 N. W. 991, holding that chattel mortgagee of removable building on leased premises cannot remove same after tenant loses right of removal; *Morey v. Hoyt*, 62 Conn. 549, 19 L. R. A. 615, 26 Atl. 127, holding that creditor's right to tenant's fixtures, removable under lease, is gone after tenant is out of possession; *Little Valeria Gold Min. & Mill. Co. v. Lambert*, 15 Colo. App. 448, 62 Pac. 964, holding that attaching creditor has no greater right in fixtures than debtor tenant.

Cited in note (84 Am. St. Rep. 896) on right of execution creditors and purchasers at execution sale to remove fixtures.

Possession as notice of title.

Cited in *Whitham v. Lehmer*, 22 Okla. 635, 98 Pac. 351; *Ogden v. Garrison*, 82 Neb. 303, 17 L.R.A.(N.S.) 1136, 117 N. W. 714,—holding a purchaser chargeable with notice of tenant's rights when the latter is in actual possession of real estate at time it is sold.

Cited in notes (13 L.R.A.(N.S.) 65) on possession of land as notice of title; (11 Eng. Rul. Cas. 548) on possession as evidence of seisin.

9 L. R. A. 703, *INTERNATIONAL & G. N. R. CO. v. KEENAN*, 78 Tex. 294, 22 Am. St. Rep. 52, 14 S. W. 668.

Duty to inspect foreign cars.

Followed in *St. Louis, A. & T. R. Co. v. Putnam*, 1 Tex. Civ. App. 143, 20 S. W. 1002, holding railway company liable for injury to brakeman resulting from furnishing, without proper inspection, defective foreign car received from connecting line.

Cited in *Galveston, H. & S. A. R. Co. v. Nass*, 94 Tex. 258, 59 S. W. 870, holding railroad liable for failure to inspect foreign car; *Bennett v. Northern P. R. Co.* 2 N. D. 115, 13 L. R. A. 467, 49 N. W. 408, holding it railroad's duty to inspect foreign cars; *Missouri, K. & T. R. Co. v. Chambers*, 17 Tex. Civ. App. 492, 43 S. W. 1090, holding it question for jury whether ordinary care, required inside inspection of foreign car; *Kiley v. Rutland R. Co.* 80 Vt. 547, 68 Atl. 713, 13 A. & E. Ann. Cas. 269, holding the inspection of foreign cars as they come to a company is the receiving company's duty and the one appointed to perform this duty is representative of the company.

Cited in footnote to *Budge v. Morgan's L. & T. R. & S. S. Co.* 58 L. R. A. 333, which holds master failing to inspect foreign cars liable for consequences of defects discoverable by ordinary inspection.

Cited in notes (41 L.R.A. 103) on rule as to inspection of foreign cars; (93 Am. St. Rep. 307) on same point.

Delegation as excuse for nonperformance of duty.

Cited in *Texas & P. R. Co. v. Juneman*, 18 C. C. A. 397, 30 U. S. App. 541,

71 Fed. 943, holding railroad liable for injuries caused by crippled steer which employee fails to remove; *Burns v. Merchants & P. Oil Co.* 26 Tex. Civ. App. 226, 63 S. W. 1061, holding that duty of master to warn servant repairing cable, of danger from approaching engine, cannot be delegated; *Missouri, K. & T. R. Co. v. Hutchens*, 35 Tex. Civ. App. 344, 80 S. W. 415, holding negligence of one whose duties were the inspecting of doors and fastenings of cars and preparing cars for the truckman was the negligence of the company; *Missouri, K. & T. R. Co. v. Harris*, 45 Tex. Civ. App. 547, 101 S. W. 506, holding it the duty of company to use ordinary care to furnish a reasonably safe hand hold for use of one performing duties of brakeman, and such one has a right to presume such duty is performed.

Cited in note (98 Am. St. Rep. 301) on effect of delegation of duty to supply, repair, or inspect.

Who are fellow servants.

Cited in *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 344, 16 L. R. A. 343, 37 Am. St. Rep. 348, 52 N. W. 942, holding car inspector not brakeman's fellow servant.

Cited in footnotes to *Buck v. New Jersey Zinc Co.* 60 L.R.A. 453, which holds blacksmith in factory working link for chain to keep box of dump car in position, a fellow servant of one using car; *Lellis v. Michigan C. R. Co.* 70 L.R.A. 598, which holds car inspector and switchman fellow servants.

Cited in notes (18 L. R. A. 795) on who are fellow servants; (54 L. R. A. 103) on vice principalship as determined with reference to character of act causing injury; (75 Am. St. Rep. 596, 599, 621, 622), on who is a vice principal.

Liability to servant for injuries from defective appliances.

Cited in footnote to *Crawford v. United R. & E. Co.* 70 L.R.A. 489, which holds street car company liable for injury to employee by defect in car due to custom in leaving it for several hours of night in public street after inspection, without rule or regulation for guarding from negligent or wanton injury.

Cited in notes (98 Am. St. Rep. 292) on liability to servant for injuries due to defective machinery and appliances; (1 L.R.A.(N.S.) 671) on negligence of servant in sending out unsafe street cars causing injury to other servants.

9 L. R. A. 704, *EMMELUTH v. HOME BEN. ASSO.* 122 N. Y. 130, 25 N. E. 234.

Right of one to sue on contract with several.

Cited in *Brown v. Farnham*, 55 Minn. 36, 56 N. W. 352, holding that any creditor, party to composition agreement, may bring several action for breach; *Spencer v. Wabash R. Co.* 36 App. Div. 449, 55 N. Y. Supp. 948, holding that each member of theatrical company may maintain suit for breach of contract to carry baggage; *Fisher Textile Co. v. Perkins*, 100 App. Div. 21, 90 N. Y. Supp. 993 (dissenting opinion), on right of one to sue on joint contract.

9 L. R. A. 706, *BOWERY NAT. BANK v. WILSON*, 122 N. Y. 478, 19 Am. St. Rep. 507, 25 N. E. 855.

Validity of assignment.

Cited in footnote to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded.

Cited in note (21 L. R. A. 798) on constitutionality of statutes restricting contracts and business.

— Unearned salary of public officer.

Cited in *Re Worthington*, 141 N. Y. 12, 23 L. R. A. 98, footnote p. 97, 35

N. E. 929, Affirming 51 N. Y. S. R. 557, 22 N. Y. Supp. 19, holding assignment of commissions by executor before accounting, void; State use of Perkins v. Barnes, 10 S. D. 311, 73 N. W. 80, holding assignment of future salary of fees of district attorney, void; National Bank v. Fink, 86 Tex. 304, 40 Am. St. Rep. 883, 24 S. W. 256, holding lien upon assessor's future fees, to secure discounted note, void; Walker v. New York, 72 Misc. 100, 129 N. Y. Supp. 1059, holding that assignment by public officer of future salary is void; First Nat. Bank v. State, 68 Neb. 482, 94 N. W. 633, 4 A. & E. Ann. Cas. 423; Rosenstock v. New York, 101 App. Div. 11, 91 N. Y. Supp. 737, 34 N. Y. Civ. Proc. Rep. 18; People ex rel. Blair v. Grout, 45 Misc. 508, 92 N. Y. Supp. 742,—holding unearned salary of a public officer cannot be assigned or attached in satisfaction of a judgment; Oakeshott v. Smith, 104 App. Div. 389, 93 N. Y. Supp. 659, holding assignment by a public officer of his fees or salary, before earned, is void as against public policy; Serrill v. Wilder, 77 Ohio St. 358, 14 L.R.A.(N.S.) 988, 83 N. E. 486, holding an officer cannot make an assignment in advance of his fees or his salary; Stevenson v. Kyle, 42 W. Va. 233, 57 Am. St. Rep. 854, 24 S. E. 886, holding, as only past service is assignable, plaintiff must show that the service had been performed at date of assignment; Thompson v. Interborough Rapid Transit Co. 49 Misc. 103, 96 N. Y. Supp. 416, on right to assign unearned wages.

Cited in footnotes to State v. Williamson, 21 L. R. A. 827, which holds assignment of unearned salary by mail carrier, void; Edwards v. Randle, 36 L. R. A. 174, which holds sale by postmaster of postoffice furniture and agreement to resign office, void; White v. Cook, 57 L. R. A. 417, which holds void, sale by sheriff to deputy of all work of office in one district and compensation for same; Cansler v. Penland, 48 L. R. A. 441, which holds void, contract by which sheriff turns over tax list to another to collect taxes on specified commission.

Cited in note (5 L.R.A.(N.S.) 567) on validity of assignment of future wages or salary.

Distinguished in Bowery Bank v. Gerety, 153 N. Y. 412, 47 N. E. 793, Affirming 91 Hun, 540, 36 N. Y. Supp. 254, holding bank's remedy against accommodation indorsers not affected by taking void assignment of future fees of maker as public officer, as collateral; Blake v. Bolte, 10 Misc. 335, 31 N. Y. Supp. 124, holding that salary of judge may be reached by creditors after it is earned and paid.

9 L. R. A. 708, JEMISON v. CITIZENS SAV. BANK, 122 N. Y. 135, 19 Am. St. Rep. 482, 25 N. E. 264.

Notice of power or authority.

Approved in Nuting v. Kings County Elev. R. Co. 91 Hun, 257, 36 N. Y. Supp. 142, holding one dealing with agent of corporation bound to know extent of his authority; Parmelee v. Associated Physicians & Surgeons, 9 Misc. 460, 61 N. Y. S. R. 119, 30 N. Y. Supp. 250, holding one dealing with officer of corporation without inherent executive authority chargeable with notice of officer's apparent want of authority; Brisay v. Star Co. 13 Misc. 355, 35 N. Y. Supp. 99, holding one dealing with corporation bound to take notice of its powers and that ratification cannot make *ultra vires* act good; Warner v. Scoharie & S. Mut. F. Ins. Asso. 39 N. Y. S. R. 651, 15 N. Y. Supp. 632, holding member of mutual fire insurance association bound by its charter and that he must seek indemnity for loss in accordance with its rules and by-laws.

Cited in Kelley v. Chenango Valley Sav. Bank, 21 Misc. 243, 79 N. Y. S. R. 653, 45 N. Y. Supp. 651, holding depositor justified in relying on statement of treasurer authorized to receive and credit deposits in savings bank as to his

authority to deliver pass book showing deposits in national bank doing business in same room; *Scott v. Bankers' Union*, 73 Kan. 588, 85 Pac. 604; *Smoot v. Bankers Life Asso.* 138 Mo. App. 464, 120 S. W. 719,—holding persons dealing with corporation are bound to take notice of provisions for control of its affairs, of authority of its officers and agents, and especially of business in which it is engaged; *Sturdevant Bors. v. Farmers & M. Bank*, 69 Neb. 225, 95 N. W. 819, holding all the world bound to take notice of powers and purposes of a corporation in dealing with it; *Swindell v. Bainbridge State Bank*, 3 Ga. App. 368, 60 S. E. 13, holding notice of powers and legal capacity of a corporation is indisputably imputed to all persons contracting with it.

Cited in footnotes to *Heir v. Miller*, 63 L.R.A. 952, which holds that personal interest of cashier is sufficient to put his creditor upon inquiry as to cashier's power to enter amount of his individual debts as a credit on pass book of his creditor; *Bank of Ravenswood v. Wetzel*, 70 L.R.A. 306, which denies implied power of bank cashier to receive money for interest in advance on note owned by bank and to agree to extend time of payment thus discharging indorser.

Ultra vires contracts.

Approved in *Filon v. Miller Brewing Co.* 38 N. Y. S. R. 603, 15 N. Y. Supp. 57, holding guaranty of lease of saloon by brewing company *ultra vires*, although lessee agreed to buy his beer of the company; *Aaronson v. David Mayer Brewing Co.* 29 Misc. 292, 60 N. Y. Supp. 523, holding brewery company not liable on guaranty of its vice president of customer's lease of saloon where company had no knowledge of guaranty; *Kipp v. East River Electric Light Co.* 46 N. Y. S. R. 398, 19 N. Y. Supp. 387, holding contract of electric light company to pay funeral expenses of employee *ultra vires*, in absence of legal liability; *Brisay v. Star Co.* 13 Misc. 352, 35 N. Y. Supp. 99, holding offer of newspaper corporation to pay certain sum to heirs of person accidentally killed who may have upon his body copy of paper of current date, *ultra vires*; *Snow, C. & Co. v. Hall*, 19 Misc. 658, 44 N. Y. Supp. 427, holding that collection agency may recover from client for legal services incidental to its business that it caused to be rendered; *Kennan v. Rundle*, 81 Wis. 225, 51 N. W. 426, holding mutual insurance company without power, under statute, to take bond from policy holders to establish a guaranty fund; *McVity v. E. D. Albro Co.* 90 App. Div. 124, 86 N. Y. Supp. 144 (dissenting opinion), majority holding stockholder of foreign corporation entitled to have *ultra vires* contract rescinded; *Usher v. New York C. & H. R. R. Co.* 76 App. Div. 429, 78 N. Y. Supp. 508 (dissenting opinion), majority holding enforceable *ultra vires* contract for employment of injured servant for life against master having benefit thereof.

Cited in *Southern Mut. Aid Asso. v. Boyd*, 145 Ala. 175, 41 So. 164, holding a mutual benefit association can neither authorize nor use means not contemplated in the scheme of the association; *Kavanaugh v. Commonwealth Trust Co.* 64 Misc. 323, 118 N. Y. Supp. 758, holding speculative undertakings entered into by a trust company subject to hazard and contingency of gain or loss, are *ultra vires*; *Gause v. Commonwealth Trust Co.* 196 N. Y. 155, 24 L.R.A.(N.S.) 977, 89 N. E. 476, holding authority given a corporation to buy and sell stocks and bonds does not authorize it to indulge in hazardous promoting schemes in hopes of making large commissions; *Gause v. Commonwealth Trust Co.* 55 Misc. 117, 116 N. Y. Supp. 288, holding a contract *ultra vires* will nevertheless be enforced where either the person with whom corporation has contracted or corporation has received the full benefit.

Cited in note (70 Am. St. Rep. 158, 163, 166, 176) on *ultra vires* contracts of private corporation.

Estoppel to deny liability.

Cited in *Hutchison v. Rock Hill Real Estate & Loan Co.* 65 S. C. 61, 43 S. E. 295, holding corporation bound by action of secretary certifying that resolution, authorizing execution of bond and assignment of assets, had been passed.

Cited in notes (12 L. R. A. 168) on estoppel of corporation to deny liability on its contracts; (20 L. R. A. 768) on estoppel of corporation to set up plea of *ultra vires*.

Failure to disclose principal.

Cited in *Argersinger v. Macnaughton*, 114 N. Y. 539, 11 Am. St. Rep. 687, 21 N. E. 1022, holding failure of agent, contracting in his own name, to disclose name of principal renders agent personally liable.

Relation between bank and depositor.

Cited in *People ex rel. Newburgh Sav. Bank v. Peck*, 22 Misc. 483, 50 N. Y. Supp. 820, to point that relation between depositors and savings bank is that of debtor and creditor.

9 L. R. A. 711, *BOHAN v. PORT JERVIS GASLIGHT CO.* 122 N. Y. 18, 25 N. E. 246.

What are nuisances, and liability for same.

Approved in *Moon v. National Wall Plaster Co.* 31 Misc. 633, 66 N. Y. Supp. 33, holding owner of factory liable for injury due to discharge of dust from defective machine, although he used due diligence to obviate trouble; *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 812, 12 L. R. A. 56, 12 S. E. 1085, holding noise of furniture factory materially impairing physical comfort, a nuisance; *Pach v. Geoffroy*, 67 Hun, 404, 22 N. Y. Supp. 275, granting injunction restraining tenant from operating dynamo and machinery in such manner as to constitute a private nuisance to the damage of another tenant; *Campbell v. United States Foundry Co.* 73 Hun, 578, 26 N. Y. Supp. 165, holding foundry company liable for loss by fire due to its failure to maintain spark arrester on top of chimney; *Morris v. Barrisford*, 9 Misc. 15, 29 N. Y. Supp. 17, holding one who maintains insecure awning over highway, liable for injury thereby inflicted on pedestrian; *Davis v. Niagara Falls Tower Co.* 25 App. Div. 328, 49 N. Y. Supp. 554, holding maintenance of tower upon which ice forms and drops on adjoining building to its damage, unlawful; *Albee v. Chappaqua Shoe Mfg. Co.* 62 Hun, 224, 16 N. Y. Supp. 687, holding company liable for injury due to frightening horse in highway by steam factory whistle; *Booth v. Rome, W. & O. R. Co.* 44 N. Y. S. R. 11, 17 N. Y. Supp. 336, holding railroad liable for injury to house caused by repeated concussions in blasting; *Sullivan v. Dunham*, 161 N. Y. 298, 47 L. R. A. 719, 76 Am. St. Rep. 274, 55 N. E. 923, holding one exploding blast on his own land without negligence, whereby piece of wood falls on traveler in highway, liable for injury inflicted; *Bates v. Holbrook*, 171 N. Y. 474, 64 N. E. 181, holding structures erected by subcontractors for carrying on work, nuisance when needlessly erected near hotel to proprietor's damage; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 7, 55 N. Y. Supp. 192, holding that franchise to manufacture gas which does not specify place or process of manufacture, does not relieve from liability for conducting its business so as to constitute nuisance.

Cited in *Reilly v. Erie R. Co.* 72 App. Div. 481, 76 N. Y. Supp. 620 (dissenting opinion), majority holding maintenance of dynamite magazine less than 1,000 feet from dwelling house private nuisance rendering owner liable to injury due to explosion; *American Ice Co. v. Catskill Cement Co.* 43 Misc. 230, 88 N. Y. Supp. 455, holding owner of ice in river entitled to enjoin soot nuisance during harvesting season; *Lonoke v. C. R. I. & P. R. Co.* 92 Ark. 551, 123 S. W.

395, holding a railroad constructed across and along the public streets under authority of law is not per se a nuisance; *Durfey v. Thalheimer*, 85 Ark. 553, 109 S. W. 519, holding a livery stable so built and used as to interfere with comfort of occupants of adjoining premises may be abated as a nuisance; *Judson v. Los Angeles Suburban Gas Co.* 157 Cal. 171, 26 L.R.A.(N.S.) 183, 106 Pac. 581, 21 Ann. Cas. 1247, holding that operation of gas plant in such manner that smoke, odor and noise produced by it interfere with comfortable enjoyment of neighboring property, may constitute nuisance; *Franklin v. Peoples' Heat & Light Co.* 32 N. S. 49, holding gas works, contaminating and polluting the air in the owner's house and in and around his gardens, so as to substantially interfere with the use and enjoyment of his property, constituted a nuisance; *Czarnecki v. Bolen-Darnell Coal Co.* 91 Ark. 61, 120 S. W. 376, holding a burning dump-pile from a mine constituted a nuisance; *Bentley v. Empire Portland Cement Co.* 48 Misc. 461, 96 N. Y. Supp. 831, holding a cement plant, located within 1000 feet of a dwelling, so situated as to cover the dwelling with a fine dust whenever wind blew in a certain direction constituted a nuisance; *Judson v. Los Angeles Suburban Gas Co.* 157 Cal. 171, 26 L.R.A.(N.S.) 187, 106 Pac. 581, holding it sufficient if the odors, sounds and smoke were offensive to the senses; *Bradbury Marble Co. v. Laclede Gaslight Co.* 128 Mo. App. 108, 106 S. W. 594, holding, as a general proposition, neither a private person or a corporation has right to erect and maintain a nuisance, which has effect of depriving adjoining proprietor of beneficial use of his land; *Bowman v. Humphrey*, 132 Iowa, 237, 6 L.R.A.(N.S.) 1112, 109 N. W. 714, 11 A. & E. Ann. Cas. 131, holding it no answer to existence of a nuisance to say that it is a perfectly legitimate enterprise, or one of great and general convenience and benefit; *Vernon v. Wedgeworth*, 148 Ala. 493, 42 So. 749, on sufficiency of pleadings to show cause of action for nuisance; *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 64 Misc. 212, 118 N. Y. Supp. 1027, on wrongs constituting a public nuisance; *Fonda v. Sharon Springs*, 70 Misc. 104, 128 N. Y. Supp. 147, holding that discharge of sewage by municipality into natural watercourse, so that stream is rendered unfit for cattle to drink, and at times causing stench constitutes nuisance; *Collar v. Ulster & D. R. Co.* 72 Misc. 279, 131 N. Y. Supp. 56, to the point that land owner is not obliged to submit to unreasonable use by railroad of its property, consisting of discharge of smoke, soot, cinders, ashes and dust; *McCarty v. Natural Carbonic Gas Co.* 189 N. Y. 46, 13 L.R.A.(N.S.) 468, 81 N. E. 549, 12 A. & E. Ann. Cas. 840, holding the maxim "sic utere tuo ut alienum non laed" as the foundation of rule that one is liable in making an unreasonable use of his own premises to the material injury of his neighbor's premises; *Rochester v. Macauley-Fien Mill. Co.* 199 N. Y. 212, 32 L.R.A.(N.S.) 558, 92 N. E. 641, to the point that courts may enjoin persons from so using their property as to unreasonably interfere with rights of others; *Thornton v. Dow*, 60 Wash. 633, 32 L.R.A.(N.S.) 976, 111 Pac. 899, holding that nuisance includes almost all wrongs interfering in any way with personal rights of every kind.

Cited in footnotes to *Wylie v. Elwood*, 9 L. R. A. 726, which holds coal sheds on railroad lands, a nuisance; *People v. Detroit White Lead Works*, 9 L. R. A. 722, which holds conduct of business with which smoke, soot, and noxious odors and gases inseparably connected, a nuisance; *Robb v. Carnegie Bros. & Co.* 14 L. R. A. 329, which holds operator of coke oven on own land liable for injuries to adjoining owners; *Fogarty v. Junction City Pressed Brick Co.* 18 L. R. A. 756, which holds generation of gas destroying growing crops on adjacent land, a nuisance; *Frost v. Berkeley Phosphate Co.* 26 L. R. A. 693, which holds owner of factory liable for damage by fumes; *Swift v. Broyles*, 58 L. R. A. 390, which sustains right to compensation for discomfort from noxious gases, etc., from

chemical works on adjoining premises; *Susquehanna Fertilizer Co. v. Malone*, 9 L. R. A. 737, which holds business of manufacturing sulphuric acid and fertilizer, a nuisance; *Hauek v. Tide Water Pipe-Line Co.* 20 L. R. A. 642, which holds pipe-line proprietor absolutely liable for escape of oil; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L. R. A. 544, which denies to telephone company, injunction against operation of electric railway; *Rowland v. Miller*, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants;" *Haggart v. Stehlin*, 22 L. R. A. 577, which holds saloon in residence district previously free from such business, a nuisance; *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds noise from boiler works causing physical discomfort to occupants of dwelling, enjoined; *Sullivan v. Jones & L. Steel Co.* 66 L.R.A. 712, which holds that manufacturer of pig iron will be enjoined from changing manner of operating furnaces if result is to cast ore dust on neighboring residential property in such quantity as to destroy homes or other property there situated; *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Cited in notes (12 L. R. A. 54) on annoyance by noise as nuisance; (12 L. R. A. 577) on damages for pollution of water of stream; (15 L.R.A.(N.S.) 748) on right of state to enjoin public nuisance which is also a crime; (20 L.R.A. (N.S.) 467, 469, 470, 471) on gas plant as nuisance; (23 Am. St. Rep. 174) on defenses to action for nuisance; (42 Am. St. Rep. 541) on liability of railroad for fires caused by its locomotives; (107 Am. St. Rep. 201) on what are public nuisances; (118 Am. St. Rep. 870, 871) on actions against two or more persons creating or maintaining a nuisance; (25 Eng. Rul. Cas. 160) on liability for maintenance of nuisance.

Distinguished in *Fifth Ave. Coach Co. v. New York*, 58 Misc. 406, 111 N. Y. Supp. 759, holding the exhibiting of signs advertising goods for sale in colors cannot be restrained on ground of being a nuisance.

Extent of damage.

Approved in *Rosecoe Lumber Co. v. Standard Silica Cement Co.* 62 App. Div. 422, 70 N. Y. Supp. 1130, holding that owner need not be driven from dwelling by nuisance, but that it is enough if his enjoyment of light and property be rendered uncomfortable; *Emigrant Mission Committee v. Brooklyn Elev. R. Co.* 20 App. Div. 599, 47 N. Y. Supp. 344, holding injury from ashes and cinders dumped from engines in yards established without statutory authority, element of past damage only, but not fee damage.

Cited in *Jones v. Royster Guano Co.* 6 Ga. App. 513, 65 S. E. 361, holding jury are left to say what damages should be received, in view of the discomfort and inconvenience.

Distinguished in *Farrell v. New York Steam Co.* 23 Misc. 726, 53 N. Y. Supp. 55, denying injunction to restrain operation of steam plant from which comes occasional disturbance, heat, odors, or cinders not due to negligence or amounting to nuisance.

Statutory authority.

Approved in *Morton v. New York*, 140 N. Y. 212, 22 L. R. A. 243, 35 N. E. 490, holding that legislative authority to shelter actual nuisance must be express or clearly implied; *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 273, 53 N. E. 44, holding that railroad cannot maintain bridge obstructing highway in absence of statutory authority expressed or clearly implied; *Garvey v. Long Island R. Co.* 159 N. Y. 331, 70 Am. St. Rep. 550, 54 N. E. 57, holding that statutory authority to operate steam surface rail-

road does not authorize maintenance of turn-table in immediate vicinity of inhabited dwellings; *Spring v. Delaware, L. & W. R. Co.* 88 Hun, 388, 34 N. Y. Supp. 810, holding railroad without right to maintain structure for coaling engines opposite dwelling house in absence of statutory authority expressed or clearly implied; *Fries v. New York & H. R. Co.* 169 N. Y. 277, 62 N. E. 358, holding railroad changing manner of operation from depressed cut to elevated viaduct in pursuance of statutory mandate not liable for remote or consequential damages to abutting owner; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 319, 25 L. R. A. 169, 24 S. W. 591, holding that statute making railroad liable for fires set by its locomotives does not impair obligation of contract in its charter authorizing use of steam power; *Kobbe v. New Brighton*, 20 Misc. 478, 45 N. Y. Supp. 777, holding legislature without power to authorize village to maintain crematory to the injury of private property; *Kobbe v. New Brighton*, 23 App. Div. 245, 48 N. Y. Supp. 990, holding village without right to maintain crematory constituting nuisance, in absence of statutory authority expressed or clearly implied; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 6, 58 L. R. A. 502, 64 N. E. 745, holding that public character of electric illuminating company's business does not entitle it to maintain nuisance; *Butler v. White Plains*, 59 App. Div. 36, 69 N. Y. Supp. 193, holding that statutory authority to justify pollution of stream with sewage must be express or unquestionably implied; *Hill v. New York*, 139 N. Y. 502, 34 N. E. 1090, holding city liable for consequential injuries due to dumping garbage from pier unless acting under statutory authority, expressly given or clearly implied.

Cited in *Welde v. New York & H. R. Co.* 168 N. Y. 602, 61 N. E. 554, raising but not deciding question whether abutting owner has right of action for maintenance of viaduct structure in presence of statutory authority; *Sadlier v. New York*, 40 Misc. 81, 81 N. Y. Supp. 308, holding owner entitled to compensation for injury to property by bridge authorized by legislature without provision for compensation for injuries; *Townsend v. Norfolk R. & Light Co.* 105 Va. 45, 4 L.R.A. (N.S.) 96, 115 Am. St. Rep. 842, 52 S. E. 970, 8 A. & E. Ann. Cas. 558; holding there must be something more than mere authority to do the act to relieve a public service corporation from liability for creating nuisance; *Missouri, K. & T. R. Co. v. Anderson*, 36 Tex. Civ. App. 132, 81 S. W. 781, holding fact that the business is a lawful one, and is properly and carefully conducted, is no defense where it occasions a nuisance; *People v. Transit Development Co.* 131 App. Div. 176, 115 N. Y. Supp. 297, holding the act, for the doing of which legislative authority is claimed, must have been within the contemplation of the legislature, and either expressly or by necessary implication permitted by it; *Sadlier v. New York*, 104 App. Div. 84, 93 N. Y. Supp. 579, holding fact that legislature authorized the bridge, and that it was constructed within such authority, does not relieve city from liability for trespass in the administration of it; *Junction City Lumber Co. v. Sharp*, 92 Ark. 542, 123 S. W. 370, holding the right to build and maintain that which is lawful on the owners land, must be exercised so it does not destroy right of neighboring owners to the enjoyment of their property; *Stubley v. Allison Realty Co.* 124 App. Div. 167, 108 N. Y. Supp. 759, holding owner in erecting a building is not liable for injuries to others, except in cases of negligence, or when the damages is necessary consequences or springs from the construction, when owner is liable for a nuisance.

Cited in notes (1 L.R.A.(N.S.) 109) on effect of legislative authority upon liability for private nuisance; (16 Eng. Rul. Cas. 582; 22 Eng. Rul. Cas. 113) on legislative authority as justification for nuisance.

Distinguished in *Bennett v. Long Island R. Co.* 181 N. Y. 438, 74 N. E. 418, 34 N. Y. Civ. Proc. Rep. 299, holding a railroad is not liable to purchasers of land abutting on highway for damages caused by construction of a viaduct thereafter,

where railroad right of way was purchased from same party and before purchases by abutting owners.

Due process of law.

Cited in *Forster v. Scott*, 136 N. Y. 584, 18 L. R. A. 547, 32 N. E. 976, holding that statute denying compensation for building erected after filing map of proposed street deprives owner of property without just compensation; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 328, 25 L. R. A. 172, 24 S. W. 591, holding that statute making railroad liable for fires set by locomotives does not take its property without due process of law or contrary to law.

9 L. R. A. 722, *PEOPLE v. DETROIT WHITE LEAD WORKS*, 82 Mich. 471, 46 N. W. 735.

What constitutes nuisance.

Cited in *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 812, 12 L. R. A. 56, 12 S. E. 1085, holding noise of factory materially impairing comfort of neighborhood, public nuisance.

Cited in footnote to *Wylie v. Elwood*, 9 L. R. A. 726, which holds coal sheds on railroad lands a nuisance; *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds noise from boiler works, causing physical discomfort to occupants of dwelling, enjoinable.

Cited in note (23 Am. St. Rep. 307) on what are nuisances.

Necessity as excuse for nuisance.

Cited in *Austin v. Augusta Terminal R. Co.* 108 Ga. 712, 47 L. R. A. 772, 34 S. E. 852, by Lumpkin and Lewis, JJ., dissenting, who hold company liable for diminution in value of property through noise, smoke, and vibration incident to operation of railroad.

Previous establishment as excuse for nuisance.

Cited in *State ex rel. Board of Health v. Lederer*, 52 N. J. Eq. 677, 29 Atl. 444, holding that establishment of offensive business in uninhabited locality will not excuse continuance after occupation; *United States v. Luce*, 141 Fed. 410, holding mere fact that one voluntarily "comes to a nuisance" will not preclude him from complaining of and obtaining relief against it; *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 79, 42 S. E. 315, holding if terminal yard is a nuisance because located near dwellings, it would be a nuisance wherever put, as soon as owners of adjacent land built houses on their land; *Bowman v. Humphrey*, 132 Iowa, 238, 6 L.R.A.(N.S.) 1113, 109 N. W. 714, 11 A. & E. Ann. Cas. 131, holding imprudence or negligence in moving into the sphere of the injurious effects of the nuisance will not serve to avoid claim for damages; *Perrin v. Crescent City Stockyard & Slaughterhouse Co.* 119 La. 98, 43 So. 938, 12 A. & E. Ann. Cas. 903, holding existence of similar nuisance is no defense.

Cited in note (53 L. R. A. 894) on prescriptive right to maintain public nuisance.

— When business must be stopped.

Cited in *Northwood v. Barber Asphalt Paving Co.* 126 Mich. 288, 54 L. R. A. 456, footnote p. 454, 85 N. W. 724, holding that where no means devisable to prevent nuisance, business must be discontinued.

Distinguished in *Ballentine v. Webb*, 84 Mich. 47, 13 L. R. A. 324, 47 N. W. 485, holding slaughterhouse not abatable at instance of newcomers into neighborhood where not injurious to health.

Liability of officers for acts of corporation.

Cited in *Overland Cotton Mill Co. v. People*, 32 Colo. 269, 105 Am. St. Rep. 74, 75 Pac. 924, holding an officer of a corporation, through whose act the cor-

poration commits an offense against the laws of the state, is himself guilty of the same offense; *State v. Ross*, 55 Or. 466, — L.R.A.(N.S.) —, 104 Pac. 596, holding that officers of corporation having state money on deposit are personally liable for its conversion; *United States v. MacAndrews & F. Co.* 149 Fed. 832, holding under the statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, both may be so charged in the same indictment.

Cited in note (28 L. R. A. 427) on personal liability of officers of corporation for its torts or negligence.

Distinguished in *Union Pacific Coal Co. v. United States*, 97 C. C. A. 578, 173 Fed. 745, holding an agent of a corporation cannot alone form an unlawful combination between himself and his corporation by his thoughts and acts within scope of his agency, without knowledge or participation of other agents or officers of corporation.

Validity of ordinances coincident with general law.

Cited in *State v. Fourcade*, 45 La. Ann. 726, 40 Am. St. Rep. 249, 13 So. 187, holding ordinance not invalidated by existence of state statute relating to same subject; *Hood v. Von Glahn*, 88 Ga. 408, 14 S. E. 564, holding that existence of general law does not prevent delegation by legislature of power to enact municipal ordinance on same subject.

Cited in footnotes to *Ogden v. Madison*, 55 L. R. A. 506, which sustains city's power to impose penalty for keeping house of ill fame through misdemeanor under state statute; *Judy v. Lashley*, 57 L. R. A. 414, which denies power to make punishable by city ordinance, carrying of deadly weapons made punishable by state law.

Cited in notes (110 Am. St. Rep. 153; (17 L.R.A.(N.S.) 53) on power of municipality to punish act also an offense under state law.

Municipal power over nuisances.

Cited in *Glucose Ref. Co. v. Chicago*, 138 Fed. 213, holding city of Chicago invested with the power to declare what is a nuisance, and to abate the same; *Re Jones*, 4 Okla. Crim. Rep. 81, 31 L.R.A.(N.S.) 552, 140 Am. St. Rep. 655, 109 Pac. 570, holding that municipality may declare billiard and pool halls nuisances and forbid them.

Cited in notes (36 L. R. A. 603, 611) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 324) on municipal power over nuisances affecting safety, health, and personal comfort; (41 L. R. A. 326) on injunctions by municipal corporations against nuisances affecting public morals, peace, good order, and health and safety; (39 L. R. A. 552) on municipal control over smoke as public nuisance; (38 L. R. A. 646) on municipal power over nuisances relating to trade or business.

Nuisances; remedy.

Cited in *Grand Rapids v. Weiden*, 97 Mich. 85, 56 N. W. 233, holding bill to abate nuisance proper form of procedure; *Detroit Realty Co. v. Barnett* (*Detroit Realty Co. v. Oppenheim*) 156 Mich. 389, 21 L.R.A.(N.S.) 588, 120 N. W. 804, holding equity has jurisdiction to abate a saloon and dancing hall, although the nuisance is, also a breach of the criminal law.

Cited in footnote to *Sullivan v. Jones & L. Steel Co.* 66 L.R.A. 712, which holds that manufacturer of pig iron will be enjoined from changing manner of operating furnaces if result is to cast ore dust on neighboring residential property in such quantity as to destroy homes or other property there situated.

Cited in notes (118 Am. St. Rep. 870) on actions against two or more per-

sons creating or maintaining a nuisance; (133 Am. St. Rep. 778; 7 Eng. Rul. Cas. 483) on indictment against corporation for nuisance.

— Proof.

Cited in *Micks v. Mason*, 145 Mich. 216, 11 L.R.A.(N.S.) 659, 108 N. W. 707, 9 A. & E. Ann. Cas. 291, holding decision in a criminal case for violation of a city ordinance is not *res adjudicata* and conclusive as to bill subsequently brought for injunction to remove building in question as a nuisance.

“Vicinity.”

Cited in *Mann v. Pere Marquette R. Co.* 135 Mich. 220, 97 N. W. 721, holding entire territory covered by lumber piles situated near tracks was in the vicinity of the tracks.

Criminal responsibility of corporations.

Cited in note (2 Brit. Rul. Cas. 245) on criminal responsibility of corporations.

9 L. R. A. 726, *WYLIE v. ELWOOD*, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 570.

What constitutes a nuisance.

Cited in *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 812, 12 L. R. A. 56, 12 S. E. 1085, holding factory a nuisance, if it materially impairs ordinary comfort of ordinary normal persons; *Bielman v. Chicago, St. P. & K. C. R. Co.* 50 Mo. App. 154, holding stockyards a nuisance where proximity to dwelling necessarily produces discomfort and destroys reasonable enjoyment of same.

Cited in footnotes to *People v. Detroit White Lead Works*, 9 L.R.A. 722, which holds business with which smoke, soot, and noxious odors and gases inseparably connected, a nuisance; *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Cited in note (107 Am. St. Rep. 205, 215, 232) on what are public nuisances.

Distinguished in *Flood v. Consumers Co.* 105 Ill. App. 566, refusing to enjoin construction of building where bill does not show, beyond doubt, structure to be a nuisance.

Remedy for special injury by nuisance.

Cited in *Crane Co. v. Stammers*, 83 Ill. App. 332, holding individual action for loss of eye available to party injured by public smoke and cinder nuisance; *Curran v. McGrath*, 67 Ill. App. 567, sustaining action by owner for depreciation in value of property though surrounding property similarly affected by noise, vibration, etc.; *Kuhn v. Illinois C. R. Co.* 111 Ill. App. 328, holding action maintainable for damages for injury to merchandise from smoke, soot, etc., escaping from roundhouse; *Choctaw, O. & G. R. Co. v. Hamilton*, 182 Fed. 122, holding that abutting owner cannot recover damages for obstruction of street where it does not deprive him of access to it through other streets; *Hoyt v. McLaughlin*, 250 Ill. 447, 95 N. E. 464, holding that individual specially affected by public nuisance may enjoin same, although others in vicinity are also affected; *Swain v. Chicago, B. & Q. R. Co.* 160 Ill. App. 537, holding that person sustaining special injury from public nuisance he may maintain action for damages therefor; *Roesler & H. Chemical Co. v. Doyle*, 73 N. J. L. 524, 64 Atl. 156, holding one suffering special injury from a public nuisance may maintain an action; *Wente v. Commonwealth Fuel Co.* 232 Ill. 533, 83 N. E. 1049, holding question whether a hopper was a public nuisance should be determined in an action at law, in any case where the legal right and the injury are not clearly established; *Savannah, F. & W. R. Co. v. Parish*, 117 Ga. 897, 45 S. E. 280, holding one suffering sickness or depreciation of property value by reason of stagnant pool may

maintain action against one maintaining it, though such pool constitutes a public nuisance; *Pedrick v. Raleigh & P. S. R. Co.* 143 N. C. 498, 10 L.R.A.(N.S.) 559, 55 S. E. 877, holding courts act with great caution in interfering at suit of private party to enjoin a proposed public nuisance.

Cited in footnotes to *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds enjoined, noise of boiler factory causing physical discomfort and annoyance to occupants of dwelling; *Farmers' Co-Op. Mfg. Co. v. Albemarle & R. R. Co.* 29 L. R. A. 700, which authorizes private action for public nuisance by one having common misfortune with class of persons, but not with entire public; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* 33 L. R. A. 542, which denies steamboat owner's right of action for obstructing navigation of river; *Griffith v. Holman*, 54 L. R. A. 178, which denies private individual's right to abate public nuisance consisting of fence across navigable stream; *Hill v. McBurney Oil & Fertilizer Co.* 52 L. R. A. 398, which authorizes injunction against blowing of loud factory whistle at unreasonable hours in populous community; *Jenkins v. Pennsylvania R. Co.* 57 L. R. A. 309, which sustains right to more than nominal damages for emission of smoke from locomotives denser than required; *Reyburn v. Sawyer*, 65 L.R.A. 931, which sustains right of owner of island to injunction against maintenance of fishing nets in adjoining waters so as to obstruct navigation; *Sullivan v. Jones & L. Steel Co.* 66 L.R.A. 712, which holds that manufacturer of pig iron will be enjoined from changing manner of operating furnaces if result is to cast ore dust on neighboring residential property in such quantity as to destroy homes or other property there situated; *Redd v. Edna Cotton Mills*, 67 L.R.A. 983, which holds that blowing of factory whistle will not be enjoined until fact of nuisance has been established; *Smith v. St. Paul, M. & M. R. Co.* 70 L.R.A. 1018, which denies liability to make compensation for injuries to neighboring property as necessary result of skilful operation of railroad caused by usual noises, fumes, and odors attendant thereon.

Cited in notes (28 Am. St. Rep. 198) on injunction against nuisance at request of private person; (124 Am. St. Rep. 595) on abatement of public nuisance by private person without suit; (1 Eng. Rul. Cas. 599) on remedy of special sufferer for injury suffered in common with public generally.

Distinguished in *Illinois C. R. Co. v. Anderson*, 73 Ill. App. 626, holding grant of right of way to railroad with all necessary appurtenances, bars action by subsequent purchaser for damages caused by soot and noise.

Evidence of special injury by nuisance.

Cited in *Litchfield v. Whitenack*, 78 Ill. App. 367, holding evidence of effect of sewer odors upon family and visitors, admissible to show extent and character of injuries and power of nuisance to produce them; *Belvidere Gaslight & Fuel Co. v. Jackson*, 81 Ill. App. 429, holding condition of neighboring wells admissible to show extent, character, and production of injury by operation of gas plant; *Crane Co. v. Stammers*, 83 Ill. App. 333, holding evidence of injury to others by smoke and cinders competent to prove that nuisance might inflict injury complained of; *N. K. Fairbank Co. v. Bahre*, 112 Ill. App. 291, holding testimony of others than plaintiff admissible to prove that odors complained of were incapable of producing discomfort and sickness.

Damages covered by payment for right of way.

Cited in *Atterbury v. Chicago, I. & St. L. S. L. R. Co.* 134 Ill. App. 332, holding where right of way is conveyed to railroad by deed it will be presumed that all damages resulting to balance of grantor's land were included in consideration paid.

Effect of legislative authority on liability for nuisance.

Cited in note (1 L.R.A.(N.S.) 50, 76) on effect of legislative authority upon liability for private nuisance.

9 L. R. A. 731, *HOPKINS v. ENSIGN*, 122 N. Y. 144, 25 N. E. 306.

Agreements to refrain from bidding.

Cited in *De Baun v. Brand*, 61 N. J. L. 628, 41 Atl. 958, Reviewing 60 N. J. L. 287, 37 Atl. 726, upholding agreement not to bid at sale of testator's property in consideration of promise to pay legacy; *Barnes v. Morrison*, 97 Va. 380, 34 S. E. 93, holding agreement to make joint bid at judicial sale, without intention to suppress competition, valid; *Gulick v. Webb*, 41 Neb. 712, 43 Am. St. Rep. 720, 60 N. W. 13, upholding agreement by judgment lienors to make joint bid.

Cited in notes (20 L.R.A. 545, 552) on effect of preventing or checking bids on validity of sales at auction; (38 L.R.A.(N.S.) 722) on validity of agreement to purchase property at judicial sale for joint benefit; (131 Am. St. Rep. 486) on chilling bids and stifling competition at auction sales.

Service of process upon foreign corporation.

Disapproved in *Venner v. Denver Union Water Co.* 40 Colo. 241, 122 Am. St. Rep. 1036, 90 Pac. 623, holding fact that foreign corporation doing business in the state appoints an agent upon whom service of process may be had as required by the constitution of state, does not limit service to that agent alone.

9 L. R. A. 735, *ALEXANDER v. WILCOX*, 30 Neb. 793, 47 N. W. 81.

Adverse possession.

Cited in *Black v. Leonard*, 33 Neb. 747, 51 N. W. 126, and *Alexander v. Meadville*, 33 Neb. 221, 49 N. W. 1123, holding that adverse possession of lands as owner for ten years defeats prior tax-deed lien; *Meyer v. Lincoln*, 33 Neb. 570, 18 L. R. A. 150, 29 Am. St. Rep. 500, 50 N. W. 763, holding that full adverse possession of portion of city street for ten years vests title; *Postal v. Martin*, 4 Neb. (Unof.) 540, 95 N. W. 8, holding open, exclusive, notorious, and adverse possession of a strip of ground by the public as a highway for ten years is sufficient to acquire an easement therein.

Cited in note (9 L. R. A. 773) on adverse possession under color of title.

Statute of limitations.

Cited in *Darr v. Wisner*, 63 Neb. 308, 88 N. W. 518, and *Alexander v. Thacker*, 43 Neb. 497, 61 N. W. 738, holding action to foreclose tax lien barred five years after time to redeem ends; *Warren v. Demary*, 33 Neb. 329, 50 N. W. 15, holding action to foreclose brought nearly ten years after issue of tax deed, barred.

Corrected in *Fuller v. Colfax County*, 33 Neb. 725, 50 N. W. 1044, holding tax deed issued more than three years after expiration of time to redeem, invalid.

Sales for taxes.

Cited in note (9 L. R. A. 769) on service by publication.

9 L. R. A. 737, *SUSQUEHANNA FERTILIZER CO. v. MALONE*, 73 Md. 268, 25 Am. St. Rep. 595, 20 Atl. 900.

Nuisance.

Cited in *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 227, 28 Atl. 702, enjoining operation of fertilizer plant in populous neighborhood, where nausea, sickness, and depreciation of property resulted; *Pittsburgh, C. C. & St. L. R. Co. v. Crothersville*, 159 Ind. 335, 64 N. E. 914, holding proof of similar nuisances existing in neighborhood no excuse for continuance of one complained of; *Judson v. Los Angeles Suburban Gas Co.* 157 Cal. 173, 26 L.R.A.(N.S.) 183, 106 Pac. 581, 21 Ann. Cas. 1247, holding that adoption of most approved methods of

production of gas in gas factory justify continuance of that which, in spite of them, remains a nuisance.

Cited in footnotes to *Swift v. Broyles*, 58 L. R. A. 390, which sustains right to compensation for discomfort from noxious gases, etc., from chemical works on adjoining premises; *Rowland v. Miller*, 22 L. R. A. 182, which holds offensive undertaking business, violation of restrictive covenant even though not a nuisance; *Sullivan v. Jones & L. Steel Co.* 66 L.R.A. 712, which holds that manufacturer of pig iron will be enjoined from changing manner of operating furnaces if result is to cast ore dust on neighboring residential property in such quantity as to destroy homes or other property there situated; *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Cited in notes (23 Am. St. Rep. 307) on what are nuisances; (118 Am. St. Rep. 870, 871) on actions against two or more persons creating or maintaining a nuisance; (124 Am. St. Rep. 592) on abatement of public nuisance by private person without suit.

— Necessity for material injury.

Cited in *Euler v. Sullivan*, 75 Md. 618, 32 Am. St. Rep. 420, 23 Atl. 845, overruling instruction that smoke, steam, and cinders rendering premises "less" comfortable and useful, constitutes nuisance; *Sayre v. Newark*, 58 N. J. Eq. 147, 42 Atl. 1068, enjoining construction of large sewer discharge within 60 feet of complainant's wharfage premises as anticipatory material injury.

— Use of care.

Cited in *Frost v. Berkeley Phosphate Co.* 42 S. C. 410, 26 L. R. A. 696, 46 Am. St. Rep. 736, 20 S. E. 280, holding that injury by phosphate-factory gases supports action in spite of care used in process; *People v. Burtleson*, 14 Utah, 264, 47 Pac. 87, holding that care in conduct of lawful business does not relieve party injuring others thereby from liability for nuisance; *Euler v. Sullivan*, 75 Md. 620, 32 Am. St. Rep. 420, 23 Atl. 845, holding instruction to find for defendant if factory conducted in reasonable manner in manufacturing district, erroneous; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 572, 63 Am. St. Rep. 533, 39 Atl. 270, holding injury to property and comfort by gases support action, though emitted in lawful business carefully conducted in factory district; *Perrin v. Crescent City Stockyard & Slaughterhouse Co.* 119 La. 98, holding no one has the right to use his own, so as to injure those about him; *Carroll Springs Distilling Co. v. Schnepfe*, 111 Md. 430, 74 Atl. 828, holding one chargeable with the knowledge that no one has a right to erect or operate works which are a nuisance to a neighboring owner, and then depend on ground that he has expended large sums thereon; *Judson v. Los Angeles Suburban Gas Co.* 157 Cal. 173, 26 L.R.A.(N.S.) 187, 106 Pac. 581, holding the adoption of the most approved appliances and methods will not justify the continuance of that which, in spite of them, remains a nuisance.

Lawfulness of undertaking as defense to nuisance.

Cited in *Missouri K. & T. R. Co v. Anderson*, 36 Tex. Civ. App. 132, 81 S. W. 781, holding fact that the business is a lawful one and is carefully conducted, is no defense where it occasions a nuisance; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 328, 59 Atl. 654, 3 A. & E. Ann. Cas. 660, holding same without regard to the locality where such business is carried on; *Madison v. Ducktown Sulphur, Copper & I. Co.* 113 Tenn. 357, 83 S. W. 658, holding equitable relief will not be denied because the persons proceeded against are engaged in a lawful business where pleadings and evidence show grounds for relief; *Bowman v. Humphrey*, 135 Iowa, 237, 6 L.R.A.(N.S.) 1112, 109 N. W. 714, 11 A. & E. Ann. Cas. 131,

holding same though the utmost care has been taken to avoid all just cause of complaint.

— **Prior location.**

Cited in *Baltimore v. Fairfield Improv. Co.* 87 Md. 364, 40 L. R. A. 496, 67 Am. St. Rep. 344, 39 Atl. 1081, holding prior location of pesthouse in secluded locality no bar to action by parties subsequently locating near by, as to whom it is nuisance, where right to maintain such nuisance not prescriptive; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 10, 58 L. R. A. 504, footnote p. 500, 64 N. E. 745, holding that tenant under lease executed during continuance of nuisance may maintain action to abate same; *Lurssen v. Lloyd*, 76 Md. 367, 25 Atl. 294, holding evidence of sale of premises to mortgagee on foreclosure irrelevant in action by mortgagor in possession for injuries caused by nuisance; *United States v. Luce*, 141 Fed. 410, holding fact that one voluntarily "comes to a nuisance" will not preclude him from complaining of and obtaining relief against it; *Oehler v. Levy*, 139 Ill. App. 303, holding priority of occupation is not controlling where changing conditions of outskirts of a city makes a business legitimate in itself a nuisance to the occupants; *Langley v. McGeoch*, 115 Md. 189, 80 Atl. 843, holding that person comes to nuisance is no defense to his application for injunction.

Cited in footnote to *Storms v. Manhattan R. Co.* 66 L.R.A. 625, which holds lessee's right to damages for injuries to building by interference with light, air, and access by construction of elevated railway in abutting street not cut off by renewal of lease in accordance with its terms.

Refusal of misleading instructions.

Cited in *Baltimore Belt R. Co. v. Sattler*, 102 Md. 606, 62 Atl. 1125, holding a prayer properly refused which was calculated to mislead jury as to the real issues involved.

9 L. R. A. 740, *CLARK v. LINDSEY*, 47 Ohio St. 437, 25 N. E. 422.

Effect of tax sale on dower right.

Cited in *Clason v. Ward*, 1 Ohio N. P. 219, 1 Ohio S. & C. P. Dec. 193, holding right of doweress not forfeited until one year after sale for taxes.

Distinguished in *Tullis v. Pierano*, 9 Ohio C. C. 651, 9 Ohio C. D. 105, holding that subsequent purchase by heirs of landowner from purchaser at tax sale does not reinvest widow's dower.

Rights of tenant in common paying taxes.

Cited in *Hake v. Lee*, 106 La. 485, 31 So. 54, holding cotenant purchasing at tax sale only acquires claim against co-owners for reimbursement; *Bossier v. Herwig*, 112 La. 545, 36 So. 557, holding adjudication, where sale for taxes at auction is made to joint owner, operates as a payment of taxes for benefit of all the owners.

Cited in footnote to *Crawford v. Meis*, 66 L.R.A. 154, which holds that one cotenant in remainder not entitled to possession may as against cotenants obtain good title from stranger purchasing property at tax sale made possible through life tenant's default.

Cited in notes (9 L.R.A. 769) on redemption from tax sale; (75 Am. St. Rep. 237, 238; 116 Am. St. Rep. 371, 372) on co-tenant's right to acquire and enforce tax titles.

Good faith due one co-tenant from another.

Cited in *Faher v. Buckeye Supply Co.* 7 Ohio N. P. 424, 5 Ohio S. & C. P. Dec. 194, holding that where a co-tenant mortgages the premises, and delivers possession to the mortgagee the latter must account to the other cotenants for their share of the rents and profits.

9 L. R. A. 744, *WESTERN U. TELEG. CO. v. SHORT*, 53 Ark. 434, 14 S. W. 649.

Liability for negligence in transmission of messages.

Cited in *Mitchell v. Western U. Teleg. Co.* 12 Tex. Civ. App. 281, 33 S. W. 1016, and *Reed v. Western U. Teleg. Co.* 135 Mo. 673, 34 L. R. A. 497, 58 Am. St. Rep. 609, 37 S. W. 904, holding that telegraph company cannot, by contract, exempt itself from liability for servant's negligence; *Fleischner v. Pacific Postal Teleg. Cable Co.* 55 Fed. 742, holding telegraph company liable for operator's failure to inform sender of important message, of break in line notwithstanding stipulation against liability for unrepeatd message; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 696, 56 L. R. A. 493, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority holding that contract valid where made exempting telegraph company from liability for mistakes in unrepeatd message will be sustained in other state; *Western U. Teleg. Co. v. Woodard*, 84 Ark. 328, 105 S. W. 579, 13 Ann. Cas. 354, as considering different features of the relations between parties to a message and telegraph companies; *Western U. Teleg. Co. v. Milton*, 53 Fla. 496, 11 L.R.A.(N.S.) 570, 125 Am. St. Rep. 1077, 43 So. 495, holding stipulation limiting liability for negligence in handling message, invalid; *Strong v. Western U. Teleg. Co.* 18 Idaho, 403, 30 L.R.A.(N.S.) 417, 109 Pac. 910, Ann. Cas. 1912 A, 55, holding that stipulation exempting telegraph company from damages for negligence is void.

Cited in footnotes to *Coit v. Western U. Teleg. Co.* 53 L. R. A. 678, which holds one requesting information bound by correspondent's agreement with telegraph company limiting liability; *Brown v. Postal Teleg. Cable Co.* 17 L. R. A. 648, which holds limitation of amount of liability for mistake in transmitting telegram, void as to mistake caused by negligence; *Birkett v. Western U. Teleg. Co.* 33 L. R. A. 404, which holds valid, condition against liability beyond amount paid for sending unrepeatd message.

Cited in notes (13 L. R. A. 510) on effect of stipulations in contract to transmit telegrams; (11 L. R. A. 102) on stipulation for sixty days' notice in contracts for delivering telegrams; (117 Am. St. Rep. 289) on elements of damages recoverable for failure to transmit and deliver telegrams; (38 L. ed. U. S. 884) on damages for error in telegraph message, or failure to deliver.

— Right of action by addressee.

Cited in *Western U. Teleg. Co. v. Woodard*, 84 Ark. 326, 105 S. W. 579, 13 A. & E. Ann. Cas. 354, holding addressee of telegraph message may recover damages for non-delivery or delivery of incorrect message.

Cited in note 30 L.R.A.(N.S.) 1124, 1129, 1133, 1136) on right of addressee of telegram to sue for delay in delivery.

Recovery of damages incidentally resulting from breach of contract.

Cited in *Western U. Teleg. Co. v. Henley* 23 Ind. App. 25, 54 N. E. 775, denying liability of telegraph company failing to deliver message, for mental distress suffered by sender through not being met at railroad station; *Murrell v. Pacific Exp. Co.* 54 Ark. 25, 26 Am. St. Rep. 17, 14 S. W. 1098, holding express company, without notice, not liable for difference between special sale and market price of goods delayed in shipment; *Moffitt-West Drug Co. v. Byrd*, 34 C. C. A. 354, 92 Fed. 293, holding incidental expenses of purchaser in connection with contract of sale not recoverable; *Crutcher v. Choctaw, O. & G. R. Co.* 74 Ark. 360, 85 S. W. 770, holding carrier not liable for special damages caused by delay unless notified of special circumstance at time of contract; *Western U. Teleg. Co. v. Hogue*, 79 Ark. 37, 94 S. W. 924, holding damage for mental anguish caused by failure to deliver message not recoverable where nothing appeared in message or otherwise to give company notice of result in case of nondelivery; *Western U. Teleg. Co. v. Moxley*,

80 Ark. 559, 98 S. W. 112, holding damages not recoverable for mental suffering not concerning those related by ties of blood, for nondelivery, without notice of the circumstances given to company at time of message.

Cited in note (53 L. R. A. 38, 42, 94, 96) on loss of profits as an element of damages for breach of contract.

Liability for mistake in unrepeated message.

Cited in *Western U. Teleg. Co. v. Lyman*, 3 Tex. Civ. App. 464, 22 S. W. 656, holding that failure to repeat message does not excuse negligent misdirection.

Powers of telegraph companies.

Cited in footnote to *State, Duke, Prosecutor, v. Central N. J. Teleph. Co.* 11 L. R. A. 664, which holds company organized under act to regulate telegraph companies may condemn route for telephone lines.

Limitation of right to contract.

Cited in *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 417, 23 L. R. A. 269, 41 Am. St. Rep. 109, 25 S. W. 75, holding act prohibiting withholding of discharged employee's wages, unconstitutional as to persons, but valid as to corporations.

9 L. R. A. 748, *BURBANK v. BURBANK*, 152 Mass. 254, 25 N. E. 427.

Proper representative of public interests.

Cited in *Stearns v. Newport Hospital*, 27 R. I. 316, 62 Atl. 132, 8 A. & E. Ann. Cas. 1176, holding the attorney general to be the proper person to inquire into the conduct of trustee in his administration of a public trust; *McQuesten v. Atty. Gen.* 187 Mass. 186, 72 N. E. 965, on the desirability of having public interests actively represented in court by attorney general in civil cases.

Public charitable trusts.

Cited in *Codman v. Brigham*, 187 Mass. 312, 105 Am. St. Rep. 394, 72 N. E. 1008, holding an instrument providing a hospital for the indigent sick residing in certain county by accumulation in trust, to create a charitable trust from date of death of testator; *Ware v. Fitchburg*, 200 Mass. 67, 85 N. E. 951, holding that where a testator bequeathes subject to a contingency his residue estate to a city to found and maintain a hospital a charitable trust is created, on the taking effect of the gift; *Sears v. Atty. Gen.* 193 Mass. 553, 79 N. E. 772, 9 A. & E. Ann. Cas. 1200, holding a trust fund created for benefit of widows and orphans of ministers of certain church to be a public charity; *Buchanan v. Kennard*, 234 Mo. 140, 37 L.R.A.(N.S.) 993, 136 S. W. 415, holding that bequest to found hospital "for sick and injured persons" was sufficiently definite.

Cited in note (14 L.R.A.(N.S.) 68, 102) on enforcement of general bequest for charity or religion.

9 L. R. A. 750, *LOUISVILLE, N. A. & C. R. CO. v. NITSCHKE*, 126 Ind. 229, 22 Am. St. Rep. 582, 26 N. E. 51.

Complaint in actions for permitting fire to spread.

Cited in *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 72, 30 N. E. 812, holding complaint alleging negligent escape of fire from defendant's premises sufficient; *Louisville, N. A. & C. R. Co. v. Palmer*, 13 Ind. App. 162, 39 N. E. 881, holding allegation that fire was negligently permitted to escape to plaintiff's premises essential; *Lake Erie & W. R. Co. v. Lowder*, 7 Ind. App. 544, 34 N. E. 447, holding that complaint charging negligence in permitting fire to spread from train wreck to plaintiff's property states cause of action; *Wabash R. Co. v. Schultz*, 30 Ind. App. 499, 64 N. E. 481, holding paragraph of complaint charging negligence in permitting fire to escape from right of way, sufficient; *Lake Erie & W.*

R. Co. v. McFall, 165 Ind. 581, 76 N. E. 400, holding paragraph of complaint insufficient to charge negligence in permitting fire to escape from right of way, by allegation that sparks and coals of fire are emitted from engine and carried by wind to object burned; Pittsburgh, C. C. & St. L. R. Co. v. Wise, 36 Ind. App. 63, 74 N. E. 1107, holding that under an averment of negligent permission of escape of fire, the combustible condition of material on right of way leading to plaintiff's premises may be shown.

Distinguished in Lake Erie & W. R. Co. v. Miller, 9 Ind. App. 194, 36 N. E. 428, holding that allegation of negligence in relation to spark-arresters does not state cause of action for negligently permitting fire to escape from premises.

Explained in Miller v. Miller, 17 Ind. App. 612, 47 N. E. 338, holding that complaint alleging fire set "purposely, wrongfully, and negligently" proceeds upon theory of negligence.

Liability for starting fire on one's own premises.

Cited in Brummit v. Furness, 1 Ind. App. 410, 50 Am. St. Rep. 215, 27 N. E. 656, holding setting fire to peat bed extending into neighbor's land, in dry time, negligence; Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 18, 38 N. E. 534, holding railroad liable for negligently permitting fire to escape from right of way; Tien v. Louisville, N. A. & C. R. Co. 15 Ind. App. 307, 44 N. E. 45, raising, without deciding, question whether setting fire to burn over right of way positive wrong, permitting recovery independent of negligence; Chicago & E. R. Co. v. Smith, 6 Ind. App. 266, 33 N. E. 241, holding that presence of combustible material on adjoining land imposes duty on railroad company to exercise greater care against setting fires; Jordan v. Welch, 61 Wash. 573, 112 Pac. 656 (dissenting opinion), on liability of railroad for suffering fire to escape from right of way and injure adjoining property.

Cited in footnote to Norfolk & W. R. Co. v. Fritts, 68 L.R.A. 864, which sustains liability for fire of railroad company unnecessarily running heavy freight train up grade at double its scheduled speed in dry season and during heavy wind.

Cited in notes (21 L. R. A. 258, 260) on liability for setting fires which spread to property of others; (11 L. R. A. 506, 507) on right of railroad company to burn combustibles on its right of way.

Proximate cause.

Cited in Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 34, 30 N. E. 696, holding fire set on railroad land, burning over intervening lands, subdued several times but again breaking out, proximate cause of resulting injury; Pittsburgh, C. C. & St. L. R. Co. v. Iddings, 28 Ind. App. 512, 62 N. E. 112, holding negligence in permitting fire to spread from right of way to adjoining lands proximate cause of destruction of roadway; Chicago & E. I. R. Co. v. Ross, 24 Ind. App. 229, 56 N. E. 451, and Chicago & E. R. Co. v. Kreig, 22 Ind. App. 405, 53 N. E. 1033, holding fire negligently started in adjoining premises, passing to plaintiff's property without intervention of independent human agency, proximate cause of resulting injury; Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 220, 28 N. E. 328, holding fire escaping to adjoining pasture proximate cause of injury to stock wandering into it; Union P. R. Co. v. McCollum, 2 Kan. App. 327, 43 Pac. 97, and Lake Erie & W. R. Co. v. Keiser, 25 Ind. App. 425, 58 N. E. 505, holding ordinary wind, causing fire to break forth afresh, not intervening cause; Chicago & E. R. Co. v. Luddington, 10 Ind. App. 637, 38 N. E. 342, holding fire carried by wind across intervening premises, proximate cause of resulting injury; Reid v. Evansville & T. H. R. Co. 10 Ind. App. 390, 53 Am. St. Rep. 391, 35 N. E. 703, holding railroad's delay in forwarding car not proximate

mate cause of destruction by fire from adjacent building; *Davis v. Williams*, 4 Ind. App. 491, 31 N. E. 204, holding owner of dead dog placed in highway without his knowledge not liable to person whose horse was frightened thereby; *Knouff v. Logansport*, 26 Ind. App. 206, 84 Am. St. Rep. 292, 59 N. E. 347, holding failure to maintain railing at abutment proximate cause of injury to one falling over while dodging bicycle; *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 395, 26 N. E. 64, holding hand car wrongfully placed on highway proximate cause of injuries received through horse's taking fright at it; *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 316, 65 N. E. 591, holding unsafe embankment proximate cause of death of quarry employee leaping from runaway car, and rolling under wheels; *Chicago & E. R. Co. v. Lesh*, 158 Ind. 424, 63 N. E. 794, holding ordinary wind not a new and independent intervening agency in spread of fire; *Florida East Coast R. Co. v. Welch*, 53 Fla. 159, 44 So. 250, 12 A. & E. Ann. Cas. 210, holding that the fact that fire set by defendant, is communicated to plaintiff's premises through the land of another renders defendant's negligence none the less the proximate cause of injury; *St. Louis & S. F. R. Co. v. League*, 71 Kan. 84, 80 Pac. 46, holding that under the circumstances the question whether fire started by defendant is proximate cause of final burning or not is for the jury; *Brown v. American Steel & Wire Co.* 43 Ind. App. 567, 88 N. E. 80, directing verdict for defendant where the evidence as to cause of death merely showed lapses of mental vigor at times intervening the accident and suicide.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform heavy doors blown on track by severe gale not proximate cause of derailment of engine.

Cited in notes (17 L.R.A. 38) on effect of concurring negligence of third person on liability of one sued for negligently causing injury; (36 Am. St. Rep. 824) on proximate and remote cause.

Change of wind as intervening cause.

Cited in *Florida East Coast R. Co. v. Welch*, 53 Fla. 166, 44 So. 250, 12 Ann. Cas. 210, holding change in direction of wind not an intervening cause relieving railway company from damage for starting fire.

Technical or impractical reasoning.

Cited in *Crawford & McC. Co. v. Gose*, 43 Ind. App. 378, 87 N. E. 709, on subtle refinements and speculative inquiries as repudiated by the courts.

9 L. R. A. 754, *CLEVELAND, C. C. & I. R. CO. v. CLOSSER*, 126 Ind. 348, 3 Inters. Com. Rep. 387, 22 Am. St. Rep. 593, 26 N. E. 159.

Discrimination in charges by corporations.

Cited in *Indiana Natural Illuminating Gas Co. v. State*, 158 Ind. 523, 57 L.R.A. 763, 63 N. E. 220, holding that option to charge meter or "flat" rates for gas to consumers does not authorize charging meter rate to one person only; *Lovejoy v. Michels*, 88 Mich. 28, 13 L. R. A. 775, 49 N. W. 901 (concurring opinion), holding combination to control prices, unlawful; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 581, 9 C. C. A. 664, 27 U. S. App. 1, 61 Fed. 997, holding pooling-railway agreement void; *Knight & J. Co. v. Miller*, 172 Ind. 38, 87 N. E. 823, holding that all contracts tending to stifle competition are void as against public policy without respect to number of persons effected, or territorial limits of the effect; *Bessire & Co. v. Corn Products Mfg. Co.* 47 Ind. App. 304, 94 N. E. 353, holding that there is nothing morally or legally wrong in contract to pay rebate.

Cited in footnotes to *Cook v. Chicago, R. I. & P. R. Co.* 9 L. R. A. 764, which holds allowance of rebate to some customers unjust discrimination; *Fitzgerald v. Grand Trunk R. Co.* 13 L. R. A. 70, which holds agreement for rebate to one.

shipper illegal; *Bagg v. Wilmington, C. & A. R. Co.* 14 L. R. A. 596, which holds act compelling shipment of freight within specified time not interference with commerce; *Western U. Teleg. Co. v. Call Pub. Co.* 27 L. R. A. 622, which authorizes difference in telegraph rates to morning and evening paper; *Laurel Cotton Mills v. Gulf & S. I. R. Co.* 66 L.R.A. 453, which holds milling in transit agreement between manufacturer and carrier by which former is to be credited on freight bills for manufactured goods shipped freight paid on raw materials shipped to mill not prohibited rebate.

Cited in notes (12 L. R. A. 436) on rates of freight, long and short hauls and interstate commerce regulations; (18 L. R. A. 105) on right of carrier at common law to discriminate between passengers and shippers; (5 Eng. Rul. Cas. 378) on discrimination by carrier.

Contracts in restraint of trade.

Cited in *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* 38 Ind. App. 238, 70 N. E. 843, holding an agreement not to build sidings to certain stone quarry near its line, allowing a prior builder to have a monopoly is void; *Chicago M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 N. S. App. 1, 61 Fed. 997, holding a contract between railroad companies pooling the through freight business with a view to suppress competition, void.

Cited in note (74 Am. St. Rep. 250) on combinations constituting unlawful trusts.

Knowledge of corporate agents, as notice.

Cited in *Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 660, 39 N. E. 912, holding knowledge of carpenter making car handles, of defective handle, notice to master; *Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 660, 39 N. E. 912, holding knowledge of a carpenter with respect to defects in material he uses is knowledge of his employers.

Implied authority of agent.

Cited in *American Teleph. & Teleg. Co. v. Green*, 164 Ind. 357, 73 N. E. 707, holding that an agent empowered to obtain releases from liability is impliedly authorized to fix the consideration for a release; *Ellinger v. Rawlings*, 12 Ind. App. 340, 40 N. E. 146, holding that where traveling salesman has apparent authority to take back defective goods his taking may be held binding on his master; *Wolcott v. Hayes*, 43 Ind. App. 584, 88 N. E. 111, holding that an agent in obtaining a reduction in amount payable for land may find his master to waive of a possible shortage in acreage.

Special findings and evidence supporting judgment.

Cited in *Kedey v. Petty*, 153 Ind. 185, 54 N. E. 798, and *Becknell v. Hosier*, 10 Ind. App. 8, 37 N. E. 580, holding special verdict to be considered, not in detachments, but as a whole; *Ellinger v. Rawlings*, 12 Ind. App. 340, 40 N. E. 146, sustaining judgment for goods sold and delivered where part of them, not like sample, were not promptly returned; *Merritt v. Temple*, 155 Ind. 498, 58 N. E. 699, holding that if special finding, taken as a whole, supports judgment, it must stand; *Kedey v. Petty*, 153 Ind. 185, 54 N. E. 798, holding special verdict must be considered as a whole; *Mount v. Montgomery County*, 168 Ind. 666, 14 L.R.A. (N.S.) 486, 80 N. E. 629; *Merritt v. Temple*, 155 Ind. 498, 58 N. E. 699,—holding that if the special finding considered as a whole legitimately supports the judgment it must stand; *Becknell v. Hosier*, 10 Ind. App. 8, 37 N. E. 580, holding that the facts relied upon in a special verdict when considered as a whole must not be ambiguous.

Authority of railroad commissioners.

Cited in footnote to *State ex rel. Tompkins v. Chicago, M. & St. P. R. Co.* 47

L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

Power of legislature to regulate freights and fares.

Cited in *Indianapolis v. Navin*, 151 Ind. 144, 41 L. R. A. 340, 47 N. E. 525, upholding constitutionality of 3-cent fare act; *State v. Central Vermont R. Co.* 81 Vt. 466, 130 Am. St. Rep. 1065, 71 Atl. 194, holding that legislature has no power to compel railroad to do service without reward, or to take private property for public use without compensation.

Cited in notes (11 L. R. A. 247) on power of Congress to regulate commerce; (11 L. R. A. 452) on state regulation of fares and freights; (13 L. R. A. 107) on power of state law to regulate interstate commerce.

Necessity of timely objections to rulings.

Cited in *Strickland v. State*, 171 Ind. 644, 87 N. E. 12, holding that an objection not having been urged in lower court cannot be made on appeal.

Issues outside the pleadings.

Cited in *Webster v. Major*, 33 Ind. App. 218, 71 N. E. 176, holding that where the answer fails to allege former adjudication no issue as to that point is raised.

Admissibility of declarations of agent.

Cited in note (131 Am. St. Rep. 336) on admissibility of declarations of agent after transaction.

Refusal of courts to aid enforcement of illegal contract.

Cited in footnote to *Woodson v. Hopkins*, 70 L.R.A. 645, which holds one conducting loan office and receiving rates of interest so extortionate as to shock moral sense and be against public policy not entitled to aid of equity to compel agent to pay over money received in business or to obtain possession of property pertaining to business.

Meaning of word "necessary."

Cited in *Rexroth v. Holloway*, 45 Ind. App. 37, 90 N. E. 87, holding that meaning of word "necessary" must be determined from circumstances in which it is used.

9 L. R. A. 764, *COOK v. CHICAGO, R. I. & P. R. CO.* 81 Iowa, 551, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080.

Discriminating rates by carrier.

Followed in *Blair v. Sioux City & P. R. Co.* 109 Iowa, 380, 80 N. W. 673, holding that railroads, entering agreement for joint rates, create new line, subject to law preventing discrimination.

Cited in *Kidder v. Fitchburg R. Co.* 165 Mass. 400, 43 N. E. 115, upholding right of express company to same privileges and facilities as those furnished others by railroad company; *Kelly v. Chicago, M. & St. P. R. Co.* 93 Iowa, 449, 61 N. W. 957, denying that unjust discrimination is shown by company furnishing free transportation, when rates charged others are reasonable; *Western U. Teleg. Co. v. Call Pub. Co.* 44 Neb. 346, 27 L. R. A. 628, 48 Am. St. Rep. 729, 62 N. W. 506 (dissenting opinion), majority denying telegraph company's liability to repay excess of usual rate, transmission being made under different circumstances.

Cited in footnote to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* 66 L.R.A. 453, which holds milling in transit agreement between manufacturer and carrier by which former is to be credited on freight bills for manufactured goods shipped freight paid on raw materials shipped to mill not prohibited rebate.

Cited in note (5 Eng. Rul. Cas. 378) on discrimination in rates by carrier.

Common law as to discrimination.

Cited in *Murray v. Chicago & N. W. R. Co.* 62 Fed. 44, and *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 872, holding that common law gives shipper right of action for fraudulent discrimination, independent of interstate law.

Cited in note (18 L. R. A. 105) on right of carrier at common law to discriminate between passengers or shippers.

Distinguished in *Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 143, 28 L. R. A. 566, 63 N. W. 589, denying that common law is part of national jurisdiction authorizing state to recover freight overcharges on interstate shipment; *Beadle v. Kansas City, Ft. S. & M. R. Co.* 51 Kan. 252, 32 Pac. 910, holding provisions of statute allowing treble damages for overcharge by carrier, substituted for common-law action.

Operation of statute of limitations.

Followed in *Cole v. Charles City Nat. Bank*, 114 Iowa, 635, 87 N. W. 671, denying that statute of limitations begins to run till discovery of mistake in bank account.

Cited in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 871, holding that statute does not begin to run against shipper's action for fraudulent discrimination until fraud discovered; *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* 68 Kan. 596, 75 Pac. 1051, 1 A. & E. Ann. Cas. 639 (dissenting opinion), to point that statute of limitations may be prevented from running by fraud.

Cited in notes (25 L.R.A. 567) on how far statute of limitations will be regarded as having abrogated maxim that one cannot profit by his own wrong; (16 Eng. Rul. Cas. 259) as to when limitations begin to run in case of fraud or concealment.

Disapproved in effect in *McBride v. Burlington, C. R. & N. R. Co.* 97 Iowa, 95, 59 Am. St. Rep. 395, 66 N. W. 73, denying that operation of statute is interrupted by company's concealment of facts concerning accident.

Recovery back of voluntary payments.

Cited in notes (94 Am. St. Rep. 421) on recovery back of voluntary payment; (18 L.R.A.(N.S.) 127) on recovery of excessive payments to public service corporation.

9 L. R. A. 767, *BROWN v. POOL*, 81 Iowa, 455, 46 N. W. 1069.

Erroneously cited in *Lowry v. Chicago, B. & Q. R. Co.* 46 Fed. 85, on subject of discriminating rates by carriers.

Notice to redeem from tax sale.

Cited in *Shelley v. Smith*, 97 Iowa, 264, 66 N. W. 172, holding one improving and tilling land in same quarter section entitled to notice to redeem; *Seymour v. Harrison*, 85 Iowa, 136, 52 N. W. 114, holding notice to redeem unnecessary when property sold in name of person taxed.

Repayment by contribution among cotenants.

Cited in note (9 L. R. A. 740) on right to reimbursement by contribution among cotenants.

9 L. R. A. 770, *SENECA MIN. CO. v. SECRETARY OF STATE*, 82 Mich. 573, 47 N. W. 25.

When amendments become operative.

Followed in *Re Joslyn*, 117 Mich. 443, 75 N. W. 930, holding that amendment to Constitution raising salary of judges becomes operative at time of ratification.

Cited in *State v. Kyle*, 166 Mo. 297, 56 L. R. A. 118, footnote, p. 115, 65 S. W.

763, holding amendment to Constitution making information and indictment concurrent remedies operative from time of canvass of votes.

Constitutional conventions and amendments.

Cited in *Carton v. Secretary of State*, 151 Mich. 353, 115 N. W. 429, as to when an amendment takes effect, and by whom and when it should be submitted to vote; *Chase v. Wayne County*, 151 Mich. 411, 115 N. W. 454, holding that an amendment may not be submitted at spring election held in April in the even-numbered years under existing constitution.

Cited in footnotes to *State ex rel. Torryson v. Grey*, 19 L. R. A. 134, which holds publication of proposed constitutional amendments sixteen to eighteen months before election, allowable; *State ex rel. Wineman v. Dahl*, 34 L. R. A. 97, which holds submission to popular vote of proposal for constitutional convention properly made by legislature; *Worman v. Hagan*, 21 L. R. A. 716, which holds governor's proclamation of adoption of constitutional amendment conclusive; *Com. ex rel. Elkin v. Griest*, 50 L. R. A. 568, which holds governor's approval of proposed constitutional amendment, unnecessary; *Edwards v. Lesueur*, 31 L. R. A. 815, which holds proposed constitutional amendment for changing location of seat of state government not invalidated by new conditions imposed.

Validation of void statute.

Cited in *State v. Miller*, 66 W. Va. 438, 66 S. E. 522, 19 Ann. Cas. 604, holding that void statute can be made effective only by re-enactment.

Cited in note (38 L.R.A.(N.S.) 78) on validation of unconstitutional statute by constitutional amendment.

Absolute nullity of a void statute.

Cited in *State ex rel. Lee v. Chaney*, 23 Okla. 800, 102 Pac. 133, holding that a statute void as repugnant to the organic act, does not extend to or remain in force after the admission of the territory as a state, though not repugnant to the state constitution.

9 L. R. A. 772, *CRAMER v. CLOW*, 81 Iowa, 255, 47 N. W. 59.

Adverse possession.

Followed in *Boling v. Clark*, 83 Iowa, 483, 50 N. W. 57, holding ten years of notorious adverse possession based upon contract by husband, sufficient, against wife's interest.

Cited in *Independent District v. Fagen*, 94 Iowa, 678, 63 N. W. 456, holding ten years' adverse possession by school district sufficient to support action to quiet title; *Severson v. Gremm*, 124 Iowa, 733, 100 N. W. 862, holding that although deed failed to cover part of tract a holding under the belief that it did completely cover, for required period is sufficient to support an action to quiet title; *Ritz v. Ritz*, 64 W. Va. 113, 60 S. E. 1095, holding that a deed inoperative to pass title by reason of defects may give color of title sufficient to support adverse possession; *Hassam v. Safford Lumber Co.* 82 Vt. 451, 74 Atl. 197, holding that instrument may constitute color of title though it is so defective as to be void as a conveyance.

Cited in footnotes to *Sontag v. Bigelow*, 16 L. R. A. 326, which holds master's deed in partition proceedings sufficient color of title upon which to found claim of adverse possession; *Alexander v. Wilcox*, 9 L. R. A. 735, which holds title acquired as against lien of tax deed by ten years' adverse possession.

Cited in notes (9 L. R. A. 169) on constructive notice; service by publication; (13 L.R.A. 207) on defenses in action of ejectment; (88 Am. St. Rep. 711) on color of title; (95 Am. St. Rep. 672) on effect of bar of statute of limitations.

Cross-petition.

Cited in *Armstrong v. Mayer*, 69 Neb. 192, 95 N. W. 51, holding that defendant may seek affirmative relief against plaintiff or co-defendants by cross-petition though not provided for by Code and is not restricted to statutory counter claim.

9 L. R. A. 777, *SWEESEY v. SPARLING*, 81 Iowa, 433, 25 Am. St. Rep. 506, 46 N. W. 1068.

Homestead rights.

Cited in *Smith v. Love*, 49 Fla. 242, 38 So. 376, holding that after title to homestead lands passes to private parties equity may convert holder legal title into trustee to true owner.

Cited in footnote to *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in note (11 L. R. A. 705) on judgment lien subject to homestead right.

Agreements affecting rights in public land claims.

Cited in *Smith v. Love*, 49 Fla. 242, 38 So. 376, holding that where plaintiff entered on defendants claim, and by fraud on defendant is permitted to remain his patent received from the government is considered to be held in trust for defendant; *McElhaney v. McElhaney*, 125 Iowa, 282, 101 N. W. 90, holding that contract by husband to give wife one half of land acquired thereafter applies to timber claim obtained thereafter where wife settled with him thereon as a member of his family.

9 L. R. A. 780, *TRAGESSER v. GRAY*, 73 Md. 250, 20 Am. St. Rep. 587, 20 Atl. 905.

Police power.

Cited in *State v. Heinemann*, 80 Wis. 258, 27 Am. St. Rep. 34, 49 N. W. 818, holding statute imposing penalty upon keeping retail pharmacy without having registered pharmacist in employ, valid; *State v. Richcreek*, 167 Ind. 230, 5 L.R.A.(N.S.) 881, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899, holding that an act requiring that all individuals or members of firms conducting banking business shall be residents of the state is valid; *Com. v. Hana*, 195 Mass. 265, 11 L.R.A.(N.S.) 802, 122 Am. St. Rep. 251, 81 N. E. 149, 11 A. & E. Ann. Cas. 514, holding a statute restricting grant of peddler's license to citizens or those about to become citizens of the United States to be a valid police regulation; *Com. v. Patsone*, 231 Pa. 50, 79 Atl. 928, Affirming 44 Pa. Super. Ct. 133, 19 Pa. Dist. R. 312, Affirming 57 Pittsb. L. J. 343, holding that statute prohibiting unnaturalized foreign born resident from hunting certain kinds of game is within police power.

Cited in notes (14 L.R.A. 582, 584) on constitutional equality of privileges, immunities, and protection; (25 Am. St. Rep. 890) on 14th amendment as to special privileges, burdens and restrictions.

Distinguished in *Templar v. State Examiners*, 131 Mich. 258, 90 N. W. 1058, holding unconstitutional act prohibiting issuance of barbers' licenses to aliens.

Regulation of sale of intoxicating liquors.

Cited in *State ex rel. George v. Aiken*, 42 S. C. 235, 26 L. R. A. 353, 20 S. E. 221, holding statute regulating time and place of sale, and permitting sale only by state officers, valid; *State ex rel. Noble v. Cheyenne*, 7 Wyo. 437, 40 L. R. A. 716, 52 Pac. 975, holding ordinance vesting discretionary power in municipal council to issue licenses, valid; *Farmville v. Walker*, 101 Va. 327, 61 L. R. A. 127, 99 Am. St. Rep. 870, 43 S. E. 558, holding constitutional, act permitting

town to establish dispensary for exclusive sale of liquors; *Cooke v. Loper*, 151 Ala. 555, 44 So. 78, raising the question as to whether a ruling of aldermen and mayor refusing grant of liquor license on grounds of race prejudice might be assailed; *State v. Maryland Club*, 105 Md. 596, 66 Atl. 667, holding social club to be a licensee for sale of liquor subject to city regulations and amenable to city law for sale of liquor to a member on Sunday; *Lochnar v. State*, 111 Md. 661, 76 Atl. 586, holding an act to require license for sale of liquor within certain county, and prohibiting sale within certain limits is valid exercise of police power; *De Grazier v. Stephens*, 101 Tex. 197, 16 L.R.A.(N.S.) 1034, 105 S. W. 992, 16 A. & E. Ann. Cas. 1059, holding statute requiring applicants for liquor license to be residents of state and county wherein license is sought, to be valid.

Cited in footnotes to *Com. v. Fowler*, 33 L. R. A. 839, which sustains restraint of sales of liquor by druggists for medicinal purposes except on physician's prescription; *State v. Gerhardt*, 33 L. R. A. 313, which upholds requirement for locking doors of room where liquor sold during prohibited hours; *Bennett v. Pulaski*, 47 L. R. A. 278, which sustains ordinance for closing saloons between ten and four at night and on Sundays, but not requirement for removing curtains on front doors and windows; *State ex rel. Galle v. New Orleans*, 67 L.R.A. 70, which denies right to refuse liquor license on objection of minority property holders or on ground that no more barrooms are needed.

Cited in notes (46 L. R. A. 417) on liability of carrier for transporting intoxicating liquors; (10 L. R. A. 616) on interstate commerce; importations of intoxicating liquors; sale by importer; (6 L.R.A.(N.S.) 724) on validity of police regulation discriminating in favor of saloons already established; (30 L.R.A.(N.S.) 1004) on constitutionality of statute by which conviction of violating liquor law entails revocation of license.

Distinguished in *Ex parte Theisen*, 30 Fla. 537, 32 Am. St. Rep. 36, 11 So. 901, holding ordinance prohibiting use of state liquor license within certain distance of church or school, except with consent of common council, void.

9 L. R. A. 786, *MAGENAU v. FREMONT*, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280.

Validity of acts of de facto officer.

Cited in *Waite v. Santa Cruz*, 184 U. S. 323, 46 L. ed. 566, 22 Sup. Ct. Rep. 327, Reversing 89 Fed. 628, holding act of *de facto* officer in signing city bonds valid as to public and third persons.

Cited in footnote to *Oliver v. Jersey City*, 48 L. R. A. 412, which holds unauthorized acceptance of second office does not prevent one from being *de facto* officer on continuing performance of duties of first office.

Cited in note (140 Am. St. Rep. 179) on *de facto* officers.

Transaction of business in municipal bodies.

Cited in *Moore v. Perry*, 119 Iowa, 427, 93 N. W. 510, holding business presentable at special meeting of council, properly considered at adjourned session thereof; *People ex rel. Scott v. Nelson*, 252 Ill. 518, 96 N. E. 1071, holding that board of trustees of school has power to adjourn regular meeting and such action is not subject to review, unless there is abuse of power; *Nelson v. South Omaha*, 84 Neb. 437, 121 N. W. 453, holding that business may be done at a special meeting of council at any time, on consent and presence of all the members.

Cited in footnotes to *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant; *Board of Education v. Best*, 27 L. R. A. 77, which holds mandatory provision for requiring ayes and nays on motion to employ teacher.

— Powers of executive officers.

Cited in footnotes to *Cate v. Martin*, 48 L. R. A. 613, which denies mayor's power to veto action by aldermen in passing on election for member of board; *Brown v. Foster*, 31 L. R. A. 116, which authorizes mayor to vote only to break tie; *State ex rel. Young v. Yates*, 37 L. R. A. 205, which holds mayor's right to casting vote in case of tie not restricted by provision requiring majority vote of all members of council; *State ex rel. Morris v. McFarland*, 39 L. R. A. 282, which holds auditor's right to give casting vote on tie vote by township trustees not limited to vote by ballot; *Wooster v. Mullins*, 25 L. R. A. 694, which authorizes casting vote by mayor where three newspapers receive each the votes of four aldermen.

Tax on occupations.

Followed in *York v. Chicago, B. & Q. R. Co.* 56 Neb. 580, 76 N. W. 1065, denying that statute imposing occupation tax upon common carrier is violation of Constitution; *Steidl v. State*, 63 Neb. 697, 88 N. W. 853, holding money paid for occupation license, license money, not tax; *Templeton v. Tekamah*, 32 Neb. 544, 49 N. W. 373, denying that law authorizing cities to collect occupation tax is unconstitutional.

Cited in *German-American F. Ins. Co. v. Minden*, 51 Neb. 874, 71 N. W. 995, sustaining right of city to impose occupation tax upon insurance company, applying proceeds to support fire department; *Western U. Telegr. Co. v. Fremont*, 39 Neb. 698, 26 L. R. A. 700, 5 Inters. Com. Rep. 51, 58 N. W. 415, upholding city's right to collect occupation tax from telegraph company; *State ex rel. School District v. Aiken*, 61 Neb. 493, 85 N. W. 395, and *German-American F. Ins. Co. v. Minden*, 51 Neb. 877, 71 N. W. 995, denying city's authority to make payment of occupation tax condition precedent to conducting business; *State ex rel. School District v. Boyd*, 63 Neb. 836, 58 L. R. A. 111, 89 N. W. 417 (dissenting opinion), majority holding ordinance adopted to raise revenue by imposing occupation assessment, tax ordinance.

Cited in footnotes to *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers, but not others, whose business is less than \$1,000; *Child v. Bemus*, 12 L. R. A. 57, which holds discretionary power granted mayor to revoke licenses not unreasonable; *Perry v. Salt Lake City*, 11 L. R. A. 446, which holds that city council has wide discretion as to granting of licenses; *Hoefling v. San Antonio*, 16 L. R. A. 608, which holds that city cannot levy occupation tax on persons not similarly taxed by state; *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; *Knisely v. Cotterel*, 50 L. R. A. 86, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade.

Cited in notes (60 L.R.A. 341) on constitutional equality in the United States in relation to corporate taxation; (129 Am. St. Rep. 251, 253, 256, 268) on constitutional limitations on power to impose license or occupation taxes.

Overruled in *Rosenbloom v. State*, 64 Neb. 347, 57 L. R. A. 924, 89 N. W. 1053, holding statute authorizing imprisonment for nonpayment of license tax, valid.

— Uniformity.

Cited in *Salt Lake City v. Christensen Co.* 34 Utah, 44, 17 L.R.A.(N.S.) 902, 95 Pac. 523, holding that the constitutional provision for uniformity and equality does not apply to tax on banking and other business and professions, not being a tax on property direct; *Los Angeles v. Los Angeles Independent Gas Co.* 152 Cal. 768, 93 Pac. 1006, on the validity of a tax on occupations in Nebraska not graduated according to profits or capital invested; *Aachen & M. F. Ins. Co. v. Omaha*, 72 Neb. 528, 101 N. W. 3, holding a tax upon the gross amount of

premiums received by a foreign insurance company during the preceding year within a specified district to be constitutional.

Constitutional protection of political and property rights.

Cited in State *ex rel.* Atty. Gen. v. Moores, 55 Neb. 489, 41 L. R. A. 627, 76 N. W. 175, sustaining power of courts to declare statute invalid which deprives voters of cities from choosing their own officers.

Cited in note (11 L. R. A. 286) on constitutional protection of property rights.

Enforceability of valid parts of statute or ordinance.

Cited in State *ex rel.* Farmers Mut. Ins. Co. v. Moore, 48 Neb. 877, 67 N. W. 876, holding constitutional portions of statute will be sustained if separable from invalid part; State *ex rel.* Wheeler v. Stuht, 52 Neb. 217, 71 N. W. 941, upholding valid provisions of statute, illegal in part; Re Langston, 55 Neb. 313, 75 N. W. 828, upholding valid parts of ordinance prohibiting keeping billiard rooms without license; Johnson v. Bessemer, 143 Mich. 315, 106 N. W. 852, holding an ordinance valid to the extent of authorizing council to refuse approval of bond for license contrary to provision of ordinance though ordinance provided no penalty for violation thereof.

Cited in note (104 Am. St. Rep. 655) on enforcement of valid parts of municipal regulations of street railways for protection of public.

Taxation permissible under constitution.

Cited in State *ex rel.* Slabaugh County v. Vinsonhaler, 74 Neb. 677, 105 N. W. 472, holding that an enumeration of subjects of taxation in state constitution is not exclusive, thus an inheritance tax not prohibited or enumerated may be valid; Wilkinson v. Lord, 85 Neb. 145, 24 L.R.A.(N.S.) 1110, 122 N. W. 699, holding that the constitutional provision that "all municipal corporations may be vested with authority to assess and collect taxes" is not a limitation on the taxing power to the legislature.

9 L.R.A. 792, WILSON v. BROOKSHIRE, 126 Ind. 497, 25 N. E. 131.

Rule as to profiting out of trust relation.

Cited in Taylor v. Calvert, 138 Ind. 76, 37 N. E. 531, holding that guardian cannot obtain title adverse to ward's, even without intending fraud; Frazier v. Jenkins, 64 Kan. 618, 57 L.R.A. 577, footnote p. 575, 68 Pac. 24, holding guardian's sale to her husband void; Baker v. Seattle-Tacoma Power Co. 61 Wash. 591, 112 Pac. 647, Ann. Cas. 1912C, 859 (dissenting opinion), on voidability of acts of trustee in relation to trust property performed for purpose of private gain.

Cited in footnotes to Clark v. American Coal Co. 17 L. R. A. 557, which holds ratifiable, contract by which agent gets stock in corporation from which he purchases for principal; Strong v. Brennan, 47 L. R. A. 792, which denies right of attorney to recover for services to association employing him when also engaged and paid by adverse party; Harrison v. Mulvane, 54 L. R. A. 405, which holds one charged with selling corporate stock to pay encumbrances one of which he owns, not forbidden, as trustee, to buy prior liens to protect own interests.

Cited in notes (12 L. R. A. 396) on agent, acting in double capacity; (13 L. R. A. 492) on purchase by trustee of objects of trust; (13 L. R. A. 493) on effect of purchase by trustee; (13 L. R. A. 494) on setting aside sale of trust property to trustee.

Statute of limitations.

Cited in Parks v. Satterthwaite, 132 Ind. 415, 32 N. E. 82, holding that in continuing trust, where demand is necessary, statute does not begin to run until such demand has been made; Jefferson School Twp. v. Worthington, 5 Ind. App. 589, 32

N. E. 807, holding six years' statute of limitations applicable to action to recover tax moneys converted by school township; *Morgan v. King*, 27 Colo. 559, 63 Pac. 416, holding five-year statute applicable in cases of fraud where trust relation exists, three-year statute, otherwise; *Underwood v. Deckard*, 34 Ind. App. 209, 70 N. E. 383, holding six-year statute of limitation inapplicable to action where fraud is incidental and not the primary cause of action.

Cited in note (35 L. ed. U. S. 1030) on statute of limitations and lapse of time as bar to trusts.

New trial as matter of right.

Cited in *Rariden v. Rariden*, 129 Ind. 290, 28 N. E. 701, holding assignee, seeking to establish right to foreclose mortgage, not entitled to new trial as matter of right; *Pool v. Davis*, 135 Ind. 329, 34 N. E. 1130, holding that no question of title being involved in issues adjudged against a party, new trial as matter of right is not given by statute; *Roeder v. Keller*, 135 Ind. 697, 35 N. E. 1014, holding new trial not given as matter of right in action for subrogation; *Seisler v. Smith*, 150 Ind. 93, 46 N. E. 993; *Corbin v. Thompson*, 141 Ind. 314, 40 N. E. 532; *Bennett v. Closson*, 138 Ind. 551, 38 N. E. 46,—holding that where in one of two joined substantive causes of action, losing party is not entitled to new trial, new trial will not be granted; *Jones v. Peters*, 28 Ind. App. 387, 62 N. E. 1019, holding new trial as of right properly denied, in action to quiet title and declare deed a mortgage; *Richwine v. Presbyterian Church*, 135 Ind. 86, 34 N. E. 737, holding new trial as of right not demandable where action is substantially one for injunction and damages; *Schlichter v. Taylor*, 31 Ind. App. 169, 67 N. E. 556, denying new trial in partition, defendant claiming title and possession under oral contract; *Hofferbert v. Williams*, 32 Ind. App. 596, 70 N. E. 405, holding: that a new trial as of right will not be granted where title to real estate is but incidentally involved; *Ætna L. Ins. Co. v. Stryker*, 42 Ind. App. 59, 83 N. E. 647, denying new trial as of right in action for ejectment where another cause of action is joined in same complaint and all prosecuted to final judgment; *Cambridge Lodge, No. 9, K. of P. v. Routh*, 163 Ind. 9, 71 N. E. 148, denying new trial as of right from a judgment rendered on a complaint containing paragraph for ejectment or to quiet title which complaint also contains paragraph based on another cause of action; *Earl v. Van Natta*, 29 Ind. App. 541, 64 N. E. 901, holding that where two paragraphs of a complaint, state a good cause of action, it is not necessary on demurrer to decide which of the two controls with respect to granting or denying a new trial as of right.

Title to real estate.

Cited in *Branson v. Studabaker*, 133 Ind. 164, 33 N. E. 98, holding title in fee acquirable by possession or limitation.

Res judicata.

Cited in footnote to *Allred v. Smith*, 65 L.R.A. 924, which holds judgment in action quasi in rem binding on the parties only.

Cited in notes (22 Am. St. Rep. 615) on res judicata; (112 Am. St. Rep. 24, 31) on effect of judgment against tenant as res judicata.

9 L. R. A. 798, *HENDRY v. SQUIER*, 126 Ind. 19, 25 N. E. 830.

Breach of agreement to repair.

Cited in *Hanson v. Cruse*, 155 Ind. 178, 57 N. E. 904, denying damages to tenant for injuries resulting from obvious defects which landlord agreed to repair; *Hamilton v. Feary*, 8 Ind. App. 621, 52 Am. St. Rep. 485, 35 N. E. 48, denying landlord's liability for breach of covenant to repair well, causing injury to tenant; *Reams v. Taylor*, 31 Utah, 295, 8 L.R.A.(N.S.) 439, 120 Am. St. Rep. 930, 87

Pac. 1089, 11 A. & E. Ann. Cas. 51, holding landlord not liable for personal injury for defect in premises where tenant knowing of defect failed to exercise her right to repair and deduct from rent or to abandon premises.

Cited in note (16 L.R.A.(N.S.) 739) on liability for injury to tenant's property from breach of covenant to repair.

Sufficiency of notice to terminate tenancy.

Cited in *McClung v. McPherson*, 47 Or. 86, 82 Pac. 13, on the proper time and form of notice to quit premises.

9 L. R. A. 801, *HANAW v. BAILEY*, 83 Mich. 24, 46 N. W. 1039.

Acts of party not affecting appeal.

Cited in *Whittaker v. Deadwood*, 12 S. D. 610, 82 N. W. 202, holding payment of tax in suit, under protest, to save sale of property not ground for dismissing appeal.

Effect of absence of re-entry clause in lease.

Cited in note (15 Eng. Rul. Cas. 560) on effect of absence of re-entry clause on landlord's right of re-entry for nonpayment of rent.

Distinguished in *Ganson v. Baldwin*, 93 Mich. 221, 53 N. W. 171, upholding action to recover land upon defendant's breach of agreement to support grantor, although re-entry clause is absent; *Re Pennewell*, 55 C. C. A. 574, 119 Fed. 142, holding lease not forfeitable for violation of stipulation against subletting, in absence of provision therefor.

9 L. R. A. 803, *KING v. WELBORN*, 83 Mich. 195, 47 N. W. 106.

Rights in homestead.

Followed in *Barkume v. Phelps*, 141 Mich. 546, 104 N. W. 980, allowing homestead exemption on two lots both occupied by same building, within corporate limits of city.

Approved in *Lamont v. Le Fevre*, 96 Mich. 178, 55 N. W. 687, sustaining homestead exemption in land purchased for homestead upon which building is erected and occupied by owner for residence and hotel; *De Ford v. Painter*, 3 Okla. 99, 30 L. R. A. 728, 41 Pac. 96, holding building in business part of city exempt as homestead where owner resides on part of second floor, and remainder of building rented for offices and stores; *Lawrence v. Morse*, 122 Mich. 271, 80 N. W. 1087, holding tenant in common entitled to benefit of homestead; *Smith v. Guckenhimer*, 42 Fla. 47, 27 So. 900 (dissenting opinion), majority holding that entire block not wholly used as homestead cannot be set aside as exempt; *Averill v. Benzie County State Sav. Bank*, 143 Mich. 307, 106 N. W. 865, holding three lots in one inclosure, entitled to exemption as one.

Cited in *Holley v. Horton*, 164 Mich. 33, 129 N. W. 6, holding that statute exempting homestead cannot be construed to cover forty-one acres of land purchased as homestead and additional acre is liable to execution.

Cited in footnote to *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in notes (11 L.R.A. 705) on judgment liens subject to homestead right; (32 Am. St. Rep. 293) on occupancy of homestead which will support claim of exemption.

9 L. R. A. 807, *WRIGHT v. MULVANEY*, 78 Wis. 89, 23 Am. St. Rep. 393, 46 N. W. 1045.

Water rights.

Cited in *Bishop v. Baldwin*, 147 Mich. 27, 110 N. W. 139, holding that when

the paramount right of navigation and that of fishing conflict, the navigator cannot negligently destroy the fish nets across the stream.

Cited in notes (12 L. R. A. 637) on qualified property in water front; (12 L. R. A. 673) on paramount rights of navigation and commerce; (64 L. R. A. 982, 983) on liabilities for injuries caused by attempted exercise of rights of navigation.

Rights as to fishing.

Approved in *Kuehn v. Milwaukee*, 83 Wis. 588, 18 L. R. A. 556, 53 N. W. 912, holding injury to public fishery in navigable stream not ground for private suit by individual fisherman.

Cited in footnotes to *State v. Harrub*, 15 L. R. A. 761, which holds statute prohibiting shipment of oysters in shells from state not interference with commerce; *Com. v. Brown*, 28 L. R. A. 110, which sustains weekly tax on sales of oysters; *Bradshaw v. Lankford*, 11 L. R. A. 583, which holds that question of dredging for oysters in public waters in specified county, cannot be submitted to certain election districts thereon.

Cited in notes (60 L.R.A. 487, 525) on right to fish; (131 Am. St. Rep. 763) on law of fishing.

Objection first taken on appeal.

Approved in *Continental Nat. Bank v. McGeoch*, 92 Wis. 309, 66 N. W. 606, refusing to consider transactions alleged to invalidate settlement with creditors where not specifically presented and determined by trial court.

Cited in *Paulis v. O'Neil*, 131 Wis. 81, 111 N. W. 333 (dissenting opinion), on refusal to hear objection to question put to jury, first taken on appeal

Measure of damages.

Approved in *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 217, 52 L. R. A. 215, 53 Am. St. Rep. 909, 66 N. W. 119, holding fair profit lost, measure for breach of contract to furnish goods; *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 312, 53 N. W. 501, holding that utmost damages for sales in violation of defendant's contract are profits, if defendant made sales; *Pewaukee Mill. Co. v. Howitt*, 86 Wis. 277, 56 N. W. 784, holding loss of rental value, measure of lessee's damages where water wheel of less power than stipulated was put in.

Cited in *Kelley v. La Crosse Carriage Co.* 120 Wis. 90, 102 Am. St. Rep. 971, 97 N. W. 674, holding that special damages must not be so uncertain and conjectural, that they may not with reasonable certainty be ascertained; *Chicago City R. Co. v. Flynn*, 131 Ill. App. 507, holding evidence as to income from coal business depending on personal efforts and those of employees not admissible to show an element of damage from personal injury; *Gross v. Heckert*, 120 Wis. 329, 97 N. W. 952, holding that when recovery for loss of profits is allowed the rules applicable to the establishment of the damage should be strictly regarded, and administered with caution; *Kellogg v. Malick*, 125 Wis. 251, 103 N. W. 1116, 4 A. & E. Ann. Cas. 893, holding damages from depreciation in cattle expense for feeding and loss of butter product resulting from breach of contract to supply pasturage, too remote for recovery.

Cited in note (52 L. R. A. 46) on damages for tort as affected by loss of profits.

Distinguished in *Hichhorn v. Bradley*, 117 Iowa, 139, 90 N. W. 592, holding loss of profits provable upon illegal revocation of agency to introduce brand of cigars into specified territory.

9 L. R. A. 810, *HORN v. MILLER*, 136 Pa. 640, 20 Atl. 706.

Report of second appeal in 142 Pa. 557, 21 Atl. 994.

Covenant running with land.

Approved in *Webb v. Bennett's Branch Improv. Co.* 161 Pa. 628, 29 Atl. 260, holding administrator without right to compensation for flooding of lands subsequent to testator's death, in violation of agreement with latter; *Patterson v. Fair*, 8 Northampton Co. Rep. 113, holding grant of right to conduct water, covenant running with the land; *Boyden v. Roberts*, 131 Wis. 670, 111 N. W. 701, holding that a covenant restricting use of certain land applies to a parcel conveyed therefrom though covenant is not expressed in deed.

Cited in *Erb's Estate*, 25 Lanc. L. Rev. 20, holding that covenant by owner with lessee of water power to pay half of repairs to dam and race runs with land.

Cited in footnote to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall expressly declared to run with land.

Cited in notes (82 Am. St. Rep. 684) on what covenants run with the land. Distinguished in *Hill v. Pardee*, 143 Pa. 104, 28 W. N. C. 451, 22 Atl. 815, holding lessee of coal mine not liable for failure to furnish support under predecessor's covenant not declared on.

Right to divert water of stream.

Cited in *Manheim Water Co. v. Home of the Homeless*, 24 Lanc. L. Rev. 362, holding that water company cannot use stream so as to interfere with right of upper riparian owner to use water for aged people's home.

Cited in footnote to *Gould v. Eaton*, 38 L. R. A. 181, which denies riparian owner's power to transfer right to divert water from stream to use on nonriparian land.

9 L. R. A. 814, *VEON v. CREATON*, 138 Pa. 48, 20 Atl. 865.

Civil damage act.

Cited in *Littell v. Young*, 41 W. N. C. 103, 5 Pa. Super. Ct. 214, holding that person injured when intoxicated has right of recovery from saloonkeeper, under act giving damages to any person aggrieved; *Bradford v. Boley*, 36 W. N. C. 239, holding wife to be a "person aggrieved," having action for damages for husband's imprisonment for manslaughter, committed while intoxicated; *Cunningham v. Porchet*, 23 Tex. Civ. App. 83, 56 S. W. 574, holding one whose boarders left because of saloon and dancehall, "aggrieved" thereby; *State v. Central Vermont R. Co.* 81 Vt. 461, 21 L.R.A.(N.S.) 950, 71 Atl. 193, holding purchaser of goods not a party aggrieved by overcharge for carriage made on consignor, though overcharge was included in price of goods.

Cited in footnote to *Gage v. Harvey*, 43 L. R. A. 143, which holds loss of money taken from intoxicated person's pocket not included in damages from sale of liquor to him.

Distinguished in *Eddy v. Courtright*, 91 Mich. 269, 51 N. W. 887, holding mother receiving support from son killed by intoxication, within statute giving action for injury to means of support.

Licensing sale of liquors.

Cited in footnote to *Perry v. Salt Lake City*, 11 L. R. A. 446, which holds city council has wide discretion as to granting of licenses.

What liquors are intoxicating.

Cited in note (10 L. R. A. 520) on cider as a fermented liquor.

9 L. R. A. 817, *ROSUM v. HODGES*, 1 S. D. 308, 47 N. W. 140.

Demand before suit.

Cited in *Guernsey v. Tuthill*, 12 S. D. 595, 82 N. W. 190, and *Consolidated*

Land & Irrig. Co. v. Hawley, 7 S. D. 231, 63 N. W. 904, holding demand unnecessary in action for wrongful seizure of property by officer; Willard v. Monarch Elevator Co. 10 N. D. 406, 87 N. W. 996, holding demand unnecessary before action for conversion of wheat; Schwamb Lumber Co. v. Schaar, 94 Ill. App. 546, holding demand unnecessary to sustain replevin, defendant's possession being wrongful.

Extent of cross-examination.

Cited in note (11 Eng. Rul. Cas. 171) on extent of right to cross-examine witness.

9 L. R. A. 820, MURPHY v. MURPHY, 1 S. D. 316, 47 N. W. 142.

Impeaching verdict by affidavits of jurors.

Followed in Ulrick v. Dakota Loan & T. Co. 2 S. D. 294, 49 N. W. 1054, holding affidavits of jurors not admissible to show misconduct in reaching verdict; State v. Kiefer, 16 S. D. 181, 91 N. W. 1117, 1 A. & E. Ann. Cas. 268, 12 Am. Crim. Rep. 619, holding that affidavits of jurors cannot be received by court to impeach their verdict.

Approved in Ralton v. Sherwood Logging Co. 54 Wash. 257, 103 Pac. 28, refusing impeachment of verdict by affidavits of jurors of misconduct on their part not within the statutory exception to the rule.

Cited in State v. Andre, 14 S. D. 217, 84 N. W. 783, holding affidavit of juror alleging use of intoxicating liquors during trial no ground for new trial; Clark v. VanVleck, 135 Iowa, 200, 112 N. W. 648, holding that allowances of damage not prayed for may not be shown by affidavit of juror to impeach the verdict; Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co. 27 Nev. 147, 103 Am. St. Rep. 759, 73 Pac. 759, holding that affidavits of jurors, that verdict was reached by averaging estimates of the jurors cannot be received to impeach verdict; Ewing v. Lunn, 22 S. D. 106, 115 N. W. 527, holding that affidavits of jurors are inadmissible in support, motion for new trial, for purpose of showing one of the jurors was intoxicated.

Cited in notes (11 L. R. A. 706) on jurors impeaching their own verdict; (31 L. R. A. 489) on right of jurors to act on their own knowledge of the facts in or relevant to the issue.

Distinguished in Edward Thompson Co. v. Gunderson, 10 S. D. 43, 71 N. W. 764, holding juror's affidavits admissible to sustain verdict.

Distinguished on statutory grounds in Wolfgram v. Schoepke, 123 Wis. 25, 100 N. W. 1054, 3 A. & E. Ann. Cas. 398, holding affidavits of jurors admissible to show that the insertion of an answer in special verdict error and was directly opposite from conclusion arrived at.

Presumption as to agreement to pay for services of relative.

Cited in footnote to Ulrich v. Ulrich, 18 L. R. A. 37, which holds that no presumption exists against parents' agreement to pay for services where evidence tends to show agreement.

Cited in note (11 L.R.A.(N.S.) 882, 894, 895) on implication of agreement to pay for services of relative or member of household.

9 L. R. A. 824, WHITE v. CHICAGO, M. & ST. P. R. CO. 1 S. D. 326, 47 N. W. 146.

Measure of damages for injury to property.

Cited in Bailey v. Chicago, M. & St. P. R. Co. 3 S. D. 532, 19 L. R. A. 655, 54 N. W. 596, holding that where trees are wrongfully destroyed, owner may recover either for value of trees or injury to real estate; Chicago & N. W. R. Co. v. Kendall, 108 C. C. A. 251, 186 Fed. 141, holding that measured damages is

value of buildings destroyed by fire, detached from land, in action against railroad for destruction of building by fire; *Louisville & N. R. Co. v. Beeler*, 126 Ky. 335, 11 L.R.A.(N.S.) 936, 128 Am. St. Rep. 291, 103 S. W. 300, 15 A. & E. Ann. Cas. 913, upholding instruction that measure of damage is the difference in value of the object injured before the fire and after, and refusing instruction of same kind with respect to whole form.

Cited in note (19 L. R. A. 659) on measure of damages for injury to or destruction of trees.

Proof of cause of fire.

Cited in *Finkelston v. Chicago, M. & St. P. R. Co.* 94 Wis. 283, 68 N. W. 1005, holding damages for injury by fire not recoverable where cause of fire is merely speculative; *Balding v. Andrews*, 12 N. D. 277, 96 N. W. 305, holding that person alleging damage from loss by fire caused by neglect to use due care, must put forth proof to establish the charge.

Presumption of negligence from fact of fire.

Cited in *Cronk v. Chicago, M. & St. P. R. Co.* 3 S. D. 100, 52 N. W. 420, holding presumption of negligence as to fire from engine sparks, rebuttable; *Allend v. Spokane Falls & N. R. Co.* 21 Wash. 333, 53 Pac. 244, holding presumptive evidence that engine sparks caused explosion sufficient to take case to jury; *Osburn v. Oregon R. & Nav. Co.* 15 Idaho, 483, 19 L.R.A.(N.S.) 745, 98 Pac. 627, 16 A. & E. Ann. Cas. 870, on the rule that proof of starting a fire from locomotive raises presumption of negligence; *Hutto v. Seaboard Air Line R. Co.* 81 S. C. 574, 62 S. E. 835, holding that the fact of fire raises presumption of negligence casting burden on company of proving proper construction and operation of engine.

Cited in note (15 L. R. A. 40) on presumption of negligence from occurrence of railway fires.

Liability of railroads for fire from defective engine appliances.

Cited in *Gainesville, J. & S. R. Co. v. Edmondson*, 101 Ga. 750, 29 S. E. 213, holding that in action against railroad for destruction of property by fire caused by running locomotive, it must appear that such damage was caused by negligence.

Cited in footnote to *Norfolk & W. R. Co. v. Fritts*, 68 L.R.A. 864, which sustains liability for fire of railroad company unnecessarily running heavy freight train up grade at double its scheduled speed in dry season and during heavy wind.

Cited in note (11 L. R. A. 508) on railroad company's liability for fire communicated by defective engine appliances.

9 L. R. A. 829, *DEL ESCOBAL'S SUCCESSION*, 42 L. Ann. 1086, 8 So. 268.

Validity of noncupative will.

Cited in footnote to *Baird v. Baird*, 68 L.R.A. 627, which holds verbal will made when testator is likely to die at any time and in view of death not invalid because of prior preparation to make it nor because sufficient time to make written one thereafter occurs.

9 L. R. A. 830, *STINSON v. LEE*, 68 Miss. 113, 24 Am. St. Rep. 257, 8 So. 272.

Commercial paper.

Cited in footnote to *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.

Cited in note (21 L.R.A.(N.S.) 1053) on liability of principal on negotiable paper executed by agent.

9 L. R. A. 831, *MAYO v. INDIA MUT. INS. CO.* 152 Mass. 172, 23 Am. St. Rep. 814, 25 N. E. 80.

Constructive total loss.

Cited in *Searles v. Western Assur. Co.* 88 Miss. 272, 117 Am. St. Rep. 741, 40 So. 866, on distinction between actual and constructive total loss.

— Liability.

Cited in *Devitt v. Providence Washington Ins. Co.* 173 N. Y. 22, 65 N. E. 777, Affirming 61 App. Div. 400, 70 N. Y. Supp. 654, holding insurer liable for constructive total loss.

Disapproved in *Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co.* 179 U. S. 14, 45 L. ed. 58, 21 Sup. Ct. Rep. 1, Affirming 106 Fed. 117, denying right of recovery for constructive total loss under memorandum warranting free from particular average; *Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co.* 27 C. C. A. 134, 50 U. S. App. 231, 82 Fed. 297, holding constructive total loss not covered by policy with warranty against partial loss.

Marine insurance.

Cited in footnote to *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* 65 L.R.A. 388, which holds marine policy providing that no risk shall attach until amount and description is approved and indorsed thereon, not changed into open and unrestricted policy covering all property assured elects to report, by adopting agreement fixing uniform premiums, supplying blanks on which to report risks, and a long continued custom of reporting risks by assured when convenient, and their uniform acceptance by insurer.

9 L. R. A. 833, *MILLER v. SOUTH CAROLINA R. CO.* 33 S. C. 359, 11 S. E. 1093.

Authority of agent as to delivery of goods.

Cited in footnote to *Rudell v. Ogdensburg Transit Co.* 44 L. R. A. 415, which sustains agent's general authority to contract for delivery of goods at specified time.

Review of findings of fact.

Cited in *Rhodes v. Russell*, 38 S. C. 424, 17 S. E. 222, holding question of fact left to referee not reviewable on appeal; *Wilson v. Cantrell*, 40 S. C. 128, 18 S. E. 517, holding findings of fact by master beyond review on appeal.

Proof of delivery to connecting carrier.

Cited in *Jonesville Mfg. Co. v. Southern R. Co.* 77 S. C. 484, 58 S. E. 422, holding a sheet showing delivery of goods each day to connecting carrier including goods in question signed by connecting carrier to be a sufficient receipt in writing.

Liability of connecting carrier for loss beyond own line.

Cited in *Chartrand v. Southern R. Co.* 85 S. C. 481, 67 S. E. 741, holding that under statute initial carrier relieves itself from liability by showing receipt from connecting steamship company, upon complying with statute.

Cited in note (31 L.R.A.(N.S.) 23, 91) on liability of connecting carrier for loss beyond own line.

9 L. R. A. 838, *HOBBS v. ATLANTIC & N. C. R. CO.* 107 N. C. 1, 12 S. E. 124.

Fellow servants.

Cited in *Hancock v. Norfolk & W. R. Co.* 124 N. C. 226, 32 S. E. 679, upholding act making railroad companies liable for injuries to servants through negligence of fellow servants; *Nicholson v. Transylvania R. Co.* 138 N. C. 517, 51 S. E. 40, as containing primary discussion of the recent origin of and reason for the fellow servant doctrine.

Cited in note (38 L. ed. U. S. 1010) on railroad conductors and engineers as fellow servants with other employees.

— Who are fellow servants.

Approved in *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 547, 26 S. E. 922, holding motorman and track foreman, fellow servants; *Pleasants v. Raleigh & A. Air Line R. Co.* 121 N. C. 495, 61 Am. St. Rep. 674, 28 S. E. 267, holding conductor of side-tracked train, fellow servant of engineer of passing train.

Cited in note (50 L. R. A. 431) on what servants are deemed to be in same common employment apart from statutes where no questions as to vice principalship arise.

Incompetence of vice principal.

Cited in *Harris v. Balfour Quarry Co.* 131 N. C. 556, 42 S. E. 973, holding knowledge of master essential to charge him with liability for injury due to incompetence of vice principal.

9 L. R. A. 840, *STATE v. BAGWELL*, 107 N. C. 859, 12 S. E. 254.

9 L. R. A. 841, *CLARK v. HIRSCHL*, 81 Iowa, 200, 47 N. W. 78.

Rights of insured and beneficiary under insurance contract.

Approved in *Schmidt v. Iowa K. of P. Ins. Asso.* 82 Iowa, 306, 11 L. R. A. 206, 47 N. W. 1032, holding indorsement upon benefit certificate, by third person in absence of insured in accordance with oral instructions from latter, sufficient to change beneficiary; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 579, 19 S. W. 25, holding beneficiary of certificate without vested interest therein; *Schmidt v. Northern Life Asso.* 112 Iowa, 47, 51 L. R. A. 144, 84 Am. St. Rep. 323, 83 N. W. 800, holding benefit certificate payable to administrator of insured murdered by beneficiary; *Delaney v. Delaney*, 175 Ill. 201, 51 N. E. 961, holding new benefit certificate issued to new beneficiary, valid although former one not surrendered as stipulated; *Fink v. Delaware L. & W. Mut. Aid Soc.* 57 App. Div. 512, 68 N. Y. Supp. 80, holding request for change of beneficiary with required fee, effective; *Cade v. Head Camp P. J. W. W.* 27 Wash. 230, 67 Pac. 603, holding wife, named as beneficiary in certificate, without special equity as such.

Cited in *Schardt v. Schardt*, 100 Tenn. 279, 45 S. W. 340, raising, without deciding, question as to force of word "attest" in rule for changing beneficiary; *Waldum v. Homstad*, 119 Wis. 319, 96 N. W. 806, holding change of beneficiary not defeated by failure of officer of society to forward certificate; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 405, 126 N. W. 949, holding that change of beneficiary is effected where member does all that is necessary to effect change, even though member dies before issuance of new certificate; *Holden v. Modern Brotherhood*, 151 Iowa, 681, 132 N. W. 329, holding that substitution of new beneficiary will be effected where insured complied with all rules for change except to surrender old certificate which was in hands of original beneficiary who refused to surrender it.

Cited in footnote to *Lahey v. Lahey*, 61 L. R. A. 791, which denies right of original beneficiary to fund notwithstanding failure to effect change on his refusal to surrender old certificate.

Cited in notes (15 L. R. A. 352) on changing description in benefit certificate otherwise than in prescribed method; (49 L. R. A. 755) on power of insured to destroy rights of beneficiary; (34 L.R.A.(N.S.) 277) on effect of assured's death before contemplated change of beneficiary complete; (52 Am. St. Rep. 562) on change of beneficiary of mutual or membership life or accident insurance.

Distinguished in *Shuman v. Ancient Order*, U. W. 110 Iowa, 645, 82 N. W.

331, holding irregular attempt to change beneficiary, known to insurer after insured's death, ineffective; *Urick v. Western Travelers Acci. Asso.* 81 Neb. 335, 116 N. W. 48, holding that a request to association for change of beneficiary not followed by any other act or by filling out required blank is insufficient to bring about a change.

Criticized in *Carpenter v. Knapp*, 101 Iowa, 729, 38 L. R. A. 133, 70 N. W. 764, holding requirement of beneficiary's consent in case of "assignment," inapplicable to change of beneficiary.

9 L. R. A. 844, *VILAS v. BUTLER*, 123 N. Y. 440, 20 Am. St. Rep. 771, 25 N. E. 941.

Relief from judgment.

Approved in *Lyster v. Pearson*, 7 Misc. 99, 27 N. Y. Supp. 399, holding motion to vacate, proper remedy where judgment entered by default after service on one whose designation was invalid; *Post v. Charlesworth*, 66 Hun, 258, 21 N. Y. Supp. 168, holding that relief against judgment rendered upon unauthorized appearance of attorney may be sought by motion in the action; *New York v. Smith*, 48 N. Y. S. R. 588, 20 N. Y. Supp. 666, holding that one against whom unjust judgment rendered on appearance of unauthorized attorney may seek relief by motion in action unless circumstances require resort to equity; *Re White*, 52 App. Div. 233, 65 N. Y. Supp. 168, refusing to vacate decree because party disagreed with his attorneys and dismissed them without substituting others or informing his adversaries of the fact; *Smith v. Johnson*, 44 W. Va. 284, 29 S. E. 509, holding that bill in equity to set aside judgment rendered without service of process and on unauthorized appearance of attorney must be sustained by preponderance of evidence.

Cited in *Bush v. O'Brien*, 164 N. Y. 221, 58 N. E. 106 (dissenting opinion), majority holding that taxpayer may maintain action to restrain collection of judgment entered against city on unauthorized offer of corporation counsel; *Cross v. Gould*, 131 Mo. App. 599, 110 S. W. 672, holding that a judgment procured by fraud may be set aside at a subsequent term on motion in the nature of a writ of error coram nobis; *Cross v. Gould*, 131 Mo. App. 602, 110 S. W. 672, on relief from judgment procured by unauthorized appearance of attorney also citing note with approval; *United States L. Ins. Co. v. Hellinger*, 130 App. Div. 416, 114 N. Y. Supp. 885, holding that because of delay and under doubtful circumstances as to authority of attorney the relief should be had or denied in equity by common law proof; *Hope v. Shevill*, 137 App. Div. 88, 122 N. Y. Supp. 127, to the point that relief from judgment entered on unauthorized appearance should, except in special cases, be sought by motion in action.

Cited in notes (21 L.R.A. 850) on effect of judgment obtained on unauthorized appearance by attorney; (54 Am. St. Rep. 247) on relief in equity against judgments and other judicial determinations; (60 Am. St. Rep. 644, 648, 662) on vacation of judgment on motion when not specially authorized by statute.

Want of jurisdiction.

Approved in *Myers v. Prefontaine* 40 App. Div. 604, 58 N. Y. Supp. 70, holding that judgment *in rem* against nonresident remaining without state, on appearance by unauthorized attorney, will be set aside as granted without jurisdiction; *Re Stephani*, 75 Hun, 190, 26 N. Y. Supp. 1089, holding that court acquires no jurisdiction by unauthorized appearance of attorney for a nonresident; *McKenna v. Duffy*, 64 Hun, 598, 19 N. Y. Supp. 248, holding that purchaser, on sale in partition, cannot be compelled to take title where nonresident parties, not served with process, appeared by attorneys whose authority is not shown; *Prichard v. Sigafus*, 103 App. Div. 537, 93 N. Y. Supp. 152, holding that

the rule that an unserved judgment debtor cannot collaterally assail a judgment against himself through unauthorized appearance of attorney applies only to domestic judgments and not to a judgment from New Mexico to be here enforced.

Cited in *Tyler v. Registration Court Judges*, 175 Mass. 88, 51 L. R. A. 440, 55 N. E. 812 (dissenting opinion), majority holding jurisdiction of proceeding *in rem* acquired without personal service or notice, not a violation of constitutional provisions for due process of law.

Direct or collateral attack.

Approved in *Donohue v. Hungerford*, 1 App. Div. 530, 37 N. Y. Supp. 628, holding that unauthorized appearance of attorney cannot be attacked in collateral proceeding, but that relief should be sought by motion in the action; *O'Connor v. Felix*, 87 Hun, 186, 33 N. Y. Supp. 1074; *Washbon v. Cope*, 144 N. Y. 294, 39 N. E. 388, holding that objection that judgment is without jurisdiction because of unauthorized appearance of attorney cannot be taken in collateral proceeding or action; *Nathan Mfg. Co. v. Edna Smelting & Ref. Co.* 130 App. Div. 520, 114 N. Y. Supp. 1037, holding that a person named in judgment who has not been served may move to have his name stricken from the judgment.

Cited in *O'Donoghue v. Boies*, 159 N. Y. 99, 53 N. E. 537, holding judgment rendered by court without jurisdiction a nullity which may be attacked directly or collaterally; *Kahn v. Lesser*, 28 Abb. N. C. 79, 18 N. Y. Supp. 98, holding presumption of jurisdiction of superior court of other state and recital of defendant's appearance in record not *per se* overcome by defendant's uncorroborated oath that he did not authorize an appearance; *Max J. Winkler Brokerage Co. v. Courson*, 160 Ala. 379, 49 So. 341, holding that relief from judgment confessed without authority is by direct application to court of judgment or by bill in equity; *Parham v. Burns*, 135 App. Div. 888, 120 N. Y. Supp. 142, holding that a decree of foreclosure can only be assailed by creditors of mortgagor by direct proceedings in the original action even though the decree was an unauthorized stipulation of attorneys; *White v. Glover*, 138 App. Div. 800, 123 N. Y. Supp. 482, holding that wife who was not personally served in an action in another state may show in action on foreign judgment here, that her husband, who appeared for her as attorney at law, did so without authority.

Cited in note (23 Am. St. Rep. 105) on collateral attack upon judgment.

Delay in application.

Approved in *Abbett v. Blohm*, 54 App. Div. 425, 66 N. Y. Supp. 838, holding that court will vacate unauthorized appearance and set aside judgment only where application is made promptly or adverse party has lost no rights by the delay; *Quinn v. Jenks*, 88 Hun, 436, 34 N. Y. Supp. 962, refusing to set aside sale and foreclosure, where rights of purchasers in good faith for value and without notice of plaintiff's equities, had interfered.

Cited in *McEachern v. Brackett*, 8 Wash. 656, 40 Am. St. Rep. 922, 36 Pac. 690, holding that judgment rendered against party not served with process on unauthorized appearance of attorney will be set aside as a nullity when application is made promptly although innocent third parties may suffer.

Presumption of authority.

Approved in *Briggs v. Gardner*, 60 Hun, 545, 15 N. Y. Supp. 335, holding that where defense of pendency of former suit is interposed, it will be presumed, until its discontinuance, that attorney bringing it was authorized to do so.

Cited in *People ex rel. Allen v. Murray*, 2 Misc. 153, 23 N. Y. Supp. 160, to point that authority of attorney appearing in court of record will be presumed.

Regularity of judgment.

Approved in *Post v. Charlesworth*, 66 Hun, 258, 21 N. Y. Supp. 168, holding

judgment rendered on unauthorized appearance of attorney regular; *New York v. Smith*, 48 N. Y. S. R. 588, 20 N. Y. Supp. 666, holding judgment rendered against resident by court of general jurisdiction upon unauthorized appearance of attorney, neither void nor irregular.

Contradicting recital in judgment.

Cited in *Cooper v. Newell*, 173 U. S. 569, 43 L. ed. 812, 19 Sup. Ct. Rep. 506, holding evidence admissible to contradict recital in judgment that defendant was resident, and to show he was not served with process, and that attorney who appeared was unauthorized.

Authority of attorney.

Cited in *Herbert v. Lawrence*, 21 N. Y. Civ. Proc. Rep. 338, 42 N. Y. S. R. 407, 18 N. Y. Supp. 95, holding attorney abandoning action for want of funds, without power to withdraw answer.

Distinguished in *Reich v. Cochran*, 105 App. Div. 560, 94 N. Y. Supp. 404, holding that an authorized attorney may authorize an attorney to appear for him.

9 L. R. A. 850, *MAYER v. HEIDELBACH*, 123 N. Y. 332, 25 N. E. 416.

Discharge of indebtedness.

Cited in *Dykman v. Keeney*, 16 App. Div. 134, 45 N. Y. Supp. 137, holding acceptance by bank of notes given by other parties in payment of note surrendered to debtor whose account is marked paid, discharges old debt; *Union Bank v. Schneider*, 70 Misc. 378, 128 N. Y. Supp. 878, to the point that acceptance of check by bank on which drawn, constitutes payment of note against drawer held by bank.

Cited in note (35 L.R.A.(N.S.) 35, 36) on payment by commercial paper.

Who are bona-fide holders.

Approved in *First Nat. Bank v. Dean*, 137 N. Y. 118, 32 N. E. 1108, holding that one who takes warehouse receipts for value without knowledge of equities between original parties, makes advances of money, and takes renewal note, is bona-fide holder; *Chapman v. Ogden*, 37 App. Div. 358, 56 N. Y. Supp. 73, holding that one who accepts notes in payment of indebtedness and releases remedies against debtors, is bona-fide holder; *Western Nat. Bank v. Flannagan*, 14 Misc. 318, 35 N. Y. Supp. 848, holding surrender of collaterals and extension of time of payment, sufficient consideration to constitute pledgee bona-fide holder of new note given as collateral security; *Spring Brook Chemical Co. v. Dunn*, 39 App. Div. 131, 57 Am. St. Rep. 100, holding that receipt by bank of draft and application and credit of it in payment of existing indebtedness, does not, in absence of express agreement extinguishing debt, make bank holder for value; *Skinner Engine Co. v. Old Staten Island Dyeing Establishment*, 12 Misc. 72, 33 N. Y. Supp. 82, holding creditor, accepting indorsed note for old debt without surrendering any security or evidence of indebtedness, not bona-fide holder; *Button v. Rathbone*, 126 N. Y. 192, 27 N. E. 266, holding prior unfiled chattel mortgage not void against purchaser who has given credit for goods covered by mortgage upon pre-existing debt not extinguished by the transaction; *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 262, 101 Am. St. Rep. 701, 55 Atl. 1080, holding bank to be bona fide holder for value of a note received in regular course endorsed in blank to be applied to maker's indebtedness though the note was filled in after indorsement and misapplied; *Albert v. Hoffman*, 64 Misc. 89, 117 N. Y. Supp. 1043, holding transferee of a check in payment of past loan a bona fide holder for value.

Cited in notes (17 L.R.A.(N.S.) 749) on exchange of commercial paper as con-

stituting one a holder in due course for value; (31 L.R.A.(N.S.) 292, 295) on holder of bill or note as collateral as bona fide holder; (4 Eng. Rul. Cas. 332) on who are bona fide holders of bills or notes.

— **Valuable consideration.**

Approved in *Central Trust Co. v. West India Improv. Co.* 48 App. Div. 179, 63 N. Y. Supp. 853, to point that notes taken in absolute payment and extinguishment of debt are taken for value; *New York County Nat. Bank v. American Surety Co.* 69 App. Div. 157, 74 N. Y. Supp. 692, holding surrender and extinguishment of unsecured note and acceptance of secured note, a valuable consideration within statute as to bona-fide purchasers; *Weaver v. Farrington*, 6 Misc. 55, 26 N. Y. Supp. 78, holding part payment and taking note for lesser amount good consideration for indorsement and transfer of the note taken; *Carter, R. & Co. v. Howard*, 17 Misc. 383, 39 N. Y. Supp. 1060, holding discharge of precedent debt or forbearance to collect on receipt of indorsed note adequate consideration for its indorsement; *Schloss v. Feltus*, 103 Mich. 526 note, holding pre-existing debt not such consideration or payment for transfer of goods as will defeat replevin by original vendor who sets up fraud; *O'Brien v. Fleckenstein*, 180 N. Y. 354, 105 Am. St. Rep. 768, 73 N. E. 30, holding that where a party gives a valid extension of time of payment of a pre-existing debt and takes a mortgage as security for same he thereby becomes a bona fide purchaser for value; *Re Hopper-Morgan Co.* 154 Fed. 255, holding that under New York negotiable instrument law an indorsee of an accommodation note taking same from another endorsee as collateral security for a past indebtedness in good faith is a holder for value.

Cited in *Blair v. Hagemeyer*, 26 App. Div. 224, 49 N. Y. Supp. 965, to point that satisfaction of judgment is good consideration for transfer of note.

— **Exclusion of equities.**

Approved in *Sixth Nat. Bank v. Lorillard Brick Works Co.* 46 N. Y. S. R. 236, 18 N. Y. Supp. 861, holding discount of diverted note by bank which credits proceeds without parting with them, does not make it bona-fide holder so as to exclude existing equities between parties; *Sutherland v. Mead*, 80 App. Div. 107, 80 N. Y. Supp. 504, holding actual payment and discharge of pre-existing debt valuable consideration for transfer of diverted commercial paper and sufficient as against accommodation indorsers to shut off prior equities; *Iowa Nat. Bank v. Sherman*, 17 S. D. 406, 106 Am. St. Rep. 778, 97 N. W. 12, holding that the transfer of a negotiable promissory note before maturity in payment of a pre-existing indebtedness is on a valuable consideration sufficient to constitute transferee a bona fide holder entitling him to protection against defects not brought to his notice.

Cited in *Rock Springs Nat. Bank v. Luman*, 6 Wyo. 153, 42 Pac. 874 (dissenting opinion), to point that transfer of negotiable paper in payment of existing debt, is for value under rule barring undisclosed equities, whether payment absolute or conditional.

9 L. R. A. 853, *STATE v. TAMLER*, 19 Or. 528, 25 Pac. 71.

Appeals from trial courts.

Followed in *State v. Robinson*, 32 Or. 52, 48 Pac. 357, holding motion to acquit for failure of proof in any respect must specify grounds.

Cited in *State v. Fiester*, 32 Or. 264, 50 Pac. 561, holding that motion to acquit must specify where evidence is insufficient except on total failure of proof; *Watson v. Southern Oregon Co.* 39 Or. 485, 65 Pac. 985, holding misconduct or improper remarks of counsel, not connected with judicial error in respect thereto,

not reviewable; *State v. Foot You*, 24 Or. 67, 32 Pac. 103, holding that in order to raise question on appeal, objection must be made, ruling obtained, and exception taken; *State v. Schuman*, 36 Or. 22, 47 L. R. A. 155, 78 Am. St. Rep. 754, 58 Pac. 661, holding that claim of immunity under state law must be asserted in trial court to be considered on appeal; *State v. Hyde*, 22 Wash. 563, 61 Pac. 719, holding nonsuit impossible in criminal case; *State v. Haines*, 35 Or. 382, 58 Pac. 39, holding that circuit court has jurisdiction only to review city court's action respecting violation of municipal ordinances; *State v. Sally*, 41 Or. 368, 70 Pac. 396, holding that insufficiency of proof as to taking animal should have been brought to attention of court, on motion for direction of verdict in prosecution for larceny; *State v. Reyner*, 50 Or. 230, 91 Pac. 301, holding that party seeking to review action of trial court on account of a lack of evidence of which he complains is required to point out the legal principle for the maintenance of which he contends and a failure to do so at proper time is a waiver of any error unless there then is a total failure of proof; *Krebs Mop Co. v. Livesley*, 51 Or. 536, 92 Pac. 1084, holding that an objection to form of remedy first made on appeal, no record of action on such objection by trial court appearing, is not a subject for review.

Pleading exceptions.

Followed in *State v. Carmody*, 50 Or. 8, 91 Pac. 1081, holding that exceptions and provisions in a criminal statute need not be negated in an indictment unless they be descriptive of the offense or a necessary ingredient in its definition.

Cited in *Binhoff v. State*, 49 Or. 421, 90 Pac. 586, holding an indictment failing to plead the statutory exception to a misdemeanor is insufficient when such exception is included in the enacting clause; *State v. Eisen*, 53 Or. 303, 100 Pac. 257, holding an information for contributing to a child's delinquency insufficient for failure to negative pregnancy in a lawful manner as result of marriage; *State v. Atwood*, 54 Or. 535, 102 Pac. 295, holding that an indictment for abortion need not negative the possibility that the abortion was a medical necessity; *State v. Edmunds*, 55 Or. 239, 104 Pac. 430, holding that indictment for violation of local option statutes is sufficient if offense is charged in language of statute, without negating exceptions.

Necessity of specification as to failure of proof on motion for acquittal.

Cited in *State v. Brinkley*, 55 Or. 137, 104 Pac. 893, holding that particulars in which proof is insufficient must be specified upon motion for acquittal, unless there is entire failure of proof.

9 L. R. A. 856, *LAW v. BUTLER*, 44 Minn. 482, 46 N. W. 53.

Sale of mortgage of homestead by one spouse only.

Cited in *Weitzner v. Thingstad*, 55 Minn. 247, 56 N. W. 817, holding contract of husband alone to convey homestead, void; *Murphy v. Renner*, 99 Minn. 350, 8 L.R.A.(N.S.) 567, 116 Am. St. Rep. 418, 109 N. W. 593, holding it void, although wife may have abandoned husband and home; *Mundy v. Shellaberger*, 153 Fed. 221, holding contract to convey by husband solus, invalid; *Delisha v. Minneapolis, St. P. R. & D. Electric Traction*, 110 Minn. 521, 27 L.R.A.(N.S.) 966, 126 N. W. 276, holding that contract by husband to convey perpetual easement for railway right of way over homestead without signature of wife is void; *Bushnell v. Loomis*, 234 Mo. 395, 36 L.R.A.(N.S.) 1040, 137 S. W. 257, holding that statute making conveyance by husband of homestead previously acquired invalid unless wife joins therein is valid.

Cited in footnote to *Wallace v. Travelers' Ins. Co.* 26 L. R. A. 806, which holds.

recorded power of attorney to husband insufficient showing of consent to mortgage of homestead.

Cited in note (95 Am. St. Rep. 918, 920, 921) on effect of conveyance or encumbrance of homestead by one spouse only.

— **Estoppel to dispute.**

Cited in *Withers v. Love*, 72 Kan. 156, 3 L.R.A. (N.S.) 522, 83 Pac. 204, holding acts of husband in disposal of homestead do not estop him where they do not estop wife; *Lucy v. Lucy*, 107 Minn. 436, 131 Am. St. Rep. 502, 120 N. W. 754 (dissenting opinion) to point that conveyance of homestead by husband, without joinder of wife, cannot be rendered valid, under rule of estoppel, by subsequent conduct of husband alone.

Assignability of vendor's lien.

Cited in note (22 Am. St. Rep. 279) on assignability of lien of vendor.

9 L. R. A. 859, *GOFF v. STOUGHTON STATE BANK*, 78 Wis. 106, 47 N. W. 190.

Report of second appeal, in 84 Wis. 370, 54 N. W. 732.

Admissibility of declarations in party's favor.

Cited in *Grisim v. Milwaukee City R. Co.* 84 Wis. 22, 54 N. W. 104, holding declaration as part of *res gestæ* only admissible when made contemporaneously with the transaction.

Admissibility of account books.

Cited in footnote to *Re Fulton*, 35 L. R. A. 133, which holds book containing charges against one person only, inadmissible.

9 L. R. A. 861, *SWEET v. OHIO COAL CO.* 78 Wis. 127, 47 N. W. 182.

Assumption of risks of employment.

Cited in *Erdman v. Illinois Steel Co.* 95 Wis. 12, 60 Am. St. Rep. 66, 69 N. W. 993, holding servant negligent in working at cracked, high-speed saw, cutting iron, on master's promise to repair; *Burnell v. West Side R. Co.* 87 Wis. 392, 58 N. W. 772, holding danger from unguarded gear wheels of electric car in cleaning commutator, risk of motorman's employment; *Paule v. Florence Min. Co.* 80 Wis. 356, 50 N. W. 189, holding that "trammer" in mine assumes risk of ore and rock falling from roof; *Yerkes v. Northern P. R. Co.* 112 Wis. 188, 88 Am. St. Rep. 961, 88 N. W. 33, holding servant not guilty of contributory negligence, as matter of law, in continuing to use defective apparatus on promise to repair; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 558, 65 N. W. 186, denying right of recovery for death of rivet heater killed by fall from stringer to ground while at work; *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 655, 68 N. W. 1057, denying right of recovery for injury due to closeness of building to railroad tracks, danger being known to plaintiff; *Reed v. Stockmeyer*, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 189, holding servant knowing danger of more hazardous employment, outside of that for which he had engaged, assumes risks thereof; *Hennesey v. Chicago & N. W. R. Co.* 99 Wis. 121, 74 N. W. 554 (concurring opinion), holding it question for jury whether switchman observed danger of open ditch between tracks, and assumed risk thereof; *Corrigan v. West Division S. S. Co.* 133 Wis. 82, 113 N. W. 441, holding that one employed to lift hatch covers knew or ought to have known of the incident dangers and assumed the risk of injury therefrom; *Jones v. Milwaukee Electric R. & Light Co.* 147 Wis. 433, 133 N. W. 636, holding that servant who has ample opportunity to familiarize himself with danger in connection with his employment will be deemed to have assumed the risk.

Cited in note (4 L.R.A.(N.S.) 849) on servant's assumption of obvious risks arising from master's negligence.

Contributory negligence.

Cited in *Murphy v. Herold Co.* 137 Wis. 613, 119 N. W. 294, holding plaintiff not guilty of contributory negligence as a matter of law where he, without looking walked into an open unguarded hatch in sidewalk, through which he saw men putting paper while guarded earlier in the day.

9 L. R. A. 863, *LINDEN STEEL CO. v. IMPERIAL REF. CO.* 138 Pa. 10, 20 Atl. 867.

Description of property covered by mechanics' lien.

Cited in *Linden Steel Co. v. Rough Run Mfg. Co.* 158 Pa. 245, 33 W. N. C. 247, 27 Atl. 895, holding lien notice describing land, buildings, and machinery, with accurate map of premises appended, sufficient; *Hassenfus v. Philadelphia Packing & Provision Co.* 15 Pa. Co. Ct. 660, holding mechanics' lien describing, as separate building, part of single building, defective; *Nolan Bros. v. Warren*, 11 Pa. Dist. R. 562, holding that where filing of mechanic's lien is as of "a building situated" etc., containing no other description, it is defective; *Pusey v. Pennsylvania Paper Mills*, 173 Fed. 645, holding that a mechanic's lien, including other buildings than those erected belonging to same plant also a dam-site, is defective as the buildings erected were capable of a separate lien; *Hiestand v. Keath*, 229 Pa. 156, 78 Atl. 40, 27 Lanc. L. Rev. 295, to the point that court has power to strike from record claim, in mechanic's lien action, irregular on face.

L. R. A. CASES AS AUTHORITIES.

CASES IN 10 L. R. A.

10 L. R. A. 33, *ESTERBROOK v. RILEY*, 81 Iowa, 479, 46 N. W. 1072.

Mechanic's lien.

Cited in footnote to *Steger v. Artic Refrigerating Co.* 11 L. R. A. 580, which holds lien for laying pipes on land of strangers for refrigerating company, enforceable against entire plant of company.

Cited in note (62 L. R. A. 374) on mechanic's liens upon buildings distinct from the land.

— What constitutes "ownership."

Followed in *Webster City Steel Radiator Co. v. Chamberlin*, 137 Iowa, 719, 115 N. W. 504, holding that mechanic's lien is attachable on an improvement made by tenant for his own use on the premises of lessor with lessor's consent and approval.

Cited in *Jameson v. Gile*, 98 Iowa, 493, 67 N. W. 396, holding one in possession under contract of purchase, "owner" within mechanic's lien law; *Knapp v. Greenwood*, 83 Iowa, 5, 48 N. W. 1055, holding agent entitled to hold and occupy premises as owner under power of attorney, "owner" within meaning of lien law; *Willverding v. Offineer*, 87 Iowa, 478, 54 N. W. 592, holding father's interest sufficient under purchase by daughter with separate funds, but for his use, to support lien under his contract.

Cited in note (13 L. R. A. 706) on priority under New York mechanics' lien law of 1885.

10 L. R. A. 35, *STATE v. NORMAN*, 101 Mo. 520, 20 Am. St. Rep. 623, 14 S. W. 661.

What constitutes larceny.

Cited in note (52 L. R. A. 139) on larceny of money or property delivered by mistake.

10 L. R. A. 36, *MELLOR v. MISSOURI P. R. CO.* 105 Mo. 455, 14 S. W. 758, 16 S. W. 849.

Relation of carrier to party riding, or article carried, under special contract.

Cited in *Jones v. St. Louis S. W. R. Co.* 125 Mo. 676, 26 L. R. A. 721, 46 Am. St. Rep. 514, 28 S. W. 883, holding carrier liable to Pullman car porter as passenger; *Cleveland, C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 353, 19 L. R. A. 342, 36 Am. St. Rep. 550, 33 N. E. 116, holding postal clerk doing extra work on other than regular train, still passenger; *Poling v. Ohio River R. Co.* 38 W. Va. 659, 24 L. R. A. 222, 18 S. E. 782, holding railway not liable for injuries caused by

negligence of postal clerk in handling mail bags; *Lawton v. Waite*, 103 Wis. 252, 45 L. R. A. 619, 79 N. W. 321, holding mail clerk, injured by subcontractor's negligence, entitled to maintain action for tort, but not on contract against bondsmen of subcontractor agreeing to carry mail in accordance with contract of principal contractor by which he assumed liability to any person aggrieved; *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. 562, holding express company's contract, relieving railroad from liability to express agents, injured through its negligence, ineffectual to deprive agent of rights as passenger; *Kansas City, M. & B. R. Co. v. Southern R. News Co.* 151 Mo. 385, 45 L. R. A. 384, 74 Am. St. Rep. 545, 52 S. W. 205, holding contract by news company, indemnifying carrier for loss through injuries to former's employees, valid, though such employees passengers; *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 118 Iowa, 434, 59 L. R. A. 801, 92 N. W. 88, holding railroad company carrying mail, not liable to sender for loss of registered package; *McDermon v. Southern P. Co.* 122 Fed. 676, upholding contract between Pullman car porter and company releasing latter from liability; *Holmes v. Birmingham Southern R. Co.* 140 Ala. 213, 37 So. 338, holding a car cleaner furnished by a contractor under contract for shipment, not a fellow servant of engineer while riding under the contract; *Southern R. Co. v. Harrington*, 166 Ala. 637, 139 Am. St. Rep. 59, 52 So. 57, holding that railway postal clerks are passengers on train on which they are riding while at work; *Barker v. Chicago, P. & St. L. R. Co.* 243 Ill. 489, 26 L.R.A.(N.S.) 1062, 134 Am. St. Rep. 382, 90 N. E. 1057, holding railroad company liable for negligent injury of mail clerk, caused by company employee, in same manner as if clerk were a passenger; *Wabash R. Co. v. Jellison*, 124 Ill. App. 662, holding mail clerk a passenger while working in mail car according to custom, though car is only being switched during makeup of train; *Breeden v. Frankford M. Acci. & Plate Glass Ins. Co.* 220 Mo. 346, 119 S. W. 576, on the liability of carrier to persons riding under special contract not in the capacity of a servant, for injury from negligence.

Cited in notes (19 L. R. A. 340) on liability of railroad company for injuries received by postal clerk on their trains; (37 L. R. A. 68) on which of two or more persons is master of another who is conceded to be servant of one of them; (18 L.R.A. 795) on what constitutes common employment; (61 Am. St. Rep. 99) on who are passengers and when they become such.

Distinguished in *Yarrington v. Delaware & H. Co.* 143 Fed. 567, holding that by reason of Pennsylvania statute a railway mail clerk in performance of his duties is not entitled to rights of passenger, but is to be treated as a servant of carrier.

Waiver of privilege.

Cited in *Butler v. Manhattan R. Co.* 3 Misc. 456, 23 N. Y. Supp. 163, holding privilege not waived by mere fact that physical condition of plaintiff is in issue, where physician's testimony not made relevant by plaintiff on direct examination; *Burgess v. Sims Drug Co.* 114 Iowa, 282, 54 L. R. A. 367, footnote p. 364, 89 Am. St. Rep. 359, 86 N. W. 307, holding patient's testimony on cross-examination as to communications to physician, not waiver of privilege; *Jones v. Caldwell*, 20 Idaho, 17, — L.R.A.(N.S.) —, 116 Pac. 110; *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 358, 136 S. W. 651,—holding that fact that patient waived privilege as to one physician who treated him does not waive right to object to testimony of another physician who treated him at another time for same disease; *Hartley v. Calbreath*, 127 Mo. App. 564, 106 S. W. 570, holding that suit by patient against physician for malpractice waives privilege as to information gained by defendant and consulting physicians during treatment, but not as to information gained by physician after termination of defendant's con-

nections; *May v. Northern P. R. Co.* 32 Mont. 540, 70 L.R.A. 119, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, holding that testimony on part of plaintiff in cross-examination as to what physician attended her without detailing conversation with him or character or extent of his treatment, will not permit his being called by the defense; *Epstein v. Pennsylvania R. Co.* 143 Mo. App. 156, 122 S. W. 366, holding omission to claim privilege when one physician was called did not waive it as to other attending physicians.

Distinguished in *Webb v. Metropolitan Street R. Co.* 89 Mo. App. 608, holding that party's detailed statement concerning condition and treatment, waives privilege and permits opponent to question physician; *Evans v. Trenton*, 112 Mo. 403, 20 S. W. 614, reversing judgment where party's counsel, on argument, in response to insinuation, states what physicians would have testified to had they been called; *Springer v. Byram*, 137 Ind. 22, 23 L. R. A. 248, 45 Am. St. Rep. 159, 36 N. E. 361, holding statements by brother of plaintiff, in latter's presence, to physician while in ambulance, not privileged.

Variance.

Cited in *Chouquette v. Southern Electric R. Co.* 152 Mo. 264, 53 S. W. 897; *La Belle Sav. Bank v. Taylor*, 69 Mo. App. 103; *Fisher & Co. Real Estate Co. v. Staed Realty Co.* 159 Mo. 567, 62 S. W. 443; *Hansberger v. Sedalia Electric R. Light & Power Co.* 82 Mo. App. 574,—holding variance not ground for reversal where no objection taken and no affidavit of surprise filed by appellant as required by statute; *Grether v. McCormick*, 79 Mo. App. 332, upholding judgment on verdict where complaint general and objection to evidence taken only at end of trial; *Donovan v. P. Schoenhofen Brewing Co.* 92 Mo. App. 349, and *White v. Gilleland*, 93 Mo. App. 315, upholding judgment where variance does not amount to failure of proof and objection not taken in statutory manner; *Albin v. Chicago, R. I. & P. R. Co.* 103 Mo. App. 317, 77 S. W. 153, holding variance between allegation of negligent operation of switch engine and proof of failure of light, waived by failure to object; *Bragg v. Metropolitan Street R. Co.* 192 Mo. 331, 91 S. W. 527, holding variance waived by admission of proof without objection, and failure to file affidavit; *Farmers Bank v. Manchester Assur. Co.* 106 Mo. App. 125, 80 S. W. 299, holding that variance must be objected to on trial in manner provided for by statute or held to be waived on appeal; *Litton v. Chicago, B. & Q. R. Co.* 111 Mo. App. 146, 85 S. W. 978, holding failure to object to irrelevant evidence at time of introduction not cured by objection to instruction covering such evidence; *Wall v. Continental Casualty Co.* 111 Mo. App. 519, 86 S. W. 491, holding variance not taken advantage of by adverse party as provided for by statute cured by verdict; *Ingwersen v. St. Louis & H. R. Co.* 116 Mo. App. 146, 92 S. W. 357, holding objection to variance must be raised in court below; *Chamlee v. Planters' Hotel Co.* 155 Mo. App. 159, 134 S. W. 123, holding that defendant waives his right to complain of reception of evidence where he fails to object and except to it.

Damages; special allegation — Necessity for.

Cited in *Pryor v. Metropolitan Street R. Co.* 85 Mo. App. 380, holding evidence of damage by loss of time inadmissible in absence of special allegation thereof; *Stoetzle v. Sweringen*, 96 Mo. App. 594, 70 S. W. 911, holding damages for loss of earnings or of time not recoverable in absence of special allegation thereof; *Krueger v. Chicago & A. R. Co.* 94 Mo. App. 462, 68 S. W. 220, holding diminished earning capacity after maturity, not element of damage in action by infant, where not alleged; *Johnson v. Gary*, 18 Idaho, 627, 111 Pac. 855, to the point that loss of earnings and loss of capacity to earn must be specially alleged in action for personal injuries; *Wojtylak v. Kansas & T. Coal Co.* 188 Mo. 292, 87 S. W. 506, holding evidence of earning capacity not admissible as

element of damage for personal injury unless counted on in the petition; Davidson v. St. Louis Transit Co. 211 Mo. 348, 109 S. W. 583, holding construction submitting impairment of earning capacity as an element of damages, erroneous though such point is specifically pleaded but on which no evidence is introduced; Abbitt v. St. Louis Transit Co. 104 Mo. App. 541, 79 S. W. 496, holding failure to object on trial to admission of evidence on loss of time, such point not being pleaded, a waiver of the right; Zongker v. People's Union Mercantile Co. 110 Mo. App. 390, 86 S. W. 486, holding that value of injured person's time must be specially alleged and proven; Stafford v. Adams, 113 Mo. App. 726, 88 S. W. 1130, holding that loss of earnings from date of injury to time of bringing suit must be specially pleaded and proved; Van Cleve v. St. Louis, M. & S. E. R. Co. 124 Mo. App. 23, 101 S. W. 632, holding that diseased condition proximately resulting from injury alleged need not be specially alleged; Moellman v. Gieze-Henselmeier Lumber Co. 134 Mo. App. 492, 114 S. W. 1023, holding instruction submitting future medical expense and care and future loss of earnings erroneous where such elements are not specially pleaded; Scholl v. Grayson, 147 Mo. App. 663, 127 S. W. 415, holding that while amount of hospital bill should be alleged in action for personal injury, such item may be proved if not objected to, although not averred in pleading; Pannell v. Allen, 160 Mo. App. 719, 142 S. W. 482, holding that all such damages as may have resulted from injury, but are not as matter of law implied from it must be pleaded.

— Sufficiency.

Cited in Coontz v. Missouri P. R. Co. 115 Mo. 674, 22 S. W. 572, holding evidence of loss of earnings not admissible under allegation that plaintiff "has been permanently disabled from labor;" Slaughter v. Metropolitan Street R. Co. 116 Mo. 275, 23 S. W. 760, holding loss of time and earnings not element of damage under allegation that plaintiff is "permanently crippled, disfigured, and disabled;" Paquin v. St. Louis & Suburban R. Co. 90 Mo. App. 128, holding evidence of amount paid to others to attend to plaintiff's patients inadmissible under general allegation of loss of time and profits of business; Wilbur v. Southwest Missouri Electric R. Co. 110 Mo. App. 694, 85 S. W. 671, holding an allegation of inability to perform work and follow ordinary avocations of life sufficient to support proof of loss of time and earnings; Goodloe v. Metropolitan Street R. Co. 120 Mo. App. 202, 96 S. W. 482, holding an allegation of impairment of earning capacity by permanent cause sufficient to support proof of loss of earnings permanently; Ferrier v. Schoenberg Mercantile Co. 158 Mo. App. 536, 138 S. W. 893, holding that loss of past earnings is not embraced within general allegation of permanent injury, but must be specially pleaded.

Distinguished in Kupferschmid v. Southern Electric R. Co. 70 Mo. App. 445, holding allegation of "great expense for medical attendance" sufficiently specific to permit proof of amount paid; Mason v. St. Louis, I. M. & S. R. Co. 75 Mo. App. 9, holding evidence of loss of physician's practice admissible under inferential allegation of occupation and special count for loss of earnings; Bartley v. Trorlicht, 49 Mo. App. 218, holding loss of earning capacity properly included in damages even without direct proof, where minor plaintiff alleges permanent disability to labor; Gerdes v. Christopher & S. Architectural Iron & F. Co. 124 Mo. 360, 25 S. W. 557, holding omission of *quantum* of damages by loss of earnings will not vitiate otherwise sufficient special allegation; Gordon v. Northern P. R. Co. 39 Mont. 581, 104 Pac. 679, holding that evidence of loss of earnings from defect in left eye caused by injury to right eye cannot be admitted on a mere allegation of injury to right eye.

— **Waiver of insufficiency.**

Cited in *Lesser v. St. Louis & Suburban R. Co.* 85 Mo. App. 330, holding evidence of earning capacity admissible under general allegation of loss of time, where no motion made for more definite and certain petition; *Loe v. Chicago, R. I. & P. R. Co.* 57 Mo. App. 356, holding objection to evidence of damage from loss of time, for insufficiency of allegation, waived where not made on trial; *Smiley v. St. Louis & H. R. Co.* 160 Mo. 639, 61 S. W. 667, holding insufficient allegation of resulting insanity not ground for removal where evidence admitted without objection; *Bogges v. Metropolitan Street R. Co.* 118 Mo. 338, 23 S. W. 159, holding objection to evidence of plaintiff's acts tending to enhance injury waived, where admitted on trial without objection.

Submission to jury.

Cited in *Och v. Missouri, K. & T. R. Co.* 130 Mo. 64, 36 L. R. A. 454, 31 S. W. 962 (dissenting opinion), majority holding question of negligence properly left to jury where evidence shows injury by fall of ventilating window on passenger's head.

Construction of statutes.

Cited in *Dooley v. Jackson*, 104 Mo. App. 32, 78 S. W. 330, holding a statute providing for recovery of money bet on "any election" not to mean money bet on primaries.

10 L. R. A. 39, *STATE v. NELSON*, 101 Mo. 477, 14 S. W. 718.

Larceny; proof of ownership.

Cited in *State v. Crow*, 54 Mo. App. 213, reversing verdict where instruction failed to require finding of ownership of property by third person, though such evidence introduced; *State v. Sweeney*, 56 Mo. App. 411, holding information for petit larceny not demurrable for giving merely initials of chattel owner's Christian name.

Variance.

Cited in *State v. Crow*, 107 Mo. 345, 17 S. W. 745, holding verdict on indictment for larceny of "cow," not invalidated by proof of larceny of "heifer;" *State v. Harl*, 137 Mo. 257, 38 S. W. 919, holding evidence of defendant's statement that note signed by "Montgomery" admissible on indictment for uttering forged note of "Mugumry;" *State v. Kellar*, 53 Mo. App. 35, holding variance in name of parties engaged in gambling immaterial where game proved; *State v. Meysenburg*, 171 Mo. 29, 71 S. W. 229, holding indictment charging that certain sum paid, and proof showing transfer of check, not variance justifying reversal; *State v. Lackey*, 230 Mo. 714, 132 S. W. 602; *State v. Roswell*, 153 Mo. App. 341, 133 S. W. 99,— holding that ownership of stolen property must be proved as charged unless in case of immaterial variance.

Impeachment of reputation.

Cited in *State v. Crow*, 107 Mo. 345, 17 S. W. 745, holding that accused's witness, testifying to accused's good character, may be cross-examined as to felonies committed by him.

Waiver of exceptions.

Cited in *State use of Russell v. Fargo*, 151 Mo. 285, 52 S. W. 199; *Brown v. Mays*, 80 Mo. App. 83; *Metropolitan Rubber Co. v. Monarch Rubber Co.* 74 Mo. App. 271; *King v. Greaves*, 51 Mo. App. 541; *Roberts v. Boulton*, 56 Mo. App. 407; *Fullerton v. Carpenter*, 97 Mo. App. 201, 71 S. W. 98,— holding exceptions to instructions waived, where not made ground of motion for new trial; *Laird v. Upton*, 8 N. M. 414, 45 Pac. 1010, holding that errors, not excepted to on trial at time, will not be considered on appeal; *State ex rel. Wealaka M. & M. Co. v.*

Turner, 113 Mo. App. 54, 87 S. W. 464, holding erroneous instructions not reviewable on appeal unless the exception taken thereto is renewed as a ground for new trial.

10 L. R. A. 41, *HARBER v. EVANS*, 101 Mo. 661, 20 Am. St. Rep. 646, 14 S. W. 750.

Rights in party wall.

Cited in *Everly v. Driskill*, 24 Tex. Civ. App. 421, 58 S. W. 1046, enjoining cutting of windows in party wall without consent; *Fidelity Lodge I. O. O. F. v. Bond*, 147 Ind. 442, 45 N. E. 338, holding that party wall cannot be raised by grantor of adjoining lot where deed to grantee restricts height; *Springer v. Darlington*, 207 Ill. 244, 69 N. E. 946, holding that party wall means solid wall; *Bellenot v. Laube*, 104 Va. 847, 52 S. E. 698, holding that one of the owners of a party wall may carry such wall up to any height suitable to his building purpose.

Cited in footnote to *Clemens v. Speed*, 19 L. R. A. 240, which denies to party-wall owners easement from support of buildings.

Cited in notes (89 Am. St. Rep. 925, 928) on party walls; (10 L.R.A.(N.S.) 1192) on right to open windows, or apertures, in party wall.

Party-wall contracts.

Cited in *Fox v. Mission Free School*, 120 Mo. 359, 25 S. W. 172, holding repairs and improvements of existing building not construction of "new building" within contract requiring payment of half cost of party wall; *Huston v. de Zeng*, 78 Mo. App. 530, holding that party using wall must pay moiety of cost under agreement though party building has violated same by opening windows; *Bright v. Bacon*, 131 Ky. 861, 20 L.R.A.(N.S.) 392, 116 S. W. 268, holding that a beneficial use of party wall may be made by one of the parties under implied agreement.

Cited in footnotes to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall expressly declared to run with land; *Nalle v. Paggi*, 13 L. R. A. 50, which holds sale of lot use of party wall; *Negus v. Becker*, 25 L. R. A. 667, which holds one carrying up party wall not insurer against injuries to neighbors' property.

Injunction against trespass.

Cited in *Metropolitan Land Co. v. Manning*, 98 Mo. App. 257, 71 S. W. 696, holding that injunction will lie to prevent continuous trespass likely to cause multiplicity of suits.

10 L. R. A. 43, *LONGYEAR v. BUCK*, 83 Mich. 236, 47 N. W. 234.

License and tax laws as to dogs.

Cited in *McGlone v. Womack*, 129 Ky. 286, 17 L.R.A.(N.S.) 859, 111 S. W. 688, holding that a statute imposing tax on dogs to be applied to losses caused by killing of sheep by dogs is valid not as a tax for revenue but as a police regulation.

Cited in notes (40 L.R.A. 523) on property rights in dogs; (17 L.R.A.(N.S.) 855, 856) on constitutionality of dog tax for benefit of sheep owners.

10 L. R. A. 45, *GARDNER v. FIRST NAT. BANK*, 10 Mont. 149, 25 Pac. 29.

Varying written instrument by parol.

Cited in *Schuler v. Citizens' Bank*, 13 S. D. 190, 82 N. W. 389, holding oral agreement to apply deposit on note not matured, admissible against levy on deposit as maker's property.

10 L. R. A. 46, *DE PAUW v. BANK OF SALEM*, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151.

Relation of parties to negotiable instrument.

Cited in *Pape v. Randall*, 18 Ind. App. 59, 47 N. E. 530, holding neither party to note surety for other where signed jointly, on face, though proceeds used in payment of prior note of which one was surety; *Woody v. Haworth*, 24 Ind. App. 638, 57 N. E. 272, holding partner agreeing, on dissolution, to pay "indebtedness" of firm, bound by firm indorsement in blank of non-negotiable note.

Cited in footnote to *Aebi v. Bank of Evansville*, 68 L.R.A. 964, which holds that bank accepting check on deposit with depositor's indorsement discharges indorser from liability by failing to notify him of nonpayment for nearly a month though bank waited in hope that check sent by mail would reach destination.

Cited in notes (18 L.R.A. 35, 36) on liability of stranger who indorses commercial paper before delivery; (31 Am. St. Rep. 752) on rights and liabilities of accommodation parties; (72 Am. St. Rep. 682) on effect of indorsement by stranger before delivery; (4 Eng. Rul. Cas. 551) on presumptive order of liability among parties to bill or note.

Alteration of negotiable instrument.

Cited in *Hodge v. Farmers' Bank*, 7 Ind. App. 97, 34 N. E. 123, holding parties signing note as sureties, discharged by unauthorized addition of word "cashier" to name of payee; *Moore v. Hinshaw*, 23 Ind. App. 270, 77 Am. St. Rep. 434, 55 N. E. 236, holding surety on blank note released by insertion of rate of interest without surety's knowledge; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 219, 54 N. E. 835, holding maker not liable on note in hands of one having notice that name of bank was inserted, without authority, as place of payment; *Young v. Baker*, 29 Ind. App. 134, 64 N. E. 54, holding insertion by payee of name of bank in blank for place of payment renders note invalid in hands of innocent purchaser for value.

Distinguished in *Light v. Killinger*, 16 Ind. App. 106, 59 Am. St. Rep. 313, 44 N. E. 760, holding parties to negotiable note not discharged by filling in of blank for bank at which payable.

Demand, and notice of dishonor.

Cited in *La Follette Coal & I. Co. v. Whiting Foundry Equipment Co.* 25 Ind. App. 649, 57 N. E. 255, reversing judgment against indorser of negotiable note on special findings which show neither demand of payment nor notice of dishonor; *Hoffman v. Hollingsworth*, 10 Ind. App. 355, 37 N. E. 960, holding presentment at bank by person authorized to receive payment, sufficient demand of maker of note payable at bank.

Distinguished in *People's Nat. Bank v. Winton*, 13 Ind. App. 110, 41 N. E. 75, holding indorser not entitled to notice of dishonor where note given for his accommodation.

10 L. R. A. 48, *FT. WAYNE, C. & L. R. CO. v. SHERRY*, 126 Ind. 334, 25 N. E. 898.

Appropriation for railroad right of way.

Cited in *Peoria & E. R. Co. v. Attica, C. & S. R. Co.* 154 Ind. 222, 56 N. E. 210, holding railroad bridging canal, not entitled to appropriate underlying canal bed purchased by another railroad and used by it for tracks.

Width of right of way grant.

Cited in *Southern Indiana R. Co. v. Indianapolis & L. R. Co.* 168 Ind. 375, 13 L.R.A.(N.S.) 203, 81 N. E. 65, holding that railway company must file map

showing its exact intended location and extent of use of land under right of way grant.

Cited in note (5 L.R.A.(N.S.) 851) on extent of indefinite easement as affected by extent of use.

Disapproved in Seaboard Air Line R. Co. v. Olive, 142 N. C. 269, 55 S. E. 263, holding that where there is uncertainty in deed as to width of land it will be taken to include the limit allowed by statute and not merely the amount actually used.

10 L. R. A. 48, LONG v. PEOPLE, 135 Ill. 435, 25 N. E. 851.

Amendment of information.

Cited in Long v. People, 34 Ill. App. 481, holding information amendable, on motion, immediately after order to quash; Secor v. State, 118 Wis. 628, 95 N. W. 942, holding information filed in embezzlement proceeding, subject to amendment; Gilbert v. People, 121 Ill. App. 428, holding that misnomer in an information is amendable; Bergstrasser v. People, 134 Ill. App. 610, sustaining allowance of amendment of information by inserting the quoted words in the averment that the device was one upon the "result of the action" of which money was staked; People v. Nylin, 139 Ill. App. 502, allowing insertion of true date of filing in place of wrong date on the back of the information where no verification is necessary; People v. Manns, 146 Ill. App. 573, holding that court may allow information to be amended.

Verification of information.

Cited in Samuel v. People, 164 Ill. 384, 45 N. E. 728, holding witness's privilege as to self-incriminating testimony not waived by signature to affidavit on which information, signed by state's attorney, is based.

Trial on information.

Cited in People ex rel. Plotke v. Lower, 236 Ill. 617, 86 N. E. 577, as an instance of trial on information without objection.

10 L. R. A. 50, STATE v. BARKER, 107 N. C. 913, 12 S. E. 115.

Number and selection of jurors and grand jurors.

Cited in English v. State, 31 Fla. 347, 12 So. 689, and Donald v. State, 31 Fla. 261, 12 So. 695, holding statute authorizing finding of indictment on concurrence of only eight grand jurors, unconstitutional; Eastham v. Holt, 43 W. Va. 628, 27 S. E. 883 (dissenting opinion), as to effect, on indictment, of improper assumption by court of power to exclude grand jurors for cause; State v. Brittain, 143 N. C. 669, 57 S. E. 352, holding a statute providing for selection of jurors by a marshal of a special court composed of the mayoralty, constitutional.

Cited in notes (28 L. R. A. 36) on number of grand jurors necessary to concur in finding indictment; (27 L. R. A. 847) on number of grand jurors necessary or proper to act; (43 L. R. A. 78) on number and agreement of jurors necessary to constitute valid verdict.

— Presumption of validity.

Cited in State v. Perry, 122 N. C. 1022, 29 S. E. 384, holding indictment, found on panel of only seventeen grand jurors, presumptively valid in absence of plea in abatement and proof.

Implied existence of grand jury.

Cited in State v. Lewis, 142 N. C. 636, 7 L.R.A.(N.S.) 676, 55 S. E. 600, 9 A. & E. Ann. Cas. 604, on the implication of the existence of a grand jury from the time presentment and indictment.

Interpretation of constitution.

Cited in *Ex parte Cain*, 20 Okla. 131, 93 Pac. 974, 1 Okla. Crim. Rep. 12, holding that definitions of terms used in constitution are to be found in the common law, such law being the source of the constitution by way of re-enactment; *Ex parte McNaught*, 23 Okla. 293, 100 Pac. 27, 1 Okla. Crim. Rep. 267, holding that the constitutional provision that "no person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information" used in the light of the common law is self-executing.

10 L. R. A. 53, *HERNDON v. ÆTNA F. INS. CO.* 107 N. C. 194, 12 S. E. 241.

10 L. R. A. 55, *YOUNG v. EDWARDS*, 33 S. C. 404, 26 Am. St. Rep. 689, 11 S. E. 1066.

Allotment in partition.

Cited in *Ferris v. Montgomery Land & Improv. Co.* 94 Ala. 568, 33 Am. St. Rep. 146, 10 So. 607, holding vendee of tenant in common in sole possession, erecting improvement, entitled to allotment of improved portion on partition; *Charleston, C. & C. R. Co. v. Leech*, 39 S. C. 450, 17 S. E. 994, holding grant by tenant in common of right of way to railroad, bars right of grantor's heirs to damages, where portion on which road built is ordered allotted to grantor on partition; *Moonshine Co. v. Dunman*, 51 Tex. Civ. App. 165, 111 S. W. 161; *Pellow v. Arctic Iron Co.* 164 Mich. 95, — L.R.A.(N.S.) —, 128 N. W. 918, Ann. Cas. 1912B, 827,—holding that parcel of land conveyed by one tenant in common by metes and bounds will be set off, on partition of premises, to grantee in accordance with equities of parties, if such can be done without prejudice to others.

Conveyance by tenant in common.

Cited in *Kennedy v. Boykin*, 35 S. C. 84, 28 Am. St. Rep. 838, 14 S. E. 809, holding mortgage of whole tract by tenant in common covers specific portion allotted to mortgagor on partition; *Stewart v. Blalock*, 45 S. C. 69, 22 S. E. 774, holding that purchaser at foreclosure of widow's mortgage of homestead purporting to convey entire interest, acquires only her one-third interest as tenant in common with children; *Garret v. Weinberg*, 43 S. C. 38, 20 S. E. 756, holding partition properly brought against grantees of one of several tenants in common, purporting to deed fee of entire tract; *McElroy v. McLeay*, 71 Vt. 402, 45 Atl. 898, holding easement against tenant in common enlarged to easement against fee, where entire interest acquired by tenant in common; *Woodward v. Santee River Cypress Lumber Co.* 73 S. C. 35, 114 Am. St. Rep. 76, 52 S. E. 733, holding that plaintiffs being tenants in common with grantors of different defendants to different tracts of land become tenants in common with the defendant grantees and may enjoin them in action for petition.

Cited in notes (14 Eng. Rul. Cas. 802; 100 Am. St. Rep. 650, 652, 653) on conveyance by one cotenant of specific part of common property.

Distinguished in *Kenoye v. Brown*, 82 Miss. 611, 100 Am. St. Rep. 645, 35 So. 163, holding that a conveyance by one cotenant by specific metes and bounds passes all grantor's interest within such metes and bounds only, and is voidable if it prejudice the other cotenants.

10 L. R. A. 57, *STEWART v. POWELL*, 90 Ky. 511, 14 S. W. 496.

Revocation of will.

Cited in *Ransom v. Connelly*. 93 Ky. 66, 18 S. W. 1029, holding husband's will revoked by his remarriage notwithstanding antenuptial agreement with second wife, specifying her interest in his estate.

Cited in footnotes to *Re Comassi*, 28 L. R. A. 414, which holds married woman's will not revoked by subsequent marriage after becoming widow; *Cutler v. Cutler*, 57 L. R. A. 209, which holds will revoked by adopting mutilations by vermin; *Billington v. Jones*, 56 L. R. A. 654, which holds will revoked by writing on it statement that it is void, stating that it is killed, and filing it away; *Re Newlin*, 68 L.R.A. 464, which holds sufficient provision for unborn child to sustain will made by establishing remainder to be divided among children and a fee to be divided among or held in trust for them on arriving at maturity.

Distinguished in *Baacke v. Baacke*, 50 Neb. 21, 69 N. W. 303, holding absolute revocation of will not implied in absence of statute, by reason of divorce of testator and death of child.

10 L. R. A. 58, *ANDREWS v. CENTRAL R. & BKG. CO.* 86 Ga. 192, 12 S. E. 213.

Negligence in climbing over cars blocking crossing.

Approved in *Russell v. Central R. Co.* 119 Ga. 706, 46 S. E. 858, holding that recovery for injury to person crawling through train obstructing crossing can only be had when an employee of defendant has actual knowledge of plaintiff's position with the means at hand to control the train.

Cited in *Studer v. Southern P. Co.* 121 Cal. 404, 66 Am. St. Rep. 39, 53 Pac. 942, holding child attempting to climb between freight cars standing at crossing cannot recover for injuries due to sudden unannounced starting; *Wherry v. Duluth, M. & N. R. Co.* 64 Minn. 417, 67 N. W. 223, holding party climbing between freight cars blocking street for twenty minutes cannot recover for injury due to sudden starting unannounced; *Magoon v. Boston & M. R. Co.* 67 Vt. 188, 31 Atl. 156, holding party climbing between blocking freight cars cannot recover, though no engine attached or in sight at time; *Renner v. Northern P. R. Co.* 46 Fed. 345, holding party cannot recover though assured by brakeman that he could climb over bumpers in safety; *Rodriguez v. International & G. N. R. Co.* 27 Tex. Civ. App. 326, 64 S. W. 1005, denying recovery for injuries to one crossing track between cars likely to be moved at any moment; *Curtis v. St. Louis & S. F. R. Co.* 96 Ark. 398, 34 L.R.A.(N.S.) 469, 131 S. W. 947, Ann. Cas. 1912 B, 685, holding that one who attempts to cross between cars of train which he knows or might have known is likely to move at any moment, is guilty of negligence; *Johnson v. Atlantic Coast Line R. Co.* 59 Fla. 304, 138 Am. St. Rep. 126, 51 So. 851, 20 Ann. Cas. 1093, holding that in action for injury at railroad crossing traveller cannot be considered trespasser upon railroad property because of passing around end to train which blocked crossing for unreasonable time.

Cited in note (13 L.R.A.(N.S.) 1068) on negligence in attempting to cross train standing on crossing.

Distinguished in *Westbrook v. Kansas City, M. & B. R. Co.* 170 Ala. 581, 34 L.R.A.(N.S.) 469, 54 So. 231, holding that while freight train is standing over crossing, brakeman thereon has no implied authority to invite pedestrian to climb between cars, or give him assurance to safety.

10 L. R. A. 60, *STATE v. BONEIL*, 42 La. Ann. 1110, 21 Am. St. Rep. 413, 8 So. 298.

Followed without opinion in *State v. Boneil*, 42 La. Ann. 1207, 8 So. 300.

Lottery, what constitutes.

Cited in *New Orleans v. Collins*, 52 La. Ann. 982, 27 So. 532, holding slot machine, prizes in which are determined by chance, lottery; *Quatsoe v. Eggleston*, 42 Or. 319, 71 Pac. 66, upholding contract relating to giving pianos to persons casting largest number of tickets given by certain merchant; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 616, 62 L.R.A. 124, footnote p. 93, 97 Am. St.

Rep. 177, 44 S. E. 320, holding that determination by lot, of members of association who shall be paid the amount their money has earned, does not make scheme a lottery, as the element of prize is lacking.

Cited in footnotes to State *ex rel.* Kellogg v. Kansas Mercantile Asso. 11 L. R. A. 430, which holds scheme for distribution of prizes by chance, a lottery; State *ex rel.* Prout v. Nebraska Home Co. 60 L. R. A. 448, which holds scheme by which common fund distributed among contributors, a valuable preference in distribution depending on chance, a lottery; Meyer v. State, 51 L. R. A. 496, which holds giving customers chance to operate slot machine and secure in addition to purchase article whose value determined by place where revolving wheel stops, a lottery; Lynch v. Rosenthal, 31 L. R. A. 835, which holds sale of lots to be drawn by lot with one prize lot to be given to one of purchasers as result of chance, void; State *ex rel.* Sheets v. Interstate Sav. Invest. Co. 52 L. R. A. 531, which holds investment securities, etc., capable of particular device, of redemption before accumulation, in reserve fund, of credit equal to stipulated endowment value, illegal; Thornhill v. O'Rear, 31 L. R. A. 792, which holds agreement by one person to take all chances of raffle not unlawful; Martin v. Richardson, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to proceeds from one fraudulently obtaining it after prize drawn; Equitable Loan & S. Co. v. Waring, 62 L.R.A. 93, which holds consideration, prize, and chance essential elements of lottery. People *ex rel.* Ellison v. Lavin, 66 L.R.A. 601, which holds distribution of prizes to those who shall make closest estimate of number of cigars on which tax is paid during specified month, a lottery; People v. McPhee, 69 L.R.A. 505, which holds a scheme by which a certain number of persons pay a small sum weekly and choose by lot each week one of the number to receive a suit of clothes worth much more than the weekly payment after which he ceases to be a member, a lottery, although each member is entitled to trade out the amount paid in whenever he chooses to withdraw.

Cited in note (12 L. R. A. 89) on gift enterprise as lottery.

Distinguished in Boniel v. Block, 44 La. Ann. 516, 10 So. 869, holding landlord liable for unauthorized removal of tenant's property though used in maintenance of lottery.

Municipal penal ordinances.

Cited in State v. O'Neil, 49 La. Ann. 1173, 22 So. 352, upholding validity of ordinance imposing fine for erection of wooden structure within city fire limit; State v. Stone, 46 La. Ann. 151, 15 So. 11, upholding ordinance imposing fine and imprisonment for sale of impure milk.

Cited in notes (33 L.R.A. 39) on how far proceedings for violation of ordinances are to be regarded as prosecutions for crime; (78 Am. St. Rep. 271) on violations of municipal ordinances as crimes.

Modification of sentence.

Cited in notes (45 L.R.A. 137) on effect of excessive sentence; (38 L.R.A.(N.S.) 197) on power of municipal authorities to remit penalties or punishment for violation of municipal ordinances.

10 L. R. A. 62, HARVEY v. BRIGGS, 68 Miss. 60, 8 So. 274.

Return of consideration on repudiation by infant.

Cited in Bullock v. Sprowls, 93 Tex. 192, 47 L. R. A. 329, 77 Am. St. Rep. 849, 34 S. W. 661, holding conveyance may be repudiated by infant on attaining majority without repaying consideration where squandered during infancy; Lake v. Perry, 95 Miss. 567, 49 So. 569, holding that infant may disaffirm contract without returning consideration received where he has squandered same.

Cited in notes (26 L.R.A. 178) on necessity of returning consideration in order to disarm infants' contracts; (42 L. ed. U. S. 327) on right of infants to disaffirm contract without restoring consideration.

Distinguished in *MacGreal v. Taylor*, 167 U. S. 700, 42 L. ed. 332, 17 Sup. Ct. Rep. 961, holding borrowed money so far as applied on improvement of property, deemed still in infant's hands on repudiation of mortgage; *Sanger v. Hibbard*, 2 Ind. Terr. 550, 53 S. W. 330, holding infant must refund where goods in possession at time of attachment, but disposed of after giving bond and before repudiation.

Adverse possession.

Cited in *Smith v. Cunningham*, 79 Miss. 430, 30 So. 652, holding continued possession by widow with children of husband's lands before allotment of dower, not adverse to children.

Cited in note (19 L. R. A. 844) on adverse possession against remaindermen and owners of future estates.

Rights of heir as against grantee of widow.

Cited in *Anglin v. Broadnax*, 97 Misc. 518, 52 So. 865; *Barrier v. Young*, 96 Miss. 162, 50 So. 559,—holding that heir of deceased owner becomes owner of land of decedent in absence of will, notwithstanding widow of deceased owner gave deed thereof purporting to convey fee.

10 L. R. A. 64, *STATE v. EASTON SOCIAL, LITERARY & MUSICAL CLUB*, 73 Md. 97, 20 Atl. 783.

Sale of intoxicating liquors by.

Cited in *State v. Boston Club*, 45 La. Ann. 599, 20 L. R. A. 190, footnote p. 185, 12 So. 895, holding incorporated clubs selling liquors to members must have license, though sales not for profit or livelihood; *State ex rel. Robinson v. Bacon Club*, 44 Mo. App. 88, holding furnishing of liquors to members of social club, without license, forfeits franchises; *State v. Neis*, 108 N. C. 792, 12 L. R. A. 414, 13 S. E. 225, holding steward of club subject to indictment where members furnished with liquor at cost, without license; *Com. v. Tierney*, 1 Pa. Dist. R. 19, 29 W. N. C. 195, holding sale of liquor above cost within incorporated "social club," violation of license statute; *People ex rel. Stevenson v. Law & Order Club*, 203 Ill. 132, 62 L. R. A. 887, footnote p. 885, 67 N. E. 855, denying right of social club, without license, to dispense liquors to members in exchange for checks delivered to them upon payment of assessments; *Manning v. Canon City*, 45 Colo. 575, 23 L.R.A.(N.S.) 194, 101 Pac. 978, holding a dispensation of liquor to club members by rules and provisions of its board of control to be a sale under statute providing fine therefor; *Ada County v. Boise Commercial Club*, 20 Idaho, 436, 38 L.R.A.(N.S.) 101, 118 Pac. 1086, holding that word "sell" as used in section 1506 of Revised Codes was intended by legislature to mean transfer of title to liquor by agreement from one party to another for some consideration; *South Shore Country Club v. People*, 228 Ill. 86, 12 L.R.A.(N.S.) 526, 119 Am. St. Rep. 417, 81 N. E. 805, 10 A. & E. Ann. Cas. 383, holding dispensation of liquor to members without profit by a bona fide social club to be a prohibited sale under statute if without license; *People v. Craig*, 155 Ill. App. 75, holding that furnishing liquor to member of "club" by steward for compensation who placed it in locker to which member had key, was violation of statute prohibiting sale of liquor; *State v. Johns*, 140 Iowa, 134, 118 N. W. 295, on the rule that distribution of liquor among members of a club constitutes a sale under statute; *State ex rel. Young v. Minnesota Club*, 106 Minn. 522, 20 L.R.A.(N.S.) 1104, 119 N. W. 494, holding sale by club was within license law; *State ex rel. Hadley v. Meramec Rod & Gun Club*, 121 Mo. App. 373, 98 S. W. 815, disorganizing

a corporation in the nature of a social club used as a sham to cover sale of liquor in contravention of the law; *Com. v. Hutz*, 38 Pa. Co. Ct. 111, holding that furnishing of liquors by unincorporated lodge or club to its members at profit is sale within meaning of law.

Cited in footnote to *State ex rel. Stevenson v. Law & Order Club*, 62 L.R.A. 895, which denies right of incorporated social club to dispense liquor to members without license.

Cited in notes (12 L.R.A. 412) on sales of intoxicating liquors by social club; (24 Am. St. Rep. 36, 46) on distribution of liquor by social clubs.

Distinguished in *State ex rel. Bell v. St. Louis Club*, 125 Mo. 328, 26 L. R. A. 580, footnote p. 573, 28 S. W. 604, holding distribution of liquor among members by social club not a sale by retail or in original package within rule as to license; *People v. Adelphi Club*, 149 N. Y. 13, 31 L. R. A. 513, footnote, p. 510, 52 Am. St. Rep. 700, 43 N. E. 410, holding distribution of liquor at cost by social club to members not illegal sale.

Procedure to annul corporate charter.

Cited in *State v. Cumberland & P. R. Co.* 105 Md. 483, 66 Atl. 458, holding that the state may file demurrers to an answer to petition for forfeiture of railroad charter though such is not provided for in procedure under the code.

Cited in note (14 L.R.A.(N.S.) 684) on annulling club charter for violating law.

10 L. R. A. 67, *FRESH v. CUTTER*, 73 Md. 87, 20 Am. St. Rep. 575, 20 Atl. 774.

Privilege.

Cited in *Ross v. Ward*, 14 S. D. 245, 86 Am. St. Rep. 746, 85 N. W. 182, holding instruction omitting question of privilege in action for slanderous charge of theft in election address to taxpayers, erroneous; *Brinsfield v. Howeth*, 107 Md. 290, 24 L.R.A.(N.S.) 593, 68 Atl. 566, holding statement that a teacher appointed by defendants' competitor for office as school commissioner was unchaste, not privileged; *Rosenbaum v. Roche*, 46 Tex. Civ. App. 239, 101 S. W. 1164, holding a statement made voluntarily by employer to father of girl discharged why he discharged her, not privileged, but if made in response to inquiry by father he having the right to ask it is privileged.

Cited in footnote to *Brown v. Norfolk & W. R. Co.* 60 L. R. A. 472, which holds privileged, publication as to reason for employee's discharge.

Cited in notes (104 Am. St. Rep. 150) on what libelous statements are privileged; (17 Eng. Rul. Cas. 252; 4 L.R.A.(N.S.) 1108) on liability growing out of giving or refusing information affecting character or reputation of servant.

Distinguished in *Coffin v. Brown*, 94 Md. 195, 55 L. R. A. 735, 89 Am. St. Rep. 422, 50 Atl. 567, holding letter attacking character of appointee not privileged where sent to politician having no authority to remove.

Qualified privilege.

Cited in *Brinsfield v. Howeth*, 107 Md. 287, 24 L.R.A.(N.S.) 593, 68 Atl. 566, holding slanderous statements made without malice to state's attorney in answer to question by him outside of court, to be qualifiedly privileged.

Cited in note (9 Eng. Rul. Cas. 81) as to what communications enjoy a qualified privilege.

Proof of damage in slander.

Cited in *Cairnes v. Pelton*, 103 Md. 46, 63 Atl. 105, holding that on proof of a cause of action for words slanderous per se recovery can be had without proof of actual or special damage.

— Proof of malice.

Cited in *Abraham v. Baldwin*, 52 Fla. 157, 10 L.R.A.(N.S.) 1055, 42 So. 591, 10 A. & E. Ann. Cas. 1148, holding that plaintiff in an action for slander need not prove express malice unless defendant shows or it be conceded that the words spoken were privileged if not malicious.

Punitive damages.

Cited in *Shockey v. McCauley*, 101 Md. 462, 61 Atl. 583, 4 A. & E. Ann. Cas. 921, holding that where words spoken in presence of third persons are actionable per se and there is no evidence of justification, punitive and compensatory damages may be recovered in absence of express malice.

Cited in note (28 Am. St. Rep. 880) on exemplary or punitive damages.

Distinguished in *Coffin v. Brown*, 94 Md. 198, 55 L. R. A. 736, 89 Am. St. Rep. 422, 50 Atl. 567, holding punitive damages allowable, even in absence of express malice, for publication of unprivileged libel.

10 L. R. A. 69, *FEEK v. BLOOMINGDALE TWP.* 82 Mich. 393, 47 N. W. 37.

Validity of statutes void in part.

Followed in *People v. Whitney*, 105 Mich. 633, 63 N. W. 765, holding act of 1899 regulating sale of intoxicating liquors constitutional.

Cited in *Chambe v. Durfee*, 100 Mich. 115, 58 N. W. 661, holding inheritance tax law 1893, void *in toto* where appropriation of proceeds of tax unconstitutional.

Delegation of legislative power.

Cited in *State ex rel. Witter v. Forkner*, 94 Iowa, 11, 28 L. R. A. 210, 62 N. W. 772, upholding statute permitting suspension of certain penalties of prohibitory liquor law on consent of council and majority of voters; *Police Jury v. Descant*, 105 La. 515, 29 So. 976, holding statute empowering police juries to make such regulations of liquor traffic and grant such licenses as majority of voters shall determine, constitutional; *Wilson v. Thompson*, 56 Ark. 113, 19 S. W. 321, holding petition against allowance of sales of liquor near school must have assent of majority of voters in prescribed radius though adjoining county included; *McClanahan v. Breeding*, 172 Ind. 464, 88 N. E. 695, holding that a statute providing that any community by a remonstrance of a majority of the voters thereof can prohibit grant of license to any or all applicants is a delegation of police power to local application not involving public policy; *King v. Concordia F. Ins. Co.* 140 Mich. 268, 103 N. W. 616, 6 A. & E. Ann. Cas. 87, holding delegation of power to a commission to draw up and obligate the use of a standard fire insurance policy in the insurance business invalid as being legislative; *Atty. Gen. ex rel. Battishill v. Springwells*, 143 Mich. 529, 107 N. W. 87, holding an act providing for annexation of territory to Detroit provided that a majority of the persons voting on the proposed annexation from that district approve of it, is a proper delegation of authority; *State ex rel. Van Alstine v. Frear*, 142 Wis. 355, 125 N. W. 961, as explaining a former decision with respect to delegation of legislative power to people in special localities.

Liquor prohibition laws — validity.

Cited in *People v. Eberle*, 167 Mich. 481, 133 N. W. 519, holding that under police power state may regulate or prohibit manufacture and sale of intoxicating liquors; *State ex rel. Crothers v. Barber*, 19 S. D. 11, 101 N. W. 1078, on constitutionality of liquor regulation and prohibition laws.

Cited in notes (8 L.R.A.(N.S.) 363) on discrimination as between different localities in respect to right to sell liquor; (15 L.R.A.(N.S.) 944) on constitutional right to prohibit sale of intoxicants.

— Local option.

Cited in *People v. Shuler*, 136 Mich. 165, 98 N. W. 986, holding local option law not invalid as discriminating against local druggists as compared with druggists doing business outside of locality applying the law; *White v. Bracelin*, 144 Mich. 337, 107 N. W. 1055, 8 A. & E. Ann. Cas. 256, on the validity of legislation peculiar to the locality of its operation; *Re O'Brien*, 29 Mont. 545, 75 Pac. 196, 1 A. & E. Ann. Cas. 373, on the validity of local option laws; *People v. Myers*, 161 Mich. 41, 125 N. W. 701, as sustaining the constitutionality of a local option act making it unlawful to manufacture, store, or keep for sale, or give away, spirituous or intoxicating liquor.

Cited in notes (114 Am. St. Rep. 324, 325) on constitutionality of local option laws; (1 L.R.A.(N.S.) 484) on local option law as unconstitutional delegation of power.

— Conferring power on board of commissioners.

Cited in *Haehnle Brewing Co. v. Jackson County*, 156 Mich. 498, 121 N. W. 209, holding that the action of board of supervisors in canvassing votes on local option question is administrative and their determination therein is final not subject to mandamus; *Michigan Central R. Co. v. Michigan R. Commission*, 160 Mich. 361, 125 N. W. 549, on the rule that an act conferring power on board of commissioners with respect to canvassing vote confers on them merely administrative powers and not judicial.

10 L. R. A. 80, *FLETCHER v. FORLER*, 83 Mich. 52, 46 N. W. 1023.

Illegal sales of intoxicating liquors to minors.

Cited in footnote to *State v. Neely*, 27 L. R. A. 503, which holds sale of liquor to minor claiming to be for sick teachers unnamed unlawful.

Cited in notes (10 L. R. A. 544, 12 L. R. A. 433) on sale of intoxicating liquor to minors.

Civil damages.

Cited in footnote to *Gage v. Harvey*, 43 L. R. A. 143, which holds loss of money taken from intoxicated person's pocket not included in damages from sale of liquor to him.

Cited in note (9 L. R. A. 816) on construction of Pennsylvania liquor laws, civil damage act.

10 L. R. A. 83, *STATE ex rel. WALSH v. HINE*, 59 Conn. 50, 21 Atl. 1024.

Town control of school districts.

Cited in *Young v. Bethany*, 73 Conn. 171, 46 Atl. 822, holding special notice to each district, of proposed abolition thereof by town, not necessary; *State ex rel. Huntington v. Huntington Town School Committee*, 82 Conn. 566, 74 Atl. 882, holding that the fact that the state allows the towns to elect the school committees does not by implication give the town control of them, such control residing in the state.

10 L. R. A. 85, *ARMSTRONG v. DOUGLASS*, 89 Tenn. 219, 14 S. W. 604.

Perpetuity.

Cited in *Boyd v. Robinson*, 93 Tenn. 37, 23 S. W. 72, construing "lawful heirs" as "children" to prevent perpetuity, where will permits.

Cited in footnotes to *Murphy v. Whitney*, 24 L. R. A. 123, which holds agreement that land descending to brothers and sisters shall, on death of last survivor, pass to child of only married one, not void as perpetuity; *Andrews v. Lincoln*,

56 L. R. A. 103, which holds void, devise in trust for accumulation for thirty years.

Cited in note in (49 Am. St. Rep. 123, 126, 129) on rule against perpetuities.

Construction of wills.

Cited in *East v. Burns*, 104 Tenn. 181, 56 S. W. 830, construing "at my death" to mean within reasonable time thereafter, where intention of testator clear.

Distinguished in *Katzenberger v. Weaver*, 110 Tenn. 635, 75 S. W. 937, holding that grand children take only in case of parent's death prior to that of testator where there is a bequest over in case of parent's death.

10 L. R. A. 87, *RANDOLPH v. LAMPKIN*, 90 Ky. 551, 14 S. W. 538.

Advising jury to agree.

Cited in *State v. Tulip*, 9 Kan. App. 464, 60 Pac. 659, setting aside verdict where court instructs jurors not to "act the fool" in regard to evidence; *State v. Ivanhoe*, 35 Or. 153, 57 Pac. 317, holding instruction, after disagreement of jury, that they should not be stubborn, but open to change of opinion, and should agree, reversible error; *Southern Ins. Co. v. White*, 58 Ark. 283, 24 S. W. 425, reversing where on disagreement court ordered reconsideration with instructions to get next best thing if each could not get what he wanted; *McPeak v. Missouri P. R. Co.* 128 Mo. 646, 30 S. W. 170, reversing where court advised divided jury against dogmatic spirit, and suggested "getting together" in fact; *Territory v. Griego*, 8 N. M. 138, 42 Pac. 81, reversing where, jury after disagreeing, are recalled and instructed that if they find defendant guilty they may recommend to mercy; *Richardson v. Coleman*, 131 Ind. 213, 31 Am. St. Rep. 429, 29 N. E. 909, holding instruction that law will tolerate compromises and concessions among jurors, error; *Brooks v. Barth*, 98 Mo. App. 95, 71 S. W. 1098, holding court's statement to jury failing to agree, that men mistake stubbornness for firmness, error; *State v. Chambers*, 9 Idaho, 684, 75 Pac. 274, holding admonitions, instructions and urgings of judge to the jury to agree and sacrifice their private opinions to that end is prejudicial error; *Sandefur v. Com.* 143 Ky. 665, 137 S. W. 504, holding that judge should not by entreaty or threat attempt to coerce verdict, or exert his authority to force agreement; *State v. Nelson*, 181 Mo. 347, 103 Am. St. Rep. 602, 80 S. W. 947, holding that advice by the judge to the jury to "get together and agree" is reversible error.

Cited in note (105 Am. St. Rep. 574) on urging or coercing verdict.

Compromise verdict.

Cited in *Williams v. Pressler*, 11 Okla. 126, 65 Pac. 934, setting aside verdict reached by part of jury signing statement that they believed defendant lied.

Cross-errors not involved in appeal.

Distinguished in *Clark v. Lancaster County*, 69 Neb. 729, 96 N. W. 593, holding on appeal, which unlike error brings the case on de novo, appellee is not concluded unless appellant is.

10 L. R. A. 89, *BARSALOUX v. DENVER, U. & P. R. CO.* 15 Colo. 290, 25 Pac. 165.

Rights of owner abutting on tracks.

Cited in *Denver, U. & P. R. Co. v. Toohey*, 15 Colo. 298, 25 Pac. 166, holding release of damages at time of construction of railroad bars action for additional damage without proof that new mode of operation worked same; *Haskell v. Denver Tramway Co.* 23 Colo. 63, 46 Pac. 121, refusing injunction to abutting owner to prevent authorized construction of railway injuring access to property where damages compensatory; *People ex rel. Dyett v. McMurray*, 27 Colo. 280,

61 Pac. 226, refusing mandamus to abutting owner to compel exercise of discretionary power by municipal council to removal of tracks unlawfully laid.

Cited in notes (22 Am. St. Rep. 52; 36 L.R.A.(N.S.) 821) on abutter's right to compensation for railroads in streets.

Use of streets by railways.

Cited in *Colorado Springs v. Colorado & S. R. Co.* 38 Colo. 112, 89 Pac. 820, holding that city has authority to grant to railway company a reasonable and necessary use of streets subject to public easement.

10 L. R. A. 91, *PARKINSON v. PEOPLE*, 135 Ill. 401, 25 N. E. 764.

Evidence of distinct offense.

Cited in *Bishop v. People*, 194 Ill. 369, 62 N. E. 785, holding evidence of prior theft inadmissible on indictment for subsequent distinct offense; *Towne v. People*, 89 Ill. App. 283, holding evidence of defendant's conspiracy to injury property of third party inadmissible on indictment for conspiracy to injure informant's business; *Janzen v. People*, 159 Ill. 444, 42 N. E. 862, holding evidence of prior rape by father on another daughter inadmissible on indictment for rape upon second daughter; *State v. Crofford*, 121 Iowa, 405, 96 N. W. 889, holding evidence of other abortions, incompetent; *State v. Fitchette*, 88 Minn. 149, 92 N. W. 527, holding evidence of previous offense of receiving reward for procuring appointment, inadmissible; *Schultz v. People*, 210 Ill. 204, 71 N. E. 405, holding it error to admit evidence of a ring stolen other than the one charged to have been taken; *State v. Williams*, 36 Utah, 281, 103 Pac. 250, holding that in prosecution for rape, evidence that defendant told prosecutrix that he had committed like offense with other children is inadmissible.

Cited in notes (62 L.R.A. 334) on evidence of other crimes in criminal case; (8 Eng. Rul. Cas. 87) on evidence of subsequent acts to prove intent or motive for crime.

Distinguished in *Palin v. State*, 38 Neb. 865, 57 N. W. 743, holding evidence to prove crime charged, but upon different date from that laid in indictment, admissible.

Criminal pleading and arraignment.

Cited in *Browning v. State*, 54 Neb. 204, 74 N. W. 631, and *Persefield v. People*, 100 Ill. App. 489, reversing conviction where record fails to show prisoner's plea to arraignment; *Dansby v. United States*, 2 Ind. Terr. 462, 51 S. W. 1083, arresting judgment where record fails to show arraignment on waiver thereof before trial; *Crain v. United States*, 162 U. S. 642, 40 L. ed. 1102, 16 Sup. Ct. Rep. 952, setting aside conviction where record fails to show plea to indictment though jury sworn to "try the issue joined;" *United States v. Aurandt*, 15 N. M. 298, 27 L.R.A.(N.S.) 1185, 107 Pac. 1064, holding that arraignment and plea must precede impaneling and swearing of jury; *State v. Walton*, 50 Or. 155, 13 L.R.A.(N.S.) 820, 91 Pac. 490, holding arraignment and plea or refusal to plead essential to conviction for a felony.

Distinguished in *Gaines v. United States*, 1 Ind. Terr. 302, 37 S. W. 98, holding voluntary procedure to trial without arraignment waives defect under statute.

10 L. R. A. 93, *CAWLEY'S APPEAL*, 136 Pa. 628, 20 Atl. 567.

Appeal from probate of second will in 162 Pa. 520, 29 Atl. 701.

Mutual wills.

Cited in *Re Vogel*, 27 Pittsb. L. J. N. S. 82, holding signatures of brothers to instrument giving all to survivor, mutual will, revoked by subsequent will of either; *Gerbrich v. Freitag*, 213 Ill. 555, 104 Am. St. Rep. 234, 73 N. E. 338,

2 A. & E. Ann. Cas. 24, holding joint will capable of separate probate and disposition of property of each at the time of each death, is valid; *Buchanan v. Anderson*, 70 S. C. 456, 50 S. E. 12, holding that either party to a joint or mutual will may revoke it in the absence of a valuable consideration for the making; *Wilson v. Gordon*, 73 S. C. 164, 53 S. E. 79, holding that a contract cannot be implied from the fact that two maiden sisters had separate wills drawn at same time making each the devisee of the other; *Robertson v. Robertson*, 94 Miss. 652, 47 So. 675, holding that a mutual or joint will making a life estate in survivor of the property of both to be divided at termination thereof between the heirs of both cannot be revoked by the survivor as to the interest of the other; *Bower v. Daniel*, 198 Mo. 320, 95 S. W. 347, on the validity of joint and mutual wills; *Deseumeur v. Rondel*, 76 N. J. Eq. 400, 74 Atl. 703, holding that instrument disposing of property held jointly is "joint will," but if same instrument refers to and deals with property held separately it would be mutual will; *Prince v. Prince*, 64 Wash. 557, 117 Pac. 255, to the point that distinction cannot be made between single instrument signed by both parties, and separate instruments alike in kind and character and intended to effectuate same purpose.

Cited in notes (136 Am. St. Rep. 592, 593, 600, 603) on joint, mutual, reciprocal, or multi-wills; (27 L.R.A.(N.S.) 512) on revocability of mutual will.

What constitutes will.

Cited in *Parker's Estate*, 4 Pa. Dist. R. 222, 36 W. N. C. 400, 16 Pa. Co. Ct. 345, holding agreement for sale indorsed on lease and performable only in event of punctual performance of lessee's covenants and death of lessor during term, enforceable as testamentary contract.

Cited in footnote to *Ferris v. Neville*, 54 L. R. A. 464, which holds sufficient, paper executed as will, stating that it is good to specified person for specified amount from writer's estate.

10 L. R. A. 97, *WISCHAM v. RICKARDS*, 136 Pa. 109, 20 Atl. 532.

Fellow servants.

Cited in *Cincinnati, N. O. & T. P. R. Co. v. Finnell*, 108 Ky. 139, 57 L. R. A. 267, 55 S. W. 902, holding railway not liable for injuries received by lad assisting railroad employees at their request; *Weisser v. Southern P. R. Co.* 148 Cal. 431, 83 Pac. 439, 7 A. & E. Ann. Cas. 636, holding student brakeman working on train at his own request and by permission of defendant without recompense to learn such work was a fellow servant of the trainmen; *Fiesel v. New York Edison Co.* 123 App. Div. 679, 108 N. Y. Supp. 130, holding that a servant called by person employed to repair elevator, to operate such elevator where there is no necessity for such assistance is not a fellow servant of the repairer; *Baynes v. Billings*, 30 R. I. 60, 73 Atl. 625, holding an elevator passenger who at the request of the operator goes onto the top of the car to replace a screen was a fellow servant of the operator.

Distinguished in *Connelly v. Faith*, 190 Pa. 557, 42 Atl. 1024, holding employee of independent contractor not fellow servant of employee of owner of building by whose negligence injured; *Welch v. Maine C. R. Co.* 86 Me. 566, 25 L. R. A. 661, 30 Atl. 116, holding employee of contractor for railroad grading not fellow servant of railroad employees negligently loading dirt cars; *Louisville & N. R. Co. v. Ward*, 98 Tenn. 127, 60 Am. St. Rep. 848, 38 S. W. 727, holding laborer employed by shippers to unload freight car not fellow servant of brakeman by whose negligence injured while bringing car to place of loading.

Volunteers — Liability for injury to.

Cited in *McConnell v. Pennsylvania R. Co.* 223 Pa. 445, 72 Atl. 849, holding

a stone mason being delayed by lack of laborers to unload stone, not a volunteer in the unloading of such stone with his master's consent; *Kelly v. Tyra*, 103 Minn. 180, 17 L.R.A.(N.S.) 341, 114 N. W. 750, holding that no affirmative duty to exercise care is originally due a volunteer though he be assisting in the master's work at request of a servant.

10 L. R. A. 101, *ROBINSON v. LEWIS*, 68 Miss. 69, 24 Am. St. Rep. 254, 8 So. 258.

Trust relation of husband and wife.

Cited in *Clark v. Rainey*, 72 Miss. 156, 16 So. 499, holding purchase at tax sale by wife of tenant in common operates merely as redemption; *Hamblet v. Harrison*, 80 Miss. 124, 31 So. 580, holding husband's deed to wife impeachable where his title acquired before coverture through fraudulent tax sale; *Herrin v. Henry*, 75 Ark. 276, 87 S. W. 430, holding that purchase of insolvent husband's property at tax sale by his wife operates as a redemption in favor of his creditors; *First Congregational Church v. Terry*, 130 Iowa, 518, 114 Am. St. Rep. 443, 107 N. W. 305, holding that wife of life tenant occupying premises as a homestead cannot obtain valid tax title as against remainderman; *Alexander v. Light*, 112 La. 927, 36 So. 806, holding that husband while acting as agent for his wife in administration of property belonging to her and coheirs, obtains property at tax sale, he obtains no title adverse to interests of coheirs; *Beaman v. Beaman*, 90 Miss. 766, 44 So. 987, holding that a purchase of property of a cotenancy under a trust deed by wife of one of cotenants inures to benefit of all co-owners.

Purchase by one co-tenant.

Cited in *Coleman v. Coleman*, 71 S. C. 524, 51 S. E. 250, holding that any title acquired by one cotenant by conveyance, presumption or otherwise inures to the benefit of all; *Trumbull v. Bruce*, 64 Wash. 649, 117 Pac. 472, holding that redemption from taxes by tenant in common of community property inures to benefit of cotenants although money used was taken from separate estate.

Cited in notes (75 Am. St. Rep. 237; 116 Am. St. Rep. 372) on cotenant's right to acquire and enforce tax titles.

10 L. R. A. 103, *BLAKE v. STUMP*, 73 Md. 160, 20 Atl. 788.

Sale by agent.

Cited in footnote to *Lester v. Heidt*, 10 L. R. A. 108, which holds real-estate broker's memorandum of sale referring to parol terms agreed on insufficient.

Cited in note (44 L. R. A. 324) as to when real-estate broker is considered as procuring cause of sale or exchange effected.

Effect of custom.

Cited in *Pennsylvania R. Co. v. Naive*, 112 Tenn. 254, 64 L.R.A. 447, 79 S. W. 124, holding company liable for failure to notify consignee of arrival of fruit when business on following day is suspended by custom; *Groscup v. Downey*, 105 Md. 277, 65 Atl. 930, holding that recovery of usual and customary compensation for agency in sale of property may be had only on the finding of the existence of a custom in that respect.

Cited in notes (44 L. R. A. 600, 601) on custom as affecting performance by real-estate broker of contract to find a purchaser or effect an exchange of his principal's property; (13 L. R. A. 439) on custom and usage as law.

Commissions.

Cited in *Leupold v. Weeks*, 96 Md. 289, 53 Atl. 937, holding broker procuring cause of sale of patent rights entitled to commissions; *Mayhew v. Brislin*, 13

Ariz. 109, 108 Pac. 253, holding that compensation to be made to real estate brokers is by ordinary judgment of business men measured by results obtained; *Levinness v. Kaplan*, 99 Md. 687, 59 Atl. 127, on the procurement of a purchaser sufficient to entitle agent to commissions; *Martien v. Baltimore*, 109 Md. 270, 71 Atl. 966, holding that to entitle broker to recover commissions for sale he must show the efforts and negotiations for sale and that such efforts and negotiations resulted in sale; *Slagle v. Russell*, 114 Md. 427, 80 Atl. 164, holding that broker is not entitled to commissions for sale of land, where he is interested in purchase, unless vendor knew of and assented to arrangement; *Moore v. Councilman*, 115 Md. 635, 81 Atl. 122, holding that real estate broker must show employment or that his action was ratified in order to recover commissions.

Cited in note (45 L. R. A. 46) on fraud and secret dealings or interest of real-estate brokers as affecting their commissions.

Re-direct examination.

Cited in *Iron Clad Mfg. Co. v. Stanfield*, 112 Md. 388, 76 Atl. 854, holding that evidence of damaging use after construction is admissible to rebut defective construction on redirect examination.

10 L. R. A. 108, *LESTER v. HEIDT*, 86 Ga. 226, 12 S. E. 214.

Modification of contract by parol evidence.

Cited in *Jackson v. Strowger Automatic Teleph. Exchange*, 108 Ga. 648, 34 S. E. 207, and *Augusta Southern R. Co. v. Smith & K. Co.* 106 Ga. 867, 33 S. E. 28, holding contract necessarily in writing cannot be modified by parol; *Douglass v. Bunn*, 110 Ga. 163, 35 S. E. 339, holding parol evidence incompetent to supply description in contract to sell "four lots of timber."

Sale by agent.

Cited in notes (10 L. R. A. 103) on employment of real-estate broker; (44 L. R. A. 629) on performance by real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property.

— Sufficiency of memorandum.

Cited in note (11 L. R. A. 143) on specific performance where remedy of contract defective.

Statute of frauds.

Cited in *Corbin v. Durden*, 126 Ga. 431, 55 S. E. 30, holding that a sale of growing timber by written agreement not stipulating price is within statute of frauds; *Capital City Brick Co. v. Atlanta Ice & Coal Co.* 5 Ga. App. 443, 63 S. E. 562, holding a series of signed writings executed contemporaneously or subsequent to agreement, intelligible without parol evidence, showing an agreement coextensive with the one alleged is sufficient to satisfy statute of frauds; *Wagniere v. Dunnell*, 29 R. I. 584, 73 Atl. 309, 17 A. & E. Ann. Cas. 205, holding that a memorandum to satisfy statute of frauds must contain all the substantive terms of the contract to the extent that it is not necessary to resort to oral testimony to prove any material part.

10 L. R. A. 109, *PEOPLE v. MORAN*, 123 N. Y. 254, 20 Am. St. Rep. 732, 25 N. E. 412.

Attempt.

Cited in *People v. Gardner*, 144 N. Y. 124, 28 L. R. A. 705, 43 Am. St. Rep. 741, 38 N. E. 1003, *Reversing* 73 Hun, 71, 25 N. Y. Supp. 1072, holding party guilty of attempt at extortion, though party upon whom extortion attempted to be practised, mere decoy for police; *People v. Lee Kong*, 95 Cal. 668, 17 L. R. A. 627, 29 Am. St. Rep. 165, 30 Pac. 800, holding attempt to commit assault with

intent to murder complete on firing of loaded pistol though victim not at spot imagined; *People v. Spolascio*, 33 Misc. 24, 67 N. Y. Supp. 1114, holding attempt to commit grand larceny by false pretenses complete upon making of representations, though no property obtained; *People v. O'Connell*, 60 Hun, 115, 14 N. Y. Supp. 485, holding approach with ax intending to kill, attempt though not near enough to effect purpose; *People v. Sullivan*, 173 N. Y. 134, 63 L. R. A. 372, 93 Am. St. Rep. 582, 65 N. E. 989, holding one guilty of attempt to commit burglary by arming for purpose, stealing necessary tools, and proceeding to inspect building; *People v. Mills*, 178 N. Y. 285, 70 N. E. 786, holding one receiving indictments from officer bribed to deliver them, guilty of attempt to remove public documents; *Bloch v. State*, 161 Ind. 278, 68 N. E. 287, holding one found going through drawers of book case, guilty of attempt to steal; *Stokes v. State*, 92 Miss. 428, 21 L.R.A.(N.S.) 901, 46 So. 627, holding that whenever the design of a person to commit a crime is shown clearly, slight acts done in furtherance of this design will constitute an attempt; also citing annotation on this point; *People v. Du Veau*, 105 App. Div. 386, 94 N. Y. Supp. 225, 19 N. Y. Crim. Rep. 274, holding that the doing of an act with intent to commit a crime and tending, but failing to effect its commission, constitutes an attempt to commit that crime; *People v. Jaffe*, 185 N. Y. 499, 9 L.R.A.(N.S.) 266, 78 N. E. 169, 7 A. & E. Ann. Cas. 348, Reversing 112 App. Div. 519, 98 N. Y. Supp. 486, holding purchase of property supposedly stolen, but really offered as a decoy, was not an attempt to buy stolen goods; *People v. Mills*, 178 N. Y. 285, 67 L.R.A. 136, 70 N. E. 786, holding that a person taking property supposing it to have been stolen for him is guilty of an attempt to remove the property though it was given to him to decoy him; *People v. Moore*, 142 App. Div. 405, 127 N. Y. Supp. 98, to the point that whether person has made attempt to commit crime depends upon the mind and intent of actor and not upon result of act.

Annotation cited in *State v. Hurley*, 79 Vt. 31, 6 L.R.A.(N.S.) 806, 118 Am. St. Rep. 934, 64 Atl. 78, holding an attempt to break jail not shown by procurement of tools adaptable to that purpose.

Cited in footnote to *State v. Bowers*, 15 L. R. A. 199, which holds solicitation to set fire to third person's dwelling house attempt to commit felony.

Cited in note (8 Eng. Rul. Cas. 51, 53) on criminal intent as essential to attempt to commit crime.

Distinguished in *People v. Teal*, 196 N. Y. 382, 25 L.R.A.(N.S.) 125, 89 N. E. 1086, 17 A. & E. Ann. Cas. 1175, Reversing 133 App. Div. 40, 117 N. Y. Supp. 743, holding that where testimony if given would not amount to perjury or subornation thereof no procurement with respect thereto could amount to an attempt.

Contents of information.

Cited in *Bloch v. State*, 161 Ind. 277, 68 N. E. 287, holding that information for violation of § 2003 need not describe property or allege value.

Application of civil-service law.

Cited in *People ex rel. Fleming v. Dalton*, 24 Misc. 90, 53 N. Y. Supp. 291, holding that Laws 1898, § 3, relating to filing reasons for discharge of one holding place under civil service, applies to New York city.

Purpose of penal code.

Cited in *People v. Rochester R. & Light Co.* 59 Misc. 349, 112 N. Y. Supp. 362, on the effect of the enactment of the Penal Code to embrace all the criminal law of the state in a single enactment under a uniform system.

10 L. R. A. 113, *LORILLARD v. CLYDE*, 122 N. Y. 498, 25 N. E. 917.

Rights of stranger to contract.

Cited in *Feist v. Schiffer*, 79 Hun, 277, 29 N. Y. Supp. 423, holding judgment creditor cannot recover against parties indemnifying judgment debtor against outcome of litigation; *Jefferson v. Asch*, 53 Minn. 451, 25 L. R. A. 273, 39 Am. St. Rep. 618, 55 N. W. 604, holding beneficiary in indemnity bond cannot sue on same where not party nor giving any consideration; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 74 N. Y. S. R. 885, 40 N. Y. Supp. 451, holding party injured cannot sue on policy to owner of boiler insuring against injuries; *Parlin v. Hall*, 2 N. D. 478, 52 N. W. 405, holding general guaranty of grocery bill, not on its face contemplating advancement thereon by third party, will not sustain action by third party; *Morris v. Mix*, 4 Kan. App. 661, 46 Pac. 58, and *McKay v. Ward*, 20 Utah, 182, 46 L. R. A. 632, 57 Pac. 1024, holding mortgagee cannot enforce personal liability of grantee assuming mortgage where grantor not personally liable; *Carrier v. United Paper Co.* 73 Hun, 290, 26 N. Y. Supp. 414, holding mortgagee cannot sue grantee of mortgaged premises on assumption of mortgage debt, where grantor not personally liable and not legally interested in performance of grantee's covenant; *Durnherr v. Rau*, 135 N. Y. 222, 48 N. Y. S. R. 396, 32 N. E. 49, holding wife not entitled to benefit of grantee's covenants in deed in which she did not join; *German State Bank v. Northwestern Water & Light Co.* 104 Iowa, 723, 74 N. W. 685, holding corporation cannot enforce promise of stockholder to vendee of stock to pay corporate debts; *The Richard Thompson Co. v. Brook*, 37 N. Y. S. R. 507, 14 N. Y. Supp. 370, holding corporation cannot enforce agreement among officers for lower salaries, to which not party; *O'Neil v. Hudson Valley Ice Co.* 74 Hun, 166, 26 N. Y. Supp. 598, holding laborers not entitled to recover wages from party letting contract for entire job to their employer, though right to keep their time and pay, reserved; *Kramer v. Gardner*, 104 Minn. 376, 22 L.R.A.(N.S.) 498, 116 N. W. 925, holding that a third person for whose benefit a contract is made cannot sue thereon unless he can show some privity by contract or otherwise or some legal obligation from promisee to him; *Jarmulowsky v. Susskind*, 53 Misc. 606, 103 N. Y. Supp. 763, holding a contract by which a partnership is formed to be dissolved on election of one member on condition that he pay a sum to a third person, confers no right on the third person; *Wait v. Wilson*, 86 App. Div. 487, 83 N. Y. Supp. 834, holding that a third person the beneficiary of a contract entered into between two others may not sue thereon in the absence of a legal or equitable interest in its performance.

Cited in notes (25 L.R.A. 265, 270) on right of third party to sue on contract made for his benefit; (71 Am. St. Rep. 190) on same point.

Distinguished in *Spingarn v. Rosenfeld*, 4 Misc. 525, 24 N. Y. Supp. 733, holding creditor for purchase price of goods entitled to benefit of assumption agreement by firm on debtors transferring title to same; *Riordan v. First Presby. Church*, 6 Misc. 86, 26 N. Y. Supp. 38, holding physician entitled to recover on promise to pay medical attendance, though ignorant thereof at time of service.

10 L. R. A. 116, *MILLER v. HORTON*, 152 Mass. 540, 23 Am. St. Rep. 850, 26 N. E. 100.

Police power.

Cited in *Health Department v. Trinity Church*, 145 N. Y. 43, 27 L. R. A. 714, 45 Am. St. Rep. 579, 39 N. E. 833, holding statute requiring water in every floor of tenement house, valid exercise of police power; *Harrington v. Providence*, 20 R. I. 246, 38 L. R. A. 321, 38 Atl. 1, upholding statute compelling abutting owners to connect drainage with sewer and to destroy privy vaults; *Com. v.*

Parks, 155 Mass. 533, 30 N. E. 174, holding ordinance penalizing blasting within city limits, valid; *White v. Gove*, 183 Mass. 339, 67 N. E. 359, holding that bill in equity will lie to cancel deed by tax collector for nonpayment of void sewer assessment; *Henley v. State*, 98 Tenn. 724, 39 L. R. A. 142, 41 S. W. 1104 (dissenting opinion), majority upholding statute forbidding payment of witness fees by state in criminal prosecution; *New York & N. E. R. Co's Appeal*, 62 Conn. 540, 26 Atl. 122, upholding statute ordering railway to remove grade crossings at its own expense; *Loesch v. Koehler*, 144 Ind. 283, 35 L. R. A. 683, 41 N. E. 326, holding statute authorizing agent to kill animal without notice to owner, unconstitutional; *Atty. Gen. v. Old Colony R. Co.* 160 Mass. 100, 22 L. R. A. 123, 35 N. E. 252 (dissenting opinion), majority holding statute requiring railroad to accept mileage tickets of other roads unconstitutional; *Re Dowdell*, 169 Mass. 389, 61 Am. St. Rep. 290, 47 N. E. 1033, upholding statute providing for summary commitment of lunatics, where right to institute judicial proceedings reserved to party committed; *Polar Wave Ice & Fuel Co. v. Alton Branch of Illinois Humane Soc.* 155 Ill. App. 315, to the point that state cannot, under police power, authorize destruction of property as nuisance without notice to owner and opportunity for hearing; *Durgin v. Minot*, 203 Mass. 28, 24 L.R.A. (N.S.) 244, 133 Am. St. Rep. 276, 89 N. E. 144, denying police power to compel paving of all private ways at owner's expense in manner prescribed by officers; *Com. v. Sisson*, 189 Mass. 254, 1 L.R.A.(N.S.) 756, 109 Am. St. Rep. 630, 75 N. E. 619, explaining that the difference between majority and minority of court in cited case as being based on construction not principle.

Cited in note (47 Am. St. Rep. 546) on quarantine and health laws and regulations.

Contagious disease.

Cited in footnotes to *State v. Fox*, 24 L. R. A. 679, which holds seller of horse with contagious disease liable for death of one contracting disease while in charge of horse; *Furley v. Chicago, M. & St. P. R. Co.* 23 L. R. A. 74, which holds absolute liability for damage by importing infected cattle not imposed by statute.

Cited in note (26 L. R. A. 638) on validity and construction of statutory regulations as to infected animals.

— Determination of infection.

Cited in *State v. Main*, 69 Conn. 138, 36 L. R. A. 628, 61 Am. St. Rep. 30, 37 Atl. 80, holding determination of jury as to infection of trees with "yellows" conclusive on defendant's right to refuse to obey order to destroy.

Cited in notes (36 L. R. A. 613) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 322, 335) on municipal power over nuisances affecting safety, health, and personal comfort.

— Finality of decision.

Cited in *Pearson v. Zehr*, 138 Ill. 52, 32 Am. St. Rep. 113, 29 N. E. 854, sustaining demurrer to plea justifying killing of horses on mere authority of order of commissioners; *Stone v. Heath*, 179 Mass. 387, 60 N. E. 975, refusing to enjoin removal of matter adjudged a nuisance by board of health, but holding damages recoverable in event of determination that no nuisance exists; *Belmont v. New England Brick Co.* 190 Mass. 446, 77 N. E. 504, holding that the jurisdiction of a health board not being conclusive a health order is subject to review as to its reasonableness and necessity; *People ex rel. Peabody v. Chanler*, 133 App. Div. 163, 117 N. Y. Supp. 322, Affirmed in 196 N. Y. 525, 25 L.R.A.(N.S.) 950, 89 N. E. 1109, on the right to a hearing after the execution of an order as satisfying constitutional rights; *North American Cold Storage Co. v. Chicago*, 211 U. S. 318, 53 L. ed. 201, 29 Sup. Ct. Rep. 101, holding that food

unfit for consumption may be destroyed by ex parte act of health officers and the owner may have his hearing with respect thereto after the destruction.

Compensation for injuries.

Cited in *Shipman v. State Live Stock Sanitary Commission*, 115 Mich. 492, 73 N. W. 817, holding commissioners, and not state, liable for value of sound cattle destroyed under erroneous condemnation; *Houston v. State*, 98 Wis. 486, 42 L. R. A. 49, 74 N. W. 111, holding officer, but not state, liable for destruction of cattle not diseased; *Bates v. Worcester Protective Dept.* 177 Mass. 135, 58 N. E. 274, holding protective association liable for loss caused by agent's acts done in good faith for protection of property; *Taft v. Com.* 158 Mass. 547, 33 N. E. 1046, holding general consequential damages from construction of authorized sewer in highway, covered by compensation for highway; *Pierce v. Cunard S. S. Co.* 153 Mass. 90, 26 N. E. 415, holding steamship company liable for death of employee smothered by closing of hatches before his escape; *Spade v. Lynn & B. R. Co.* 172 Mass. 489, 43 L. R. A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, holding carrier not liable for injuries to passenger by fall of drunken passenger during removal; *United States v. Welch*, 217 U. S. 339, 54 L. ed. 789, 28 L.R.A.(N.S.) 388, 30 Sup. Ct. Rep. 527, holding that a destruction of an easement by the government for public purposes amounts to a taking for which compensation may be had.

Jurisdiction.

Cited in *Taft v. Com.* 158 Mass. 551, 33 N. E. 1046, holding jurisdiction of county commissioners to relocate road conclusive as to parties failing to contest same at hearing in location proceedings; *Asbell v. Edwards*, 63 Kan. 620, 66 Pac. 641, holding sheriff not protected by letter from commission requesting quarantine, under statute requiring complaint; *United States v. Sing Tuck*, 194 U. S. 167, 48 L. ed. 920, 24 Sup. Ct. Rep. 621, holding inspector not deprived of jurisdiction by mere allegation of citizenship by Chinaman.

Liability of board members for official errors and wrongs.

Cited in *Williams v. Rivenburg*, 145 App. Div. 100, 129 N. Y. Supp. 473, holding that agent of commissioner of agriculture in seizing and destroying calves under age of four weeks, when offered for sale is not liable in conversion; *Lowe v. Conroy*, 120 Wis. 159, 66 L.R.A. 911, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341, holding health officer liable where in the supposed exercise of his duty he oversteps its limits invading private property rights; *The Eliza Lines*, 199 U. S. 131, 50 L. ed. 120, 26 Sup. Ct. Rep. 8, 4 A. & E. Ann. Cas. 406, on necessity justifying trespass.

Cited in note (5 L.R.A.(N.S.) 635) on personal liability of health authorities.

Distinguished in *Valentine v. Englewood*, 76 N. J. L. 517, 19 L.R.A.(N.S.) 266, 71 Atl. 344, 16 A. & E. Ann. Cas. 731, holding members of board of health not liable personally for acts for public good if done in good faith under statute.

Disapproved in *Kirk v. Board of Health (Kirk v. Wyman)* 83 S. C. 383, 23 L.R.A.(N.S.) 1193, 65 S. E. 387, holding health officers not personally liable unless on showing of bad faith.

10 L. R. A. 122, *MERRIMAC RIVER SAV. BANK v. LOWELL*, 152 Mass. 556, 26 N. E. 97.

Right to cut off water supply.

Cited in *Crumley v. Watauga Water Co.* 99 Tenn. 427, 41 S. W. 1058, holding water company liable for damages for cutting off supply of water to enforce payment of old dues where present dues paid; *Turner v. Revere Water Co.* 171 Mass. 335, 40 L. R. A. 660, 68 Am. St. Rep. 432, 50 N. E. 634, denying right of

water company to shut off supply to lessee on ground of owner's nonpayment of prior year's rent; *Jones v. Nashville*, 109 Tenn. 565, 72 S. W. 985, sustaining ordinance prohibiting use of water till past rates paid.

Cited in notes (14 L. R. A. 669) on right to stop supply of water or gas for default of payment; (61 L. R. A. 118) on establishment and regulation of municipal water supply; (28 Am. St. Rep. 44) on cutting off water supply.

Duty to supply water or gas.

Cited in *Shaw Stocking Co. v. Lowell*, 199 Mass. 121, 18 L.R.A.(N.S.) 748, 85 N. E. 90, 15 A. & E. Ann. Cas. 377, on the duty of municipality to supply water to private users; *Cox v. Malden & M. Gaslight Co.* 199 Mass. 326, 17 L.R.A.(N.S.) 1236, 127 Am. St. Rep. 503, 85 N. E. 180, holding that gas company may be compelled to supply gas to corporation in hands of receiver for benefit of creditors though such corporation is in debt for gas furnished.

Nature of charges for public service.

Cited in *Mansfield v. Humphreys Mfg. Co.* 82 Ohio St. 221, 31 L.R.A.(N.S.) 305, 92 N. E. 233, holding that rents charged for water supplied by city and used by private person are not taxes.

Municipal liability for negligence.

Cited in *Watson v. Needham*, 161 Mass. 411, 24 L. R. A. 288, 37 N. E. 204, holding city liable for actual damage resulting to plants in greenhouse through failure to supply water for steam heating; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 365, 35 S. W. 341, holding municipality liable for value of property destroyed by fire through its negligent failure to supply sufficient water; *Davies v. Boston*, 190 Mass. 197, 76 N. E. 663, holding city liable for negligence causing injury to a passenger on its ferry operated as a common carriage for which toll is charged.

Distinguished in *Kelley v. Boston*, 186 Mass. 167, 66 L.R.A. 431, 71 N. E. 299, holding city not liable for injury caused by employee in throwing snow from city building merely because such building was occupied by water department and others, not paying rent.

Relation of municipality to state.

Cited in *Mt. Hope Cemetery v. Boston*, 158 Mass. 513, 35 Am. St. Rep. 515, 33 N. E. 695, holding statute ordering city to transfer title of public cemetery to corporation void, since city's ownership is in its private or proprietary capacity.

10 L. R. A. 123, *BUFFINTON v. CHASE*, 152 Mass. 534, 25 N. E. 977.

Removal of bar of limitations.

Cited in *Day v. Mayo*, 154 Mass. 475, 28 N. E. 898, holding partial cash payment within period of limitation raises implied promise at time to pay balance; *Nunn v. McKnight*, 79 Ark. 397, 96 S. W. 193, holding a partial payment on a closed account by credit of proceeds of sale of goods obtained from debtor while account was running, interrupts the running of statute of limitations.

Cited in notes (12 L.R.A.(N.S.) 1032) on effect of payment on collateral to stay running of statute against principal obligation; (16 Eng. Rul. Cas. 178) on acknowledgment or part payment taking debt out of statute of limitations; (16 Eng. Rul. Cas. 159; 1 Brit. Rul. Cas. 496) on time at which partial payment by cheque or note arrests running of limitations.

10 L. R. A. 125, *COFFEY v. EMIGH*, 15 Colo. 184, 25 Pac. 83.

Mandamus denied in 18 Colo. 500, 33 Pac. 162.

Intervention of execution purchaser of property denied in *Rockwell v. Coffey*, 20 Colo. 398, 38 Pac. 376.

Title to cross veins.

Cited in *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 504, 45 L. ed. 1205, 21 Sup. Ct. Rep. 885, holding senior location entitled to all mineral of intersecting cross veins within surface boundary.

Laches.

Cited in *Dunne v. Statesbury*, 16 Colo. 94, 26 Pac. 333, holding nonelapsed statutory period of limitations control rights where no equitable estoppel from actions; *Nichols v. McIntosh*, 19 Colo. 28, 34 Pac. 278, holding water rights not lost by mere abandonment of ditch without unreasonable cessation of exercise of water rights.

Cited in footnote to *Reid v. Mix*, 55 L. R. A. 706, which requires one seeking to rescind contract for delay of other party, to show special damages of other party's intent to treat contract at end.

Compromise of void claim.

Cited in note (25 L.R.A.(N.S.) 292, 309) on void, invalid, or unfounded claim as subject of valid compromise.

Constructive notice by possession.

Cited in *Runyan v. Snyder*, 45 Colo. 162, 100 Pac. 420, holding that notice of the claims of trespassers in possession need not be taken by purchaser, they not having any rights by virtue of such possession.

Cited in notes (104 Am. St. Rep. 341; 11 Eng. Rul. Cas. 548; 13 L.R.A. (N.S.) 59) on possession of land as notice of title.

10 L. R. A. 129, *CRAFFORD v. WARWICK COUNTY*, 87 Va. 110, 12 S. E. 147.

Extent of term "persons."

Cited in note (19 L. R. A. 223) on who or what included in term "persons."

10 L. R. A. 132, *BRIGGS v. SAMPLE*, 43 Fed. 102.

Citizenship.

Cited in *Baldwin v. Letson*, 6 Kan. App. 17, 49 Pac. 619, holding citizenship not acquired by Indian until issue of patent of lands to him by president under treaty.

Deeds from Indians.

Cited in *Nelson v. John*, 43 Wash. 490, 86 Pac. 933, holding that the repeal of restrictions to alienation of land by Indian does not validate a deed made contrary to restrictions prior to repeal.

10 L. R. A. 135, *STATE v. SCHLEMMER*, 42 La. Ann. 1166, 8 So. 307.

Constitutional law, and the police power.

Cited in *Chambers v. Gilbert*, 17 Tex. Civ. App. 109, 42 S. W. 630, upholding statutory provision for destruction of cattle found by disinterested parties to be affected with glanders; *Sprigg v. Garrett Park*, 89 Md. 415, 43 Atl. 813, upholding summary abatement of cesspool under statute and ordinance prohibiting same.

Cited in footnotes to *Bailey v. People*, 54 L. R. A. 838, which holds void, restriction on number lodging house keepers may permit to occupy one room; *State v. Snow*, 11 L. R. A. 355, which holds regulation for marking packages of lard and substitutes not violation of due process of law; *Atkins v. Phillips*, 10 L. R. A. 158, which holds monthly license fee of \$5 for vending fresh meats at private markets, not abuse of police power; *Bessette v. People*, 56 L. R. A. 558, which holds void, requirement that horseshoers shall practise business for four years, submit to examination, and pay license fee; *State v. Layton*, 62 L. R. A. 164, sustaining statute prohibiting manufacture or sale of baking powder con-

taining alum; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food, whereby damage or inferiority is concealed.

Cited in notes (16 L. R. A. 401) on police power of cities as to matters affecting health; (10 L. R. A. 187) on police regulations for protection against fire; (38 L. R. A. 325) on municipal power over nuisances affecting safety, health, and personal comfort; (11 L. R. A. 286) on constitutional protection of property rights; (14 L. R. A. 583) on constitutional equality of privileges, immunities, and protection; (23 L.R.A.(N.S.) 767) on power of state or health authorities to forbid use of polluted water supply; (25 Am. St. Rep. 884) on 14th amendment as to special privileges, burdens and restrictions.

10 L. R. A. 137, *STATE ex rel. MATRANGA v. BRINGIER*, 42 La. Ann. 1091, 8 So. 279.

Preliminary examination.

Cited in *State ex rel. Guion v. Brunot*, 104 La. 240, 28 So. 996, enforcing by mandamus state's rights to preliminary examination of accused although waived by latter; *Knight v. District Ct.* 32 Nev. 350, 108 Pac. 358, holding that grand jury may indict person accused, although case may be pending on preliminary examination before justice of peace.

Jurisdiction of recorder.

Cited in *State ex rel. Dist. Atty. v. Moulin*, 45 La. Ann. 315, 12 So. 142, upholding jurisdiction of recorder in preliminary examination on charge of murder.

Distinguished in *Louisiana Soc. for Prevention of C. to C. v. Cage*, 45 La. Ann. 1396, 14 So. 422, holding forfeiture of bail bond given on preliminary examination before recorder, not reviewable on appeal to Supreme Court.

10 L. R. A. 139, *TOOMEY v. SOUTHERN P. R. CO.* 86 Cal. 374, 24 Pac. 1074.

Liability for injuries to trespassers.

Cited in *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 594, 52 N. E. 1013, holding railway not liable for death of child trespassing on tracks, in absence of wilful killing; *Candelaria v. Atchison, T. & S. F. R. Co.* 6 N. M. 271, 27 Pac. 497, holding railway not liable for negligent killing of party walking on tracks without right; *Tennis v. Inter-State Consol. Rapid Transit R. Co.* 45 Kan. 508, 25 Pac. 876, denying liability for death of one killed while walking on tracks; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 379, 25 Pac. 893, denying recovery to boy stealing ride where injury due to his act caused by fright at closing of door of box car; *Ward v. Southern P. Co.* 25 Or. 441, 23 L.R.A. 718, 36 Pac. 166, holding the frequent use of track as a footpath did not affect the right of the company to a clear track; *Palmer v. Oregon Short Line R. Co.* 34 Utah, 477, 98 Pac. 689, 16 A. & E. Ann. Cas. 229, holding that company owes no more duty to an infant trespasser than to an adult trespasser with respect to lookout.

Cited in footnotes to *Patton v. East Tennessee, V. & G. R. Co.* 12 L. R. A. 184, which holds duty owed to trespassers to have lookouts on rear section of train broken in two, to give warning; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 267, which requires stopping to enable trespasser discovered on railroad bridge to escape; *Clark v. Wilmington & W. R. Co.* 14 L. R. A. 749, which holds negligence of trespasser in getting on railroad trestle not relieve railway from liability for running down; *Schreiner v. Great Northern R. Co.* 58 L. R. A. 75, which holds failure to build fence not proximate cause of injury to trespasser pushed on track by cow; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 98, which denies duty towards trespassers on tracks before discovery.

Cited in notes (11 L. R. A. 385) on duty as to trespasser on railroad; (28 L. R. A. 749) on whether wrongdoer may take advantage of general statutory imposition of damages for negligent injury; (55 L. R. A. 432) on doctrine of "last clear chance."

— **Duty after discovery of danger.**

Cited in *Duncan v. St. Louis & S. F. R. Co.* 152 Ala. 125, 44 So. 418, holding that where injured person is trespasser the defendant owes him no duty until its employees actually see him in place of danger; *Esrey v. Southern P. Co.* 88 Cal. 406, 26 Pac. 211, holding defendant liable for injury to trespasser where after discovery of her danger the accident could have been avoided; *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 199, 33 L.R.A. 75, 24 S. E. 570 (dissenting opinion), on duty of company servants after discovery of negligent person on track.

Cited in note (55 L.R.A. 432) on doctrine of "last clear chance."

Duty to give warnings at crossings.

Cited in *Cleveland, A. & C. R. Co. v. Workman*, 66 Ohio St. 542, 90 Am. St. Rep. 602, 64 N. E. 582, holding failure to give statutory signals not element of railway's negligence, where injury occurred 600 feet from crossing; *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 359, 67 Am. St. Rep. 252, 49 N. E. 388, denying right of action based on failure to give statutory signals at crossing, where resulting injury is to trespassing child not at crossing; *New York, C. & St. L. R. Co. v. Martin*, 35 Ind. App. 676, 72 N. E. 654, holding the statutory duty to whistle at crossings is only owed to those who are attempting to cross and does not apply to person driving parallel to track; *Lynch v. Great Northern R. Co.* 38 Mont. 519, 100 Pac. 616, holding failure to give crossing signal not available to person injured at place other than crossing.

Cited in footnote to *Raines v. Chesapeake & O. R. Co.* 24 L. R. A. 226, which holds railroad employees have right to presume on giving signals that person on track will step aside.

To whom statutory duty is owed.

Cited in *Indiana & C. Coal Co. v. Neal*, 166 Ind. 463, 77 N. E. 850, 9 A. & E. Ann. Cas. 424, holding that driver of coal car in mine cannot recover for injury caused while trying to go through door for which operator failed to provide an opener under statute requiring an opener at each door for ventilation purposes and fixing liability for any injury resulting therefrom.

Cited in notes (69 L.R.A. 543) on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained; (9 L.R.A.(N.S.) 343, 345) on private action for violation of statute not expressly conferring it; (28 L.R.A. 749) as to whether wrongdoer may take advantage of general statutory imposition of damages for negligence.

10 L. R. A. 144, *QUONG TUE SING v. ANGLO-NEVADA ASSUR. CORP.* 86 Cal. 566, 25 Pac. 58.

Cancellation of policy.

Cited in *Union Cent. L. Ins. Co. v. Jones*, 17 Ind. App. 601, 47 N. E. 342, holding that insurer must show compliance with conditions to a cancellation of policy or that insured knowing all facts waived compliance.

Cited in footnote to *Crown Point Iron Co. v. Aetna Ins. Co.* 14 L. R. A. 147, which holds surrender of policy with request for termination a cancellation.

— **Notice to agent.**

Cited in *Johnson v. North British & Mercantile Ins. Co.* 66 Ohio St. 16, 63 N. E.

610, holding agent only to procure policy not authorized to receive notice of cancellation.

Cited in footnote to *Clark v. Insurance Co. of N. A.* 35 L. R. A. 276, which holds ineffectual agent's unauthorized attempt to transfer insurance to other company.

Cited in notes (20 L.R.A. 284) as to when insurance agent is the agent of insured; (38 L.R.A.(N.S.) 624) on insurance brokers as agent for the insured.

— **Tender of unearned premium.**

Cited in *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* 95 Wis. 240, 37 L. R. A. 137, 70 N. W. 84, holding tender of unearned premium essential to valid cancellation of policy.

Cited in notes (25 Am. St. Rep. 706; 13 L.R.A.(N.S.) 885) on return of premium as condition of cancelling insurance; (13 L.R.A.(N.S.) 891) on waiver of return or unearned premium as condition of cancelling insurance.

10 L. R. A. 147, *WARD v. FAGIN*, 101 Mo. 669, 20 Am. St. Rep. 650, 14 S. W. 738.

Landlord's obligation to keep premises in good condition.

Cited in *Gordon v. Peltzer*, 56 Mo. App. 602, holding landlord not liable for injury resulting from tenant's negligent care of properly constructed coal hole; *Jones v. Millsaps*, 71 Miss. 18, 23 L. R. A. 159, 14 So. 440, holding landlord not liable to lessee for injuries due to leaks from upper stories of building; *Roberts v. Cottey*, 100 Mo. App. 503, 74 S. W. 886, holding landlord not liable for injuries resulting from failure to make repairs, in absence of contract to repair; *Johnson v. Snow*, 102 Mo. App. 241, 76 S. W. 675, holding lessee liable to guest for injuries from failure to provide fire escapes; *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 452, 60 L. R. A. 587, 91 N. W. 994, holding no implied agreement upon owner of building leased in separate sections to keep in repair part remaining in his possession; *Stevens v. Wadleigh*, 6 Ariz. 357, 57 Pac. 622; *Stevens v. Wadleigh*, 5 Ariz. 94, 46 Pac. 70,—holding landlord not liable to tenant for temporary partial destruction of leased premises caused by flood; *Glenn v. Hill*, 210 Mo. 296, 16 L.R.A.(N.S.) 701, 109 S. W. 27, holding landlord not liable for injury resulting to tenant from failure to repair in absence of contract to repair; *Coats v. Meriwether*, 144 Mo. App. 91, 129 S. W. 468, holding that there is no duty to repair resting on landlord in absence of contract where he has not exclusive control of premises defective; *Sheridan v. Forsee*, 106 Mo. App. 499, 81 S. W. 494, holding landlord not liable to a tenant for injury caused by tenant in control of floor above; *Mayer v. Schrupf*, 111 Mo. App. 57, 85 S. W. 915, holding landlord not liable to third person for defective condition caused by negligence of tenant; *Zeibig v. Pfeiffer Chemical Co.* 150 Mo. App. 487, 131 S. W. 131; *Finer v. Nichols*, 158 Mo. App. 545, 138 S. W. 889; *Hahs v. Cape Girardeau & C. R. Co.* 147 Mo. App. 279, 126 S. W. 524,—holding that in absence of statute lessee is bound to make repairs to premises where lease is silent in that respect; *Moorshead v. United R. Co.* 203 Mo. 169, 100 S. W. 611, on settled meaning and incidents of lease; *Moorshead v. United R. Co.* 119 Mo. App. 579, 96 S. W. 261, holding lessor of railway property not liable to third persons for negligent use of premises by lessee where such premises are turned over to lessee in good condition.

Cited in footnote to *Miller v. McCardell*, 30 L. R. A. 682, which holds lessors bound by covenant to repair roof.

Cited in notes (34 L. R. A. 825) on landlord's liability for injury to tenant from defect in premises; (14 L. R. A. 241) on responsibility of landlord for injuries resulting from defects in portions of building remaining in his possession; (34 L.R.A. 562) on individual liability for falling walls or buildings; (4 L.R.A.

(N.S.) 1143) on liability of landlord for injuries from defective condition of foundation, walls, chimneys, or roof of building apportioned among different tenants; (9 Eng. Rul. Cas. 457) on implied obligation of landlord to repair, and implied warranty of fitness of premises for purposes for which they are let.

Distinguished in *Memphis v. Miller*, 78 Mo. App. 72, holding landlord liable for injuries on leased premises, where caused by condition constituting nuisance *per se* at time of lease; *McGinley v. Alliance Trust Co.* 168 Mo. 264, 56 L. R. A. 337, 66 S. W. 153, holding owners of apartment house retaining control of stairs, liable for injuries due to defective condition; *Herd v. Koenig*, 137 Mo. App. 594, 119 S. W. 56, holding landlord liable to guest of tenant injured by defects in yard for common use of all the tenants in the appurtenant building.

— **Arising from contract.**

Cited in *Rife v. Reynolds*, 137 Mo. App. 292, 117 S. W. 652, holding landlord liable for damage to tenants furniture caused by defective roof which he has covenanted to repair.

— **Nonfeasance and misfeasance.**

Cited in *Charlie's Transfer Co. v. Malone*, 159 Ala. 333, 48 So. 705, holding landlord liable for misfeasance only with respect to defects in premises though he has under his control the defective part of premises; *New Era Mfg. Co. v. O'Reilly*, 197 Mo. 476, 95 S. W. 322, on liability of landlord to tenant for misfeasance only, in the absence of contractual obligations.

10 L. R. A. 150, *TALCOTT v. PHILBRICK*, 59 Conn. 472, 22 Atl. 436.

Validity of ballots.

Cited in *Fields v. Osborne*, 60 Conn. 551, 12 L. R. A. 553, footnote, p. 551, 21 Atl. 1070, holding ballots void where title of office contains descriptive matter not prescribed by statute; *People ex rel. Nichols v. Onondaga County*, 129 N. Y. 414, 14 L. R. A. 631, 29 N. E. 327, holding ballots distributed to and cast at different polling place from that for which indorsed, void; *Re McDade*, 29 Misc. 221, 60 N. Y. Supp. 105, holding use of posters on ballot renders same void where not specifically permitted by statute; *Slaymaker v. Phillips*, 5 Wyo. 491, 47 L. R. A. 855, 42 Pac. 1049 (dissenting opinion), majority holding absence of official stamp on ballot invalidates same under statute; *Dickerman v. Gelsthorpe*, 19 Mont. 257, 47 Pac. 999, upholding ballot on which beside straight party vote, candidate of another party indicated for particular office.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *Detroit v. Rush*, 10 L. R. A. 171, which holds voter's rights not restricted by requirement of uniform size and color for all ballots; *Fisher v. Dudley*, 12 L. R. A. 586, which holds party nominee independently nominated entitled to two places on ballot; *State ex rel. Briesen v. Barden*, 10 L. R. A. 155, which holds printing of word "judiciary" on back of ballot not prevent counting it; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited as limited in *Coughlin v. McElroy*, 72 Conn. 105, 77 Am. St. Rep. 301, 43 Atl. 854, holding ballot not invalidated by erasure of name on poster and insertion of name originally printed.

Distinguished in *Bowers v. Smith*, 111 Mo. 58, 16 L. R. A. 759, 33 Am. St. Rep. 491, 20 S. W. 101, holding ballots not invalidated by erroneous printing of additional names thereon by county clerk; *Lynip v. Buckner*, 22 Nev. 441, 30 L. R. A. 358, 41 Pac. 762, holding ballots not invalidated by unintentional omission of inspectors to remove number strip; *State ex rel. Law v. Saxon*, 30 Fla.

684, 18 L. R. A. 725, 32 Am. St. Rep. 46, 12 So. 218, holding ballot bearing name of issuing political party, not void though unauthorized by statute.

Disapproved in *Boyd v. Mills*, 53 Kan. 609, 25 L. R. A. 491, 42 Am. St. Rep. 306, 37 Pac. 16, holding election carried on with sample, instead of official, ballots, by mistake, valid; *Parker v. Hughes*, 64 Kan. 240, 56 L. R. A. 279, 91 Am. St. Rep. 216, 67 Pac. 637, holding ballot not invalidated by voter's double designations of candidate where latter appears under different ticket; *State ex rel. Waggoner v. Russell*, 34 Neb. 122, 15 L. R. A. 742, 33 Am. St. Rep. 625, 51 N. W. 465, upholding ballots marked with pencil instead of with ink as directed by statute; *Gauvreau v. Van Patten*, 83 Neb. 67, 119 N. W. 11, holding that the provision in the statute, against placing identifying marks on ballot by elector is directory only not authorizing the throwing out of ballot unless intent to identify appears.

Fraudulent intent in preparation of ballots.

Cited in *Esquibel v. Chaves*, 12 N. M. 517, 78 Pac. 505 (dissenting opinion), on immateriality of fraudulent purpose in marking ballot distinctively.

10 L. R. A. 155, *STATE ex rel. BRIESEN v. BARDEN*, 77 Wis. 601, 20 Am. St. Rep. 146, 46 N. W. 899.

Stipulations in practice.

Cited in *Smith v. Kibling*, 97 Wis. 208, 72 N. W. 869, stating arguendo, that want of formal pleading may be waived by stipulation.

Statutory regulation of ballot.

Cited in *Ex parte Owens*, 148 Ala. 407, 8 L.R.A.(N.S.) 891, 121 Am. St. Rep. 67, 42 So. 676, holding statute not to be violative of the constitutional provision for secrecy in voting.

Cited in footnote to *Detroit v. Rush*, 10 L. R. A. 171, which holds voter's rights not restricted by requirement of uniform size and color for all ballots.

Cited in note (10 L. R. A. 151) on form of ballot.

Validity of ballot.

Cited in footnote to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364 in which various decisions as to validity of ballots are made.

Cited in note (13 L. R. A. 762) on marks or devices to distinguish ballots.

10 L. R. A. 158, *ATKINS v. PHILLIPS*, 26 Fla. 281, 8 So. 429.

Construction of mandatory statutes.

Cited in *Swindell v. State*, 143 Ind. 170, 35 L. R. A. 55, 42 N. E. 528, construing requirement of two-thirds vote to suspend necessity for three readings of proposed ordinance before passage to mean two thirds of those present; *North Platte v. North Platte Waterworks Co.* 56 Neb. 413, 76 N. W. 906, holding provision for suspension of rule by vote of three fourths of council complied with by vote of all present at meeting though but two thirds present; *State ex rel. Meyer v. Greene*, 154 Ala. 256, 46 So. 268, construing the word "house" as used in constitution to mean quorum and not entire membership.

Cited in footnote to *Board of Education v. Best*, 27 L. R. A. 78, which holds mandatory provision for requiring ayes and noes on motion to employ teacher.

Disapproved in *Criekenberger v. Westfield*, 71 N. J. L. 468, 58 Atl. 1097, holding "all the members of the council" to mean exactly what is said including members both absent and present.

Police power.

Cited in footnote to *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds

statute prohibiting the coloring, coating, or polishing of article intended for food whereby damage or inferiority is concealed.

Cited in notes (10 L. R. A. 136) on protection of health within police power; (10 L. R. A. 187) on police regulations for protection against fire; (24 L. R. A. 585) on market regulations restricting sale; (33 L. R. A. 37) on how far proceedings for violation of ordinances are to be regarded as prosecutions for crime.

— **License taxes.**

Cited in *Ottumwa v. Zekind*, 95 Iowa, 626, 29 L. R. A. 736, 58 Am. St. Rep. 447, 64 N. W. 646, holding license tax of \$250 per week upon transient merchants void, as amounting to revenue tax; *Blanchard v. Ivers*, 40 Fla. 122, 24 So. 66, upholding ordinance establishing public market where not shown that stall rents exceed expense of maintenance; *Littlefield v. State*, 42 Neb. 228, 28 L. R. A. 590, footnote p. 588, 47 Am. St. Rep. 697, 60 N. W. 724, upholding regulation of sales of milk where revenue not disproportional to cost of issuing license and fair regulation of business; *Howland v. State*, 56 Fla. 433, 21 L.R.A.(N.S.) 197, 47 So. 963 (dissenting opinion), on the power of city to levy a fee, to cover license and inspection expense, for vending of fresh meat outside public market.

Cited in footnote to *Re Snyder*, 68 L.R.A. 708, which sustains right of farmer to sell products of his farm in city without license.

Cited in notes (30 L.R.A. 430, 432, 434) on limit of amount of license fees; (129 Am. St. Rep. 259) on constitutional limitations on power to impose license or occupation taxes.

10 L. R. A. 162, *EBEY v. ADAMS*, 135 Ill. 80, 25 N. E. 1013.

Rule in Shelley's Case.

Cited in *Nobbie v. Ogden*, 178 Ill. 366, 53 N. E. 104, Reversing 72 Ill. App. 250, holding provision in trust deed for reconveyance to grantor "or his heirs" after death of beneficiary, enforceable by grantor's devisee.

Cited in footnotes to *Glover v. Condell*, 35 L. R. A. 360, which holds ownership of fund subject to limitation over given by bequest to son and over in case of his death without living heirs; *Grainger v. Grainger*, 36 L. R. A. 186, which holds rule in *Shelley's Case* not applicable to devise to one for life and after his death to heirs of his body, if any survive him, with devise over otherwise.

Cited in note (10 Eng. Rul. Cas. 758) on rule in *Shelley's case*.

Vested and contingent remainders.

Cited in *Chapin v. Crow*, 147 Ill. 225, 37 Am. St. Rep. 213, 35 N. E. 536, holding remainder to sons, if survive life tenant, but to children in event of prior death, contingent; *Dunlap v. Fant*, 74 Miss. 213, 29 So. 873, holding children take vested remainder by purchase under devise to wife for life, remainder over to children alive at her death.

Cited in footnote to *Starnes v. Hill*, 22 L. R. A. 598, which holds indefeasible fee not vested in one to whom life estate given with estate in fee to his "heirs."

Cited in note (37 Am. St. Rep. 147) on vested and contingent legacy.

Time of vesting of devise of proceeds of land.

Cited in *McDole v. Shepardson*, 53 Ill. App. 515, holding executor's power of sale coupled with sufficient interest and to support action of forcible entry and detainer; *Ladd v. Judson*, 174 Ill. 353, 66 Am. St. Rep. 267, 51 N. E. 838 (dissenting opinion), majority holding debtor's equitable interest in proceeds of realty under devise, subject, before sale, to creditor's proceeding in equity; *Starr v. Willoughby*, 218 Ill. 490, 2 L.R.A.(N.S.) 626, 75 N. E. 1029, holding that where proceeds are to be divided after death of testator between such children as may be living at that time the title there does not vest until after

distribution so that a beneficiary thereunder could not devise his share away from his heir; *Breehbeller v. Wilson*, 228 Ill. 506, 81 N. E. 1094, holding residue not to vest till time of distribution under a will providing for life estate with residue to be distributed between such of his children as survived the life tenant and the heirs of those predeceasing such tenant; *Barnes v. Johnston*, 233 Ill. 626, 84 N. E. 610, holding widow of distributee not to take any interest in proceeds where such distributee died leaving child before time of distribution; *Schaeffer v. Schaeffer*, 54 W. Va. 685, 46 S. E. 150, holding conveyance by distributee of his share of proceeds before termination of the precedent estate and vesting of his interest passes nothing.

Cited in footnote to *Bowen v. Hackney*, 67 L.R.A. 441, which holds that no estate vests in children until widow's death under will giving life estate to widow and providing that at her death that given to her for life shall be equally divided between all the children, the representatives of those having died to stand in place of ancestors.

Election by beneficiaries.

Cited in *People v. Lease*, 71 Ill. App. 393, holding devisee may elect to take share in money under provision of will directing share to be invested in land; *Robinson v. Botkin*, 181 Ill. 184, 54 N. E. 915, holding express provision of will giving children power to divide land among themselves creates no greater interest than exists by law under devise of proceeds after sale; *Strode v. McCormick*, 158 Ill. 146, 41 N. E. 1091, holding no interest to vest in child under devise of proceeds of sale of land to children, where child died before election prior to mother's death.

Construction of will.

Cited in *Primm v. Primm*, 111 Ill. App. 246, holding that different parts of will should be considered together, in construing will; *Thompson v. Adams*, 205 Ill. 559, 69 N. E. 1, holding words "then remaining" not authorize widow to dispose of fee; *Lash v. Lash*, 209 Ill. 605, 70 N. E. 1049, holding that direction to executor to apply proceeds of sale of land to payment of legacies gives him power of sale; *Boland v. Tiernay*, 118 Iowa, 66, 91 N. W. 836, holding executor's failure to sell real estate and distribute proceeds, not defeat devise; *Taylor v. Taylor*, 118 Iowa, 412, 92 N. W. 71, holding under will for division of property "between my children or their heirs as law directs," heirs of children take by substitution; *Bank of Ukiah v. Rice*, 143 Cal. 273, 101 Am. St. Rep. 118, 76 Pac. 1020, holding land descended to heirs subject to administration under will giving widow life estate, then directing sale and distribution; *Johnson v. Preston*, 226 Ill. 463, 10 L.R.A.(N.S.) 571, 80 N. E. 1001, holding that in a devise of realty in trust for 25 years, to vest in grandchildren or their heirs at expiration thereof the word "or" indicates substitution merely; *Olcott v. Tope*, 213 Ill. 130, 72 N. E. 751, Affirming 115 Ill. App. 126, construing the word "or" in connection with preceding sections of will to mean "and" as necessary to carry out intent of the testator; *Covey v. Dinsmoor*, 129 Ill. App. 53, holding that intent of testator is to be found from provisions of his will taking into consideration all its parts giving the language the sense it was used by him.

Cited in note (37 Am. St. Rep. 147) on gathering testator's intention from entire will.

Equitable conversion and reconversion.

Cited in *Beaver v. Ross*, 140 Iowa, 158, 20 L.R.A.(N.S.) 72, 118 N. W. 287, 17 A. & E. Ann. Cas. 640, holding that there need be no devise in terms to executors or trustees in order that the doctrine of equitable conversion can apply; *Darst v. Swearingen*, 224 Ill. 233, 115 Am. St. Rep. 152, 79 N. E. 635,

holding rules of conversion and reconversion apply if there is any difference either in quality or shares of estates given to heirs from their intestate rights.

Cited in notes (20 L.R.A.(N.S.) 69) on time of equitable conversion under direction in will to sell realty which postpones sale; (7 Eng. Rul. Cas. 23) on equitable conversion of realty into personalty, and vice versa.

Devise by implication of legal title to trustee.

Cited in *Emmerson v. Merritt*, 249 Ill. 541, 94 N. E. 955, holding that if it is necessary for executor to hold legal title to land in order to carry out trust, it will be held legal title was devised to him by implication.

10 L. R. A. 165, *BUDGE v. GRAND FORKS*, 1 N. D. 309, 47 N. W. 390.

Recovery of purchase money at tax sale.

Cited in *Tyler v. Cass County*, 1 N. D. 381, 48 N. W. 233, holding purchase money paid at tax sale of nontaxable land, not recoverable; *Iowa & D. Land Co. v. Barnes County*, 6 N. D. 604, 72 N. W. 1019, holding money paid on sale for taxes illegal by reason of insufficient description of property on assessment roll and tax list, not recoverable; *Pennock v. Douglas County*, 39 Neb. 304, 27 L. R. A. 126, 42 Am. St. Rep. 579, 58 N. W. 117, holding money paid for property on sale for taxes illegally imposed not recoverable from municipality; *McHenry v. Brett*, 9 N. D. 71, 81 N. W. 65, holding owner not liable for taxes subsequently paid in support of title by purchaser at void tax sale of exempt property; *Van Nest v. Sargent County*, 7 N. D. 140, 73 N. W. 1083, holding county not liable for purchase money at tax sale and subsequent taxes paid, where sale not declared void though land exempt; *American Invest. Co. v. Beadle County*, 5 S. D. 416, 59 N. W. 212, refusing to give retroactive effect to statute ordering refund of purchase money at void tax sale, in absence of clear expression of legislative intent; *Linder v. New Orleans*, 116 La. 373, 40 So. 736, 7 A. & E. Ann. Cas. 919, holding that, in the absence of special legislation the purchaser of property at a tax sale has no recourse for defects in title or recovery of price against the city instituting the sale; *Lisso v. Nachitoches Parish*, 127 La. 286, 31 L.R.A.(N.S.) 1145, 53 So. 566, to the point that purchaser of tax title is presumed to have notice of illegalities and irregularities in proceedings.

Cited in footnote to *Pennocks v. County of Douglas*, 27 L.R.A. 121, which denies power to compel city to refund money received on void sale of special assessment; *Rogers v. St. Paul*, 47 L. R. A. 537, which denies right to recover back money paid on assessment for uncompleted street improvement; *McConville v. St. Paul*, 43 L. R. A. 584, which authorizes property owner to recover back assessments which he has been compelled to pay city for improvement wholly abandoned without completion.

Cited in note (42 Am. St. Rep. 588, 589) on right to recover money paid at void tax sale.

Reassessment act.

Cited in *Schintgen v. La Crosse*, 117 Wis. 167, 94 N. W. 84, holding relevying of assessment not invalidated by third person's purchase of improvement bonds from city and payment therefor; *Barkley v. Lincoln*, 82 Neb. 186, 18 L.R.A. (N.S.) 395, 130 Am. St. Rep. 659, 117 N. W. 398, holding reassessment for improvements may not be had on declared invalidity of special tax, where the improvements have been paid for and such reassessment is obviously for benefit of purchaser at tax sale for default on the invalid special tax.

10 L. R. A. 171, *DETROIT v. RUSH*, 82 Mich. 532, 46 N. W. 951.

Regulation of ballot.

Cited in *Todd v. Election Comrs.* 104 Mich. 482, 29 L. R. A. 334, 64 N. W. 496,

holding statute permitting candidate's name to appear but once on official ballot though nominated by different parties, valid; *Atty. Gen. v. McQuade*, 94 Mich. 441, 53 N. W. 944, upholding statutory provisions for absolute secrecy of elector while voting; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 547, 25 L. R. A. 329, 58 N. W. 483, holding statute regulating manner of holding elections to secure their purity, valid though resulting in inconvenience to voter; *Cole v. Tucker*, 164 Mass. 488, 29 L. R. A. 669, 41 N. E. 681, holding statute regulating but not abridging constitutional right to vote, valid; *State ex rel. Brown v. McMillan*, 108 Mo. 162, 18 S. W. 784, holding statutory regulations of ballot extends to elections of aldermen in cities of fourth class; *Eckerson v. Des Moines*, 137 Iowa, 486, 115 N. W. 177, on invalid restrictions to the right of voter to make and put choice of candidates on ballot; *Board v. Dill*, 26 Okla. 114, 29 L.R.A.(N.S.) 1175, 110 Pac. 1107, Ann. Cas. 1912 B, 101, holding that statutes mandatory in their character designed to secure secrecy of ballot, are mandatory on both officials and electors.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. McCarthy v. Moore*, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in notes (25 L.R.A. 480, 484) on how far right to vote is absolute; (45 L. ed. U. S. 214) on validity of registration laws; (40 L.R.A.(N.S.) 535) on assisting voter.

Distinguished in *State ex rel. Lamar v. Dillon*, 32 Fla. 580, 22 L. R. A. 137, 14 So. 383, holding statute inferentially forbidding vote for candidate not printed on official ballot, invalid.

Construction of statutes.

Cited in *Re Lambrecht*, 137 Mich. 454, 100 N. W. 606, holding that on the presumption that legislature knows that penal statutes cannot retroact in providing for the sentencing of persons "hereafter convicted of crime" it intended only crimes after the act took effect.

10 L. R. A. 176, *POTTER v. SAGINAW UNION STREET R. CO.* 83 Mich. 285, 47 N. W. 217.

Injunction.

Cited in *Detroit City R. Co. v. Mills*, 85 Mich. 644, 48 N. W. 1007, enjoining destruction of trolley poles on premises where erected under colorable authority of municipal ordinance; *Campau v. National Film Co.* 159 Mich. 173, 123 N. W. 606, holding that where defendants business is in breach of the lease as to risk of fire and the lessor knew of the nature of business before lease relief by injunction being out of proportion to the injury it would cause will not be granted.

Cited in notes (28 Am. St. Rep. 235) on abutter's right to injunction against telegraph and telephone poles and wires in streets and highways; (36 L.R.A. (N.S.) 811, 812) on abutter's right to injunction against railroads in streets.

Distinguished in *Barber v. Saginaw Union Street R. Co.* 83 Mich. 299, 47 N. W. 219, enjoining maintenance of pole for trolley wire on complainant's premises without consent; *Stock v. Jefferson Twp.* 114 Mich. 360, 38 L. R. A. 357, 72 N. W. 132, enjoining maintenance of ditch diverting water from mill premises though injury slight, where relief promptly sought; *Ives v. Edison*, 124 Mich. 407, 50 L. R. A. 137, 83 Am. St. Rep. 329, 83 N. W. 120, issuing mandatory in-

junction to compel restoration of stairway destroyed with notice of plaintiff's rights, though cost of doing so exceeds damage to plaintiff.

Corporate powers.

Cited in *Williams v. Citizens' R. Co.* 130 Ind. 75, 15 L. R. A. 67, 30 Am. St. Rep. 204, 29 N. E. 408, holding right to use electricity under authorization of ordinance, questionable only by state.

Motive power for street railways.

Cited in footnotes to *Hooper v. Baltimore City Pass. R. Co.* 38 L. R. A. 509, - which authorizes use of trolley system for street railway without sanction of municipal authorities; *Chicago General R. Co. v. Chicago City R. Co.* 50 L. R. A. 734, which denies liability for collision with cars of other company because of running cable cars under authority to use animal power only.

10 L. R. A. 178, *CARTHAGE v. FREDERICK*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480.

Police power.

Cited in *People v. Mattimore*, 45 Hun, 453, upholding ordinance requiring removal of ice and snow from sidewalks and gutters; *People v. Havnor*, 149 N. Y. 204, 31 L. R. A. 692, 52 Am. St. Rep. 707, 43 N. E. 541, upholding statute forbidding barbering on Sunday; *Rochester v. West*, 164 N. Y. 514, 53 L. R. A. 550, 79 Am. St. Rep. 659, 58 N. E. 673, upholding ordinance limiting height of billboards to 6 feet; *Rochester v. Simpson*, 134 N. Y. 416, 31 N. E. 871, upholding general ordinance with penalty requiring filling up or drainage of quarries; *Reinken v. Fuehring*, 130 Ind. 387, 15 L. R. A. 627, 30 Am. St. Rep. 247, 30 N. E. 414, upholding ordinance for sweeping of streets at expense of abutting owners; *Lincoln v. Janesch*, 63 Neb. 709, 56 L. R. A. 763, 93 Am. St. Rep. 478, 89 N. W. 280, upholding ordinance requiring abutting owner to repair sidewalk in front of premises; *Ballston Spa v. Markham*, 58 Hun, 241, 11 N. Y. Supp. 826, upholding ordinance requiring meat peddlers to take out license; *People ex rel. Seward v. Sing Sing*, 54 App. Div. 557, 66 N. Y. Supp. 1094, upholding ordinance prescribing term of office of policeman; *Frazer v. Chicago*, 186 Ill. 486, 51 L. R. A. 308, 78 Am. St. Rep. 296, 57 N. E. 1055, holding municipality not liable for depreciation of property through establishment of smallpox hospital in vicinity; *New York v. Sailors' Snug Harbor*, 85 App. Div. 361, 83 N. Y. Supp. 442, holding city superintendent of buildings alone has power to require erection of fire escapes on building in New York city; *State v. Cantwell*, 179 Mo. 276, 78 S. W. 569, sustaining statute prohibiting working of miners more than eight hours a day; *People v. Detroit United R. Co.* 134 Mich. 688, 63 L.R.A. 750, 104 Am. St. Rep. 626, 97 N. W. 36, sustaining ordinance requiring street cars to be equipped with air brakes; *State v. McMahon*, 76 Conn. 102, 55 Atl 591, holding ordinance compelling lot owners to remove snow and ice from sidewalk and providing penalty for failure is valid exercise of police power as distinguished from taxation; *Chicago v. M. & M. Hotel Co.* 248 Ill. 270, 93 N. E. 753, to the point that constitution supposes pre-existence of police power, and its construction must be with reference to that fact; *Owensboro v. Sweeney*, 129 Ky. 621, 18 L.R.A.(N.S.) 187, 130 Am. St. Rep. 477, 111 S. W. 364 (dissenting opinion), on validity of special assessments to keep streets free from snow and ice; *Helena v. Kent*, 32 Mont. 286, 80 Pac. 258, 4 A. & E. Ann. Cas. 235, holding ordinance compelling "occupants" of premises or owners of vacant lots to keep streets free from ice and snow under penalty of fine is valid under police power; *State v. McCrillis*, 28 R. I. 172, 9 L.R.A.(N.S.) 638, 66 Atl. 301, 13 A. & E. Ann. Cas. 701, holding an

ordinance requiring removal of snow by property owners abutting streets to be a police regulation and not an exercise of taxing power.

Cited in note (24 L. R. A. 413) on right to impose on abutting owners duty or expense of sprinkling, sweeping, and cleaning streets or sidewalks.

Distinguished in *State v. Jackman*, 69 N. H. 331, 42 L. R. A. 441, 41 Atl. 347, holding ordinance requiring tenant or owner to keep snow off sidewalk, void; *McGuire v. District of Columbia*, 24 App. D. C. 34, 65 L.R.A. 435, holding a penal statute compelling removal of snow and ice from sidewalks, to be invalid where not applicable to nonresident owners of unimproved property.

Criticized in *Stevens v. Port Huron*, 149 Mich. 538, 113 N. W. 291, 12 A. & E. Ann. Cas. 603, holding frontage tax plan as applied to sprinkling tax invalid, and denying right to charge abutting owners solely because they can "conveniently" bear the charge of street maintenance.

Corporate powers of municipalities or other public bodies.

Cited in *Lyth v. Hingston*, 14 App. Div. 16, 43 N. Y. Supp. 653, holding ordinance directing requirement by municipality from public contractor of bond available to material men, insufficient to support action by latter in absence of statutory provision; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 41, 36 L. R. A. 670, 45 N. E. 390 (dissenting opinion), majority holding lessee liable to lessor under lease by quasi-public corporation divesting itself of corporate power; *Ex parte Roach*, 104 Cal. 274, 37 Pac. 1044, holding municipal ordinance regulating liquor sales controlling within city limits notwithstanding county ordinance; *Jones v. Foster*, 43 App. Div. 36, 59 N. Y. Supp. 738, holding municipality has inherent power to pass ordinances regulating peddling in streets; *Griffin v. Gloversville*, 67 App. Div. 407, 73 N. Y. Supp. 684, holding authorized ordinances establishing building regulations, have same force as statutes; *Greater New York Athletic Club v. Wurster*, 19 Misc. 445, 43 N. Y. Supp. 703, holding general grant of power to municipality does not authorize arbitrary revocation of theater license by mayor; *Ontario County v. Shepard*, 100 App. Div. 203, 91 N. Y. Supp. 611, holding that where statute provided no way for payment for construction of a road charged thereby to county, the county can by implication issue bonds for such indebtedness; *People ex rel. Goff v. Kirk*, 65 Misc. 660, 122 N. Y. Supp. 604, holding that the right to cut ice from its reservoirs is incident to and may be exercised by corporation formed to supply pure water to municipality.

Cited in notes (21 Am. St. Rep. 373) on powers of municipal corporations; (104 Am. St. Rep. 643, 645) on municipal regulations of street railways for protection of public.

Liability for ice or snow on sidewalks.

Cited in footnote to *Chamberlain v. Oshkosh*, 19 L. R. A. 513, which holds smooth and level ice in depression in street not actionable defect.

Cited in note (21 L. R. A. 264) on liability of municipalities for ice on streets or sidewalks.

Statutory force of city ordinance.

Cited in *Sautter v. Utica City Nat. Bank*, 45 Misc. 22, 90 N. Y. Supp. 838, holding that a permit for a building encroachment onto street having been given by city council pursuant to statute has the same force and effect as if granted by legislature itself; *Moore v. Owen*, 58 Misc. 344, 109 N. Y. Supp. 585, holding city ordinance prohibiting moving picture shows from operation on Sunday has the same force as a statute within city limits such regulation being commonly exercised by cities; *People ex rel. Lodes v. Health Dept.* 117 App. Div. 875, 103 N. Y. Supp. 275 (dissenting opinion), on the force of an ordinance passed pursuant to authority of legislature as being equal within city limits as a statute.

Taking of private property.

Cited in *Re Consolidated Rendering Co.* 80 Vt. 83, 66 Atl. 790, 11 A. & E. Ann. Cas. 1069, holding statute providing fine for contempt in disobeying order to produce books and papers to be levied by county court not unconstitutional though they must be brought from other states; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 593, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175, holding that railway can at its own expense be compelled to remove and rebuild bridge adequate to drainage system without compensation.

Prosecution for violation of ordinance.

Cited in *Helena v. Kent*, 32 Mont. 290, 80 Pac. 258, 40 Ann. Cas. 235, holding that an infraction of police regulation not being a crime or misdemeanor an action therefor need not be brought in name of state.

Cited in note (78 Am. St. Rep. 271, 272) on violations of ordinances as crimes.

10 L. R. A. 184, *VAN HORN v. VAN HORN*, 52 N. J. L. 284, 20 Atl. 485.

Second appeal in 53 N. J. L. 514, 21 Atl. 1069.

Third appeal in 56 N. J. L. 319, 28 Atl. 669.

Conspiracy to injure trade.

Cited in *Doremus v. Hennessy*, 176 Ill. 616, 43 L. R. A. 801, 68 Am. St. Rep. 203, 52 N. E. 924, holding malicious interference by labor union with plaintiff's business through securing breaches of contract, actionable; *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L. R. A. 698, 44 C. C. A. 433, 105 Fed. 171, holding dissuasion of third parties from contracting with plaintiff actionable where done without justifiable cause and maliciously; *Barr v. Essex Trades Council*, 53 N. J. Eq. 115, 30 Atl. 881, enjoining circulation of boycotting notices tending to injure business of newspaper; *Master Builders' Assn. v. Domascio*, 16 Colo. App. 32, 63 Pac. 782, holding notice that members of building association would not bid if plaintiff did, insufficient to warrant issuance of injunction; *Atlanta v. Chattanooga Foundry & Pipeworks*, 64 L. R. A. 728, 61 C. C. A. 390, 127 Fed. 26, holding failure to sue all members of illegal combination no defense to action against members participating in profits; *O'Brien v. People*, 216 Ill. 373, 108 Am. St. Rep. 219, 75 N. E. 108, 3 A. & E. Ann. Cas. 966, holding attempted coercion by threats to order a strike is a wrongful harm and injury to employer and non-union laborers; *People v. Rittman*, 155 Ill. App. 526, to the point that courts should in exercise of sound legal discretion, see that rights of parties shall be strictly guarded and protected against fraudulent combinations and unlawful influences; *Dunshee v. Standard Oil Co.* 152 Iowa, 624, 36 L.R.A.(N.S.) 266, 132 N. W. 371, holding that wholesaler of oil who enters retail business solely to drive out of trade customer refusing to buy only from wholesaler is liable for damages to customer; *Standard Oil Co. v. Doyle*, 118 Ky. 672, 111 Am. St. Rep. 331, 82 S. W. 271, holding it unlawful to harass a man's business by false reports, intimidation of employees and customers and malicious prosecution; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 231, 7 L.R.A.(N.S.) 981, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Ann. Cas. 1184, holding a combination formed by wholesale drug vendors to keep prices up which is to be accomplished by boycotting retailers who refuse to maintain prices and boycotting of vendors who sell to such retailers is an unlawful combination; *Cressy v. Republic Creosoting Co.* 108 Minn. 353, 122 N. W. 484, holding that a complaint alleging assaults and assault and battery by the defendants personal co-operation with his co-employee states a cause of action for conspiracy; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 462, 22 L.R.A.(N.S.) 623, 128 Am. St. Rep. 492, 114 S. W. 997, on the rule that malicious intent is the gravamen of conspiracy; *Cobbey v. State Journal Co.*

77 Neb. 640, 113 N. W. 224, holding a petition stating facts constituting competition not lawful charging malicious interference and injury to business by reason of malicious acts by defendant in combination with other persons sufficiently states a cause of action; *Root v. Rose*, 6 N. D. 580, 72 N. W. 1022, holding that if the intended result of a conspiracy does not amount to a legal wrong the conspiracy is not actionable.

Cited in footnotes to *Lucke v. Clothing Cutters' & T. Assembly*, 19 L. R. A. 408, which holds incorporated labor union liable for causing discharge of non-union man; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to certain dealer unless he sells at fixed prices.

Cited in notes (21 L. R. A. 235, 237) on liability of third person in damages for inducing third party to break his contract; (12 L. R. A. 196) on actionable conspiracies; (97 Am. St. Rep. 925) on action for inducing one to break his contract; (103 Am. St. Rep. 494) on boycotting.

Evidence necessary and admissible under allegations.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 70 Ill. App. 417, holding averment and proof incidentally to damages permissible; *Doremus v. Hennessy*, 62 Ill. App. 403, holding conspiracy provable under general allegations, aggravation of tort complained of; *Severinghaus v. Beckman*, 9 Ind. App. 391, 36 N. E. 930, sustaining demurrer to declaration in tort, alleging conspiracy, where tort not well pleaded; *Hunter v. Robeson*, 95 Tenn. 134, 31 S. W. 1010, holding proof of conspiracy not essential to recovery in action against sheriff for false return, though alleged; *Davis v. Johnson*, 42 C. C. A. 114, 101 Fed. 956, holding failure to prove conspiracy not defeat recovery in action for false imprisonment; *Porter v. Mack*, 50 W. Va. 584, 40 S. E. 459, holding allegation of absence of probable cause necessary in declaration charging combination to injure business; *Bingham v. Lipman*, 40 Or. 373, 67 Pac. 98, upholding judgment against corporation only, in action against it and its officers for alleged "conspiracy" to extort money.

10 L. R. A. 186, *GATES v. SCHOOL DISTRICT*, 53 Ark. 468, 14 S. W. 656.

Validity of school director's contracts.

Followed in *School Dist. No. 54 v. Garrison*, 90 Ark. 339, 119 S. W. 275, holding that school directors can enter into a contract to begin in the future and after the expiration of term of office of some of the directors.

Cited in *Caldwell v. School Dist. No. 7*, 55 Fed. 373, upholding contract for services of teacher for period beyond expiration of school director's term of office; *Ward v. Kansas State Agri. College*, 70 C. C. A. 512, 138 Fed. 375, holding that where legislature has granted unlimited contractual power to school board the courts may not raise a limitation thereof on grounds of public policy.

Cited in footnote to *Mayor v. Cayce*, 30 L. R. A. 697, which holds valid, contract giving school teacher right to charge extra from pupils taking special studies.

Cited in note (29 L.R.A.(N.S.) 658) on power of school board to appoint officer or make contract for term extending beyond its own.

10 L. R. A. 187, *RICHMOND v. DUDLEY* (Ind.) 26 N. E. 184.

Reversed on rehearing in 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 312.

Validity of ordinance against storage of oils.

Cited in footnote to *Crowley v. Ellsworth*, 69 L.R.A. 276, which sustains ordinance prohibiting storage of explosive oils in large quantities within corporate

limits though it has effect of putting an end to a business and of rendering valueless structures used in connection therewith.

10 L. R. A. 188, *FITCH v. NEW YORK*, P. & B. R. CO. 59 Conn. 414, 20 Atl. 345.

Rights of abutting owner in highway.

Cited in *Newton v. New York*, N. H. & H. R. Co. 72 Conn. 427, 44 Atl. 813, holding authorized alteration of street to remove grade crossing *damnum absque injuria* where access to premises undisturbed though rendered inconvenient; *Bishop v. North Adams Fire Dist.* 167 Mass. 370, 45 N. E. 925, denying right of action for temporary obstruction of access to premises in course of authorized laying of water pipes; *McKeon v. New York*, N. H. & H. R. Co. 75 Conn. 349, 61 L. R. A. 734, 53 Atl. 656, holding abutter not entitled to compensation for injury by deposit of machinery, etc., in street for reasonable time by railway company while elevating tracks.

Trespass.

Cited in *Waterbury Clock Co. v. Irion*, 71 Conn. 259, 41 Atl. 827, holding trespass *quare clausum fregit* not maintainable without proof of exclusive possession at time of alleged trespass; *Merwin v. Morris*, 71 Conn. 573, 42 Atl. 855, holding proof of title carries presumptive possession sufficient to maintain trespass *quare clausum fregit* in absence of proof of ouster.

Cited in note (30 L.R.A.(N.S.) 243) on necessity and character of title or possession to sustain action of trespass.

10 L. R. A. 190, *DAVIES v. STOWELL*, 78 Wis. 334, 47 N. W. 370.

Maintenance and champerty.

Cited in *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 200, 67 N. W. 38, holding agreement by attorney to bear expense of taxpayer's litigation in behalf of all taxpayers, not champertous; *Tron v. Lewis*, 31 Ind. App. 186, 66 N. E. 490, upholding contract giving attorneys one half recovery if successful; nothing, if not; *Gelo v. Pfister & V. Leather Co.* 132 Wis. 580, 113 N. W. 69, holding that insurer may prosecute the appeal in an action against insured for personal injury for which insurer indemnified insured; *Mexican Nat. Coal, Timber & Iron Co. v. Frank*, 154 Fed. 224, holding an agreement by which an intervenor having a common interest in subject of suit agreed to bring and prosecute suit and divide proceeds with plaintiff not to be champertous; *Jakn v. Champagne Lumber Co.* 157 Fed. 418, holding the giving of aid to a poor litigant who is prosecuting a meritorious cause of action does not constitute maintenance in the absence of bargain to share in recovery.

10 L. R. A. 193, *SALTSBURG GAS CO. v. SALTSBURG*, 138 Pa. 250, 20 Atl. 844.

State regulation of interstate commerce.

Cited in footnote to *Jamieson v. Indiana Natural Gas & Oil Co.* 12 L. R. A. 652, which holds state regulation of pressure of natural gas in pipes within state not unlawful regulation of commerce.

Business subject to municipal regulation.

Cited in notes (11 L. R. A. 730) on power of municipalities to make public improvements; (29 L. R. A. 337) on liability for negligence in escape and explosion of gas.

Construction of contracts.

Cited in *Leaman v. Lancaster & Q. Street R. Co.* 23 Lanc. L. Rev. 214, holding

that railway cannot deviate from survey under grant of right of way across property on or along survey.

Cited in note (12 L. R. A. 376) on construction of terms used in contracts.

Natural gas.

Cited in note (16 L. R. A. 444) on natural gas.

Adequate remedy at law.

Cited in note (36 L. ed. U. S. 85) on what remedy at law will prevent remedy in equity.

10 L. R. A. 196, *FAYETTE COUNTY v. PEOPLE'S & DROVERS' BANK*, 47 Ohio St. 503, 25 N. E. 697.

Followed, without discussion, in *Commercial Bank of Morris Sharp & Co. v. Patton*, 57 Ohio St. 679, 50 N. E. 1128.

Effect of partial invalidity of statute.

Cited in *Ratterman v. American Exp. Co.* 49 Ohio St. 618, 32 N. E. 754, upholding tax of gross receipts where those improperly included in statute may be eliminated from remainder; *Gager v. Prout*, 48 Ohio St. 109, 26 N. E. 1013, holding that invalidity of section providing penalty does not affect validity of remainder of remedial statute; *Re Brown*, 6 Ohio N. P. 180, 9 Ohio S. & C. P. Dec. 813, holding that invalidity of provision for lien on filing account against public officer by city, does not destroy validity of statute requiring accounting; *Donald v. State*, 31 Fla. 261, 12 So. 695, upholding statute reducing members of grand jury to twelve notwithstanding void provision for finding indictment on concurrence of eight only; *Loeb v. Columbia Twp.* 179 U. S. 489, 45 L. ed. 290, 21 Sup. Ct. Rep. 174, holding that invalidity of provision for mode of assessment does not destroy statute directing street improvements and issuance of bonds therefor; *New England Engineering Co. v. Oakwood Street R. Co.* 75 Fed. 168, holding that invalidity of provision for injunction in support of lien created by statute does not destroy validity of lien; *State v. Insurance Co. of N. A.* 71 Neb. 342, 102 N. W. 1022, holding that where a part of an act is unconstitutional, the language found in the invalid portion of the act is of no force or effect whatever but any separable valid part of an act may be given force; *Lawrence County v. Brown*, 1 Ohio N. P. N. S. 360, 14 Ohio S. & C. P. Dec. 244, sustaining validity of original act where the amendatory act is unconstitutional; *State v. Gilfillan*, 3 Ohio N. P. N. S. 156, 15 Ohio S. & C. P. Dec. 760, holding that part of a statute may be unconstitutional and void and another part valid, if what remains is complete in itself and capable of being enforced according to legislative intent, independent of what is rejected; *Cincinnati v. Cincinnati Street R. Co.* 31 Ohio L. J. 311, 1 Ohio S. & C. P. Dec. 596, holding that where the two sections are separable and independent of one another the unconstitutionality of one does not invalidate the other; *Board of Education v. Sawyer*, 7 Ohio N. P. N. S. 417, 19 Ohio S. & C. P. Dec. 15, holding that where a part of an act is separable from the remainder, its constitutionality will save it from the constitutional infirmities of the remainder; *Cincinnati v. Pittsburgh, C. C. & St. L. R. Co.* 7 Ohio N. P. N. S. 87, 19 Ohio S. & C. P. Dec. 79, holding that that part of the statute relating to the abolition of grade crossings, which confers an unconstitutional power on the circuit court does not invalidate the whole statute; *Kislingbery v. Donovan*, 8 Ohio N. P. 481, 11 Ohio S. & C. P. Dec. 544, holding that where it appears that the legislature would not have passed the valid part of the statute if it were not for the invalid part, the whole statute is void.

Cited in footnote to *McCornick v. Pratt*, 17 L. R. A. 250, which holds statute.

establishing board of trustees not subverted by invalid provision designating certain parties as trustees.

Cited in note (17 L.R.A. 250) on effect of partial invalidity of statute.

Taxation of corporation or association.

Followed in *Patton v. Commercial Bank*, 7 Ohio N. P. 403, 10 Ohio S. & C. P. Dec. 326, sustaining constitutionality in part of statute relating to the taxation of unincorporated banks.

Cited in *State ex rel. Breckenridge v. Fleming*, 70 Neb. 536, 97 N. W. 1063, holding that mere "credits" against which there are equal outstanding debits" are "fictions" and not taxable.

Cited in notes (60 L. R. A. 365) on constitutional equality in United States in relation to corporate taxation; (23 L. R. A. 278) on constitutionality of provisions for deduction of debts from credits or other property.

Distinguished in *Collett v. Springfield Sav. Soc.* 13 Ohio C. C. 134, 7 Ohio C. D. 147, holding deposit in savings society not taxable as property of society.

Relation of bank and depositor.

Distinguished in *Collett v. Springfield Sav. Soc.* 13 Ohio C. C. 134, 7 Ohio C. D. 147, holding savings society agent of depositor; *Meisse v. Loren*, 4 Ohio N. P. 101, 6 Ohio S. & C. P. Dec. 259, holding directors of bank liable to depositors as trustees for negligent loss of assets of bank.

10 L. R. A. 202, *MARSH v. SCITUATE*, 153 Mass. 34, 26 N. E. 412.

Constitutionality of bounty statutes.

Cited in footnote to *Michigan Sugar Co. v. Dix*, 56 L. R. A. 329, which holds beet-sugar bounty unconstitutional.

Reconsideration of bill by legislature.

Cited in *Smith v. Mitchell*, 69 W. Va. 490, 72 S. E. 755, to the point that to justify reconsideration by legislative body, it must still have possession of bill.

10 L. R. A. 205, *DAY v. VINSON*, 78 Wis. 198, 47 N. W. 269.

Assignability of claim.

Cited in *Bank of Iron River v. Iron River*, 91 Wis. 599, 65 N. W. 368, holding statutory remedy available to assignee of lumber claim against school district by subcontractor; [*Falconio v. Larsen*, 31 Or. 147, 37 L. R. A. 257, 48 Pac. 703] holding assignee entitled to statutory preference in distribution of insolvent debtor's estate; *Day v. Buckingham*, 87 Wis. 220, 58 N. W. 254, holding that addition of parties *ex parte* owning labor claims in own right or as assignees does not vitiate judgment.

Personal liability of stockholders.

Cited in *Clokus v. Hollister Min. Co.* 92 Wis. 327, 66 N. W. 398, holding situs of performance of employee's services creating debt, immaterial in determining liability of stockholders; *Wechselberg v. Flour City Nat. Bank*, 26 L. R. A. 476, 12 C. C. A. 63, 24 U. S. App. 308, 64 Fed. 96, holding party signing articles of incorporation liable as partner where business carried on without legal incorporation.

10 L. R. A. 207, *CHANDOS v. MACK*, 77 Wis. 573, 20 Am. St. Rep. 139, 46 N. W. 803.

Boundary by water.

Cited in *Schlosser v. Cruickshank*, 96 Iowa, 421, 65 N. W. 344, holding land bounded by meander line of lake shore under government survey and patent, includes additional land to actual high-water line; *Brophy v. Richeson*, 137 Ind.

120, 36 N. E. 424, holding bed of lake excluded by grant "to the lake, thence along the margin of the lake;" *Cooley v. Golden*, 117 Mo. 59, 21 L. R. A. 309, 23 S. W. 100 (dissenting opinion), majority holding patent of land bordering on navigable stream conveys title only to water's edge; *Butler v. Grand Rapids & I. R. Co.* 85 Mich. 255, 24 Am. St. Rep. 84, 48 N. W. 569, holding title to unsurveyed island between shore and thread of stream acquired under government patent bounding on river without reservation; *Johnson v. Johnson*, 14 Idaho, 573, 24 L.R.A.(N.S.) 1247, 95 Pac. 499, holding that a grant of land from the government bounded on one side by navigable stream includes by intention an unsurveyed island between main channel of the stream and shore on side of the grant; *Sliter v. Carpenter*, 123 Wis. 580, 102 N. W. 27, holding plaintiff entitled to sue for conversion of timber on an unsurveyed island not reserved in grant of land on bank of navigable stream the part of such island on which timber was cut being between the plaintiffs bank and center of the stream; *Farris v. Bentley*, 141 Wis. 674, 124 N. W. 1003, holding that in a grant of land on bank of navigable stream from state or nation the grantee takes any unsurveyed island not reserved in grant on his side of the center of stream without respect to channel.

Cited in footnotes to *Lake Shore & M. S. R. Co. v. Platt*, 29 L. R. A. 52, which holds that description of premises by metes and bounds identical with navigability passes title to middle of stream; *Cooley v. Golden*, 21 L. R. A. 300, which holds water line of Missouri river boundary of land; *Snow v. Mt. Desert Island Real Estate Co.* 17 L. R. A. 280, which holds title to low-water mark passes under deed describing boundary line as "beginning at the sea;" *Allen v. Weber*, 14 L. R. A. 361, which holds boundary by low-water mark not extended because land purchased for building ice-houses.

Cited in notes (42 L. R. A. 504) on effect of bounding grant on river or tide water; (16 L. R. A. 354) on ownership of flats or lands below high-water mark; (42 L.R.A. 174) on title to land under water; (27 Am. St. Rep. 57, 59) on waters as boundary lines; (52 L. ed. U. S. 881) on government grant bounded by water, as carrying title to islands therein; (21 Eng. Rul. Cas. 605) on presumption of ownership to middle of stream.

10 L. R. A. 210, *ALDWORTH v. LYNN*, 153 Mass. 53, 25 Am. St. Rep. 608, 26 N. E. 229.

Damages from nuisance or other continuing injury.

Cited in *Steinke v. Bentley*, 6 Ind. App. 669, 34 N. E. 97, holding prospective damages from continuing nuisance caused by filling drain not recoverable; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 515, 18 L. R. A. 392, 34 Am. St. Rep. 92, 32 N. E. 693, holding only such damages from defective eavestrough on adjoining structure recoverable as occurred prior to suit; *Hoffman v. Mill Creek Coal Co.* 16 Pa. Super. Ct. 638, holding prospective damages to farm land caused by unlawful deposits of coal dirt in stream not recoverable; *Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. 577, 55 N. E. 875, holding damages only to time of action recoverable for injury due to pollution of pond by injection of offensive matter; *Hartman v. Pittsburgh Incline Plane Co.* 11 Pa. Super. Ct. 446, holding successive actions maintainable against quasi-public corporation for damages from erection of continuing nuisance; *Hartman v. Pittsburgh Incline Plane Co.* 32 Pittsb. L. J. N. S. 336, holding incline-plane railroad company liable for turning water against abutter's wall; *Doran v. Seattle*, 24 Wash. 189, 54 L. R. A. 535, footnote, p. 532, 85 Am. St. Rep. 948, 64 Pac. 230, holding damages within period of limitation before commencement of action recoverable for continuing nuisance longer in existence; *Boston Belting Co. v. Boston*, 183 Mass. 260, 67 N. E. 428, holding city liable for pollution of stream by sewage; *Pettit v. Grand*

Junction, 119 Iowa, 356, 93 N. W. 381, holding public buildings erected in street not permanent nuisance; *Alexander v. Stewart Bread Co.* 21 Pa. Super. Ct. 532, holding depreciation of market value of property not element of damages in action for injury due to operation of bakery; *Harvey v. Mason City & Ft. D. R. Co.* 129 Iowa, 473, 3 L.R.A.(N.S.) 977, 113 Am. St. Rep. 483, 105 N. W. 958, holding that if the case is tried on the theory that the injury from occasional flooding of land because of railroad improvements is permanent though strictly not so, the judgment covers past and future damage; *Vanderslice v. Irondale Electric Light, Heat & Power Co.* 232 Pa. 438, 81 Atl. 445, to the point that only damages accruing prior to commencement of action are recoverable in action for maintenance of nuisance on adjoining land; *Missouri, K. & T. R. Co. v. Green*, 44 Tex. Civ. App. 249, 99 S. W. 573, as disapproving the rule that the measure of damages to property constantly subjected to occasional injury is the depreciation in the value thereof; *Pickens v. Coal River Boom Co.* 66 W. Va. 32, 24 L.R.A.(N.S.) 366, 65 S. E. 865 (dissenting opinion), on right of recovery in an action for past and future damages because of maintenance of nuisance.

Cited in footnotes to *Schlitz Brewing Co. v. Compton*, 18 L. R. A. 390, which denies right to include damage for injuries after suit commenced from continuing nuisance; *Ridley v. Seaboard & R. R. Co.* 32 L. R. A. 708, which authorizes recovery in single action of present and future damages from insufficient passageway in railroad embankment; *Church of Holy Communion v. Paterson Extension R. Co.* 55 L. R. A. 81, which holds limitation begins to run for injuries to church wall from insufficiency of retaining wall built in constructing track from time injury occurs.

Distinguished in *Mansfield v. Tenney*, 202 Mass. 314, 25 L.R.A.(N.S.) 733, 88 N. E. 892, holding that the owner of land who has recovered the part encroached upon by a wall cannot thereafter sue for nuisance in the maintaining of the wall on his land by defendant since it now belongs to plaintiff and is his own erection.

Liability for acts in excess of right.

Cited in *Chapman v. Newmarket Mfg. Co.* 67 N. H. 182, 38 Atl. 16, holding statutory remedy for illegal flowage not maintainable against one not claiming right under such act.

Cited in footnotes to *Payne v. Kansas City, St. J. & C. B. R. Co.* 17 L. R. A. 628, which holds railway not liable for damages from overflow caused by lawful dam, where primarily due to filling bed of stream by natural causes; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L. R. A. 544, which denies to telephone company injunction against operation of electric railway.

Cited in notes (30 Am. St. Rep. 387) on liability of cities for negligence in respect to dams and reservoirs; (15 L.R.A.(N.S.) 544) on liability for escape of dangerous substance stored on premises.

Statutory authorization of nuisance.

Cited in *Com. v. Packard*, 185 Mass. 66, 69 N. E. 1067, holding proof of a license by statute and compliance therewith is a defense to an action for that which at common law is a nuisance.

Cited in notes (16 Eng. Rul. Cas. 582; 22 Eng. Rul. Cas. 113) on legislative authority as justification for nuisance.

10 L. R. A. 212, *BELT v. PRINCE GEORGE'S COUNTY ABSTRACT CO.* 73 Md. 289, 20 Atl. 982.

Inspection of public records by abstracters and others.

Cited in *State ex rel. Clay County Abstract Co. v. McCubrey*, 84 Minn. 442, 87 N. W. 1126, upholding reasonable restrictions imposed by statute extending

privilege to all citizens; *Re Chambers*, 44 Fed. 792, upholding statute giving fee to clerk for his examination of records open by statute to public inspection during reasonable hours; *Stuart v. Press Pub. Co.* 83 App. Div. 478, 82 N. Y. Supp. 401, holding publication of facts alleged in petition filed in divorce suit not privileged, as papers so filed are not open to public inspection; *State ex rel. Davis v. McMillan*, 49 Fla. 258, 38 So. 666, 6 A. & E. Ann. Cas. 537 (dissenting opinion), on payment of fees by abstract companies as required to enable them to inspect public records and obtain assistance of clerk; *State ex rel. Nevada Title Guaranty & T. Co. v. Grimes*, 29 Nev. 84, 5 L.R.A.(N.S.) 560, 124 Am. St. Rep. 883, 84 Pac. 1061, distinguishing the rule of cited case from the rule in other states and at common law where no charge is made for examination by persons currently interested.

Cited in footnote to *Upton v. Catlin*, 17 L. R. A. 282, which holds use of records by abstracters and others subject to reasonable regulation.

Cited in notes (27 L.R.A. 83) on right to inspect public records; (124 Am. St. Rep. 912, 913; 47 L. ed. U. S. 742) on right of access to public records for private abstract purposes.

10 L. R. A. 215, *WEST CHICAGO PARK v. McMULLEN*, 134 Ill. 170, 25 N. E. 676.

Authority of park commissioners.

Cited in *McCormick v. South Park*, 150 Ill. 524, 37 N. E. 1075, upholding commissioner's order forbidding construction of balcony projecting over park street; *Backer v. West Chicago Park*, 66 Ill. App. 510, holding board of commissioners not liable for negligence of officer in supplying employer with vicious horse; *Chicago v. Carpenter*, 201 Ill. 407, 66 N. E. 362, sustaining right of legislature to transfer jurisdiction over park streets from city to park board; *South Park Comrs. v. Illinois Trust & Sav. Bank*, 245 Ill. 386, 92 N. E. 267, holding the power of the park board to take over other streets for park connection with city is not exhausted by the taking of one street connecting a part of city with a park.

Cited in footnote to *Chicago & N. W. R. Co. v. West Chicago Park*, 25 L. R. A. 300, which denies power to question authority of park commissioners over street after twelve years' acquiescence.

State control of municipal or park property.

Cited in *Smith v. McDowell*, 148 Ill. 63, 22 L. R. A. 396, 35 N. E. 141, holding municipality cannot authorize construction of nuisance in street; *Cicero Lumber Co. v. Cicero*, 176 Ill. 25, 42 L. R. A. 703, 68 Am. St. Rep. 155, 51 N. E. 758, holding statute empowering municipality to prohibit heavy traffic on park streets constitutional; *Jones v. Lake View*, 151 Ill. 677, 38 N. E. 688, upholding special assessment proceedings taken by town supervisor and assessor under statute authorizing improvements without vote of people therefor; *Hartford v. Maslen*, 76 Conn. 611, 57 Atl. 740, holding that municipalities in controlling public parks exercise an authority delegated by state and are always subject to legislative control; *Clingman v. World's Columbian Exposition*, 3 Ill. C. C. 465, holding park commission holding park laws in fee for public, subject to legislation authorizing sale or change of use of park land.

Dedication of land for public park.

Cited in footnote to *Archer v. Salinas City*, 16 L. R. A. 145, which holds dedication for park effected by recording map with spaces marked thereon.

Public rights in city streets or ways.

Cited in *Daggett v. Chicago*, 3 Ill. C. C. 81, holding that "Michigan Avenue" by act of council commission making plat and dedication, is held by the city.

as a state agent, with title in fee, in trust to be used by public at large as a public street.

Special legislation.

Cited in *Cummings v. Chicago*, 144 Ill. 566, 33 N. E. 854, holding that exception of operation of general statute in cities having certain population does not render act void; *Trausch v. Cook County*, 147 Ill. 536, 35 N. E. 477, holding statute making general exception, valid though operates only specially; *Codlin v. Kohlhausen*, 9 N. M. 573, 58 Pac. 499, upholding statute providing generally for change of county seats, though applicable to only single county; *Mt. Vernon v. Evens & H. Fire Brick Co.* 204 Ill. 34, 68 N. E. 208, holding statute as to time of holding court in particular county, valid; *Pettibone v. West Chicago Park Comrs.* 215 Ill. 335, 74 N. E. 387, holding an act so constituted as to apply to only one town or community "now" existing of a certain description leaving no opening for future towns or communities to come within the act is special legislation; *People v. Kaelber*, 253 Ill. 555, 97 N. E. 1068, holding that act general in nature is not local merely because it may presently apply only to one place, if it is uniform in operation upon all persons coming within scope of the act.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county local.

Cited in note (31 Am. St. Rep. 653) on general and special laws.

Construction of grant of power as to streets.

Cited in *Northwestern Elev. R. Co. v. Chicago*, 1 Ill. C. C. 502, construing grant broadly enough to allow making additional side tracks by an elevated railroad.

10 L. R. A. 220, *KITTERLIN v. MILWAUKEE MECHANICS MUT. INS. CO.*
134 Ill. 647, 25 N. E. 772.

Conveyance of homestead; joinder of wife.

Cited in *Shields v. Bush*, 189 Ill. 544, 82 Am. St. Rep. 474, 59 N. E. 962, holding deed by husband to wife in which she does not join, void as to homestead property included therein though valid as to balance; *Barrows v. Barrows*, 138 Ill. 656, 28 N. E. 983, holding over \$1,000, but no more, conveyed to wife by husband's sole deed to her of homestead premises excess; *Despain v. Wagner*, 163 Ill. 601, 45 N. E. 129, holding deed of homestead property exceeding \$1,000 in value, by wife alone to husband, valid as to excess; *Anderson v. Smith*, 159 Ill. 96, 42 N. E. 306, establishing title of heirs subject to widow's dower, in \$1,000 worth of homestead property conveyed by widow claiming title under deed from husband to herself in which she did not join; *Gray v. Schofield*, 175 Ill. 40, 51 N. E. 684, holding judgment lien superior to mortgage executed after abandonment of homestead property not pursuant to prior deed, inoperative through non-joinder of wife; *Roberson v. Tippie*, 209 Ill. 44, 101 Am. St. Rep. 217, 70 N. E. 584, holding void, deed of homestead worth less than \$1,000 by husband to wife, in which she did not join; *Jespersen v. Mech*, 213 Ill. 494, 72 N. E. 1114, holding that a conveyance of homestead to wife without her signature passes merely the excess value thereof over \$1,000 at time of setting off of the homestead estate; *Lininger v. Helpenstell*, 229 Ill. 375, 120 Am. St. Rep. 264, 82 N. E. 306, holding deed from husband to wife inoperative to convey homestead under the value of \$1,000, without signature and acknowledgment of wife; *Garwood v. Garwood*, 244 Ill. 584, 91 N. E. 672, holding that quitclaim deed executed by husband alone, conveying to wife homestead premises on which they reside, which are worth less than \$1,000, is void; *Gillam v. Wright*, 246 Ill. 401, 138 Am. St. Rep. 243, 92

N. E. 906, holding that deed of homestead to husband by wife, not subscribed or acknowledged in accordance with statute does not convey estate, where no change in possession takes place.

Cited in footnote to *Wallace v. Traveler's Ins. Co.* 26 L. R. A. 806, which holds recorded power of attorney to husband insufficient showing of consent to mortgage of homestead.

Cited in note (95 Am. St. Rep. 926) on effect of conveyance or encumbrance of homestead by one spouse only.

Distinguished in *Maxwell v. Maxwell*, 145 Ill. 158, 34 N. E. 145, holding conveyance effected though wife not party to deed, where possession given pursuant thereto on her death; *Hagerty v. Hagerty*, 149 Ill. 659, 36 N. E. 981, holding husband not entitled to property deeded by him to wife and occupied as homestead where he afterwards abandons her and premises.

Disapproved in *Luhrs v. Hancock*, 181 U. S. 572, 45 L. ed. 1008, 21 Sup. Ct. Rep. 726, upholding conveyance of homestead property by husband to wife by deed in which she did not join.

Interest in homestead property.

Cited in *Brokaw v. Ogle*, 170 Ill. 125, 48 N. E. 394, holding reversionary undivided interest of adult married son in homestead occupied by his mother subject to execution and sale; *Donahoe v. Chicago Cricket Club*, 177 Ill. 356, 52 N. E. 357, holding heirs entitled to interest in homestead conveyed before desertion, by deed void for nonjoinder of wife; *Hertz v. Buchmann*, 177 Ill. 556, 53 N. E. 67, holding grantees of interest in homestead prior to statute of 1873, entitled to possession on death of grantor, though no release of homestead rights in deed; *Helm v. Kaddatz*, 107 Ill. App. 420, holding that reservation of homestead in house as long as grantors live does not create homestead estate.

Cited in footnote to *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in notes (56 L. R. A. 36, 42) on right of child or children in homestead of parent; (11 L. R. A. 705) on effect of judgment liens on homestead right.

10 L. R. A. 223, *JONES v. GORHAM*, 90 Ky. 622, 29 Am. St. Rep. 423, 14 S. W. 599.

10 L. R. A. 224, *OWENSBORO v. HICKMAN*, 90 Ky. 629, 14 S. W. 688.

Regulation of elective franchise.

Cited in *Butler v. Ellerbe*, 44 S. C. 286, 22 S. E. 425, by McIver, C. J., dissenting, to proposition that registration statute in effect adding to constitutional qualifications of elector is invalid; *Purnell v. Mann*, 105 Ky. 129, 50 S. W. 264 (dissenting opinion), majority upholding Goebel election law as reasonable regulation; *People ex rel. Phillips v. Strassheim*, 240 Ill. 290, 22 L.R.A.(N.S.) 1148, 88 N. E. 821, holding that a primary registration act which from the nature thereof requires a residence longer than that constitutionally required to enable an elector to vote is void; *Yates v. Collins*, 118 Ky. 687, 82 S. W. 282, as not enlarging the grounds for judicial interference with legislative action regulating elective franchise beyond the point where such action imposes additional restrictions to those constitutionally imposed and those made without reasons; *Early v. Rains*, 121 Ky. 448, 89 S. W. 289, holding invalid an election held in April the only provision for registration therefor being the registration had for the November election of the preceding year; *Ahern v. Elder*, 195 N. Y. 501, 88 N. E. 1059, holding that regulation of elective franchise need not be uniform in all communities but is valid if it facilitates the purpose of the Constitution and adds no qualifications to those imposed therein.

Cited in footnotes to Cusick's Appeal, 10 L. R. A. 228, upholding statute requiring unregistered voter to prove qualifications by affidavit; *Barret v. Taylor*, 36 L. R. A. 129, upholding right of unnaturalized minor who becomes qualified voter before revision of registry, to have name registered as voter; *Brewer v. McClelland*, 17 L. R. A. 845, which holds statute requiring notice of claim to be legal voter from persons residing less than six months in county, void.

Cited in notes (25 L.R.A. 481) on how far right to vote is absolute; (45 L. ed. U. S. 215) on validity of registration laws.

10 L. R. A. 228, CUSICK'S APPEAL, 136 Pa. 459, 20 Atl. 574.

Regulation of elections.

Followed in *Upperman's Contested Election*, 13 Pa. Dist. R. 20, throwing out ballots cast by non-registered voters not making full affidavits as required.

Cited in *De Walt v. Bartley*, 146 Pa. 540, 15 L. R. A. 773, 28 Am. St. Rep. 814, 24 Atl. 185, upholding statute imposing reasonable regulations not restricting constitutional right to vote; *Re Pike Twp.'s Contested Election*, 18 Pa. Co. Ct. 279, 5 Pa. Dist. R. 520, upholding statutory requirement for cross-mark within circle or square in designating choice of candidate on ballot; *Re Contested Election of White*, 4 Pa. Dist. R. 368, holding votes void where right of voter not established as prescribed by statute at time of election; *State v. Old*, 95 Tenn. 734, 31 L. R. A. 840, 34 S. W. 690, upholding statute defining constitutional requirement for "satisfactory evidence" of payment of poll tax; *Re Contested Election*, 33 Pittsb. L. J. N. S. 380, holding ballot with cross in circle of first column and large cross across others, valid; *Re Connell's Nomination*, 27 Pa. Co. Ct. 310, holding election invalidated by failure to take and subscribe oath; *Slaymaker v. Phillips*, 5 Wyo. 477, 47 L. R. A. 850, 40 Pac. 971 (dissenting opinion), majority upholding statute declaring ballots not properly indorsed by election officers, void; *Solon v. State*, 54 Tex. Crim. Rep. 280, 114 S. W. 349, holding an act constitutional which provides that before voting the voter must by affidavit show that his poll tax was properly paid, and not by another, for purpose of qualifying him to vote; *Ellenberg's Petition*, 35 Pa. Co. Ct. 543, 17 Pa. Dist. R. 218, holding that registration of voters is a regulation of the franchise and not a qualification therefor.

Cited in notes (10 L.R.A. 227) on registration laws; (28 Am. St. Rep. 260) on legislative power to fix proof of unregistered elector's right to vote; (45 L. ed. U. S. 217) on validity of registration laws.

Sufficiency of voter's affidavit.

Cited in *Waite's Petition*, 39 Pittsb. L. J. (N. S.) 145, 18 Pa. Dist. R. 86, holding a registration rule too restrictive which requires one who has lost his tax receipt to give in his affidavit the month and year in which tax was paid especially for taxes prior to current year; *McCullough's Registration*, 36 Pa. Co. Ct. 558, 19 Pa. Dist. R. 1072, holding that if an applicant for registration does not remember the precise date of his lost tax receipt he may interline after "on" the words "or about."

Jurat as part of oath.

Cited in *Re Sandow*, 12 Pa. Dist. R. 353, holding that the absence of a jurat raises the presumption that an oath required to be subscribed was not taken.

Correction of mistakes of public officers in jurats or signatures.

Cited in *Hart v. Jones*, 6 Kulp, 326, permitting signature of jurat by prothonotary on attachment affidavit to be added *nunc pro tunc* after levy; *Lake Winola Asso. v. Mott*, 1 Pa. Super. Ct. 308, permitting ex-sheriff to testify to oath of service of ejectment writ on defendant, and negligent omission of prothonotary's

jurat; *Re Dunn's Election*, 19 Pa. Co. Ct. 148, holding omission of voter's and officer's signature to affidavit as to right to vote may be corrected on election contest; *Weyna v. Bogert*, 10 Kulp, 207, overruling motion for judgment for want of affidavit of defense upon satisfactory proof of oath, where officer's signature to jurat omitted; *Re Leh's Contested Election*, 6 Pa. Dist. R. 154, upholding certification of nomination papers for state officers, to secretary of state.

Construction of statutes.

Cited in *Lancaster County v. Lancaster*, 160 Pa. 417, 28 Atl. 854, holding statutory requirement for keeping of account by county commissioner with city for repairs, directory, and not mandatory; *Com. ex rel. Smith v. Reno*, 25 Pa. Co. Ct. 444, holding statutory requirement of filing acceptance of office by justice of peace merely directory; *Com. v. Painter*, 1 Pa. Dist. R. 395, upholding appointment of officer in December under statute directing appointment in November; *Fitzmaurice v. Willis*, 20 N. D. 381, 127 N. W. 95, to the point that negative words in statute are usually held to be mandatory; *Apollo Borough v. Clepper*, 44 Pa. Super. Ct. 404, holding that statute providing that "it shall be duty of prothonotary of courts of common pleas to keep index in which shall be entered all tax or municipal claims" is mandatory; *Re Fulton*, 57 Pittsb. L. J. 381, on extent of authority of examiners in contested election cases under act of 1874, P. L. 208.

Cited in note (12 L. R. A. 357) on directory provisions in statute.

Affidavits.

Cited in *Peffer v. Beatty*, 18 Pa. Dist. R. 174, 11 North. Co. Rep. 248, holding that failure to sign the affidavit for writ of certiorari is not fatal it being susceptible of other proof.

10 L. R. A. 233, *HINEMAN v. MATTHEWS*, 138 Pa. 204, 20 Atl. 843.

Conditional sale.

Cited in *New Chester Water Co. v. Holly Mfg. Co.* 3 C. C. A. 410, 3 U. S. App. 264, 53 Fed. 29, Affirming 48 Fed. 887, upholding lien of seller of pumping engines remaining in exclusive charge of seller's agent, as against purchaser with notice, of land on which they stood; *Re G. & K. Trunk Co.* 176 Fed. 1009, 57 Pittsb. L. J. 451, holding that property conditionally sold if in the hands of vendee at institution of bankruptcy proceedings cannot be reclaimed; *Wickes Bros. v. Island Park Asso.* 229 Pa. 402, 78 Atl. 934, holding that upon conditional sale of personal property title does not pass until purchase money is paid; *Powell v. Clawson*, 38 Pa. Super. Ct. 248, holding that resumption of possession of goods conditionally sold, before attachment of a judgment lien thereon of creditor of vendee, gives vendor superior rights.

Cited in footnotes to *Crompton v. Beach*, 18 L. R. A. 187, which holds conditional vendor's exercise of option to enforce payment of note defeats right to retake property; *Puffer & Sons Mfg. Co. v. Lucas*, 19 L. R. A. 682, which denies right to retain payments made on retaking article conditionally sold; *Chafey v. Mathews*, 27 L. R. A. 558, which holds vendee's interest in goods by conditional sale passes under mortgage of all his stock; *Tyler Lumber Co. v. Charlton*, 55 L. R. A. 301, which holds that title does not pass by acceptance of offer to sell lumber piled at mill to be inspected by common employee.

Cited in notes (12 L. R. A. 447) on sale of personal property on instalment plan; (12 L. R. A. 821) on sales not affected by oral conditions subsequent.

Fixtures.

Cited in *New Chester Water Co. v. Holly Mfg. Co.* 3 C. C. A. 410, 3 U. S. App. 264, 53 Fed. 29, Affirming 48 Fed. 887, holding pumps supplied under conditional

sale reserving title in vendor not controlled by prior mortgage covering after-acquired property.

Effect of motion for nonsuit.

Cited in *Finch v. Conrade*, 154 Pa. 328, 26 Atl. 368, refusing on appeal to consider evidence where no bill of exceptions to court's order on motion for nonsuit.

Cited in note (15 Eng. Rul. Cas. 71) on right to withdraw civil action from jury for insufficiency of proof.

Meaning of conversation given in evidence.

Cited in *Speers v. Knarr*, 4 Pa. Super. Ct. 84, 40 W. N. C. 87, holding meaning of promise to "fix it" in regard to payment of debt, properly left to jury.

10 L. R. A. 238, *CLARK v. SLATE VALLEY R. CO.* 136 Pa. 408, 20 Atl. 562.

Rights and obligations of partners among themselves.

Cited in *Markle v. Wilbur*, 200 Pa. 468, 50 Atl. 204, holding majority under no duty to account to minority for business expenditures, in absence of fraud; *Delp v. Edlis*, 29 Pittsb. L. J. N. S. 362, holding partner failing to contribute amount of capital subscribed, liable on accounting, for only interest on deficiency.

Suit in firm name.

Cited in *Thompson v. Graham*, 34 Pa. Co. Ct. 363, holding that an appearance for a firm may be authorized by a part of the firm members and such appearance will be good as against the firm though it might not be binding on the members as individuals; *Brown v. Eicholzer*, 12 Luzerne Leg. Reg. Rep. 171, holding that a suit in a partnership name though irregular is not error.

10 L. R. A. 240, *COM. v. FERGUSON*, 137 Pa. 595, 20 Atl. 870.

Collateral-inheritance tax.

Cited in *Province's Estate*, 4 Pa. Dist. R. 593, and *Kitson's Estate*, 24 Pa. Co. Ct. 82, 9 Pa. Dist. R. 467, holding estate descending to child born out of wedlock but subsequently legitimized, subject to collateral-inheritance tax; *Phillips's Estate*, 17 Pa. Super. Ct. 108, holding that statute preventing lapse of devise to issue where such issue leaves children does not apply to adopted child.

Cited in footnote to *Re Swift*, 18 L. R. A. 709, as to what is subject to succession tax.

Cited in note (41 Am. St. Rep. 583) on constitutionality of collateral inheritance tax law.

Distinguished in *Com. v. Gilkeson*, 18 Pa. Super. Ct. 519, 24 Pa. Co. Ct. 291, 9 Pa. Dist. R. 680, holding children born out of wedlock but subsequently legitimized, not liable to collateral-inheritance tax.

Rights of adopted children.

Cited in *Morgan v. Reel*, 213 Pa. 90, 62 Atl. 253, holding that a child adopted by his grandfather inherits as a child only and not as both child and grandchild.

Cited in note (30 L.R.A.(N.S.) 919) as to whether terms "child," "children," "issue," etc., in statutes of distribution include adopted children.

10 L. R. A. 242, *ARRINGTON v. COM.* 87 Va. 96, 12 S. E. 224.

Independent prosecutions for same act.

Cited in *State v. Reiff*, 14 Wash. 668, 45 Pac. 318, holding prosecution for larceny does not bar subsequent prosecution based on same act for obtaining property under false pretenses; *State v. Barber*, 2 Kan. App. 684, 43 Pac. 800, holding prior acquittal of offense of illegal sale not bar to prosecution for keeping place where illegal sales made; *Chapman v. State*, 61 Neb. 891, 86 N. W. 907,

holding crime punishable as felony though, as to certain elements, punishable as misdemeanor by separate statute; *State v. Stevens*, 114 N. C. 877, 19 S. E. 861, upholding prosecution for violation of ordinance against unlicensed sale of liquor though criminal proceeding for offense under state laws, pending; *State v. Lytle*, 138 N. C. 740, 51 S. E. 66, holding that a conviction in police court for sale without payment of local tax no bar to action by state for same sale in violation of state tax law; *State v. Hooker*, 145 N. C. 584, 59 S. E. 866, holding an acquittal on an indictment for larceny is no bar to a prosecution for the same act on charge of breaking and entering with intent to commit larceny; *Com. v. Jones*, 33 Pa. Co. Ct. 128, 15 Pa. Dist. R. 938, holding that a person selling liquor on Sunday without a license can be convicted of both crimes thereby committed.

Cited in footnote to *People v. McDaniels*, 59 L. R. A. 578, which holds prosecution for assault to commit murder barred by conviction of battery for same acts.

Cited in notes (45 L.R.A. 859, 860) on prosecution and punishment of distinct offenses committed by single sale of intoxicating liquor; (31 L.R.A.(N.S.) 713) on right to convict for several offenses growing out of same facts; (92 Am. St. Rep. 155) on identity of offenses on plea of former jeopardy.

Date of offense.

Cited in *Rema v. State*, 52 Neb. 378, 72 N. W. 474, refusing under statute to quash indictment charging larceny "on or about" certain date; *State v. Pennington*, 41 W. Va. 601, 23 S. E. 918, holding error in indictment charging commission of offense on "13th day of August, July," cured by statute.

Sufficiency of criminal charge.

Cited in *Harding v. Com.* 105 Va. 860, 52 S. E. 832, holding that a warrant made the basis of an appeal to circuit court from justice's judgment is sufficient if it clearly and specifically informs the accused of the precise offense with which he is charged; *White v. Com.* 107 Va. 903, 59 S. E. 1101, holding that indictment need not state the place of the charged offense where place is not of the essence of the offense.

10 L. R. A. 248, *STATE ex rel. MATRANGA v. MARR*, 42 La. Ann. 1089, 8 So. 277.

Office of certiorari.

Cited in *State ex rel. Wells-Fargo Exp. Co. v. Martin*, 48 La. Ann. 1253, 20 So. 729, denying writ to review correctness of judgment where proceedings proper in form and jurisdiction unquestioned; *State ex rel. Butler v. Ferguson*, 48 La. Ann. 788, 19 So. 947, holding not available to determine validity of order of appeal from decree denying change of venue; *State ex rel. Brackenridge Lumber Co. v. Tully*, 48 La. Ann. 1533, 21 So. 119, refusing to review judgment on plea of domicile where brought up on certiorari; *State ex rel. Scooler v. Court of Appeals*, 47 La. Ann. 742, 17 So. 290, and *State ex rel. Rocchi v. Civil District Judge*, 45 La. Ann. 535, 12 So. 941, refusing to consider errors of law on certiorari reviewing merely regularity of proceedings and jurisdiction; *Wilson v. West Virginia C. & P. R. Co.* 38 W. Va. 216, 18 S. E. 577, holding that writ of certiorari does not issue to review justice's judgment wrongly rendered; *Re Theriot*, 117 La. 535, 42 So. 93, denying writ of certiorari on application not showing usurpation of power by trial judge, irregularity denying justice, or refusal to discharge a duty imposed upon him by law in the proceedings complained of.

Cited in notes (51 L.R.A. 109) on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal; (23 Am. St. Rep. 108) on office of certiorari.

Jurisdiction of recorder.

Cited in State *ex rel.* Milliet v. Aucoin, 47 La. Ann. 1678, 18 So. 709, upholding continuance of examination granted in order to secure attendance of important witnesses.

10 L. R. A. 250, BRUSH ELECTRIC LIGHTING CO. v. KELLEY, 126 Ind. 220, 25 N. E. 812.

Contributory negligence.

Cited in Barker v. Ohio River R. Co. 51 W. Va. 426, 90 Am. St. Rep. 808, 41 S. E. 148, holding walking backward on station platform does not defeat recovery for injury due to hole therein; Grant v. Sunset Teleph. & Teleg. Co. 7 Cal. App. 276, 94 Pac. 368, holding that because guy wire has been in same position and location for months without accident is not conclusive of contributory negligence of person injured thereby where he had no knowledge of location or warning of danger; Merchants' Ice & Cold Storage Co. v. Bargholt, 129 Ky. 71, 110 S. W. 364, 16 A. & E. Ann. Cas. 965, holding it not negligence as a matter of law for a pedestrian to fall over a cake of ice left on sidewalk by iceman in day time such pedestrian having no notice thereof and at the time looking across the street at a building.

Cited in footnote to Wheat v. St. Louis, 64 L. R. A. 292, holding one turning wagon around in street where he knew defective manhole existed, negligent.

Cited in notes (10 L.R.A. 741) on contributory negligence as defense in action for injuries by defective highway; (22 Am. St. Rep. 909) on contributory negligence as question for jury; (100 Am. St. Rep. 528) on contributory negligence as to electric wires.

Sufficiency of complaint for negligence.

Cited in Tipton v. Freeman, 45 Ind. App. 79, 90 N. E. 101, holding that cause of action against city is stated where complaint alleges that city negligently permitted sidewalk to remain in slanting, polished condition for two years, by reason of which plaintiff fell and was injured.

10 L. R. A. 251, THOMSON-HOUSTON ELECTRIC CO. v. SIMON, 20 Or. 60, 23 Am. St. Rep. 86, 25 Pac. 147.

Meaning of "railroad" in statutes.

Cited in Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 50, 59 U. S. App. 403, 88 Fed. 592, holding that statute giving judgment against "any railway corporation" effect of lien, does not include street railways; Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 416, 61 L.R.A. 250, footnote, p. 249, 43 S. E. 751, which holds chartered street railroad a railroad company within statute as to liability for negligence of fellow servant; Sams v. St. Louis & M. River R. Co. 174 Mo. 76, 61 L. R. A. 481, 73 S. W. 686, holding street railroad not within statute making company liable for negligence of coservant; Simoneau v. Pacific Electric R. Co. 159 Cal. 500, 115 Pac. 320, to the point that street railroad is one constructed along streets of city or town for carriage of persons from one point to another in such places or to or from suburbs.

Cited in footnotes to Funk v. St. Paul City R. Co. 29 L. R. A. 208, which holds inapplicable to cable railway statute making "railroad" companies liable for injuries through negligence of fellow servants; Vail v. Broadway R. Co. 30 L. R. A. 626, which holds passenger on street car platform not passenger on "any railroad" so as to assume risk of injury; Diebold v. Kentucky Traction Co. 63 L.R.A., 637, which holds an electric railway for carrying of passengers and freight between cities in different states a trunk railway within exception of such railways from

constitutional prohibition against granting franchises to other than the highest bidder.

— **Eminent domain.**

Cited in *Piedmont Cotton Mills v. Georgia R. & Electric Co.* 131 Ga. 142, 62 S. E. 52 (dissenting opinion), on the rule that the conferring of power of eminent domain on "railroads" generally does not include street railroads without indication of such intent; *State ex rel. Greffe v. Williams*, 227 Mo. 57, 127 S. W. 52 (dissenting opinion), on the rule not allowing street railways the right of eminent domain and the reason therefor; *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission*, 179 Fed. 244, holding that the Federal act to regulate commerce does not apply to street railways.

Railroads and street railroads distinguished.

Cited in *Kinsey v. Union Traction Co.* 169 Ind. 581, 81 N. E. 922, holding that the reason of distinction between street and other railways is not the difference in motive power but the character of their utility.

Ultra vires act.

Cited in *South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.* 119 Ala. 113, 24 So. 114, holding *ultra vires* of acquisition of realty by street railway may be asserted only by state.

10 L. R. A. 254, *PADDOCK v. SOMES*, 102 Mo. 226, 14 S. W. 746.

Injury from diversion of water.

Cited in *Central R. Co. v. Windham*, 126 Ala. 560, 28 So. 392, holding railway liable for injury caused by surface water diverted from natural flow by construction of roadbed; *Carson v. Springfield*, 53 Mo. App. 295, holding municipality liable for overflow upon private property from insufficient gutters constructed by city; *Gottenstroetter v. Kapplemann*, 88 Mo. App. 453, holding damage by water thrown by ditch from stream upon plaintiff's property, recoverable; *Byrne v. Keokuk & W. R. Co.* 47 Mo. App. 388, holding railway liable under statutes for damage caused by backwater from obstruction of depression, though not a natural drain; *Ready v. Missouri P. R. Co.* 98 Mo. App. 469, 72 S. W. 142, denying right to collect surface water into artificial channel and cast it upon neighboring land; *Noyes v. Cosselman*, 29 Wash. 640, 92 Am. St. Rep. 937, 70 Pac. 61, denying right to divert water of swamp through natural barrier to adjoining lands; *Lewis v. Springfield*, 142 Mo. App. 88, 125 S. W. 824, on the rule that city cannot collect large quantities of surface water into drains and sewers and discharge same onto private property; *Grant v. St. Louis, I. M. & S. R. Co.* 149 Mo. App. 310, 130 S. W. 80, holding that party cannot collect surface water upon his own premises and discharge it in body upon neighbor's land.

Cited in notes (21 L. R. A. 596) on rights as to flow of surface water; (53 L. R. A. 635) on extent of trespasser's liability for consequential injuries resulting from trespass.

Damages.

Cited in *Paddock v. Somes*, 51 Mo. App. 323, holding exemplary damages recoverable for failure to abate nuisance in accordance with judgment order; *Whipple v. McIntyre*, 69 Mo. App. 403, enjoining nuisance *per se* and giving nominal damages where no evidence of particular damage given; *Carson v. Springfield*, 53 Mo. App. 296, holding damage only to time of suit recoverable where insufficient gutters causing same, remediable.

Nuisance — What constitutes.

Cited in *Bungenstock v. Nishnabotna Drainage Dist.* 163 Mo. 222, 64 S. W. 149, holding ditches rendering air and well-water noxious, and causing stagnant pools

on farm land, private nuisance; *Gottenetroeter v. Kapplemann*, 83 Mo. App. 292, refusing to declare dam nuisance though surface drainage thereby obstructed to plaintiff's damage; *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* 104 Mo. App. 719, 78 S. W. 646, holding that a complaint sets up good cause of action for nuisance though it does not characterize the acts complained of as being negligent and careless; *Bradbury Marble Co. v. Laclede Gaslight Co.* 128 Mo. App. 107, 106 S. W. 594, holding that any interference with the enjoyment or use of the property of another directly or indirectly constitutes a nuisance; *Blackford v. Heman Constr. Co.* 132 Mo. App. 163, 112 S. W. 287, holding that injury and damage do not constitute a nuisance unless in violation of the rights of another.

— **Nature of action.**

Cited in *Hudson v. Burk*, 48 Mo. App. 317, holding action for damages for obstruction to watercourse and injunction against re-erection of same, proceeding at law; *Kirchgraber v. Lloyd*, 59 Mo. App. 60, holding action for damages and injunction against maintenance of brick-kiln states action on case for nuisance; *St. Louis Safe Deposit & Sav. Bank v. Kennett*, 101 Mo. App. 394, 74 S. W. 474, holding that the maintenance of a smokestack so near plaintiff's building as to shut out light and air and radiate heat through plaintiff's windows may be enjoined.

Duty of self-protection.

Cited in *Sweeney v. Montana C. R. Co.* 25 Mont. 554, 65 Pac. 912, holding evidence of diminution of damage by slight expenditure admissible.

Cited in note (33 L.R.A.(N.S.) 370) on failure to protect property against wrongfully diverted surface water as contributory negligence.

Injunction.

Cited in *Western U. Teleg. Co. v. Guernsey & S. Electric Light Co.* 46 Mo. App. 143, sustaining injunction to prevent stringing electric light wires among telephone wires though danger therefrom might be obviated at slight expense.

Cited in footnote to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden.

Questioned in *Scheurich v. Southwest Missouri Light Co.* 109 Mo. App. 430, 84 S. W. 1003, holding that abatement of a mischief can be had on proof of damages from violation of a right where such mischief is of a recurring nature.

Waiver by plea to merits.

Cited in *Ragan v. Kansas City & S. E. R. Co.* 111 Mo. 460, 20 S. W. 234, holding objection for misjoinder of party plaintiff after filing complaint waived where point not taken by demurrer or answer; *Finney v. Randolph*, 68 Mo. App. 560, holding misjoinder of parties plaintiff waived by answer; *Shuler v. Omaha, K. C. & E. R. Co.* 87 Mo. App. 622, holding errors in overruling motion to elect, strike out, and make more definite and certain, waived by answer to merits; *Phillips v. Stewart*, 87 Mo. App. 490, and *Pipkin v. National Loan & Invest. Asso.* 80 Mo. App. 6, refusing to consider sufficiency of petition stating cause of action where no objection raised in lower court; *Hudson v. Cahoon*, 193 Mo. 556, 91 S. W. 72, holding that answering over demurrer waives all objections to a petition waivable by answer; *Jordan v. St. Louis Transit Co.* 202 Mo. 427, 101 S. W. 11, holding that answering to a count containing two causes of action waives the defect; *Hanson v. Neal*, 215 Mo. 271, 114 S. W. 1073, on waiver of misjoinder by plea to merits; *Hubbard v. Slavens*, 218 Mo. 621, 117 S. W. 1104, holding that by replying over demurrer it is waived except as to the point that the answer does not state facts sufficient to constitute a cause of action as a cross petition; *Shohoney v. Quincy, O. & K. C. R. Co.* 223 Mo. 678, 122 S. W. 1025, dissenting opinion on proposition that an answer to the merits waives defects; *Strauss v. St. Louis*

Transit Co. 102 Mo. App. 648, 77 S. W. 156, holding that by pleading to merits all objections to formal defects are waived and to every thing else in petition except to jurisdiction and sufficiency of cause of action; State v. Runzi, 105 Mo. App. 328, 80 S. W. 36, holding that a failure to make a timely motion to quash an unverified information is a waiver of the defect; Continental Zinc Co. v. Amsden, L. & Co. 125 Mo. App. 515, 102 S. W. 1087, holding error in overruling demurrer waived by answering to merits after such overruling; Hendricks v. Butcher, 144 Mo. App. 673, 129 S. W. 431, holding that defendant having answered after overruling of his motion to have plaintiff elect his remedy waived any objection to sufficiency of the petition; Metropolitan Street R. Co. v. Adams, 145 Mo. App. 375, 130 S. W. 101, holding that defendant by pleading to merits waives everything in petition but two points, first, that petition does not state sufficient facts and second, that court has not jurisdiction of subject-matter; Vanloon v. Vanloon, 159 Mo. App. 270, 140 S. W. 631; Finnell v. Metropolitan Street R. Co. 159 Mo. App. 526, 141 S. W. 451; Cook v. Globe Printing Co. 227 Mo. 525, 127 S. W. 332,—holding that by pleading to merits objection as to misjoinder of causes is waived.

Distinguished in Cole v. Carson, 82 C. C. A. 408, 153 Fed. 279, holding that under Missouri Code all defenses whether of abatement or to the merits must unless defect appears on face of the petition be pleaded by the answer.

Motion to strike out pleading.

Cited in Philbert & J. Mfg. Co. v. Dawson, 77 Mo. App. 128, overruling general motion to strike reply where issue on some material point raised thereby; Wilson v. St. Louis & S. F. R. Co. 67 Mo. App. 445, holding improper joinder of counts waived where motion to elect not made before trial; O'Neill v. Blase, 94 Mo. App. 656, 68 S. W. 764, holding oral motion on trial to elect between inconsistent causes of action, made too late; Boggess v. Boggess, 127 Mo. 324, 29 S. W. 1018, holding that objection for improper joinder of parties in action to set aside deed, may be raised by party claiming interest in land covered thereby; Mumford v. Keet, 71 Mo. App. 536, holding defendant cannot proceed to trial on what re-

Motions in writing.

Cited in White v. St. Louis & M. River R. Co. 202 Mo. 557, 101 S. W. 14, holding that the ruling on a motion orally renewed cannot be reviewed.

Instructions to jury.

Cited in Marr v. Bunker, 92 Mo. App. 661, holding instructions erroneous where based upon pleadings in support of which no evidence introduced; Crow v. Houck's Missouri & A. R. Co. 212 Mo. 611, 111 S. W. 583, sustaining refusal of instruction not based on the evidence; Danker v. Goodwin Mfg. Co. 102 Mo. App. 729, 77 S. W. 338, holding an instruction prejudicial submitting grounds not supported by evidence and contradicting the only instruction properly submitted; Long v. Kansas City, 107 Mo. App. 538, 81 S. W. 909, holding that the dismissal of a count for permanent damages limits recovery to the county for damages already sustained and an instruction for damages not so limited is erroneous; Henry v. Disbrow Min. Co. 144 Mo. App. 362, 128 S. W. 841, holding instructions unsupported by evidence erroneous; Crumley v. Western Tie & Lumber Co. 144 Mo. App. 536, 129 S. W. 46, holding instructions predicated merely on pleadings on which no evidence has been introduced are erroneous.

Prayer for injunction and damages in same action.

Cited in Baker v. McDaniel, 178 Mo. 467, 77 S. W. 531, holding that under the statute one may in the same action seek to abate a nuisance, pray for injunctive process and for damages arising from the nuisance; Scheurich v. Southwest Missouri Light Co. 109 Mo. App. 423, holding it proper to plead necessary allega-

tions for equitable relief by writ of injunction in a petition which also calls for damages; *Atterbury v. West*, 139 Mo. App. 186, 122 S. W. 1106, holding that both prevention and abatement of a nuisance may be sought in one proceeding in equity; *Pope-Turnbo v. Bedford*, 147 Mo. App. 697, 127 S. W. 426, to the point action at law for damages may be joined with suit in equity for injunction when connected with same subject of action.

10 L. R. A. 259, *BRICK v. CAMPBELL*, 122 N. Y. 337, 25 N. E. 493.

Interest or assignment of insurance policy.

Reaffirmed on subsequent appeal, in 140 N. Y. 457, 35 N. E. 651, Affirming 2 Misc. 518, 22 N. Y. Supp. 388, holding assignment by married woman, prior to enabling act of 1879, of policy on her husband's life for her benefit, void.

Cited in Supreme Conclave *I. O. H. v. Dailey*, 61 N. J. Eq. 149, 47 Atl. 277, denying validity of assignment of certificate of benefit society by beneficiary with consent of member, in contravention of by-laws of society; *Ellison v. Straw*, 116 Wis. 219, 92 N. W. 1094, holding policy procured for benefit of married woman not subject to creditors' claims; *Re White*, 26 L.R.A.(N.S.) 456, 98 C. C. A. 205, 174 Fed. 335, holding that enlarged general power of married women to dispose of property did not apply to dispense with the required statutory consent of assured to disposal of life insurance effected by her or for her benefit; *Morgan v. Mutual Ben. L. Ins. Co.* 16 Cal. App. 90, 116 Pac. 385, to the point that proceeds of policy of insurance may be charged with premiums paid by assignee, although assignment is void.

Cited in footnotes to *Sydnor v. Boyd*, 37 L. R. A. 734, which holds woman's interest in policy on her life for her benefit part of her estate; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which sustains right to provide that assigned policy shall be void as to all above debt due assignee.

Cited in notes (53 L.R.A. 820, 823) on wife's right to insure husband's life; (87 Am. St. Rep. 505, 506, 513) on assignment of life insurance policies.

Distinguished in *Spencer v. Myers*, 150 N. Y. 272, 34 L. R. A. 176, footnote, p. 175, 55 Am. St. Rep. 675, 44 N. E. 942, Affirming 73 Hun, 280, 26 N. Y. Supp. 371, upholding assignment by married woman subsequent to enabling statute, of policy issued by foreign company; *Harvey v. Van Cott*, 71 Hun, 396, 25 N. Y. Supp. 25, holding policy payable to wife or her legal representatives or to her children if she is not living at husband's death, passes under will of wife dying before husband; *Dannhauser v. Wallenstein*, 28 Misc. 692, 60 N. Y. Supp. 50, denying right of wife to question her assignment of policy, for want of husband's "written consent," where his consent proved; *Travelers' Ins. Co. v. Healey*, 86 Hun, 532, 33 N. Y. Supp. 911, holding interest of children not affected by assignment of policy by mother during life of father; *Amberg v. Manhattan L. Ins. Co.* 171 N. Y. 317, 63 N. E. 1111, Reversing 56 App. Div. 345, 67 N. Y. Supp. 872, holding endowment policy in favor of wife subject to execution against her after maturity.

Contribution by beneficiaries under policy.

Cited in *Stockwell v. Mutual L. Ins. Co.* 140 Cal. 202, 98 Am. St. Rep. 25, 73 Pac. 833, holding beneficiary under policy chargeable with share of premiums paid by another beneficiary to keep policy alive; *Morgan v. Mutual Ben. L. Ins. Co.* 189 N. Y. 452, 82 N. E. 438, on right of payer of premiums to be reimbursed on avoidance of assignment; *Re Wolff*, 165 Fed. 987, holding under Bankruptcy Act that policy taken by husband for wife "if she survived him," but with right in him to change beneficiary or to surrender for cash, was his and not the wife's, but might be redeemed from the bankrupt estate by paying what the cash surrender value was when the husband ceased to pay premiums.

Consideration.

Cited in *Martin v. Manufacturers' Acci. Indem. Co.* 60 Hun, 540, 15 N. Y. Supp. 309, holding recital of surrender of policy in receipt for sum paid in settlement of liability for accident, void where not intended by insured and policy actually retained.

Presumption as to foreign law.

Cited in *Lowenstein v. Salinger*, 42 N. Y. S. R. 415, 17 N. Y. Supp. 70, holding copartnership between husband and wife in another state, void where no proof of enabling laws of place of contract.

Estoppel of married women.

Cited in note (57 Am. St. Rep. 180) on estoppel of married women.

Validity of contracts of married women.

Cited in *Thompson v. Minnich*, 227 Ill. 434, 81 N. E. 336, holding wife's adoption deed not joined in by her husband according to statute was ineffectual to bind her estate derived by inheritance from her husband, so as to give the adopted child any rights as promised heir.

Cited in note (33 L.R.A.(N.S.) 742) on validity of new promise by woman after removal of, to pay debt incurred during disability of coverture.

10 L. R. A. 263, *SULLIVAN v. HAUG*, 82 Mich. 548, 46 N. W. 795.

Right of appeal.

Cited in *Messenger v. Teagan*, 106 Mich. 658, 64 N. W. 499, holding statute limiting right of appeal from justice's courts to cases involving certain amount, valid; *Portland v. Gaston*, 38 Or. 535, 63 Pac. 1051, holding no appeal from circuit court judgment in special proceeding under statute making such judgment final; *Renaud v. State Court of Mediation*, 124 Mich. 654, 51 L. R. A. 460, 83 Am. St. Rep. 346, 83 N. W. 620, holding no appeal to lie from judgment of court of arbitration in absence of statutory provision therefor; *People ex rel. Feeny v. Richmond County*, 156 N. Y. 62, 50 N. E. 425 (dissenting opinion), majority holding final order in mandamus proceeding for recount of rejected ballots, appealable as of right; *Waterman v. Bailey*, 111 Mich. 573, 69 N. W. 1109, holding right lost by non-compliance with statutory requirements, though parties consent thereto; *Lake Erie & W. R. Co. v. Watkins*, 157 Ind. 605, 62 N. E. 443, upholding statute abolishing former right of appeal; *State v. Rockwood*, 159 Ind. 95, 64 N. E. 592, sustaining state's right to appeal from order in contempt proceedings; *Deane v. Indiana Macadam & Constr. Co.* 161 Ind. 376, 68 N. E. 686, holding statute for street improvement not void because no right of appeal given; *Van Leuven v. Ingham Circuit Judge*, 166 Mich. 117, 131 N. W. 531, holding that from special proceedings in probate court relating to juvenile delinquents, no appeal lies, as statute governing appeals generally from orders of probate court does not apply to such proceedings; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 509, 107 N. W. 500, holding that the right to appeal is subject to legislative regulation; *Mau v. Stoner*, 14 Wyo. 196, 83 Pac. 218, holding that right to appeal does not exist unless expressly conferred by statute.

Cited in footnotes to *McClain v. Williams*, 43 L. R. A. 287, which holds right of appeal subject to legislative restriction; *Johnson v. State*, 51 L. R. A. 272, which sustains provision against reversal for error in charge not excepted to.

Cited in notes (14 L.R.A. 585) on constitutional equality of privileges, immunities, and protection; (19 L.R.A.(N.S.) 377, 378) on constitutionality of statute denying right of appeal in certain classes of cases; (25 Am. St. Rep. 887) on effect of 14th amendment as to special privileges, burdens and restrictions, on right of appeal.

Constitutional rights of one accused of crime.

Cited in *People v. Fish*, 8 N. Y. Crim. Rep. 143, holding it allowable to read testimony given on preliminary hearing when witness having been subpoenaed and having promised to come disappeared and could not be found.

10 L. R. A. 268, *LAMM v. CHICAGO, ST. P. M. & O. R. CO.* 45 Minn. 71, 47 N. W. 455.

Right of abutting owner.

Cited in *Gustafson v. Hamm*, 56 Minn. 339, 22 L. R. A. 567, 57 N. W. 1054, holding abutting owner entitled to injunction against continuing nuisance in shape of maintenance of railroad in street; *Gilbert v. Emerson*, 60 Minn. 67, 61 N. W. 820, holding purchaser takes only to center of alley under deed referring to plat of submerged land, though adjoining space is unplatted; *De Geofroy v. Merchants Bridge Terminal R. Co.* 179 Mo. 720, 64 L. R. A. 968, 101 Am. St. Rep. 524, 79 S. W. 386, holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street; *Owsley v. Johnson*, 95 Minn. 171, 103 N. W. 903,—on a deed of land abutting upon a street as carrying with it the fee to the center of the street, subject to the public's easement.

Cited in footnote to *Suffolk & C. R. Co. v. West End L. & I. Co.* 68 L.R.A. 333, which holds value of land taken together with damage to abutting lots measure of compensation on condemnation by railroad company of street for right of way.

Cited in notes (10 L. R. A. 276) on rights of abutting lot owners in streets; (14 L. R. A. 383) on injury to abutter's easements by railroad in street; (22 L. R. A. 543) on American law as to easements of light, air, and prospect; (26 L. R. A. 660, 661) on effect of abandonment of highway; (26 L. R. A. 835) on discontinuance or vacation of highway by acts of public authorities; (31 Am. St. Rep. 733) on occupation of city streets by railroads; (101 Am. St. Rep. 117) on rights, obligations, and remedies of persons over whose land a highway runs; (36 L.R.A.(N.S.) 733, 779, 786, 790) on abutter's right to compensation for railroads in streets; (37 L. ed. U. S. 156) on damages to abutting owners in exercise of right of eminent domain.

— Effect of authorizing statute or ordinance.

Cited in *Pennsylvania Co. v. Stanley*, 10 Ind. App. 423, 37 N. E. 288, holding owner entitled to damages for depreciation of lot through closing of alley access by authorized alteration of grade; *Egbert v. Lake Shore & M. S. R. Co.* 6 Ind. App. 356, 33 N. E. 659, holding abutting owner entitled to damages for injury to ingress and egress caused by changes incidental to abolishment of grade crossing.

— Effect of vacation of street on.

Cited in *Vanderburgh v. Minneapolis*, 98 Minn. 337, 6 L.R.A.(N.S.) 744, 108 N. W. 480, holding that where the vacation of the street cut off all ingress and egress to the plaintiff's lots he was entitled to compensation.

— What amounts to "taking" of property.

Cited in *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 281, 24 L. R. A. 397, 29 Atl. 830, holding erection of elevated railroad abutment in center of street not "taking" of property of abutting owner; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 600, 30 L.R.A.(N.S.) 231, 95 Pac. 224, holding that obstruction of ingress and egress by street railroad is taking of property for which abutter can recover compensation.

Continuing trespass.

Cited in *Bowers v. Mississippi & R. River Boom Co.* 78 Minn. 403, 79 Am. St. Rep. 395, 81 N. W. 208, holding successive actions maintainable by owner of land.

for injuries caused by logs, ice, etc., thrust upon it by reason of piling driven in stream by defendant.

Cited in footnote to *Church of Holy Communion v. Paterson Extension R. Co.* 55 L. R. A. 81, which holds limitation begins to run for injuries to church wall from insufficiency of retaining wall built in constructing track, from time injury occurs.

Distinguished in *Gilbert v. Boak Fish Co.* 86 Minn. 369, 58 L. R. A. 738, 90 N. W. 767, holding suit to abate continuing nuisance bars action for damages, though none asked in former suit.

Disapproved in *Jacksonville, T. & K. W. R. Co. v. Lockwood*, 33 Fla. 594, 15 So. 327, holding damages for permanent injury caused by construction and operation of railway recoverable in single action.

Interest under license.

Cited in *Kremer v. Chicago, M. & St. P. R. Co.* 51 Minn. 21, 38 Am. St. Rep. 468, 52 N. W. 977, holding grantee of licensor entitled to maintain ejectment against licensee as trespasser; *Minneapolis Western R. Co. v. Minneapolis & St. L. R. Co.* 58 Minn. 132, 59 N. W. 983, holding easement not acquired by occupation under license; *Cameron v. Chicago, M. & St. P. R. Co.* 60 Minn. 104, 61 N. W. 814, holding six-year limitation not applicable to action by owner against party occupying land under transfer from licensee.

Collateral attack on official deed.

Cited in *Green v. Barker*, 47 Neb. 948, 66 N. W. 1032, holding trustee's deed of land conveyed to city by Congress, not questionable in collateral proceeding, as to compliance with preliminary steps or as to grantee's being proper person to receive deed; *Sheafer v. Mitchell*, 109 Tenn. 216, 71 S. W. 86, raising, without deciding, question whether defendant in ejectment can rely upon invalidity of tax deed.

10 L. R. A. 273, *HULL v. INDEPENDENT SCHOOL DISTRICT*, 82 Iowa, 686, 46 N. W. 1053, 48 N. W. 82.

Employment of teachers.

Cited in *Jones v. School Dist. No. 144*, 7 Kan. App. 375, 51 Pac. 927, holding contract of prior board recognized and ratified by succeeding board through payments thereunder, binding; *Benson v. Silver Lake Dist. Twp.* 100 Iowa, 333, 69 N. W. 419, holding discharge of teacher by board without opportunity to be heard, void under Code; *Burkhead v. Independent School Dist.* 107 Iowa, 31, 77 N. W. 491, holding action for breach of contract, and not appeal to county-school superintendent, proper remedy on refusal of board to permit teacher to perform services.

Cited in footnotes to *Major v. Cayce*, 30 L. R. A. 697, which holds valid, contract giving school teacher right to charge extra from pupils taking special studies; *Hosmer v. Sheldon School Dist. No. 2*, 25 L. R. A. 383, which holds teacher's void contract not validated by subsequently procuring certificate.

Cited in note (6 L.R.A.(N.S.) 77) on remedy of wrongfully discharged servant by action for breach of contract.

Consideration of errors on appeal.

Cited in *Young v. Omaha & St. L. R. Co.* 92 Iowa, 584, 61 N. W. 209, holding error waived though presented in record, where not argued on appeal.

10 L. R. A. 276, *DILL v. BOARD OF EDUCATION*, 47 N. J. Eq. 421, 20 Atl. 739.

Rights of abutting owner in highway.

Cited in *John Anisfield Co. v. Edward B. Grossman & Co.* 98 Ill. App. 187, en-

joining erection of bay window over sidewalk, authorized by ordinance, where it obstructs passage as well as light and air; *Field v. Barling*, 149 Ill. 571, 24 L. R. A. 411, 41 Am. St. Rep. 311, 37 N. E. 850, enjoining construction of bridge across public alley; *First Nat. Bank v. Tyson*, 133 Ala. 477, 59 L. R. A. 403, 91 Am. St. Rep. 46, 32 So. 144, enjoining erection of pillars projecting over sidewalk of adjoining property; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 223, 26 Atl. 788, refusing to enjoin cutting of electric-feed wire where complainant's right rests upon statute of doubtful constitutionality; *Bischof v. Merchants Nat. Bank*, 75 Neb. 841, 5 L.R.A.(N.S.) 490, 106 N. W. 996, holding a projection of stone work in front of a building to be a public nuisance, and granting relief on complaint of owner of adjoining building; *Williams v. Los Angeles*, 159 Cal. 595, 89 Pac. 330, holding that access to a lot adjoining a street cannot be obstructed by a switch tower in street, without compensation; *Indianapolis v. Miller*, 168 Ind. 287, 8 L.R.A.(N.S.) 823, 80 N. E. 626, holding right to use an alley for egress and ingress is an appurtenance to the property.

Cited in footnote to *Lostutter v. Aurora*, 12 L. R. A. 259, which authorizes city to fit up abandoned well in street without abutting owner's consent.

Cited in notes (11 L. R. A. 636) on servitude of light and air; (22 L. R. A. 543) on American law as to easements of light, air, and prospect; (10 L. R. A. 268) on damages for obstruction of street by street railroad; (11 L. R. A. 750) on right of commissioners to close highway; (122 Am. St. Rep. 218) on right of abutter to easement in street in case of unaccepted dedication; (41 Am. St. Rep. 324, 327; 2 Eng. Rul. Cas. 567) on easement of air and light in streets.

Extinguishment of easements by nonuser.

Cited in *Boyd v. Hunt*, 102 Tenn. 499, 52 S. W. 131, holding that nonuser of alley does not extinguish easement though servient tenant excavated under and built over same, leaving gate.

Cited in notes (18 L. R. A. 537) on effect of nonuser of easements; (26 L. R. A. 462) on abandonment of highway by nonuser or otherwise than by acts of public authorities; (2 L.R.A.(N.S.) 832) on failure to maintain easement as raising presumption of abandonment; (135 Am. St. Rep. 898) on abandonment of easement.

Sales by map or plan.

Cited in *White v. Tide Water Oil Co.* 50 N. J. Eq. 6, 25 Atl. 199, holding grantee under deed bounding lot by street designated on city map, entitled against grantor and assigns to have same kept open to full width, though dedication not accepted by city; *Stevens v. Headley*, 69 N. J. Eq. 553, 62 Atl. 887, holding the granting of a certain lot according to a certain road to estop grantor denying existence of road; *Jackson v. Birmingham Foundry & Mach. Co.* 154 Ala. 474, 45 So. 660, holding a platting and sale of lots with reference to plat to be a dedication of streets for purpose of access to lots; *Talbert v. Mason*, 136 Iowa, 376, 14 L.R.A.(N.S.) 881, 125 Am. St. Rep. 259, 113 N. W. 918, holding easement existed where conveyance of a parcel of land was made with reference to an alley necessary to give access to rear of premises.

Distinguished in *De Grilleau v. Frawley*, 48 La. Ann. 194, 19 So. 151, denying right of municipality to pave alley used by abutting purchasers under plan of original owner on which alley shown.

10 L. R. A. 283, *ENOCH MORGAN'S SONS CO. v. WENDOVER*, 43 Fed. 420.

Right to trade name.

Cited in *American Fibre Chamois Co. v. De Lee*, 67 Fed. 330, enjoining filling of orders for "chamois fibre" with substitutes called "chamois" or "fibre cha-

mois;" *Hagan & D. Co. v. Rigbers*, 1 Ga. App. 103, 57 S. E. 970, holding equity to have jurisdiction in cases of fraudulent use of trademarks and unfair competition; *Barnes v. Pierce*, 164 Fed. 214, sustaining right to exclusive use of word "argyrol" as the name of an antiseptic.

Distinguished in *Sanders v. Bond*, 47 Mo. App. 370, refusing to enjoin party from advertising as former employee of complainant where no misleading use made of name; *Florence Mfg. Co. v. Dowd*, 171 Fed. 124, holding word "keep clean" as name of a toilet brush to be descriptive and not a proper trademark.

10 L. R. A. 285, *WABASH EASTERN R. CO. v. EAST LAKE FORK SPECIAL DRAINAGE DISTRICT*, 134 Ill. 384, 25 N. E. 781.

Organization of drainage districts.

Cited in *Tucker v. People*, 156 Ill. 109, 40 N. E. 451, holding regularity of organization of drainage district not subject to collateral attack in proceeding to collect tax.

Cited in note (60 L. R. A. 238, 242) on procedure for the establishment of drains and sewers.

Constitutionality of statute.

Cited in *Storrie v. Houston City Street R. Co.* 92 Tex. 140, 44 L. R. A. 721, 46 S. W. 796, upholding against prior mortgagee statute increasing liability of railway for cost of street improvements; *Shibley v. Ft. Smith, & V. B. Dist.* 96 Ark. 422, 132 S. W. 444, holding that statute providing that lien for local assessment shall be superior to liens of prior judgments, does not impair obligation of contracts; *Fitchpatrick v. Botheras*, 150 Iowa, 378, 37 L.R.A.(N.S.) 558, 130 N. W. 163, holding that statute providing for special assessment for improvements is not void as to mortgagee of property assessed, because it fails to provide for notice to such mortgagee of amount and for hearing; *Baldwin v. Moroney*, 173 Ind. 578, 30 L.R.A.(N.S.) 761, 91 N. E. 3, holding that statute making drainage assessment take priority over existing mortgages, without notice to mortgagees does not deprive them of property without due process of law.

Cited in notes (35 L. R. A. 377) on effect of statute enacted subsequent to encumbrance; (58 L. R. A. 380) on who is liable for expense of drainage.

Superiority of tax lien.

Cited in *German Sav. & Loan Soc. v. Ramish*, 138 Cal. 125, 69 Pac. 89, sustaining street-bond act making lien for improvements superior to other liens; *Lybass v. Ft. Myers*, 56 Fla. 826, 47 So. 346, holding statutory lien upon abutting lots for sidewalk improvement in favor of a municipality to be superior to a mortgage lien.

Cited in note (35 L. R. A. 375) on superiority of lien of local assessment over prior lien.

Special assessment on railroad.

Cited in *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 183, 12 L.R.A.(N.S.) 118, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630, sustaining a special assessment of a portion of right of way in district assessed for a street improvement.

Cited in note (40 L.R.A.(N.S.) 936) on liability of railroad right of way to assessment for local improvement.

Disapproved in *Oregon Short Line R. Co. v. Pioneer Irrig. Dist.* 16 Idaho, 616, 102 Pac. 904, holding that a part of railroad in district assessed could be sold for an irrigation assessment.

10 L. R. A. 292, MILLER v. COOK, 135 Ill. 190, 25 N. E. 756.

Injunction.

Cited in Northwestern Traveling Men's Asso. v. Raphael, 121 Ill. App. 546; Lloyd v. Catlin Coal Co. 210 Ill. 470, 71 N. E. 335,—holding that court might refuse to grant a writ of injunction where defendant's damage by granting writ will be greater than complainant's damage by refusal.

Injunction against waste and removal of tax deed as cloud on title.

Cited in Glos v. Evanston & N. C. County Bldg. & L. Asso. 86 Ill. App. 653, holding mortgagee to whom no notice of tax sale was given, entitled to redeem after expiration of statutory period; Burton v. Perry, 146 Ill. 127, 34 N. E. 60, holding mortgagee entitled to maintain action to remove tax deed as cloud on title; Moore v. McNutt, 41 W. Va. 700, 24 S. E. 682, sustaining action to prevent acts which would cast cloud over title to land; Harrigan v. Peoria County, 106 Ill. App. 223, holding that decree enjoining county clerk from issuing tax deed should be certain; South Chicago Brewing Co. v. Taylor, 205 Ill. 139, 68 N. E. 732, holding that person having title to land entitling him to redeem from tax sale may file bill to set it aside.

Distinguished in Williams v. Chicago Exhibition Co. 86 Ill. App. 173, refusing injunction against waste which does not materially impair security of mortgage; Glos v. Evanston Bldg. & L. Asso. 186 Ill. 589, 58 N. E. 374, holding mortgagee cannot enjoin issue of tax deed to purchaser at sale of which no notice given to mortgagee; Hawkinberry v. Snodgrass, 39 W. Va. 342, 19 S. E. 417, holding tax deed conclusive against party neither legal nor equitable owner within period of redemption; Glos v. Kenealy, 220 Ill. 542, 77 N. E. 146, holding that a bill to remove land from title cannot be maintained to set aside a tax deed where party is not in possession and premises are not vacant or unoccupied.

— Reimbursement of tax-sale purchaser.

Cited in Morris v. Roseberry, 46 W. Va. 29, 32 S. E. 1019, holding tender of taxes and interest essential to validity of bill to cancel tax deed as cloud on title; Boals v. Bachmann, 103 Ill. App. 430, upholding decree requiring payment of tax and interest as condition of relief in bill to enjoin issue of tax deed; Gage v. Consumers' Electric Light Co. 194 Ill. 36, 64 N. E. 653, decreeing payment of tax and interest by party seeking to cancel tax deeds as cloud on title; Chicago v. Pick, 251 Ill. 600, 96 N. E. 539, holding that holder of invalid tax title is only entitled to reimbursement when his title is set aside in proceeding brought for that purpose.

Cited in note (11 L. R. A. 66) on equitable rights.

Facts occurring pendente lite.

Cited in Melvin v. E. B. & A. L. Stone Co. 7 Cal. App. 326, 94 Pac. 389, holding that additional damage by blasting might be set up in a supplemental bill; Brownback v. Keister, 220 Ill. 554, 77 N. E. 75, holding that where original bill fails to show ground for relief that it cannot be aided by a supplemental bill.

Cited in footnote to Schwab v. Schwab, 52 L. R. A. 414, which denies right to introduce by supplemental bill facts showing grounds for absolute divorce.

Distinguished in Kelly v. Galbraith, 186 Ill. 611, 58 N. E. 431, Affirming 87 Ill. App. 69, decreeing payment of rent up to time of decree under bill praying therefor, where no objection to such relief raised by defense.

Estoppel.

Cited in note (16 L. R. A. 813) on estoppel *in pais* upon defendant as basis for action to recover real estate.

Necessity of evidence to support decree.

Cited in *Loewenthal v. Elkins*, 175 Ill. 555, 51 N. E. 592, reversing decree that records were destroyed by fire where finding on evidence is that they were destroyed or lost by fire or otherwise.

Review of facts by appellate court in equity cases.

Cited in *Nix v. Thackaberry*, 240 Ill. 354, 88 N. E. 811, holding that supreme courts may review facts in chancery cases.

Effect of amendment of complaint on original process.

Cited in *Goodman v. Ft. Collins*, 91 C. C. A. 98, 164 Fed. 973, holding new process not required where complaint is amended to state, a necessary jurisdictional fact.

10 L. R. A. 302, *BARTON v. PEOPLE*, 135 Ill. 405, 25 Am. St. Rep. 375, 25 N. E. 776.

Obtaining property by false pretenses.

Cited in *Com. v. Ferguson*, 135 Ky. 38, 24 L.R.A.(N.S.) 1104, 121 S. W. 967, holding a knowing misrepresentation of an infant as to his age to be within a statute providing punishment of a fraud; *State v. Hammelsy*, 52 Or. 159, 17 L.R.A.(N.S.) 246, 132 Am. St. Rep. 686, 96 Pac. 865, holding fact that one drawing a check does not state that he has funds in the bank will not prevent his conviction for fraud where check is drawn with intent to defraud.

Cited in footnotes to *State v. Renick*, 44 L. R. A. 266, which holds married person obtaining money from woman under promise of marriage under fictitious name not indictable for obtaining money by false token and false pretenses; *Blum v. State*, 56 L. R. A. 322, which sustains indictment for conspiring to obtain money by false pretenses, which states offense in genuine terms without stating particulars; *Com. v. Beckett*, 68 L.R.A. 638, which holds offering of worthless bill in satisfaction of obligation with request for change punishable as obtaining of property by false tokens.

Cited in notes (10 L.R.A. 309) on false pretenses; (17 L.R.A.(N.S.) 244) on mere drawing and passing of check without funds to meet it as false pretense.

Presumption of title from possession as agent.

Cited in *Keystone Watch Case Co. v. Romero*, 36 Misc. 382, 73 N. Y. Supp. 636, holding possession of property as agent presumptive evidence that title thereto remains in the principal.

10 L. R. A. 308, *STATE v. MATTHEWS*, 44 Kan. 596, 25 Pac. 36.

Conveyances by fraudulent grantee.

Cited in *Lawrence v. Guaranty Invest. Co.* 51 Kan. 231, 32 Pac. 816, holding innocent mortgagee of fraudulent grantee protected against negligent grantor, where deed on record; *Blaisdell v. Leach*, 101 Cal. 411, 40 Am. St. Rep. 65, 35 Pac. 1019, upholding grantee's mortgage against negligent grantor acknowledging deed under fraudulent representation that it is lease.

Validity of deed with grantee's name in blank.

Cited in *Guthrie v. Field*, 85 Kan. 64, 37 L.R.A.(N.S.) 326, 116 Pac. 217, holding that deed properly executed and acknowledged, except as to grantee's name is valid in hands of innocent purchaser from person whose name was inserted as grantee contrary to directions of grantor and to latter's injury.

Cited in notes (37 L.R.A.(N.S.) 328) on effect of deed executed with name of grantee blank, where filled contrary to authorization; (5 Eng. Rul. Cas. 182) on validity of deed with grantee's name blank.

Distinguished in *Frayer v. Holtom*, 8 Kan. App. 721, 54 Pac. 918, upholding

deed where grantor asserts validity and grantee takes possession thereunder; *Exchange Nat. Bank v. Fleming*, 63 Kan. 142, 65 Pac. 213, upholding deed in which grantee's name is inserted by equitable owner of land after execution in blank by owner of legal title and delivery to equitable owner.

Obtaining property by false pretenses.

Cited in *State v. Clark*, 46 Kan. 66, 26 Pac. 481, reversing conviction where alleged defrauded party holds note, indorsers upon which are solvent.

Cited in notes (10 L.R.A. 303) on property subject to false pretenses; (25 Am. St. Rep. 389) on obtaining goods or money by false pretenses.

Right to rely on records.

Cited in *Phipps v. Kansas & C. P. R. Co.* 58 Kan. 147, 48 Pac. 573, holding railway acquires good title by condemnation to lands in possession of one under recorded tax deed, as against undisclosed equities of prior locator.

Unauthorized alteration of written instruments.

Cited in note (86 Am. St. Rep. 108, 111, 112) on unauthorized alteration of written instruments in filling in blanks.

10 L. R. A. 314, *DAUGHERTY v. FOWLER*, 44 Kan. 628, 25 Pac. 40.

Sufficiency of objection to evidence.

Cited in *Priest v. Robinson*, 64 Kan. 418, 67 Pac. 850, upholding admission of testimony improper as not best evidence and without foundation laid, where objected to only as incompetent, irrelevant, and immaterial; *Long Bell Lumber Co. v. Martin*, 11 Okla. 200, 66 Pac. 328, refusing to consider on appeal competency of deed when objected to only as "incompetent, irrelevant, and immaterial."

Passage of title on sale of personalty.

Cited in *Paulson v. Lyon*, 26 Utah, 442, 73 Pac. 510, holding that title to fixtures sold to be paid for on delivery does not pass when vendor makes repeated efforts to collect; *People's State Bank v. Brown*, 80 Kan. 523, 23 L.R.A.(N.S.) 825, 103 Pac. 102, sustaining right of vendor, as between the parties, to reclaim property where personal property is sold for cash and price is not promptly paid; *McIver v. Williamson-Halsell-Frasier Co.* 19 Okla. 457, 13 L.R.A.(N.S.) 703, 92 Pac. 170, sustaining right of vendor to recover goods as against creditors where goods are sold for cash; *St. Louis & S. F. R. Co. v. Stone*, 78 Kan. 510, 104 Pac. 1067, holding one who furnished coal "on board cars" could recover from carrier for conversion; *Lumley v. Miller*, 23 S. D. 29, 119 N. W. 104, holding that payment of purchase money is condition precedent to purchaser's right of possession of goods upon sale for cash.

Cited in footnotes to *Tyler Lumber Co. v. Charlton*, 55 L.R.A. 301, which holds that title does not pass by acceptance of offer to sell lumber piled at mill to be inspected by common employee; *Feeley v. Boyd*, 65 L.R.A. 943, which holds immediate delivery followed by actual and continued change of possession of fruit in bins shown by purchaser sending representative the same evening to take possession, and sending man the next morning to prepare for shipment.

Cited in notes (22 L. R. A. 424) on passing of title to property by delivery to carrier for transportation to consignee or vendee; (12 L. R. A. 821) on sales not affected by oral conditions subsequent; (120 Am. St. Rep. 876) on title not passing by sale which is not expressly conditional.

10 L. R. A. 317, *UNITED STATES v. LANCASTER*, 44 Fed. 885.

Conspiracy.

Cited in *Kelly v. Georgia*, 68 Fed. 656, holding killing by marshal justifiable where party accused of conspiracy refuses to surrender, and opens fire.

Distinguished in *United States v. Patrick*, 54 Fed. 345, upholding indictment for conspiracy charging conspiracy against revenue officers searching for concealed distilled spirits.

10 L. R. A. 323, *UNITED STATES v. HALL*, 44 Fed. 883.

Number of peremptory challenges.

Cited in footnote to *Stevens v. Union R. Co.* 66 L.R.A. 465, which holds that statute allowing peremptory challenge of one in four of "any qualified jurors called" refers to those not subject to challenge for cause including those substituted for persons peremptorily challenged.

— By joint defendants.

Cited in *Colfax Nat. Bank v. Davis*, 50 Wash. 94, 96 Pac. 823, 16 A. & E. Ann. Cas. 264, holding a peremptory challenge by one of two or more defendants will be denied where one of defendants refuses to join therein.

10 L. R. A. 324, *UNITED STATES v. HALL*, 44 Fed. 864.

Impeachment of witnesses.

Cited in *People v. Elco*, 131 Mich. 525, 91 N. W. 755, holding that prosecution in criminal proceedings may show contradictory statements by witness which people obliged to call.

Cited in note (21 L. R. A. 422) on right to impeach one's own witness.

Proof of perjury.

Cited in *McLaren v. State*, 4 Ga. App. 647, 62 S. E. 138, holding one witness and corroborating circumstances sufficient to establish case; *State v. Bratt*, 21 S. D. 311, 112 N. W. 152, holding that to authorize conviction of perjury there must be two witnesses testifying to falsity or one witness with strong corroborating circumstances.

10 L. R. A. 333, *UNITED STATES v. LANCASTER*, 44 Fed. 896.

Liability of co-conspirators.

Cited in *Powers v. Com.* 110 Ky. 456, 53 L. R. A. 264, footnote, p. 245, 61 S. W. 735 (dissenting opinion), majority holding conspirator not liable for murder by co-conspirator, unless committed in furtherance of conspiracy and was a necessary and probable result of its execution.

Cited in note (68 L.R.A. 217) on homicide in carrying out unlawful conspiracy.

Conspiracy.

Cited in note (12 L. R. A. 193, 196) on what constitutes conspiracy.

Distinguished in *United States v. Sanges*, 48 Fed. 90, holding indictment for conspiracy to oppress citizen for testifying before grand jury, insufficient in absence of averment that he was colored.

Testimony by accomplice.

Cited in *McNeally v. State*, 5 Wyo. 69, 36 Pac. 824, holding inference of truth in all testimony by accomplice permissible where corroborated in material part.

Cited in notes (98 Am. St. Rep. 167) on convicting on testimony of accomplice; (24 L.R.A.(N.S.) 442) on effect of agreement for immunity of accomplice testifying for prosecution.

Evidence against co-conspirators.

Cited in *Com. v. Snyder*, 40 Pa. Super. Ct. 527, holding false and irregular certification of claims by one admissible against all of conspirators when evincive of system.

10 L. R. A. 355, RATHBURN v. SNOW, 123 N. Y. 343, 25 N. E. 379.

Authority of officers of corporation.

Cited in *Re Coats*, 75 App. Div. 568, 78 N. Y. Supp. 429, granting stockholder's petition for mandamus to secure permission to see by-laws and resolutions; *Eliot Nat. Bank v. Woodsocket Electric Mach. & Power Co.* 31 R. I. 75, 76 Atl. 782, to the point that fact that notes were not in form required by by-laws and were issued without previous direction of board of directors did not necessarily make them invalid.

Cited in note (2 Eng. Rul. Cas. 365) on presumption of agent's authority to act.

Distinguished in *Wanamaker v. Megraw*, 92 App. Div. 617, 87 N. Y. Supp. 331, holding that one employed in May to take charge of certain business including employment of help, on July 1st, he had authority to bind principal by employment of help prior to July 1st.

— As to third persons.

Cited in *Hastings v. Brooklyn L. Ins. Co.* 138 N. Y. 479, 34 N. E. 289, holding secretary of life insurance company has power, even when away from office, to waive prompt payment of premium; *Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills*, 27 C. C. A. 220, 54 U. S. App. 290, 82 Fed. 516, permitting recovery on policy condition of which waived by parol by secretary of company; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 436, 26 L. R. A. 551, 38 N. E. 461, holding president of corporation has power to ratify contract entered into by him prior to incorporation; *Powers v. Schlicht Heat, Light & P. Co.* 23 App. Div. 382, 48 N. Y. Supp. 237, permitting recovery on contract entered into by president of corporation, where limitation of his powers appears only in by-laws; *Standard Fashion Co. v. Siegel-Cooper Co.* 44 App. Div. 127, 60 N. Y. Supp. 739, granting specific performance of contract entered into by president in excess of authority under by-laws unknown to other party; *White v. Sheppard*, 41 App. Div. 116, 58 N. Y. Supp. 563, holding conveyance executed by president though not conforming to authorizing resolution, not subject to attack by creditor where adopted by directors and grantee; *Parmelee v. Associated Physicians*, 11 Misc. 365, 32 N. Y. Supp. 149, Affirming 9 Misc. 460, 61 N. Y. S. R. 119, 30 N. Y. Supp. 250, which reversed 8 Misc. 679, 28 N. Y. Supp. 1139, upholding contract entered into by secretary and treasurer with party unaware of disused by-law requiring signature of president and corporate seal; *Norton v. Genesee Nat. Sav. & L. Assn.* 57 App. Div. 523, 68 N. Y. Supp. 32, holding savings bank liable for commissions to agent of party employed by general manager to collect rents and generally represent corporation; *Tyler v. Anglo-American Sav. & L. Assn.* 30 App. Div. 408, 52 N. Y. Supp. 77, holding broker entitled to commissions on sale where employed under temporary contract by secretary and general manager of loan association; *Johnston v. Milwaukee & W. Invest. Co.* 46 Neb. 489, 64 N. W. 1100, holding that resident manager of foreign cattle-raising corporation doing business solely in forum has apparent authority to sell cattle in his possession; *First Nat. Bank v. Briggs*, 69 Vt. 21, 37 L. R. A. 848, 60 Am. St. Rep. 922, 37 Atl. 231, holding sureties on bond of cashier elected for year not affected by by-law providing for his election during pleasure of board of trustees, where liability, if any, arose after expiration of year for which elected; *Newman v. Lee*, 87 App. Div. 118, 84 N. Y. Supp. 106, holding a rule of a stock exchange not binding on third persons having no notice thereof; *Lord v. United States Transp. Co.* 143 App. Div. 451, 128 N. Y. Supp. 451, to the point that person dealing with general agent of corporation has right to assume that any contract with respect to the business of corporation is within such agent's authority; *Pine Beach Invest. Corp. v. Columbia Amusement Co.* 106 Va. 815, 56

S. E. 822, holding innocent third persons not bound by by-laws limiting apparent authority of its officers.

Cited in footnote to *Fay v. Slaughter*, 56 L. R. A. 564, which denies authority of agent empowered to indorse principal's checks for deposit, to ratify deposit of checks received for securities on which agent has forged transfers.

Cited in note (25 L. R. A. 51) on effect of corporate by-laws as notice.

Delegation of delegated authority.

Distinguished in *Wanamaker v. Megraw*, 92 App. Div. 617, 87 N. Y. Supp. 331, holding that one may employ an agent to employ others to commence a business in the future.

10 L. R. A. 357, *McLAUGHLIN v. SOUTH BEND*, 126 Ind. 471, 26 N. E. 185.

Validity of licenses regulating interstate commerce.

Cited in *Martin v. Rosedale*, 130 Ind. 112, 29 N. E. 410, and *Overton v. Vicksburg*, 70 Miss. 560, 13 So. 226, holding ordinance void where license tax thereby imposed on transient peddlers selling by sample goods of foreign corporation; *State v. Lichtenstein*, 44 W. Va. 102, 28 S. E. 753, denying validity of license tax on agents taking orders for liquors to be shipped by vendor from another state; *Huntington v. Mahan*, 142 Ind. 697, 51 Am. St. Rep. 200, 42 N. E. 463, holding license tax on distributing agent of foreign book firm void where books delivered in response to orders forwarded by another agent; *Kinsley v. Dyerly*, 79 Kan. 10, 19 L.R.A.(N.S.) 409, 98 Pac. 228, holding a license tax invalid if on persons soliciting orders to be filled on approval in another state; *Re Kinyon*, 9 Idaho, 650, 75 Pac. 268, 2 A. & E. Ann. Cas. 699, holding a state license tax on solicitors unconstitutional as to those soliciting for citizens of another state, as to property in another state.

Cited in footnote to *Re White*, 11 L. R. A. 284, which holds void, ordinance requiring license by nonresident for soliciting orders for books to be filled in other state.

Cited in notes (14 L. R. A. 98) on peddlers and drummers as related to interstate commerce; (60 L. R. A. 692) on corporate taxation and the commerce clause; (19 L.R.A.(N.S.) 308) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause; (26 Am. St. Rep. 595) on license tax as interference with interstate commerce; (27 Am. St. Rep. 563) on state regulation of interstate commerce; (39 L. ed. U. S. 540) on state taxation and licenses as affecting interstate commerce; (46 L. ed. U. S. 785) on peddlers and drummers as related to interstate commerce.

Distinguished in *Indianapolis v. Bieler*, 138 Ind. 35, 36 N. E. 857, upholding ordinances licensing traffic in liquor, where such regulation authorized by Federal statute.

10 L. R. A. 359, *DAVIS v. WESTERN HOME INS. CO.* 81 Iowa, 496, 25 Am. St. Rep. 509, 46 N. W. 1073.

Increase of risk as affecting insurance.

Cited in footnote to *Traders' Ins. Co. v. Catlin*, 35 L. R. A. 595, which holds policy not defeated by more hazardous use of property ceasing before loss.

Cited in note (66 Am. St. Rep. 698) on what constitutes an increase of hazard.

Distinguished in *Des Moines Ice Co. v. Niagara F. Ins. Co.* 99 Iowa, 201, 68 N. W. 600, holding policy not avoided by setting fire to burn rubbish near insured building.

Warranties in insurance policies.

Cited in *Kelley v. Mutual L. Ins. Co.* 75 Fed. 640, upholding warranty in application against suicide of insured.

Following trust funds.

Distinguished in *Windstanley v. Second Nat. Bank*, 13 Ind. App. 548, 41 N. E. 956, holding remitting bank not entitled to preference in assets of insolvent collecting bank in absence of evidence to show amount collected mingled with funds of bank, or represented by assets in hands of assignee.

10 L. R. A. 360, *DODD v. SCOTT*, 81 Iowa, 319, 25 Am. St. Rep. 492, 46 N. W. 1007.

Effect of failure of appellee to file brief.

Cited in *Fullerton Lumber Co. v. Spencer*, 81 Iowa, 550, 46 N. W. 1058; *Alborn v. Alborn*, 100 Iowa, 384, 69 N. W. 678; *Richardson v. Probst*, 103 Iowa, 242, 72 N. W. 521,—considering only points essential to determination of appeal in absence of argument by appellee.

Estoppel to question homestead rights.

Cited in *Clevenger v. Figley*, 68 Kan. 719, 75 Pac. 1001, holding that the decision of the court in an action to foreclose a mortgage in determining the wife's homestead rights therein cannot be collaterally attacked.

10 L. R. A. 361, *FERRELL v. THOMPSON*, 107 N. C. 420, 12 S. E. 109.

Review of judgment resting in discretion of trial court.

Cited in *Benton v. North Carolina R. Co.* 122 N. C. 1010, 30 S. E. 333, refusing to review decision on motion to set aside verdict because "excessive and not warranted by evidence."

Marriage as affecting wife's property.

Cited in *Fowler v. McLaughlin*, 131 N. C. 210, 42 S. E. 589, holding that ward's marriage vests in husband property held by guardian.

10 L. R. A. 365, *WORCESTER RURAL CEMETERY v. WORCESTER COUNTY*, 152 Mass. 408, 25 N. E. 618.

Exemptions.

Cited in *Phillips Academy v. Andover*, 175 Mass. 126, 48 L. R. A. 553, 55 N. E. 841, *dictum* that houses of professors included under statute exempting realty of academy occupied for purposes of corporation; *Chicago v. University of Chicago*, 131 Ill. App. 382, holding dormitories and commons used in connection with and as a part of university to be within water tax exemptions to educational institutions.

Cited in notes (19 L. R. A. 81) on power of state legislature to exempt from taxation; (57 L. R. A. 46) on taxation of corporate franchise in the United States.

10 L. R. A. 366, *STANDARD OIL CO. v. SWAN*, 89 Tenn. 434, 15 S. W. 1068.

Evidence of custom.

Cited in *Barnes v. Zettlemoyer*, 25 Tex. Civ. App. 470, 62 S. W. 111, holding evidence of general custom as to storage of dynamite competent in action for injuries from explosion.

Cited in note (13 L. R. A. 440) on evidence of custom or usage.

10 L. R. A. 367, *OSBORN v. BLACKBURN*, 78 Wis. 209, 23 Am. St. Rep. 400, 47 N. W. 175.

Proof of foreign laws, records, etc.

Cited in *Griggs v. Becker*, 87 Wis. 317, 58 N. W. 396, enforcing judgment of foreign state where proved by competent evidence.

Cited in note (113 Am. St. Rep. 870, 871, 878) on proof of foreign laws and their effect.

— Presumption as to foreign law.

Cited in *MacCarthy v. Whitcomb*, 110 Wis. 123, 85 N. W. 707, permitting recovery by employee for injury due to negligence of fellow servant where contrary law of state where accident occurred not proved; *St. Sure v. Lindsfelt*, 82 Wis. 351, 19 L. R. A. 519, 33 Am. St. Rep. 50, 52 N. W. 308, refusing to presume existence of foreign law authorizing divorce on ground of husband's conviction of offense of cheating; *Elmergreen v. Weimer*, 138 Wis. 117, 119 N. W. 836, holding that where a foreign law is not pleaded the presumption is that it is the same as the domestic law.

Cited in note (21 L. R. A. 467) on presumption as to law of other states.

Distinguished in *Schoenberg v. Adler*, 105 Wis. 649, 81 N. W. 1056, holding presumption of similarity does not extend to foreign penal statute.

10 L. R. A. 369, *CUTTING PACKING CO. v. PACKERS' EXCHANGE*, 86 Cal. 574, 21 Am. St. Rep. 63, 25 Pac. 52.

Rights of assignees under contract.

Cited in *Anderson v. De Urioste*, 96 Cal. 408, 31 Pac. 266, holding assignee of public contractor entitled to enforce contract lien on completion of work, irrespective of consent of municipality to assignment; *Lisenby v. Newton*, 120 Cal. 574, 65 Am. St. Rep. 203, 52 Pac. 813, holding assignee of vendee not personally liable to vendor for unpaid purchase price; *Frese v. Moore*, 1 Cal. App. 591, 82 Pac. 542, holding a contract to charter a vessel and by owners to furnish lumber for freight at a fixed rate to be assignable without consent of owners; *Atlantic & N. C. R. Co. v. Atlantic & N. C. R. Co.* 147 N. C. 386, 23 L.R.A. (N.S.) 231, 125 Am. St. Rep. 550, 61 S. E. 185, 15 A. & E. Ann. Cas. 363, holding the assignee of a contract for supplies bound to indemnify the assignor for loss he may suffer at the suit of the other contracting party because of the default of the assignee.

Cited in note (10 Eng. Rul. Cas. 477) on legal title of assignee under assignment of future chattels as security.

Novation.

Cited in *Laughead v. H. C. Frick Coke Co.* 28 Pa. Co. Ct. 108, holding one accepting money and promise of position in lieu of commissions barred from action for latter.

Cited in note (13 L. R. A. 390) on novation.

Distinguished in *Stone v. Owens*, 105 Cal. 298, 38 Pac. 726, holding pledgee of a contract for construction work as security is not liable for labor performed for pledgeor.

Validity of sale of future crops.

Cited in note (5 Eng. Rul. Cas. 137) on validity of sale of future crops.

10 L. R. A. 371, *PLUM v. KANSAS*, 101 Mo. 525, 14 S. W. 657.

Condemnation proceedings.

Cited in *Kansas City v. Ward*, 134 Mo. 184, 35 S. W. 600, upholding proceeding to determine whether property can be taken and how much must be paid, since

owner's title and estate are not impaired until payment of award; *Thompson v. Chicago*, S. F. & C. R. Co. 110 Mo. 159, 19 S. W. 77, holding jurisdiction over landowner acquired by service of notice of filing of commissioner's report, although notice of filing of petition was defective; *State ex rel. Walnut Street R. Co. v. Neville*, 110 Mo. 348, 19 S. W. 491, refusing mandamus to review refusal of circuit court to appoint commissioners where jurisdiction not denied; *Mississippi River & B. T. R. Co. v. Jones*, 54 Mo. App. 537, holding general practice act governs as to giving notice of award in absence of provision in condemnation statute.

— **Interest on award.**

Cited in *Webster v. Kansas City & S. R. Co.* 116 Mo. 121, 22 S. W. 474, allowing interest from date of defendant's entry on lands condemned; *Martin v. St. Louis*, 139 Mo. 256, 41 S. W. 231, holding interest recoverable on judgment from time of rendition to time of payment into court; *State ex rel. Donofrio v. Humes*, 34 Wash. 353, 75 Pac. 348; *Brunn v. Kansas City*, 216 Mo. 115, 115 S. W. 446,—allowing interest on a decree in a condemnation proceeding.

Cited in footnote to *Norcross v. Cambridge*, 33 L. R. A. 843, which sustains eminent-domain statute, notwithstanding failure to provide for interest from time of formal taking to date of actual entry.

Cited in note (28 L.R.A.(N.S.) 62) on interest on unliquidated damages.

He who asks equity must do equity.

Cited in *Paul v. Minneapolis Threshing Mach. Co.* 87 Mo. App. 657, refusing to stay judgment on ground of fraud in accounting, where accounting prayed by defendant in action to recover salary.

Construction of ambiguous statutes.

Cited in *State ex rel. Pearson v. Louisville & M. River R. Co.* 215 Mo. 492, 114 S. W. 956, holding that an ambiguous statute is to be construed to produce a just and reasonable result; *Corrigan v. Kansas City*, 211 Mo. 651, 111 S. W. 115, holding that where there is any ambiguity in a law the consequences of the proposed constructions are to be considered.

10 L. R. A. 374, *CHANDLER v. SCOTT*, 127 Ind. 226, 26 N. E. 797.

Effect of defective recording of legal instrument.

Cited in notes (96 Am. St. Rep. 399) on effect of defective recording of legal instruments on rights of third persons; (137 Am. St. Rep. 493) on effect of failure to execute and record chattel mortgage as prescribed by statute.

10 L. R. A. 376, *AUDITOR GENERAL v. UNIVERSITY OF MICHIGAN*, 83 Mich. 467, 47 N. W. 440.

Exemption of public property from taxation.

Cited in *Richmond County Academy v. Augusta*, 90 Ga. 648, 20 L. R. A. 158, 17 S. E. 61, holding property held in trust under statute giving income to public academy, exempt though used merely as means of income; *Weinberg v. University of Michigan*, 97 Mich. 254, 56 N. W. 605 (dissenting opinion), majority holding corporation of University of Michigan not bound to require bond of contractor and subcontractor to pay materialmen, under statute.

Cited in footnotes to *Harvard College v. Cambridge*, 48 L. R. A. 547, which holds exempt from taxation houses occupied by college presidents and professors and dormitories and dining halls for students; *Yale University v. New Haven*, 43 L. R. A. 490, which holds college dormitories and dining halls exempt from taxation; *Brown University v. Granger*, 36 L. R. A. 847, which holds real estate constituting part of endowment of Brown University within exemption of "col-

lege estate;" *Gate City Guards v. Atlanta*, 54 L. R. A. 806, which denies exemption, as public property, to armory owned by volunteer military force; *Ramsey County v. Macalaster College*, 18 L. R. A. 278, which holds professors' residences on college grounds exempt, but not unused land in college tract; *German Gymnastic Asso. v. Louisville*, 65 L.R.A. 120, which holds institution for teaching physical culture exempt from taxation.

Cited in notes (19 L. R. A. 81) on power of state legislature to exempt from taxation; (29 L. R. A. 384) on liability of incorporated institutions belonging to the state; (16 L.R.A.(N.S.) 830) on effect of devotion of property otherwise nontaxable to purposes of particular society; (33 Am. St. Rep. 403, 404) on taxation and assessment of public property; (132 Am. St. Rep. 330) on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

Distinguished in *Orono v. Sigma Alpha Epsilon Soc.* 105 Me. 222, 74 Atl. 19, holding a Greek letter fraternity house not exempt from taxation though standing on campus of state university.

What are state institutions.

Cited in *White v. Alabama Insane Hospital*, 138 Ala. 483, 35 So. 454, holding state hospital a state agency, and liable for injuries to one working its coal mines; *White v. Alabama Insane Hospital*, 138 Ala. 483, 35 So. 454, holding Alabama Insane Hospital not liable to be sued for tort.

10 L. R. A. 378, *HELWIG v. LASCHOWSKI*, 82 Mich. 619, 46 N. W. 1033.

Impeachment on cross-examination.

Cited in *People v. Rice*, 103 Mich. 358, 61 N. W. 540, holding witness may be cross-examined as to employment to secure evidence, in order to impeach credibility; *People v. De Camp*, 146 Mich. 536, 109 N. W. 1047, allowing impeachment of accused as a witness by records to show he had been previously convicted of a crime.

Cited in notes (82 Am. St. Rep. 52) on evidence to show credibility or bias of witness; (11 Eng. Rul. Cas. 156) on cross-examination and impeachment of witness.

Distinguished in *People v. Peck*, 139 Mich. 686, 103 N. W. 178, holding in a prosecution for embezzlement of the amount of a check that accused could not be cross-examined as to dealing in respect to other checks.

Set-offs.

Cited in notes (11 L. R. A. 259) on rule as to cross-demands; (12 L. R. A. 321) on set-off for damages by negligence and want of skill in performance of services.

Waiver of breach of warranty.

Cited in *Saunders v. Hammond*, 28 Pa. Co. Ct. 409, holding warranty actionable after payment of price with notice.

10 L. R. A. 381, *PEOPLE ex rel. NICOLL v. NEW YORK INFANT ASYLUM*, 122 N. Y. 190, 25 N. E. 241.

Mandamus.

Cited in *People ex rel. Berkeley v. New York Casualty Co.* 34 Misc. 328, 69 N. Y. Supp. 775, holding mandamus not available to determine disputed title to office; *People ex rel. McLaughlin v. Police Comrs.* 174 N. Y. 462, 95 Am. St. Rep. 596, 67 N. E. 78, refusing writ to try title to office where another is in possession under color of right, though title is not seriously in dispute; *People ex rel. Dady v. Coler*, 171 N. Y. 377, 64 N. E. 149, refusing writ to enforce un-

liquidated and disputed claim against municipality; *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 469, 34 N. Y. Supp. 257, refusing peremptory mandamus to compel agent of foreign corporation to produce transfer books for stockholders where agent's affidavit shows book not under his control; *People ex rel. Decker v. Waters*, 4 Misc. 3, 23 N. Y. Supp. 691, refusing mandatory order to compel issuance of liquor license where no absolute right thereto created by statute; *People ex rel. New York Underground R. Co. v. Newton*, 126 N. Y. 658, 27 N. E. 370, refusing to disturb discretionary refusal of supreme court to issue writ in favor of corporation pending proceeding to annul charter; *Cullen v. New York Teleph. Co.* 106 App. Div. 251, 94 N. Y. Supp. 290, denying mandamus to compel the installation of a telephone under circumstances which justify the suspicion that it will be used for illegal purposes.

Cited in footnotes to *Johnston v. State*, 12 L. R. A. 235, which authorizes mandamus to compel performance of statutory duty to determine tie vote by lot; *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which authorizes mandamus to compel canvassing board to disregard illegal return.

Cited in notes (22 Am. St. Rep. 563) on necessity of clearly establishing right to mandamus; (98 Am. St. Rep. 865) on mandamus as proper remedy against public officers; (1 L.R.A.(N.S.) 588) on mandamus to compel payment of salary to public officer whose title is disputed; (16 Eng. Rul. Cas. 783) as to when mandamus will be granted.

Quo warranto.

Cited in *Greene v. Knox*, 76 App. App. Div. 408, 78 N. Y. Supp. 779, 33 N. Y. Civ. Pro. Rep. 208, holding information in quo warranto proper way of trying police captain's right to office; *People ex rel. Lazarus v. Sheehan*, 128 App. Div. 745, 113 N. Y. Supp. 230, holding quo warranto sole remedy to determine title to a public office actually in possession of another under color of title.

10 L. R. A. 383, UNION MUT. ACCI. ASSO. v. FROHARD, 134 Ill. 228, 23 Am. St. Rep. 664, 25 N. E. 642.

Restrictions in accident policy as to occupation and employment.

Cited in *Wilkey Casualty Co. v. Sheppard*, 61 Kan. 354, 47 L. R. A. 651, footnote, p. 650, 59 Pac. 651, holding one insured as barber not engaged in more hazardous occupation while hunting rabbits as incident to daily life; *Hess v. Preferred Masonic Mut. Acci. Asso.* 112 Mich. 200, 40 L. R. A. 449, 70 N. W. 460, holding injury to bank cashier at sawmill, not within provision of accident policy against liability for injuries occurring under "exposure" not incident to employment; *Holiday v. American Mut. Acci. Asso.* 103 Iowa, 183, 64 Am. St. Rep. 170, 72 N. W. 448, holding bookkeeper entitled to full indemnity of his class though injured while hunting; *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 398, 71 N. W. 363, permitting full recovery by "mill owner, overseeing only," though injured while superintending operation of small portable sawmill in woods; *Estabrooks v. Union Casualty & S. Co.* 74 Vt. 475, 93 Am. St. Rep. 916, 52 Atl. 1048, denying recovery of one insured as mill proprietor and injured while working farm; *Pacific Mut. L. Ins. Co. v. Van Fleet*, 47 Colo. 413, 107 Pac. 1087, holding a policy of life insurance not annulled under change of occupation clause where assured is performing some individual act outside of his customary employment; *Everson v. General Acci. F. & Life Assur. Corp.* 202 Mass. 176, 88 N. E. 658; *Kenny v. Bankers' Acci. Ins. Co.* 136 Iowa, 149, 113 N. W. 566,—holding a temporary engagement in different work not a change of "occupation;" *Simmons v. Western Travelers Acci. Asso.* 79 Neb. 27, 112 N. W. 365, holding in such case question is one for jury; *Stevens v. Modern Woodmen of*

America, 127 Wis. 611, 107, N. W. 8, 17 A. & E. Ann. Cas. 566, holding prohibited occupation of "saloon bartender" not to apply to a chore boy in a restaurant and saloon though he occasionally waited on customers; Taylor v. Illinois Commercial Men's Assn. 84 Neb. 804, 24 L.R.A.(N.S.) 1177, 122 N. W. 41, holding an incidental resort to other activities for thirty days where old vocation was not abandoned, not to be a change of vocation.

Cited in footnotes to Doody v. National Masonic Acci. Assn. 60 L. R. A. 424, which holds carrying loaded gun from one room to another "handling firearms" within clause limiting amount of insurance; Duran v. Standard L. & Acci. Ins. Co. 13 L. R. A. 637, which holds injury by slipping while hunting on Sunday not covered by insurance policy; Humphreys v. National Ben. Assn. 11 L. R. A. 564, which holds loss of sight of one's only eye covered by provision for loss of sight of both eyes; Dozier v. Fidelity & C. Co. 13 L. R. A. 114, which holds sun-stroke not bodily injury.

Cited in notes (11 L.R.A. 299) on benefit certificate avoided by assuming extra hazards; (24 L.R.A.(N.S.) 1175) on temporary pursuit of other activities as change of occupation within meaning of accident policy.

Construction of by-laws and rules of mutual associations.

Cited in Coverdale v. Royal Arcanum, 193 Ill. 101, 61 N. E. 915; Knights Templars & M. Life Indemnity Co. v. Vail, 206 Ill. 416, 68 N. E. 1103, holding by-laws strictly construed against forfeiture, especially where dues retained; Farmers' Federation v. Croney, 106 Ill. App. 425, holding proof of service of notice of nonpayment necessary before society can avail itself of forfeiture of benefit; Monahan v. Fidelity Mut. L. Ins. Co. 242 Ill. 493, 134 Am. St. Rep. 337, 90 N. E. 213, holding that ambiguous language in an insurance policy is to be construed in favor of assured; Smith v. Bankers' Life Assn. 123 Ill. App. 396, holding the naming of one physician sufficient answer to question, "name and residence of such physician?" though applicant may have consulted other physicians; Switchmen's Union of N. A. v. Colehouse, 131 Ill. App. 355, holding phrase "totally and permanently disabled" not limited to certain specified injuries; Switchmen's Union v. Colehouse, 227 Ill. 565, 81 N. E. 696, holding named cases which constitute total disability not exclusive where policy contained words or "any" physical disability.

Cited in note (52 Am. St. Rep. 569, 573, 578) on construction of by-laws of mutual or membership life or accident insurance associations.

Proof of amount realized on assessment.

Cited in Covenant Mut. Life Assn. v. Kentner, 188 Ill. 443, 58 N. E. 966, holding proof of amount assessment would have yielded if made, unnecessary where refusal to pay wrongful; National Acci. Soc. v. Taylor, 42 Ill. App. 101, holding unnecessary in absence of affirmative evidence in defense as to amount actually realized; Columbian Accident Co. v. Sanford, 50 Ill. App. 426, holding proof of number of members liable to assessment and amount assessable upon each, unnecessary in action on policy in mutual company.

10 L. R. A. 387, BAKER v. OAKWOOD, 123 N. Y. 16, 25 N. E. 312.

Adverse possession.

Cited in Freedman v. Oppenheim, 80 App. Div. 491, 81 N. Y. Supp. 110, and Heller v. Cohen, 154 N. Y. 312, 48 N. E. 527, refusing specific performance of sale of land where grantor's title dependent upon adverse possession not shown to have begun under deed excluding any other right; Simis v. McElroy, 160 N. Y. 161, 73 Am. St. Rep. 673, 54 N. E. 674, refusing specific performance where adverse possession relied on for title by vendor is subject to litigation, through.

infancy or remainders under prior title; *Dean v. Goddard*, 55 Minn. 294, 56 N. W. 1060, holding party entitled to land by adverse possession may maintain action to remove claims constituting cloud on title; *Woodruff v. Paddock*, 130 N. Y. 624, 29 N. E. 1021, holding easement of alley way lost through nonuser and exclusive possession under claim of title for statutory period; *Berkowitz v. Brown*, 3 Misc. 6, 23 N. Y. Supp. 792, holding two distinct and separate adverse holdings cannot be "tacked" to secure period requisite under statute; *Adkins v. Spurlock*, 46 W. Va. 142, 33 S. E. 121, holding remainderman not entitled to maintain ejectment until death of prior life tenant, whose estate lost by adverse possession; *Barnes v. Light*, 116 N. Y. 37, 22 N. E. 441, holding adverse possession properly submitted to jury where farm land is fenced and cultivated for statutory period, though not under deed; *Shire v. Plimpton*, 50 App. Div. 121, 63 N. Y. Supp. 568, holding defect in title no defense to foreclosure of purchase-money mortgage where vendee was in possession for statutory period; *Lewis v. New York & H. R. Co.* 162 N. Y. 219, 56 N. E. 540, holding railroad company entering street subject to right of municipality, presumed to hold possession in subordination to city's rights; *Wilhelm v. Federgreen*, 2 App. Div. 485, 38 N. Y. Supp. 8, holding vendee entitled to damages for failure of vendor to convey title, where adverse possession relied upon not established against infants by vendor; *Butler v. Oswego*, 54 Hun, 479, 8 N. Y. Supp. 114, refusing to consider adverse possession as ground for relief in suit to remove cloud on title where not presented by pleadings; *Hindley v. Metropolitan Elev. R. Co.* 42 Misc. 64, 85 N. Y. Supp. 561, holding claim by elevator company to easement by adverse possession defeated by allegation in its petition for correction of taxes during twenty years of its user, that it must pay damages to abutters; *Metzger v. Martin*, 87 App. Div. 572, 84 N. Y. Supp. 494, holding purchaser at partition sale required to take title to right of way founded upon prescription; *Brown v. Doherty*, 93 App. Div. 196, 87 N. Y. Supp. 563, holding that one claiming under deed executed by one of two executors acquires good title by adverse possession; *McAuliff v. Hughes*, 128 App. Div. 360, 112 N. Y. Supp. 486, holding that one taking possession under a deed from officer in a partition sale, holds title and possession adverse to all parties; *Knapp v. New York*, 140 App. Div. 293, 125 N. Y. Supp. 201, holding that title by adverse possession has been acquired where grantee went into possession under deed, erected buildings and inclosed land with fences and for upwards of fifty years has been in open and undisputed possession, and has paid thereon taxes and assessments; *Mutual Trust Co. v. Polymero*, 54 Misc. 385, 105 N. Y. Supp. 1024, holding actual possession of premises not included in a deed by mistake amounts to adverse possession; *Timmermann v. Cohn*, 70 Misc. 332, 128 N. Y. Supp. 770, to the point that possession, accompanied by usual acts of ownership, is presumed to be adverse until shown to be subservient to title of another; *Sparks v. Bodensick*, 72 Kan. 9, 82 Pac. 463, holding that one making an unsuccessful attempt to find heirs by advertisement and otherwise is not holding adverse as to heirs; *Muller v. Manhattan R. Co.* 53 Misc. 135, 102 N. Y. Supp. 454, on what constitutes adverse possession; *Lightfoot v. Davis*, 198 N. Y. 265, 29 L.R.A.(N.S.) 122, 91 N. E. 582, on effect of statutes of limitations as conferring title.

Cited in footnote to *Sontag v. Bigelow*, 16 L. R. A. 326, which holds cotenant's receipt of rents and payment of taxes insufficient claim of adverse possession.

Cited in notes (15 L. R. A. 68) on nature of title or estate of holder of sheriff's certificate before obtaining deed; (13 L. R. A. 207) on defenses in actions of ejectment; (95 Am. St. Rep. 673) on effect of bar of statute of limitations; (40 L.R.A.(N.S.) 752) on prescription or adverse possession of burial lot.

— Between cotenants.

Cited in *Sweetland v. Buell*, 164 N. Y. 551, 79 Am. St. Rep. 676, 58 N. E. 663, affirming 89 Hun, 547, 35 N. Y. Supp. 346, holding possession for statutory period by third party under warranty deed from tenant in common purporting to convey entire estate, established exclusive title; *Zapf v. Carter*, 70 App. Div. 397, 75 N. Y. Supp. 197, holding title acquired against coheirs where possession and management exclusive, income appropriated, and no claim made after death of heir in possession; *Satterlee v. Kobbe*, 173 N. Y. 96, 65 N. E. 952, holding dismissal of partition suit as to defendants raising issue as to tenancy in common, erroneous.

Cited in note (32 L.R.A.(N.S.) 703) on effect of conveyance by one cotenant to found adverse possession against others.

Effect of infancy on running of statute of limitations.

Cited in *Seallon v. Manhattan R. Co.* 185 N. Y. 363, 78 N. E. 284, 7 A. & E. Ann. Cas. 168, holding that if statute begins to run during life of ancestor it is not interrupted by infancy of heirs.

10 L. R. A. 393, *ROCHESTER v. CAMPBELL*, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937.

Liability for injuries.

Cited in *Freeman v. Glens Falls Paper Mill Co.* 70 Hun, 534, 24 N. Y. Supp. 403, denying owner's liability where employee accepted position with knowledge of negligent failure to erect elevator guards required by statute; *Lewiston v. Isaman*, 19 Idaho, 662, 115 Pac. 494, holding that lot owner is liable to person injured, if injury occurs on account of wilful neglect of duty enjoined by law; *Indiana & C. Coal Co. v. Neal*, 166 Ind. 462, 77 N. E. 850, 9 A. & E. Ann. Cas. 424, holding where a statute is enacted for a wholly different purpose than to prevent the injury complained of, that plaintiff could not recover.

— On defective highway.

Cited in *Little v. Wirth*, 6 Misc. 301, 26 N. Y. Supp. 1110, holding owner not liable to tenant for injuries due to failure to remove ice from walk or stoop of house; *Brown v. Wysong*, 1 App. Div. 425, 37 N. Y. Supp. 281, holding abutting owner not liable to party injured by icy pavement due to natural causes alone; *Toutloff v. Green Bay*, 91 Wis. 495, 65 N. W. 168, holding abutting owner not liable for injuries due to nonrepair of sidewalk, where repairs solely under municipal control; *Law v. Kingsley*, 82 Hun, 79, 31 N. Y. Supp. 88, denying liability of abutting owner for negligent condition of walk, though duty of repair placed upon him by statute, where same may be made by city; *McCormick v. Amsterdam*, 43 N. Y. S. R. 605, 18 N. Y. Supp. 272, holding city liable for injury on street, existing before its incorporation, where responsibility therefor is not excepted in manner provided by statute; *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 352, 59 L. R. A. 460, 96 Am. St. Rep. 552, 53 Atl. 404, denying liability of corporation to party injured, based upon violation of ordinance imposing obligation to pave between tracks; *Koch v. Fox*, 71 App. Div. 294, 75 N. Y. Supp. 913, holding owner not liable for injury due to failure of independent contractor to erect sidewalk shed required by ordinance; *English v. Kwint*, 140 App. Div. 513, 125 N. Y. Supp. 807, holding that abutting owner is not liable for injuries caused by defect in sidewalk, if he be under no obligation to keep sidewalk in repair.

Cited in footnotes to *Buchanan v. Barre*, 23 L.R.A. 488, which holds town leasing hall to opera company not liable for defect in sidewalk; *O'Hanlin v. Carter Oil Co.* 66 L.R.A. 893, which holds person maintaining steam-pipe be-

neath highway liable for injury to child precipitated into opening on giving away of earth over such pipe and burned by steam escaping from break in pipe, although the city permitted its placing in highway.

Cited in notes (21 L.R.A. 265) on municipal liability for ice on streets or sidewalks; (3 L.R.A.(N.S.) 84) on lot owner's liability to person injured by reason of nonperformance of statutory duty to repair walk; (115 Am. St. Rep. 993, 995) on liability of property owners to persons injured by nonrepair of streets.

Distinguished in *Macauley v. Schneider*, 9 App. Div. 281, 41 N. Y. Supp. 519, and *McConnell v. Bostelmann*, 72 Hun, 240, 25 N. Y. Supp. 390, holding abutting owner liable where injury was caused by nuisance for which he was responsible; *Coon v. Froment*, 25 App. Div. 252, 49 N. Y. Supp. 305, holding abutting owner liable for injury due to nuisance in shape of bundle of wire which he "caused or permitted" to obstruct highway; *Morris v. Woodburn*, 57 Ohio St. 335, 48 N. E. 1097, holding owner liable for injury due to negligent maintenance of defective covering of sidewalk vault; *Morris v. Barrisford*, 9 Misc. 15, 29 N. Y. Supp. 17, upholding recovery by pedestrian against owner for injury from licensed awning negligently maintained as nuisance; *Tremblay v. Harmony Mills*, 171 N. Y. 602, 64 N. E. 501, holding abutting owner liable for injury caused by accumulated ice due to negligent maintenance of roof gutter; *Robinson v. Mills*, 25 Mont. 396, 65 Pac. 114, holding company failing to properly fill authorized excavations in street, liable for injury caused thereby; *Zimmerman v. Baur*, 11 Ind. App. 617, 39 N. E. 299, denying liability of owner to party injured by negligent excavation made by independent contractor employed by owner; *Thompson v. West Bay City*, 137 Mich. 101, 100 N. W. 280, holding city not liable for negligence of a contractor in improperly constructing a barrier to protect a new cement sidewalk where no duty to build sidewalk is imposed on city; *Schuster v. Forty-Second Street M. & Street N. R. Co.* 192 N. Y. 410, 85 N. E. 670, holding a street railway company liable for negligence in failing to repair a hole in pavement close to its tracks; *Mullins v. Siegel-Cooper Co.* 95 App. Div. 237, 88 N. Y. Supp. 737, holding abutting property owner liable for dangerous condition of sidewalk caused by his own act.

Obligation to repair highway.

Cited in *Mosher v. Lewis*, 10 Misc. 378, 31 N. Y. Supp. 433, holding that mechanic's lien cannot be established against premises on theory of owner's implied consent to repair of sidewalk by lessee; *Mullins v. Siegel-Cooper Co.* 183 N. Y. 136, 75 N. E. 1112, holding abutting owner not required to keep sidewalk in repair except as required by statute; *Krebs v. Heitmann*, 104 App. Div. 175, 93 N. Y. Supp. 542, holding in the absence of statute abutting owner is not liable if he does no affirmative act which renders highway dangerous; *New York v. Sicilian Asphalt Paving Co.* 145 App. Div. 821, 130 N. Y. Supp. 468, holding that contractor's undertaking to make repairs when notified to do so by city, is not assumption of city's obligation to public to maintain streets in proper condition; *Kosters v. National Bank*, 62 Misc. 421, 116 N. Y. Supp. 647, holding no duty existed at common law on abutting owner to keep sidewalk free from snow and ice.

Subrogation.

Cited in *Lincoln v. Janesch*, 63 Neb. 711, 56 L. R. A. 764, 93 Am. St. Rep. 478, 89 N. W. 280, denying right of municipality to indemnity from lot owner for judgment for injuries due to owner's failure to repair walk as required by ordinance; *Wilhelm v. Defiance*, 58 Ohio St. 64, 40 L. R. A. 297, 65 Am. St. Rep. 745, 50 N. E. 18, refusing reimbursement of city from abutting owner, for judg-

ment against city for injuries due to negligent construction of walk by such owner; *Hoadley v. Dumois*, 11 Misc. 55, 31 N. Y. Supp. 853, holding consignee's right of action against charterer whose debt to owner of vessel he paid in order to secure goods; *Fulton County Gas & Electric Co. v. Hudson River Teleph. Co.* 130 App. Div. 347, 114 N. Y. Supp. 642, allowing one joint tortfeasor to sue another for contribution; *Maumee Valley R. & Light Co. v. Montgomery*, 81 Ohio St. 431, 26 L.R.A.(N.S.) 989, 91 N. E. 181, sustaining the right to join the owning company and the lessee company in an action for negligence the ultimate liability of the respective parties to be determined by special findings.

Cited in footnote to *Wilhelm v. Defiance*, 40 L. R. A. 294, which denies right of city to recover indemnity from abutter for judgment for injuries from defective sidewalk.

Cited in note (12 L.R.A.(N.S.) 950) on right of municipality to indemnity from owner or occupant of abutting property for damages recovered for defect in street.

Distinguished in *Canandaigua v. Foster*, 81 Hun, 150, 30 N. Y. Supp. 686, holding city entitled to indemnity from abutting owner for damages paid to party injured through owner's failure to keep covering to coal hole in repair; *Clay v. Hart*, 25 Misc. 115, 55 N. Y. Supp. 43, holding municipality entitled to recover cost of bridge replacing one built by millowner constituting nuisance as maintained; *Holyoke v. Hadley Water Power Co.* 174 Mass. 428, 54 N. E. 889, upholding indemnification to municipality by owner through whose fault injury caused, though party injured could not have recovered against his landlord.

Res Judicata.

Cited in *New York v. Brady*, 81 Hun, 443, 30 N. Y. Supp. 1121, holding judgment in action by party injured conclusive in action by city for indemnity from judgment, as to negligence of act.

When costs and counsel fees recoverable.

Cited in *Charman v. Hibbler*, 31 App. Div. 483, 52 N. Y. Supp. 212, holding costs and counsel fees in defense of action for violation of restrictions, recoverable in action by grantee against grantor for breach of covenant against encumbrances.

Remedies for breach of statutory rights.

Cited in *Briggs v. Knickerbocker Ice Co.* 11 Misc. 198, 32 N. Y. Supp. 95, holding statutory remedy in damages exclusive on infringement of statutory rights to river ice; *Racine v. Morris*, 136 App. Div. 472, 121 N. Y. Supp. 146, holding where legislature enjoins a duty and no special remedy is provided an action of damages will lie same as if it were a common-law duty; *People ex rel. Von Dehsen v. McKee*, 69 Misc. 35, 125 N. Y. Supp. 660, holding that where statute imposes new duty and gives remedy for its enforcement, that remedy is exclusive; *Sluder v. St. Louis Transit Co.* 189 Mo. 194, 5 L.R.A.(N.S.) 247, 88 S. W. 648 (dissenting opinion), on statutory remedy as exclusive remedy.

Cited in note (5 L.R.A.(N.S.) 264) on violation of police ordinance as ground for private action.

Distinguished in *Rooney v. Brogan Constr. Co.* 107 App. Div. 263, 95 N. Y. Supp. 1, holding remedy provided by labor law for violation of duty and by employer to employee not exclusive.

Notice of injury.

Cited in *Rosin v. Lidgerwood Mfg. Co.* 89 App. Div. 247, 86 N. Y. Supp. 49, holding that complaint in action for personal injuries due to employer's negligence need not allege service of notice of injury.

Joint tortfeasors.

Cited in *Graves v. City & Suburban Teleg. Asso.* 132 Fed. 388, holding where negligence of two parties although acting independently concurs in producing injury they are joint tortfeasors.

10 L. R. A. 397, *SPAULDING v. PEABODY*, 153 Mass. 129, 26 N. E. 421.

"Necessary" municipal expense or service.

Cited in *Waters v. Bonvouloir*, 172 Mass. 288, 52 N. E. 500, denying validity of appropriation to defray expenses of delegates to convention of municipalities; *Edgerton v. Goldsboro Water Co.* 126 N. C. 97, 48 L. R. A. 445, 35 S. E. 243, enjoining payment of public money to company supplying water to municipality under contract not sanctioned by general vote; *Mayo v. Washington*, 122 N. C. 13, 40 L. R. A. 166, 29 S. E. 343 (disapproved in dissenting opinion), majority denying validity of debt incurred by municipality in purchase of electric lighting plant without general vote therefor; *Swift v. Falmouth*, 167 Mass. 121, 45 N. E. 184, denying validity of agreement by municipal authorities to keep waters of stream open to mill pond; *Posey v. North Birmingham*, 154 Ala. 516, 15 L.R.A.(N.S.) 714, 45 So. 663, denying the power of municipal corporation to run an electric light plant where not specially authorized by statute; *Scott v. Laporte*, 162 Ind. 46, 68 N. E. 278, holding that a city has no power to guarantee private enterprise in supply water; *Capron v. Taunton*, 196 Mass. 42, 81 N. E. 873, on authority of a municipality in running a municipal lighting plant; *Dickinson v. Boston*, 188 Mass. 598, 1 L.R.A.(N.S.) 668, 75 N. E. 68, on when a municipal corporation has power to furnish light; *Commercial Wharf Corp. v. Boston*, 208 Mass. 490, 94 N. E. 805, holding that city cannot be made liable upon implied contract to pay for what it had no power to make express contract to pay for.

Cited in note (15 L.R.A.(N.S.) 712) on power of municipality to own electric light plant.

Disapproved in *Crawfordsville v. Braden*, 130 Ind. 158, 14 L. R. A. 272, 30 Am. St. Rep. 214, 28 N. E. 849, upholding power of municipality without statutory authority to erect and maintain electric lighting plant where authority to light not denied; *Christensen v. Fremont*, 45 Neb. 164, 63 N. W. 364, upholding appropriation of general tax fund to erection of municipal electric light plant on petition of majority of voters.

Remedy for ultra vires act of municipality.

Cited in *Finlay v. Boston*, 196 Mass. 270, 82 N. E. 5, dismissing petition for mandamus to restrain an unlawful expenditure because statutory method was exclusive.

10 L. R. A. 401, *HINTON v. PRITCHARD*, 107 N. C. 128, 12 S. E. 242.

Admissibility of parol evidence to establish express trust.

Cited in *Chambers v. Emery*, 13 Utah, 397, 45 Pac. 192, refusing to find trust contrary to deed where founded on parol evidence of admissions by alleged trustee during lifetime.

Resulting and constructive trusts.

Cited in footnotes to *Edwards v. Culbertson*, 18 L. R. A. 204, which holds woman purchasing land with money fraudulently obtained from man by promise to marry him, a trustee on refusal to do so; *Cook v. Patrick*, 11 L. R. A. 573, which holds resulting trust in favor of one paying for land deeded to another extends only to life interest, when such his intent; *Avery v. Stewart*, 68 L.R.A.

776, which holds that evidence must be clear and persuasive to establish trust in real estate in opposition to terms of deed.

Cited in note (58 L. R. A. 115) on trust implied to effectuate purpose of contract when its terms cannot be given effect.

Limitations as to trusts.

Cited in notes (35 L. ed. U. S. 1030) on statute of limitations and lapse of time as bar to trusts; (16 Eng. Rul. Cas. 270) on running of limitations in case of breach of fiduciary duty.

10 L. R. A. 405, FRANKLIN COUNTY GRAMMAR SCHOOL v. BAILEY, 62 Vt. 467, 20 Atl. 820.

Legislative control of municipalities.

Cited in *Re Greene*, 55 App. Div. 483, 67 N. Y. Supp. 291, holding statute granting new trial in action against county unconstitutional.

Impairment of vested rights.

Cited in footnotes to *Allen v. Forrest*, 24 L. R. A. 606, which holds statutory privilege of acquiring tide lands not vested right; *Lawrence v. Louisville*, 27 L. R. A. 560, which holds vested right to compel defense of limitation protected against subsequent change of law.

Estoppel to deny title of one from whom possession obtained.

Cited in footnote to *Gilbert use of Bishop v. American Surety Co.* 61 L. R. A. 253, which denies right of one selling property to combination and acting as its agent for years, to reclaim property on ground that sale was in restraint of trade.

Cited in notes (53 L.R.A. 934) on right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy; (38 L.R.A. (N.S.) 865) on right of tenant to show that landlord parted with or lost his title to a third person during tenancy.

10 L. R. A. 411, VAUGHN v. SCHMALESLE, 10 Mont. 186, 25 Pac. 102.

Superiority of liens.

Cited in *Miller v. Gates*, 22 Mont. 311, 56 Pac. 356, holding purchaser on foreclosure protected against creditors attaching property thereafter but before recording of sheriff's deed; *Rockefeller v. Dellinger*, 22 Mont. 422, 74 Am. St. Rep. 613, 56 Pac. 822, holding property purchased with partnership funds subject to firm mortgage in preference to prior judgment against individual member; *Dawson v. McCarty*, 21 Wash. 318, 75 Am. St. Rep. 841, 57 Pac. 816, holding unrecorded mortgage takes precedence over subsequent judgment, where record necessary to validity only as against bona fide purchasers; *Campbell v. Keys*, 130 Mich. 133, 89 N. W. 720, holding lien of unrecorded mortgage superior to lien of attachment.

Cited in note (16 L. R. A. 668, 671) on priority of liens of judgment or of prior unrecorded conveyance.

Apparent title to realty.

Cited in *Re Ricker*, 14 Mont. 185, 29 L. R. A. 659, 35 Pac. 967, upholding compromise of claim by executor against estate of party generally considered insolvent, though property, not shown to have been subject to execution, stood in name of debtor at time of compromise.

Description of property in mortgage.

Cited in note (137 Am. St. Rep. 254, 263) on description of property in mortgage other than question of boundaries.

10 L. R. A. 415, *BROWNING v. GOODRICH TRANSP. CO.* 78 Wis. 391, 23 Am. St. Rep. 428, 47 N. W. 428.

Burden of proof.

Cited in *Schaller v. Chicago & N. W. R. Co.* 97 Wis. 38, 71 N. W. 1042, holding proof of destruction of goods by fire prima facie defense under receipt containing exemption, in absence of proof of negligence.

Cited in footnotes to *Mitchell v. Carolina C. R. Co.* 44 L. R. A. 515, which holds burden of proof as to negligence on carrier when goods shipped under contract limiting liability for negligence; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which holds carrier has burden of proving that delivery of goods in wet condition not due to its negligence.

Restrictions in bill of lading.

Cited in *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 380, 58 N. W. 968, denying validity of contract limiting carrier's liability for loss of freight.

Cited in note (12 L. R. A. 800) on limitation of carrier's liability by contract.

Who are common carriers.

Cited in note (34 L. R. A. 138) on liability of baggage-transfer companies as common carriers.

10 L. R. A. 419, *GULF, C. & S. F. R. CO. v. GATEWOOD*, 79 Tex. 89, 14 S. W. 913.

Contracts limiting liability.

Cited in *Missouri, K. & T. R. Co. v. Davis*, 24 Okla. 687, 24 L.R.A.(N.S.) 872, 104 Pac. 34, holding that stipulation in contract with shipper that no suit shall be brought for damages after lapse of ninety days is valid; *Sheard v. United States Fidelity & G. Co.* 58 Wash. 34, 107 Pac. 1024, to the point that limitation of time is contained in contract is not controlling unless it is reasonable, or where there is reasonable excuse for delaying suit beyond time agreed upon.

Cited in footnote to *Pacific Exp. Co. v. Foley*, 12 L. R. A. 800, which upholds restriction in freight receipt where value not stated and loss due to simple negligence.

Cited in notes (24 L.R.A. 597) on liability for property destroyed by mob; (88 Am. St. Rep. 113, 118) on limitation of carrier's liability in bills of lading.

Estoppel to rely on limitation on time to sue.

Cited in note (63 L. R. A. 206) on estoppel to plead defense of limitations in actions on carrier's contracts.

Duty of carrier.

Cited in *Great Falls & O. D. R. Co. v. Hill*, 34 App. D. C. 312, holding duty of carrier to passenger extends to matter of passenger alighting from car.

10 L. R. A. 423, *FANEUIL HALL INS. CO. v. LIVERPOOL & L. & G. INS. CO.* 153 Mass. 63, 26 N. E. 244.

Effect of written stipulation in printed contract.

Cited in *Royal Ins. Co. v. Vanderbilt Ins. Co.* 102 Tenn. 268, 52 S. W. 168, holding written stipulation attached controls printed limitation of time for bringing action on policy; *Imperial F. Ins. Co. v. Home Ins. Co.* 15 C. C. A. 613, 30 U. S. App. 409, 68 Fed. 702, holding reinsurer liable on policies not containing coinsurance clause where pasteur on reinsurance policy provided for liability in same manner as insurer.

Damages.

Cited in *Wheeler v. Hanson*, 161 Mass. 376, 42 Am. St. Rep. 408, 37 N. E. 382,

holding expense of procuring sureties and counsel elements of damage in action for malicious prosecution; *Newton Rubber Works v. De las Casas*, 182 Mass. 438, 65 N. E. 816, holding taxable costs indemnity for expenses of suit to have dam removed.

Distinguished in *Maguire v. Pan-American Amusement Co.* 205 Mass. 68, 137 Am. St. Rep. 422, 91 N. E. 135, 18 Ann. Cas. 110, holding that counsel fees which defendant in replevin was obliged to incur cannot be recovered in action on replevin bond.

Reinsurance.

Cited in *Parvin v. Mutual Reserve L. Ins. Co.* 125 Iowa, 99, 100 N. W. 39, sustaining validity of a contract of reinsurance when not in forbidden company and when properly made according to statute; *Victoria-Montreal F. Ins. Co. v. Home Ins. Co.* 35 Can. S. C. 220 (dissenting opinion), on validity of contracts of reinsurance.

Cited in footnotes to *Hunt v. New Hampshire Fire Underwriter's Asso.* 38 L. R. A. 514, which holds reinsurer liable for whole amount of loss on insolvency of prior insurer; *Union Ins. Co v. American F. Ins. Co.* 28 L. R. A. 692, which holds inoperative agreement to reinsure property already destroyed without knowledge of parties; *Chalaron v. Insurance Co. of N. A.* 36 L. R. A. 742, which holds that failure of original insurer to bear any part of risk because entire cargo not put on board as expected does not avoid reinsurance for fraud.

Cited in notes (8 L.R.A.(N.S.) 848, 862) on liability of reinsurer; (1 Brit. Rul. Cas. 185) on limitation clause as part of reinsurance contract.

Distinguished in *Fireman's Fund Ins. Co. v. Aachen & M. F. Ins. Co.* 2 Cal. App. 696, 84 Pac. 253, holding contract of reinsurance on "following described property" was on property and not on insurer's risk.

10 L. R. A. 430, *KEITH v. STATE*, 91 Ala. 2, 8 So. 353.

"Original package."

Cited in *Harrison v. State*, 91 Ala. 64, 10 So. 30, holding sale of single bottle of liquor from case in which imported, breaks "original package" within meaning of statute; *Haley v. State*, 42 Neb. 562, 47 Am. St. Rep. 718, 60 N. W. 962, holding wooden box in which bottles wrapped in paper, sealed, and placed in paper boxes shipped, is "original package" within statute licensing sale of liquor; *Guckenheimer v. Sellers*, 81 Fed. 998, holding box or crate in which bottled liquor shipped, and not wrapped bottles, constituting "original package;" *McGregor v. Cone*, 104 Iowa, 471, 39 L. R. A. 487, footnote, p. 484, 65 Am. St. Rep. 522, 73 N. W. 1041, holding boxes of cigarettes sold at retail, subject to state police power as broken packages, where imported in pine boxes; *Austin v. State*, 101 Tenn. 577, 50 L. R. A. 483, 70 Am. St. Rep. 703, 48 S. W. 305, holding sale of box of cigarettes not sale of "original package" where not shown that basket in which boxes shipped belonged to carrier; *May v. New Orleans*, 51 La. Ann. 1068, 25 So. 959, holding goods removed from boxes, etc., in which shipped, subject to taxation as property of state, though still in manufacturer's packages; *State v. Parsons*, 124 Mo. 442, 5 Inters. Com. Rep. 253, 46 Am. St. Rep. 457, 27 S. W. 1102, holding peddler selling bottles taken from box in which imported subject to state-license tax; *Cook v. Marshall County*, 119 Iowa, 388, 93 N. W. 372, holding parcels containing ten cigarettes shipped in large quantities to be sold in unbroken packages, not "original packages;" *State v. Eckenrode*, 148 Iowa, 180, 127 N. W. 56, holding that "original package" is bundle put up for transportation or commercial handling; *Canton v. McDaniel*, 188 Mo. 227, 86 S. W. 1092, holding where goods are put in small paper packages and placed in large boxes and barrels for shipment that boxes and barrels are the original

packages; *Vernon v. State*, 161 Ala. 85, 50 So. 57, holding that an express package containing four quarts of whisky became subject of state laws when broken and contents removed; *Mobile v. Phillips*, 146 Ala. 162, 121 Am. St. Rep. 17, 40 So. 826, sustaining a license for sale of beer in original barrel where business is conducted by a resident of the city; *Moog v. State*, 145 Ala. 84, 41 So. 166, on validity of state regulation of the sale of liquors in original package.

Cited in footnotes to *Com. v. Schollenberger*, 22 L. R. A. 155, which holds package of food made, stamped, and branded in other state not necessarily original package; *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense.

Cited in notes (10 L. R. A. 616) on interstate commerce; importations of intoxicating liquor; sale by importer; (60 L. R. A. 664) on corporate taxation and the commerce clause; (39 L.R.A.(N.S.) 1054) on what constitutes original or unbroken package.

Distinguished in *Tinker v. State*, 96 Ala. 118, 11 So. 383, holding paper-wrapped bottle, "original package" where boxed by carrier, without knowledge of shipper, for convenience of carriage.

Anticipating defense.

Cited in *Rasch v. State*, 89 Md. 760, 43 Atl. 931, holding evidence to rebut an insufficient plea unnecessary where *prima facie* case made out.

Power at adjourned term.

Cited in *Barron v. Barron*, 122 Ala. 207, 25 So. 55, upholding bill of exceptions signed within time fixed at adjourned term on postponed decision of motion for new trial; *Mississippi Lumber Co. v. Smith*, 152 Ala. 539, 44 So. 475, sustaining power of court at an adjourned term to extend time of filing bill of exceptions; *Whately v. State*, 144 Ala. 74, 39 So. 1014, holding that a supernumerary judge could order and hold an adjourned term of the court while presiding at regular term; *Coker v. State*, 144 Ala. 31, 40 So. 516, holding that power of a court to make its records conform to the truth, exists during term.

Instructions as to "reasonable doubt."

Cited in *Green v. State*, 97 Ala. 64, 15 So. 242, holding instruction for conviction if jury "believe from the evidence," erroneous.

Negating exceptions in indictment.

Cited in *Devine v. Com.* 107 Va. 865, 60 S. E. 37, 13 A. & E. Ann. Cas. 361, holding that an exception of pure apple cider in an intoxicating liquor license statute need not be denied where not in the enacting clause of statute.

10 L. R. A. 432, *STATE v. CHAPMAN*, 1 S. D. 414, 47 N. W. 411.

"Original package."

Cited in *Austin v. Tennessee*, 179 U. S. 358, 45 L. ed. 232, 21 Sup. Ct. Rep. 132, Affirming 101 Tenn. 577, 50 L. R. A. 482, 70 Am. St. Rep. 703, 48 S. W. 305, holding packages of cigarettes in paper boxes thrown loosely into basket in which imported, not "original package;" *Haley v. State*, 42 Neb. 563, 47 Am. St. Rep. 718, 60 N. W. 962, holding bottles wrapped in paper, sealed, and placed in paper boxes not "original packages" where imported in wooden box; *Guckenheimer v. Sellers*, 81 Fed. 999, holding box or crate in which bottled liquor shipped, and not wrapped bottle, constitutes "original package;" *McGregor v. Cone*, 104 Iowa, 473, 39 L. R. A. 487, footnote p. 484, 65 Am. St. Rep. 522, 73 N. W. 1041, holding pine box in which boxes of cigarettes shipped "original package;" *Cook v. Marshall County*, 119 Iowa, 389, 93 N. W. 372, holding parcels containing ten cigarettes shipped in large quantities to be sold in unbroken packages, not "original packages."

Cited in footnotes to *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense; *Com. v. Schollenberger*, 22 L. R. A. 155, which holds package of food made, stamped, and branded in other state not necessarily original package; *Re Gooch*, 10 L. R. A. 830, which holds state cannot prohibit sale of oleomargarine as imported from other state.

Cited in notes (12 L. R. A. 624) on imports in original package subject to state police powers; (60 L. R. A. 664) on corporate taxation and the commerce clause; (39 L.R.A.(N.S.) 1054) on what constitutes original or unbroken package.

Sale of liquors as nuisance.

Cited in *State ex rel. Bartlett v. Fraser*, 1 N. D. 434, 3 Inters. Com. Rep. 581, 48 N. W. 343, holding knowledge and consent of owner of premises unnecessary under statute making place where liquor drunk, nuisance.

Cited in footnotes to *Laugel v. Bushnell*, 58 L. R. A. 266, which sustains ordinance declaring places where hop ale, hop and malt mead and cider sold, nuisances; *Landry v. New Iberia*, 56 L. R. A. 285, which denies city's power to arbitrarily declare particular licensed saloon a nuisance; *Kirkland v. State*, 65 L.R.A. 76, which holds proceeding to condemn and destroy liquor kept for sale in prohibited district not criminal.

Evidence of prejudice on motion for removal.

Cited in *State v. Rodway*, 1 S. D. 576, 47 N. W. 1061, holding bare statement of judge's prejudice in affidavit on application for removal, insufficient to make same appear to "satisfaction of court;" *Cox v. United States*, 5 Okla. 708, 50 Pac. 175, holding statement of facts and circumstances showing prejudice essential to sufficiency of affidavit; *State v. Hall*, 16 S. D. 13, 65 L.R.A. 156, 91 N. W. 325, holding the permitting of an officer who had formed an opinion on evidence of a former trial to summon the jury for a new trial not to be an abuse of discretion where it affirmatively appears the accused was not prejudiced thereby.

Cited in note (11 L. R. A. 571) on affidavit for removal of cause for prejudice or local influence.

Assignments of error.

Cited in *Hedlun v. Holy Terror Min. Co.* 16 S. D. 281, 92 N. W. 31, holding insufficient an assignment that the "court erred in giving plaintiff's instruction No. 5 (Abs., folios 450-452)" without stating wherein error existed; *State v. Cleveland*, 23 S. D. 336, 121 N. W. 841; *State v. Johns*, 25 S. D. 453, 127 N. W. 470,—holding that in criminal case assignment of error must be made in supreme court to enable it to determine questions presented for review.

10 L. R. A. 439, *KOHN v. MILCHER*, 43 Fed. 641.

State regulation of sales in original packages.

Cited in footnotes to *Re Gooch*, 10 L. R. A. 830, which holds state cannot prohibit sale of oleomargarine as imported from other state; *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense.

Cited in note (12 L. R. A. 624) on imports in original package subject to state police power.

Conflict of laws.

Cited in note (61 L. R. A. 432) on conflict of laws as to sales of intoxicating liquors.

Illegal sale as defense to purchase price.

Cited in *Frankel v. Hiller*, 16 N. D. 396, 113 N. W. 1067, 15 A. & E. Ann. Cas.

265, holding that vendor must participate in some manner in illegal sale to defeat recovery against vendee.

Cited in note (6 Eng. Rul. Cas. 337) on invalidity of illegal or immoral contract.

10 L. R. A. 442, *COM. v. GAGNE*, 153 Mass. 205, 26 N. E. 449.

Construction of statutes.

Cited in *People ex rel. Akin v. Butler Street Foundry & I. Co.* 201 Ill. 249, 66 N. E. 349, construing anti-trust act to refer only to combines, etc., formed within state; *State v. Smiley*, 65 Kan. 248, 69 Pac. 199, upholding anti-trust statute so general in terms as to be capable of unreasonable construction; *Com. v. Petranich*, 183 Mass. 220, 66 N. E. 807, holding invalidity of part of statute not affect balance as to sale of liquor without license; *State v. Insurance Co.* 71 Neb. 344, 102 N. W. 1022, holding that a statute is to be construed if possible so as to be constitutional; *State v. Smiley*, 65 Kan. 248, 67 L.R.A. 907, 69 Pac. 199, holding general language of statutes limited to such persons and subjects as it is reasonable to presume the legislature intended it to apply; *State v. Jack*, 69 Kan. 401, 1 L.R.A.(N.S.) 175, 76 Pac. 911, 2 A. & E. Ann. Cas. 171, construing a statute in respect to products of mines so as not to apply in contravention of Federal anti-trust law; *Standard Oil Co. v. State*, 117 Tenn. 641, 10 L.R.A.(N.S.) 1021, 100 S. W. 705, holding same as to a state anti-trust act; *Atty. Gen. ex rel. Com. v. Electric Storage Battery Co.* 188 Mass. 241, 74 N. E. 467, 3 A. & E. Ann. Cas. 631, holding a statute to apply only as to those corporations over which state could constitutionally make such regulation; *Murphy v. Wheatley*, 100 Md. 365, 59 Atl. 704, holding a provision of a statute as to stock of corporations to apply only to domestic corporations; *State ex rel. Coleman v. Western U. Teleg. Co.* 75 Kan. 629, 90 Pac. 299, holding a police regulation as to business of corporations not to apply to those doing interstate business; *Pittsburgh, C. C. & St. L. R. Co. v. Railroad Commission*, 171 Ind. 200, 86 N. E. 328, sustaining an order of the railroad commission requiring railroads to construct interchange tracks.

Distinguished in *White v. Gove*, 183 Mass. 338, 67 N. E. 359, declaring void, Stat. 1892, c. 402, providing for sewer assessments in Boston.

Regulating commerce.

Cited in *State v. Rocky Mountain Bell Teleph. Co.* 27 Mont. 402, 71 Pac. 311, upholding statute imposing license on company "doing business in state," as taxing only those engaged in business within state; *Com. v. Huntley*, 156 Mass. 252, 15 L. R. A. 847, 30 N. E. 1127 (dissenting opinion) majority sustaining statute prohibiting sale of oleomargarine in imitation of butter though in original package.

Cited in note (15 L.R.A.(N.S.) 926) on constitutional right to prohibit sale of intoxicants.

"Original package."

Cited in *Carstairs v. O'Donnell*, 154 Mass. 358, 28 N. E. 271, holding non-resident unlicensed vendor of liquor entitled to recover contract price from vendee, where delivered in original package; *State v. Lord*, 66 N. H. 480, 29 Atl. 556, holding re-enactment of state statute after passage of Wilson bill unnecessary to bring "original packages" within its scope.

Cited in footnote to *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense.

Form of indictment.

Cited in *Com. v. Gay*, 153 Mass. 214, 26 N. E. 571, upholding complaint charg-

ing generally maintenance of place for illegal sale of liquor; *Com. v. Rozen*, 176 Mass. 132, 57 N. E. 223, upholding conviction where evidence in rebuttal of possible defense not offered in establishment of prima facie case; *State v. Paige*, 78 Vt. 289, 62 Atl. 1017, 6 A. & E. Ann. Cas. 725, holding that information need not negative exception of sale of cider and native wines in an intoxicating liquor license statute.

Articles on premises of accused as evidence.

Cited in *State v. Suiter*, 78 Vt. 396, 63 Atl. 182, sustaining the admission of articles found on premises of accused tending to show his guilt though they were taken by means of illegal process.

10 L. R. A. 444, *Re RAHRER*, 43 Fed. 556.

Effect of Wilson law on prior legislation.

Cited in footnotes to *Re Spickler*, 10 L. R. A. 446, and *Re Van Vliet*, 10 L. R. A. 451, which holds it unnecessary to re-enact state prohibitory law after passage of intoxicants.

Cited in note (10 L. R. A. 617) on legislative remedy as to importations of intoxicating liquors.

Disapproved in *State ex rel. Bartlett v. Fraser*, 1 N. D. 432, 3 Inters. Com. Rep. 581, 48 N. W. 343, holding all sales of intoxicating liquor in violation of local statutes unlawful.

State regulation of liquor traffic.

Cited in footnote to *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense.

Cited in note (15 L.R.A.(N.S.) 928) on constitutional right to prohibit sale of intoxicants.

Revival of void statute.

Cited in *State ex rel. Lee v. Chaney*, 23 Okla. 800, 102 Pac. 133, holding an act void under territorial law did not become valid on adoption of state constitution.

Cited as reversed in *People v. Bootman*, 95 App. Div. 478, 88 N. Y. Supp. 887 (dissenting opinion), on revival of state statute by action of Congress removing conflict with Federal laws.

10 L. R. A. 446, *Re SPICKLER*, 43 Fed. 653.

Effect of Wilson bill on state police laws.

Cited in *State v. Rhodes*, 90 Iowa, 501, 24 L. R. A. 246, 58 N. W. 887, holding liquor in original packages subject to state police legislation on arrival within jurisdiction; *State ex rel. Bartlett v. Fraser*, 1 N. D. 433, 3 Inters. Com. Rep. 581, 48 N. W. 343, holding sales of liquor in original package, violation of state law.

Cited in footnotes to *Re Rahrer*, 10 L. R. A. 444, which holds that void state prohibitory law is not made effective by Wilson bill; *Re Van Vliet*, 10 L. R. A. 451, which holds it unnecessary to re-enact state prohibitory law after passage of Wilson bill; *Com. v. Zelt*, 11 L. R. A. 602, which holds that state may make sale of liquor in original packages to intemperate persons, a criminal offense.

Cited in notes (10 L. R. A. 616) on legislative remedy for importations of intoxicating liquors; (12 L. R. A. 624) on imports in original package subject to state police power.

Habeas corpus.

Cited in *Re Flinn*, 57 Fed. 500, and *Re May*, 82 Fed. 427, refusing habeas corpus where constitutionality of law under which conviction found not finally determined by regular procedure.

Cited in notes (10 L. R. A. 617) on jurisdiction of United States courts; by habeas corpus; (39 L. R. A. 455) on conviction for violating unconstitutional statute or ordinance.

Revival of invalid statutes.

Cited in *State ex rel. Lee v. Chaney*, 23 Okla. 800, 102 Pac. 133, holding an act void under territorial law did not become valid on adoption of state constitution.

Speedy trial.

Cited in *Ex parte Buchannen*, 20 Okla. 837, 94 Pac. 943, 1 Okla. Crim. Rep. 140, holding that one indicted under territorial law could be tried in state court after state was admitted to union.

10 L. R. A. 451 *Re VAN VLIET*, 43 Fed. 761.

Effect of Wilson Bill on police laws.

Cited in *State v. Rhodes*, 90 Iowa, 501, 24 L. R. A. 246, 58 N. W. 887, holding liquor in original packages subject to state police legislation on arrival within jurisdiction; *Ex parte Jervey*, 66 Fed. 961, holding liquors brought into port, but not unloaded, not subject to state police laws; *Re Langford*, 4 Inters. Com. Rep. 439, 57 Fed. 572, holding South Carolina dispensary act unconstitutional for discrimination against employees of certain class of common carriers in removal of liquor from cars.

Cited in footnotes to *Re Spickler*, 10 L. R. A. 446, which holds it unnecessary to re-enact state prohibitory law after passage of Wilson bill; *Re Rahrer*, 10 L. R. A. 444, which holds void state prohibitory law not made effective by Wilson bill; *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

Cited in notes (10 L. R. A. 616) on interstate commerce importations of intoxicating liquors; sale by importer; (12 L. R. A. 624) on imports in original package subject to state police power; (15 L.R.A.(N.S.) 928) on constitutional right to prohibit sale of intoxicants.

Revival of void laws.

Cited in *State ex rel. Lee v. Chaney*, 23 Okla. 800, 102 Pac. 133, holding an act void under territorial law did not become valid on adoption of state constitution.

"Original packages."

Cited in footnote to *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense.

Definition of words "upon arrival."

Cited in *R. M. Rose Co. v. State*, 133 Ga. 359, 36 L.R.A.(N.S.) 446, 65 S. E. 770, holding words "upon arrival" to mean upon delivery to consignee.

10 L. R. A. 454, *BEEKMAN v. HAMLIN*, 19 Or. 383, 20 Am. St. Rep. 827, 24 Pac. 195.

Presumption of payment of judgment.

Cited in *Cobb v. Houston*, 117 Mo. App. 654, 94 S. W. 299, holding absence from the state on the part of the judgment debtor does not repel the presumption of payment; *Bowman v. Holman*, 53 Or. 460, 99 Pac. 424, on presumption at common law of payment of a judgment after twenty years.

10 L. R. A. 459, *BANKS v. FLINT*, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477.

Usury.

Cited in *Brown v. Archer*, 62 Mo. App. 288, holding loan usurious where obtained by lender's manager receiving salary through commissions, though lender

not aware of their amount; *Payne v. Henderson*, 106 Ky. 138, 50 S. W. 34, holding loan at 7 per cent, broker who effects loan receiving amount in excess of legal rate, usurious; *Lanier v. Union Mortg. & T. Co.* 64 Ark. 58, 40 S. W. 466 (dissenting opinion) on point that transaction is usurious where one who is really the lender's agent retains 20 per cent of amount of loan for his services though contract signed recites that he is borrower's agent; *France v. Munro*, 138 Iowa, 10, 19 L.R.A.(N.S.) 399, 115 N. W. 577, holding commissions charged by lender's agent, where in excess of legal interest, to be usury where money is handled by agent according to his own judgment; *Eldred v. Hart*, 87 Ark. 538, 113 S. W. 213, holding that at time of loan, separate obligations might be made for interest.

Cited in footnote to *Clarke v. Havard*, 51 L. R. A. 499, which holds usurious, commission paid by borrower to lender's agent.

Cited in notes (41 L.R.A. 711) on effect of preferring usurious debt in assignment for creditors; (46 Am. St. Rep. 199) on what transactions are usurious.

Distinguished in *Holt v. Kirby*, 57 Ark. 255, 21 S. W. 432, holding loan not rendered usurious by commission paid to broker acting as borrower's agent, though title examined, papers prepared, and loan advised to lender, by him; *May v. Flint*, 54 Ark. 574, 16 S. W. 575, upholding mortgage where commission, relied upon to defeat validity, exacted by broker from borrower without co-operation of lender; *Sherwood v. Haney*, 63 Ark. 250, 38 S. W. 15, upholding mortgage loan in absence of proof of excessive interest to lender or bonus to agent with his knowledge and consent; *Scruggs v. Scottish Mortg. Co.* 54 Ark. 569, 16 S. W. 563, upholding loan at highest rate, where additional commission to subagent charged without lender's knowledge; *Sherwood v. Wilkins*, 65 Ark. 315, 45 S. W. 988, holding commission of 20 per cent paid by borrower to agent without lender's knowledge or consent does not render loan usurious; *Ellenhogen v. Griffey*, 55 Ark. 272, 18 S. W. 126, holding agreement for sale with deferred payment of purchase price with interest and fees, not affected with usury.

Determination of relationship of parties.

Cited in *McLean v. Ficke*, 94 Iowa, 290, 62 N. W. 753, holding declaration of written application that agent acted for borrower ineffective to establish relation where circumstances show contrary.

10 L. R. A. 464, *CHASE v. WESTERN U. TELEG. CO.* 44 Fed. 554.

Damages for mental pain and anguish.

Cited in *Crawson v. Western U. Teleg. Co.* 47 Fed. 546; *Kester v. Western U. Teleg. Co.* 55 Fed. 604; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, 6 C. C. A. 439, 13 U. S. App. 317, 57 Fed. 478; *Chapman v. Western U. Teleg. Co.* 88 Ga. 767, 17 L. R. A. 431, 30 Am. St. Rep. 183, 15 S. E. 901; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 76, 54 L. R. A. 850, 60 N. E. 674; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 443; *Butner v. Western U. Teleg. Co.* 2 Okla. 238, 4 Inters. Com. Rep. 771, 37 Pac. 1087; *Lewis v. Western U. Teleg. Co.* 57 S. C. 330, 35 S. E. 556; *Connelly v. Western U. Teleg. Co.* 100 Va. 59, 56 L. R. A. 667, 93 Am. St. Rep. 919, 40 S. E. 618; *Peay v. Western U. Teleg. Co.* 64 Ark. 546, 39 L. R. A. 467, 43 S. W. 965; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 283, 126 Fed. 297,—disallowing same where caused by negligent delay in transmission of telegram; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 447, 21 L. R. A. 815, 14 So. 148, allowing only nominal damages for mental suffering due to failure to promptly send telegram; *Connell v. Western U. Teleg. Co.* 116 Mo. 50, 20 L. R. A. 178, 38 Am. St. Rep. 575, 22 S. W. 345, refusing to allow same for negligent delay in transmission of message, though result apparent from contents; *Rowan v. Western U. Teleg. Co.* 149 Fed. 554, holding that damages for

mental suffering cannot be recovered for failure to deliver a death message; *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 95, holding that state statute making telegraph company doing business in state liable for mental anguish, for negligence in delivering telegram, applies only where negligence occurred within that state; *Western U. Teleg. Co. v. Chouteau*, 28 Okla. 680, — L.R.A.(N.S.) —, 115 Pac. 879, Ann. Cas. 1912 D, 824, holding that recovery cannot be had for mental distress alone caused by negligent delay in delivering telegram.

Cited in notes (117 Am. St. Rep. 314) on mental anguish incident to messages relating to sickness, death and burial; (30 L.R.A.(N.S.) 1139) on recovery for mental suffering of addressee of telegram for delay in delivery.

10 L. R. A. 465, *GETTY v. PETERS*, 82 Mich. 661, 46 N. W. 1036.

Forfeitures of land contracts for default.

Cited in *Bartlett v. Smith*, 146 Mich. 190, 117 Am. St. Rep. 625, 109 N. W. 260, holding where vendor contracts against encumbrances and there is a mortgage on land he cannot have contract forfeited for nonpayment until mortgage is discharged; *Treat v. Detroit United R. Co.* 157 Mich. 325, 133 Am. St. Rep. 347, 122 N. W. 93, holding that vendee under a land contract entitled to notice of claim and cause of forfeiture and a reasonable time to comply before he can be ejected; *Phenix v. Bijilich*, 30 Nev. 269, 95 Pac. 351, holding where the vendor makes false and fraudulent representations as to title that vendee may rescind without first restoring amount received under contract; *Weitzel v. Leyson*, 23 S. D. 376, 121 N. W. 868, holding that vendee has immediate right of rescission, where vendor of land claimed to be owner, when in fact he held no title.

Cited in notes (12 L. R. A. 240) on effect of forfeiture clause in contract on right to specific performance; (30 L. R. A. 62) on right to rescind or abandon contract because of other party's fault; (3 L.R.A.(N.S.) 103) on necessity of perfecting title before time for performance to hold vendee; (107 Am. St. Rep. 726) on notice of rescission or forfeiture as condition precedent to action to recover premises on vendee's default.

Distinguished in *Gould v. Young*, 143 Mich. 577, 107 N. W. 281, holding the fact that vendor in an executory contract for the sale of land borrows money by encumbering land after entering into contract does entitle vendee to have amount raised applied on contract.

10 L. R. A. 468, *TASKER v. STANLEY*, 153 Mass. 148, 26 N. E. 417.

Liability for act causing injury.

Cited in *Niven v. Boland*, 177 Mass. 14, 52 L. R. A. 788, 58 N. E. 282, holding examining physicians not liable for injury caused by their good-faith statutory certificate to party's inebriacy; *Graves v. Johnson*, 156 Mass. 213, 15 L. R. A. 838, 32 Am. St. Rep. 446, 30 N. E. 818, holding vendor of liquor with knowledge of vendee's intention to effect unlawful resale, cannot recover purchase price; *Hayes v. Hyde Park*, 153 Mass. 516, 12 L. R. A. 250, 27 N. E. 522, holding city liable for injury caused by wire negligently hanging in highway, though it would not have occurred but for unintentional act of driver of another wagon; *Corey v. Eastman*, 166 Mass. 287, 55 Am. St. Rep. 401, 44 N. E. 217, holding architect liable for negligent over-estimates of work by builder where employer bases payments thereon; *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L. R. A. 699, 44 C. C. A. 433, 105 Fed. 171 (dissenting opinion) majority denying merchant's liability to manufacturer by sending circulars to retail trade offering what he has of product at cut rate prices.

Action for injury caused by persuasion.

Cited in *Plant v. Woods*, 176 Mass. 500, 51 L. R. A. 343, 79 Am. St. Rep. 330, 57 N. E. 1011, enjoining labor union from persuasion, accompanied by threats of injury to business, in regard to employment of nonunion labor; *Vegelahn v. Guntner*, 167 Mass. 105, 35 L. R. A. 726, 57 Am. St. Rep. 443, 44 N. E. 1077 (dissenting opinion), majority enjoining maintenance of patrol interfering with business by persuasion, even where unaccompanied by threats of personal injury; *Moran v. Dunphy*, 177 Mass. 487, 52 L. R. A. 116, 83 Am. St. Rep. 289, 59 N. E. 125, sustaining action for maliciously and without justifiable cause persuading another to end his employment; *Gerner v. Gerner*, 185 Pa. 237, 40 L. R. A. 550, 64 Am. St. Rep. 646, 39 Atl. 884, sustaining judgment by wife against husband's father for maliciously persuading him to leave her; *Oakman v. Belden*, 94 Me. 283, 80 Am. St. Rep. 396, 47 Atl. 553, holding parents not liable to husband for inducing separation of wife where arguments were based upon reasonable though mistaken grounds of belief; *Mey v. Wood*, 172 Mass. 15, 51 N. E. 191 (dissenting opinion), majority holding statements alleged to be false and malicious must be set out in action for damages for inducing party to discharge servant; *Wells & R. Co. v. Abraham*, 146 Fed. 194, holding that it is a violation of a legal duty to maliciously interfere with contract between other parties; *Heisler v. Heisler*, 151 Iowa, 506, 131 N. W. 676, holding that parent is not liable for alienation of affection for giving advice honestly and with view to welfare of both parties, although such advice may lead to separation; *Jones v. Monson*, 137 Wis. 487, 129 Am. St. Rep. 1082, 119 N. W. 179, holding parent may advise child in respect to continuing to reside with husband if done in good faith; *Multer v. Knibbs*, 193 Mass. 557, 9 L.R.A.(N.S.) 325, 79 N. E. 762, 9 A. & E. Ann. Cas. 958, holding father not liable for causing his daughter to separate from her husband by advising her to do so, where he honestly believes such separation to be for her best interest; *Nolin v. Pearson*, 191 Mass. 288, 4 L.R.A.(N.S.) 647, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding that wife might maintain an action for alienation of the affections of her husband.

Cited in footnotes to *Houghton v. Rice*, 47 L. R. A. 311, which denies right of action against other woman for alienating husband's affections, unaccompanied by adultery; *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife.

Cited in notes (11 L.R.A. 548) as to when inducements to violate obligations are not actionable; (44 Am. St. Rep. 845, 848, 849, 850, 851) on action for alienation of wife's affections.

Proof of motive.

Cited in *Helm v. Anchor F. Ins. Co.* 132 Iowa, 180, 109 N. W. 605, holding that one charged with making false or fraudulent charges may testify directly as to intent or motives.

Cited in note (23 L.R.A.(N.S.) 391) on right of one to testify as to his intent.

10 L. R. A. 469, *DARLING v. BUTLER*, 45 Fed. 332.

Validity of transfer by oral agreement.

Cited in *Tynan v. Warren*, 53 N. J. Eq. 320, 31 Atl. 596, holding title to trust interest not acquired by holder of legal title, through oral agreement of relinquishment; *Whitney v. Dewey*, 10 Idaho, 652, 69 L.R.A. 580, 80 Pac. 1117, holding parol evidence not admissible to show a deed delivered to grantee is subject to the happening of a contingency not expressed therein.

Delivery in escrow.

Cited in *Dyer v. Skadan*, 128 Mich. 354, 93 Am. St. Rep. 461, 87 N. W. 277,

upholding conveyance by wife to husband by deed delivered to him for record only in case of his survivorship, where no control over instrument reserved; *Dennison v. Barney*, 49 Colo. 452, 113 Pac. 519, holding that deed cannot be delivered in escrow to grantee; *Jackson v. Lamar*, 58 Wash. 388, 108 Pac. 946, to the point that deed cannot be delivered in escrow to grantee.

Cited in footnotes to *Martin v. Flaharty*, 19 L. R. A. 243, which holds manual delivery of deed not essential; *Carter v. Moulton*, 20 L. R. A. 309, which holds delivery of note to one joint maker not an escrow; *Whitney v. Dewey*, 69 L.R.A. 572, which holds that deed absolute on face cannot be delivered to grantee to be held in escrow.

Cited in notes (12 L.R.A. 175) on delivery of deed in escrow; (16 L.R.A.(N.S.) 942) on effect of delivery of deed to grantee, subject to extrinsic condition.

10 L. R. A. 472, *DUTCHER v. HOBBY*, 86 Ga. 198, 22 Am. St. Rep. 444, 12 S. E. 356.

Subrogation.

Cited in *Ashley v. Cook*, 109 Ga. 658, 35 S. E. 89, holding purchaser at void judicial sale on foreclosure of special lien under security deed may set up rights of lienor to defeat ejectment suit, though not pleaded; *Fowler v. Maus*, 141 Ind. 54, 40 N. E. 56, holding purchaser of grantee entitled as against wife of grantor to mortgage by grantor to secure grantee against encumbrances; *Paton v. Robinson*, 81 Conn. 553, 71 Atl. 730, holding that the purchaser of a supposedly good title who discharges a mortgage on property is entitled to be subrogated to rights of mortgage as against true owner of land; *Harrill v. Weer*, 26 Okla. 318, 109 Pac. 539, holding that purchaser at void foreclosure sale under mortgage becomes subrogated to all rights of mortgagee.

Cited in footnotes to *Campbell v. Foster Home Asso.* 26 L. R. A. 117, which denies subrogation to prior mortgage paid without mortgagor's consent out of proceeds of invalid mortgage; *Dorrah v. Hill*, 32 L. R. A. 631, which sustains right of one loaning money on invalid deed of trust to be subrogated to prior valid deed paid off with money loaned.

Cited in notes (27 Am. St. Rep. 753) on subrogation to rights of mortgagor of purchaser at sale under defective power; (99 Am. St. Rep. 529) on right of subrogation.

Rights of mortgagee in possession.

Cited in *Huguley Mfg. Co. v. Galetton Cotton Mills*, 36 C. C. A. 238, 94 Fed. 270, holding mortgagee in possession under foreclosure judgment, entitled on subsequent reversal, to have value of rental during his occupation applied on balance due after resale.

Cited in note (40 L.R.A.(N.S.) 839, 843) on right of one in possession claiming under void foreclosure.

10 L. R. A. 473, *CAIRNCROSS v. PEWAUKEE*, 78 Wis. 66, 47 N. W. 13.

Liability of municipality for unlawful use of highway.

Cited in *Loberg v. Amherst*, 87 Wis. 642, 41 Am. St. Rep. 69, 58 N. W. 1048, holding town not liable for injury through fright of horse at mortar boxes beside highway, in absence of notice of unlawful manner of use; *District of Columbia v. Moulton*, 182 U. S. 579, 45 L. ed. 1239, 21 Sup. Ct. Rep. 840, holding municipality not liable for injury due to fright of horse at steam roller temporarily canvass covered at side of street while out of repair; *Portsmouth v. Lee*, 112 Va. 427, 71 S. E. 630, holding that no action lies against city for injury resulting from stumbling over hose pipe 3½ inches in diameter, left lying in street at night.

unguarded, where it appears it was directly under electric light, and was in use in flushing sewer; *Carlton v. Greenfield*, 130 Wis. 346, 110 N. W. 208, holding that municipality liable for allowing deposit of materials in street which render it unsafe for traveler; *Radichel v. Kendall*, 121 Wis. 563, 99 N. W. 348, holding that a municipality may become liable for negligence in allowing vehicles to be left in street; *Phelan v. Granite Bituminous Paving Co.* 227 Mo. 705, 127 S. W. 318, holding one attempting to drive a team past a steam roller working on a street takes chances of his horses becoming frightened.

Cited in footnotes to *Chicago, G. W. R. Co. v. First M. E. Church*, 50 L.R.A. 488, which holds water tank in street and station at which bells constantly rung and whistles blown within few rods of church, a nuisance; *Seibert v. Missouri P. R. Co.* 70 L.R.A. 72, which holds safety gates at railroad crossing though placed inside curb not nuisance where sufficient space is left for travel; *Cleveland v. Payne*, 70 L.R.A. 841, which holds policeman's knowledge of defect in street not such notice to city as to make it responsible for damages resulting from defect.

Cited in notes (10 L. R. A. 737) on municipal duty to keep streets and sidewalks in safe condition and liable for neglect to do so; (15 L. R. A. 365, 366) on municipal liability for injuries caused by horse becoming frightened at object in highway; (20 L.R.A.(N.S.) 615) on liability of municipality for defects or obstructions in streets.

— Liability of abutter.

Cited in *Davis v. Thompson*, 134 Mo. App. 18, 114 S. W. 550, holding a farmer not negligent in leaving roll of wire on side of fence temporarily while repairing fence.

Sufficiency of general allegations of a fact.

Cited in *Louisville & N. R. Co. v. Vanzant*, 158 Ala. 531, 48 So. 389, holding that a complaint alleging frightening of horses by a hand car should allege that hand car was an object calculated to frighten horses.

Cited in note (59 L. R. A. 234, 248) on sufficiency of general allegations of negligence.

10 L. R. A. 478, *NEW ENGLAND LOAN & T. CO. v. YOUNG*, 81 Iowa, 732, 39 N. W. 116, 46 N. W. 1103.

Tax liens.

Cited in *Minnesota v. Central Trust Co.* 36 C. C. A. 217, 94 Fed. 248, holding personalty tax lien superior under statute to all other liens, prior or subsequent; *Mutual Ben. L. Ins. Co. v. Siefken*, 1 Neb. (unof.) 863, 96 N. W. 603, holding no error to deduct taxes from appraised value of real estate.

Cited in notes (29 L. R. A. 278, 280) on priority of claims for taxes against assets of a debtor; (35 L. R. A. 373, 377) on superiority of lien of local assessment over prior lien; (11 L. R. A. 317) on taxes as lien on real property.

Distinguished in *Smith v. Skow*, 97 Iowa, 641, 66 N. W. 893, holding mortgage lien superior to license tax subsequently assessed; *Re Ott*, 95 Fed. 279, holding license tax does not take precedence over prior liens on distribution among creditors in insolvency.

Disapproved in *Miller v. Anderson*, 1 S. D. 544, 11 L. R. A. 320, 47 N. W. 957, holding tax liens subject to mortgage liens previously in existence.

Overruled in *Bibbins v. Clark*, 90 Iowa, 234, 29 L. R. A. 282, 57 N. W. 884, holding lien for personalty tax subject to prior mortgage liens.

Cited as overruled in *Bibbins v. Polk County*, 100 Iowa, 497, 69 N. W. 1007, holding payment of subsequent personalty tax by second mortgagee to secure

dismissal of foreclosure by first mortgagee not within statute providing for refund of taxes erroneously or illegally paid; *Lobban v. State*, 9 Wyo. 383, 64 Pac. 82, ordering by mandamus, issue of tax receipts to purchaser under prior mortgage sale, who pays taxes constituting subsequent lien.

10 L. R. A. 481, *BUNNELL v. STERN*, 122 N. Y. 539, 19 Am. St. Rep. 519, 25 N. E. 910.

Liability for loss of property of customer or guest.

Cited in *Bird v. Everard*, 4 Misc. 105, 23 N. Y. Supp. 1008, holding proprietor of Turkish bath liable for loss of coat from room where customer left same during bath; *Buttman v. Dennett*, 9 Misc. 462, 30 N. Y. Supp. 247, holding restaurant keeper liable for apparel left in his custody temporarily; *Appleton v. Welch*, 20 Misc. 345, 45 N. Y. Supp. 751, holding restaurant proprietor liable for loss of wraps taken charge of by waiter; *Bradner v. Mullen*, 27 Misc. 482, 59 N. Y. Supp. 178, holding hotel keeper liable for loss of coat hung by guest on hook behind desk in presence of employee apparently in charge; *Woodruff v. Painter*, 150 Pa. 96, 16 L. R. A. 452, footnote p. 451, 30 Am. St. Rep. 786, 24 Atl. 621, holding proprietor liable for watch laid aside by customer trying on suit of clothes, unless stolen without negligence on his part; *Hunter v. Reed*, 12 Pa. Super. Ct. 117, allowing recovery by customer, of only reasonable sum of money, on theft of diamond ring, cash, etc., from pocket of trousers, while trying on new suit; *Vogelsang v. Fredkyn*, 133 Ill. App. 359, holding a restaurant keeper liable where head waiter took coat of customer to some place unknown to customer and after dinner coat could not be found; *Wamser v. Browning*, 109 App. Div. 55, 95 N. Y. Supp. 1051, holding shopkeeper liable for property stolen while laid aside for purpose of trying on other clothing in absence of proper care on part of shopkeeper; *Wamser v. Browning, K. & Co.* 187 N. Y. 89, 10 L.R.A.(N.S.) 316, 79 N. E. 861, holding store keeper not liable for theft of valuable laid aside to try on garments by customer, where customer knows clerks are busy, and there is no one to watch the garments but himself; *Hasbrouck v. New York C. & H. R. R. Co.* 202 N. Y. 373, 35 L.R.A.(N.S.) 541, 95 N. E. 808, holding that railroad is liable for loss of articles taken from passengers suitcase by trainman to whom it was delivered; *Walpert v. Bohan*, 126 Ga. 535, 6 L.R.A.(N.S.) 831, 115 Am. St. Rep. 114, 8 A. & E. Ann. Cas. 89, holding the proprietor of a bath-house who for consideration furnished bathrooms and received valuables for safe keeping is liable for loss occurring from want of the care; *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 299, 92 N. W. 354, 1 A. & E. Ann. Cas. 21, holding bath house keeper liable for property stolen which is turned over to his care in absence of proof of proper care as custodian.

Cited in footnotes to *Prince v. Alabama State Fair*, 28 L. R. A. 716, which holds bailee of picture for competitive exhibition at fair liable for its loss; *Smith v. Library Board*, 25 L. R. A. 280, which holds bailee liable for gross negligence, notwithstanding notice against responsibility; *Tombler v. Keelling*, 27 L. R. A. 502, which holds check given to customer of bath house for valuables insufficient to show right thereto.

Cited in note (10 L.R.A.(N.S.) 314) on liability of storekeeper for theft from customer.

Distinguished in *Powers v. O'Neill*, 89 Hun, 130, 34 N. Y. Supp. 1007, holding proprietor of store not liable for loss of pocketbook placed under hat on removal, to try on new hat; *McAllister v. Simon*, 27 Misc. 217, 57 N. Y. Supp. 733, holding tailor not liable for loss of customer's purse laid aside in fitting-rooms whither she had gone without invitation; *Pattison v. Hammerstein*, 17 Misc. 376, 39 N. Y. Supp. 1039, holding proprietor of theatre not liable, in ab-

sence of negligence, for loss of out-door wraps hung on pegs of box; *Montgomery v. Ladjing*, 30 Misc. 95, 61 N. Y. Supp. 840, denying liability of restaurant keeper for loss of overcoat hung up during meal by patron, in absence of special bailment, or notice, or insufficient general supervision; *Tyson v. Bauland Co.* 186 N. Y. 401, 9 L.R.A. (N.S.) 269, 79 N. E. 3, holding a storekeeper not responsible for an arrest by special officer appointed at his request, of a person who in suspicious circumstances has possession of a satchel.

Duty voluntarily assumed.

Cited in *Brock v. St. Louis Transit Co.* 107 Mo. App. 116, 81 S. W. 219, holding where street car employees undertake to make an extra trip for a passenger that servants are bound to use ordinary care for passenger's safety.

Duty to invited person.

Cited in *Deyo v. Kingston Consol. R. Co.* 94 App. Div. 584, 88 N. Y. Supp. 487 (dissenting opinion), majority denying liability of owner of park for injury to spectator from rocket set off by independent contractor.

10 L. R. A. 484, *CURTIS v. LA GRANDE HYDRAULIC WATER CO.* 20 Or. 34, 23 Pac. 808, 25 Pac. 378.

Interest under license.

Cited in *Garrett v. Bishop*, 27 Or. 353, 41 Pac. 10, refusing to enjoin use of ditch dug across plaintiff's premises, under license to mine, where valuable improvements erected in reliance thereon; *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 808, 64 N. W. 239, denying injunction relief to party permitting construction of injurious ditch without complaint; *McBroom v. Thompson*, 25 Or. 566, 42 Am. St. Rep. 806, 37 Pac. 58, holding grantee with notice, of licensor, takes subject to license, where licensee has dug ditch and prepared land for irrigation in reliance thereon; *Sumpter R. Co. v. Gardner*, 49 Or. 416, 90 Pac. 499, holding parol license to build a railroad for a specific purpose cannot be revoked where railroad is built on faith of it; *Boring Lumber Co. v. Roots*, 49 Or. 575, 90 Pac. 487, holding that place of exercising license may be afterwards determined by parties; *Shaw v. Proffitt*, 57 Or. 202, 109 Pac. 584, holding that express license is made irrevocable by expenditures made in permanent improvements, but implied license from silence is not.

Cited in notes (49 L.R.A. 522) on revocability of license to maintain a burden on land after licensee has incurred expense in creating the burden; (31 Am. St. Rep. 170) on protection of license in equity; (31 Am. St. Rep. 713, 718), on nature and revocation of parol licenses; (16 Eng. Rul. Cas. 80) on revocability of license.

Distinguished in *North Powder Milling Co. v. Coughanour*, 34 Or. 21, 54 Pac. 223, holding grantee of licensor with notice not estopped to deny licensee's right to use ditch for other purpose than that covered by license; *Bowman v. Bowman*, 35 Or. 281, 57 Pac. 546, holding license to connect with ditches does not give licensee water rights adverse to prior appropriator; *Lavery v. Arnold*, 36 Or. 86, 57 Pac. 906, holding silent acquiescence in digging of ditch by neighbor not license to infringe prior appropriation of water; *Hallock v. Suitor*, 37 Or. 13, 60 Pac. 384, enjoining maintenance of dam in navigable stream at suit of riparian owner not objecting to erection at time of announcement of intention to build; *Miser v. O'Shea*, 37 Or. 237, 82 Am. St. Rep. 751, 62 Pac. 491, holding license to flood tailings on plaintiff's lands revocable, where no consideration paid for license, and expense of improvements erected covered by operation of mine; *Ewing v. Rhea*, 37 Or. 584, 52 L. R. A. 141, 82 Am. St. Rep. 783, 62 Pac. 790,

holding party not estopped from interference with ditch by silent acquiescence of predecessor in title in its construction.

Disapproved in *Flinn v. Vaughn*, 55 Or. 375, 106 Pac. 642, holding that failure to object to construction of dam will not estop abutting landowner to sue to restrain maintenance of dam, when dam would have been constructed regardless of objections.

Appropriation of water.

Cited in *Benton v. Johncox*, 17 Wash. 289, 39 L. R. A. 111, 61 Am. St. Rep. 912, 49 Pac. 495, holding prior riparian rights unaffected by statute regulating appropriation for irrigation; *Carson v. Gentner*, 33 Or. 517, 43 L. R. A. 132, 52 Pac. 506, enjoining interference by patentee with repair of ditch by party digging same prior to patent.

Cited in notes (30 L.R.A. 678) on right of prior appropriation of water; (25 Am. St. Rep. 254) on rights of prior appropriator of water.

Distinguished in *California Pastoral & Agri. Co. v. Enterprise Canal & Land Co.* 127 Fed. 742, holding riparian owner not estopped to enjoin wrongful diversion of stream by delay in bringing suit; *Fitzpatrick v. Montgomery*, 20 Mont. 185, 63 Am. St. Rep. 622, 50 Pac. 416, holding miner cannot by prior appropriation of stream acquire right to empty tailings to extent rendering lower property valueless.

Adverse possession.

Cited in *Williamette Real Estate Co. v. Hendrix*, 28 Or. 497, 52 Am. St. Rep. 800, 42 Pac. 514, denying title by adverse possession where claimant not in occupation of premises; *Anthony v. Kennard Bldg. Co.* 188 Mo. 720, 87 S. W. 921, holding mere permissive use of a private alley by a neighbor not adverse; *Watts v. Spencer*, 51 Or. 273, 94 Pac. 39, holding that a prescriptive right to take water cannot be acquired where water is taken with permission of owner; *Hume v. Rogue River Packing Co.* 51 Or. 256, 31 L.R.A.(N.S.) 404, 131 Am. St. Rep. 732, 92 Pac. 1065, holding the long use of seines and nets in Rogue river by riparian owners, alone does not give exclusive right by prescription.

Cited in footnote to *Boyce v. Missouri P. R. Co.* 58 L. R. A. 442, which sustains conclusive presumption of prescription right by lost grant from adverse user of easement for statutory periods.

Cited in notes (12 L.R.A.(N.S.) 1145) on right of permissive possessor to acquire title by adverse possession; (10 Eng. Rul. Cas. 97) on what is necessary to obtain easement by prescription.

Modification of decision.

Distinguished in *Portland Trust Co. v. Coulter*, 23 Or. 136, 31 Pac. 282, refusing to consider correctness of decision on former appeal, where no motion for rehearing made.

10 L. R. A. 490, *LOFTIN v. HINES*, 107 N. C. 360, 12 S. E. 197.

Mortgage of after-acquired property.

Cited in *Brown v. Neilson*, 61 Neb. 775, 54 L. R. A. 332, 87 Am. St. Rep. 525, 86 N. W. 498, holding stipulation in lease for rent lien, ineffectual as to crops subsequently grown and property not in use as execution; *Warren v. Short*, 119 N. C. 42, 25 S. E. 704, holding only such trees as have attained specified proportions at time of execution pass under deed not providing for inclusion of those attaining size within period; *Odum v. Clark*, 146 N. C. 551, 60 S. E. 513, holding a verbal extension of a mortgage of crops for next current year valid.

Cited in notes (23 L. R. A. 464, 476) on sale or mortgage of future crops; (18 L. R. A. 299) on efficacy of mortgage on chattels to be manufactured or

acquired as independent articles, and not as increase or fruits of existing property; (5 Eng. Rul. Cas. 137) on mortgage of future crops.

Distinguished in *Hahn v. Heath*, 127 N. C. 28, 37 S. E. 63, upholding mortgage of crop of single season following execution; *Perry v. White*, 111 N. C. 199, 16 S. E. 172, upholding *inter partes* mortgage of trade fixtures "thereafter to be affixed;" *Crinkley v. Egerton*, 113 N. C. 448, 18 S. E. 669, upholding priority of rent lien under sale agreement between vendor and vendee, over subsequent mortgage lien; *Brown v. Dail*, 117 N. C. 44, 23 S. E. 45, holding logs subject as against vendor to mortgage on future stock and products as security for loan constituting capital; *Merchant's Nat. Bank v. Mann*, 2 N. D. 460, 51 N. W. 946, upholding mortgage of crops on specified land for succeeding years until payment of debt thereby secured.

Description of property covered by mortgage.

Cited in *Hughes v. Abston*, 105 Tenn. 73, 58 S. W. 296, upholding mortgage of "entire interest in crop of corn, to be grown by me this present year" on property located in certain county, where valid in state of execution.

10 L. R. A. 493, *NORMAL SCHOOL DIST. NO. 3 v. PAINTER*, 102 Mo. 464, 14 S. W. 938.

Conveyances for specific use.

Cited in *Flaten v. Moorhead*, 51 Minn. 522, 19 L. R. A. 196, 53 N. W. 807, enjoining erection of prison on land acquired by municipality under conveyance for use "as public park;" *Gaskins v. Williams*, 235 Mo. 571, 35 L.R.A.(N.S.) 609, 139 S. W. 1177, holding that land dedicated for court house purposes cannot be used for any other public purposes.

Distinguished in *Hand v. St. Louis*, 158 Mo. 211, 59 S. W. 92, denying reversion to grantor's devisee of land diverted from use expressed in unconditional deed.

Doctrine of cy pres.

Cited in footnotes to *Kelly v. Nichols*, 19 L. R. A. 413, which holds doctrine of *cy pres* inapplicable to bequest not made to definite charitable use; *Crerar v. Williams*, 21 L. R. A. 454, which holds other mode for carrying charity into effect will be provided, if mode pointed out in will fails.

10 L. R. A. 495, *BURLINGAME v. GOODSPEED*, 153 Mass. 24, 26 N. E. 232

Right to proceeds of insurance.

Cited in *Spalding v. Miller*, 103 Ky. 413, 45 S. W. 462; *Harrison v. Pepper*, 166 Mass. 289, 33 L. R. A. 241, 55 Am. St. Rep. 404, 44 N. E. 222, holding remainder-man not entitled to any part of fund realized by life tenant, where insurance not for latter's benefit; *Gillespie v. Scottish Union & Nat. Ins. Co.* 61 W. Va. 176, 11 L.R.A.(N.S.) 147, 56 S. E. 213, holding mortgagor to have no interest in the proceeds of a policy insuring the mortgagee, taken out by the mortgagee to protect his own interest, and where the interest of the mortgagor has been forfeited.

Cited in note (11 L.R.A.(N.S.) 143) on interest of mortgagor in insurance secured by mortgagee for own protection.

10 L. R. A. 497, *SUBURBAN LIGHT & POWER CO. v. BOSTON*, 153 Mass. 200, 26 N. E. 447.

Police power.

Cited in *Monongahela City v. Monongahela Electric Light Co.* 3 Pa. Dist. R.

67, 12 Pa. Co. Ct. 534, compelling removal of electric wire poles erected by permission of city, where removal necessary for authorized street improvement.

Cited in note (31 L. R. A. 801) on police regulation of electric companies.

Additional street burden.

Cited in *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 399, 65 N. E. 835, holding that company maintaining telephone wires under street have no property rights in street subject of assessment for damages; *Eustis v. Milton Street R. Co.* 183 Mass. 588, 67 N. E. 663, sustaining statute authorizing selectmen to lay out streets with space for street railways.

Cited in footnote to *State v. Central N. J. Teleph. Co.* 11 L. R. A. 664, which holds company organized under act to regulate telegraph companies may condemn route for telephone lines.

Cited in note (17 L. R. A. 480) on what uses of street or highway constitutes additional burden.

Meaning of words "shall" and "may."

Cited in *State ex rel. Dangberg v. Douglass County*, 27 Nev. 472, 77 Pac. 984, holding "shall" to mean "may" in a statute respecting consideration of commissioner of a petition for closing a highway; *Cheney v. Coughlin*, 201 Mass. 212, 87 N. E. 744, holding a statute as to time of granting licenses to sell liquor directory and not mandatory; *Rutter v. White*, 204 Mass. 62, 90 N. E. 401, holding same as to a statute providing time for appointment of an engineer by mayor.

10 L. R. A. 500, *BENNETT v. FENTON*, 41 Fed. 283.

Jurisdiction under publication of summons.

Cited in *Adams v. Heckscher*, 80 Fed. 743, denying jurisdiction on substituted service of summons against nonresident defendant in personal action for specific performance of contract to convey land; *Lane v. Innes*, 43 Minn. 141, 45 N. W. 4, upholding judgment in favor of assignee for benefit of creditors against grantee in deed alleged to be fraudulent, where summons served by publication; *Corson v. Shoemaker*, 55 Minn. 399, 57 N. W. 134, holding service by publication sufficient in action to reform description in deed of realty; *Murray v. Murray*, 115 Cal. 276, 37 L. R. A. 629, 56 Am. St. Rep. 97, 47 Pac. 37, upholding judgment *in rem* in divorce proceeding where receiver of specific property of nonresident appointed and summons served by publication; *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 311, 8 L.R.A.(N.S.) 687, 119 Am. St. Rep. 199, 88 Pac. 356, holding that legislature has power to provide for the re-establishment of lost record titles to real estate against unknown claimant of proceeds served by publication; *Patterson v. Farmington Street R. Co.* 76 Conn. 635, 57 Atl. 853, holding an action to adjust interest in the stock of a domestic corporation and to compel registry on its books, of legal title to be an action *in rem*.

Cited in note (29 L.R.A.(N.S.) 626, 629) as to whether jurisdiction of suit to quiet title or remove cloud on title of land within territorial jurisdiction may rest upon constructive service of nonresident.

Cited as overruled in effect in *Knudson v. Litchfield*, 87 Iowa, 121, 54 N. W. 199, holding publication of summons against nonresident in action to quiet title constitutes due process of law.

10 L. R. A. 504, *COUSINS v. ALWORTH*, 44 Minn. 505, 47 N. W. 169.

Publication of summons.

Cited in *Hartzell v. Vigen*, 6 N. D. 135, 35 L. R. A. 459, 66 Am. St. Rep. 589, 69 N. W. 203 (dissenting opinion), majority upholding publication of summons

based on affidavit showing jurisdiction of controversy, but not of subject-matter of attachment.

Cited in footnote to *Bennett v. Fenton*, 10 L. R. A. 500, which sustains judgment against nonresident served by publication in action to determine adverse claim to land.

Sheriff's return.

Cited in *Corson v. Shoemaker*, 55 Minn. 391, 57 N. W. 134, holding filing of sheriff's return on summons or affidavits of defendant's nonresidence, essential prerequisite to publication of summons; *Crosson v. Olson*, 47 Minn. 27, 49 N. W. 406, holding finding that sheriff attached property "as of the property" of judgment debtor, not equivalent to finding of debtor's ownership.

10 L. R. A. 507, *McKISSON v. DAVENPORT*, 83 Mich. 211, 47 N. W. 100.

Statutory limitation on foreclosure of mortgage.

Cited in *Hayward v. Kinney*, 84 Mich. 598, 48 N. W. 170, permitting foreclosure of mortgage over twenty years after maturity where executed prior to statute; *Highstone v. Franks*, 93 Mich. 55, 52 N. W. 1015, holding foreclosure barred where not commenced within five years after passage of statute though executed prior thereto; *McIntire v. Conrad*, 93 Mich. 532, 53 N. W. 829, holding five-year proviso not applicable to mortgage on which fifteen years since maturity not elapsed prior to enactment of statute; *McKenzie v. A. P. Cook Co.* 113 Mich. 455, 71 N. W. 868, holding possession for fifteen years under tax title insufficient where disputable within twenty years at time of acquisition, though subsequent statute limits period to ten years.

Cited in footnotes to *Hulbert v. Clark*, 14 L. R. A. 59, which holds foreclosure of mortgage not barred by bar of action on notes secured; *Osborne v. Lindstrom*, 46 L. R. A. 715, which holds invalid, statute shortening period of limitation without leaving reasonable time to sue.

Cited in note (21 L. R. A. 551) on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust securing same.

Limitation on existing causes of action.

Cited in *Hathaway v. Washington Milling Co.* 139 Mich. 711, 103 N. W. 164, holding a statute limiting time within which to bring a personal injury action affects an action accruing after law becomes operative.

Cited in note (111 Am. St. Rep. 460) on retrospective operation of statutes of limitation.

Construction of statutes.

Cited in *Angell v. West Bay City*, 117 Mich. 688, 76 N. W. 128, holding charter provision for notice of injury not binding on party injured before charter went into effect; *McKean v. Archer*, 52 Fed. 793, holding time for action on note previously executed not altered by limiting statute with proviso for government of existing contracts by "existing laws;" *Arenac County v. Iosco County*, 158 Mich. 347, 122 N. W. 629, holding that a statute cannot be construed as retroactive to the detriment of vested rights; *Weller v. Wheelock*, 155 Mich. 710, 118 N. W. 609 (dissenting opinion), on what statutes have a retrospective operation.

Effect of check to toll statute of limitations.

Cited in note (18 L.R.A.(N.S.) 224) on effect of giving check to toll statute of limitations.

10 L. R. A. 513, *LEWIS v. NEW YORK & N. E. R. CO.* 153 Mass. 73, 26 N. E. 431.

Assumption of risk.

Cited in *Lamson v. American Axe & Tool Co.* 177 Mass. 145, 83 Am. St. Rep.

267, 58 N. E. 585, directing verdict for defendant where employee continues to work after complaint of danger for which no remedy offered; *Coombs v. Fitchburg R. Co.* 156 Mass. 202, 30 N. E. 1140, denying recovery to brakeman attempting to make flying switch, aware of danger; *Bancroft v. Boston & M. R. Co.* 67 N. H. 468, 30 Atl. 409, holding risk assumed where brakeman aware of obstruction and lack of guard at crossing, injured in collision with wagon; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 158, 31 Am. St. Rep. 537, 29 N. E. 464, holding assumption of risk for jury where employee injured by icy steps used daily in attending work; *Miner v. Connecticut River R. Co.* 153 Mass. 404, 26 N. E. 994, holding defendant entitled to directed verdict if jury find that plaintiff knew of dangerous position of car from which unloading and nevertheless approached; *May v. Whittier Mach. Co.* 154 Mass. 31, 27 N. E. 768, upholding directed verdict for defendant, where plaintiff injured by reason of pile of boards placed by fellow servant in passageway of mill; *Equitable Powder Mfg. Co. v. Green*, 109 Ill. App. 409, holding master's ordering servant back to work not waiver of assumption of risk on account of dull punch.

Distinguished in *Viou v. Brooks-Scanlon Lumber Co.* 99 Minn. 100, 108 N. W. 891, 9 A. & E. Ann. Cas. 318, holding a statement by employee, "somebody is going to get hurt here," does not conclusively show an assumption of risk.

— **Effect of promise to remove or repair.**

Cited in *Levesque v. Janson*, 165 Mass. 17, 42 N. E. 335, holding promise of employer to get new one, not justify servant in continuing to harness vicious horse with rotten harness; *Bodwell v. Nashua Mfg. Co.* 70 N. H. 391, 47 Atl. 613, refusing damages for injury due to defective steam pipe, where no evidence that employer's promise to repair influenced plaintiff to continue work; *Gulf, C. & S. F. R. Co. v. Garren*, 96 Tex. 614, 97 Am. St. Rep. 939, 74 S. W. 897, holding engineer's remark that he would have step fixed, not promise of master to repair; *Lupher v. Atchison, T. & S. F. R. Co.* 86 Kan. 725, 122 Pac. 106, holding that servant does not assume risk where complaint is made and servant is assured that danger will be removed, simply because master had other reasons than safety of servant for making of change; *Daily v. Fiberloid Co.* 186 Mass. 320, 71 N. E. 554, holding servant's continuance to work must be in reliance of master's promise to repair; *St. Louis & S. F. R. Co. v. Mealman*, 78 Kan. 502, 97 Pac. 381, holding where servant did not consider defect dangerous and a promise to repair is simply for efficiency that servant assumes risk; *Towler v. New Jersey Adamant Mfg. Co.* 79 N. J. L. 147, 74 Atl. 279, holding that where complaint by servant as to dangerous conditions fails to show that it was predicated on any anticipated danger to himself, promise to remove danger will not enable servant to recover for injury received; *Texas & P. R. Co. v. Nichols*, 41 Tex. Civ. App. 122, 92 S. W. 411, holding where complaint is made rather for comfort and safety of public than for protection of self that servant assumes risk; *Primley v. Elbe Lumber & Shingle Co.* 53 Wash. 691, 102 Pac. 763, holding that ground of complaint must be personal to himself.

Cited in notes (40 L.R.A. 781) on rights of servant who continues work on faith of master's promise to remove a specific cause of danger; 119 Am. St. Rep. 437) on recovery for injury due to nonrepair of machinery due to master's failure to perform promise to repair.

Distinguished in *Rothenberger v. Northwestern Consol. Mill Co.* 57 Minn. 464, 59 N. W. 531, upholding verdict for plaintiff for injury caused by dangerous machinery, where foreman promised to box same; *Western Electric Co. v. Prochaska*, 129 Ill. App. 591, holding it a question for jury whether a promise to repair is for efficiency of machinery or for protection of servant.

10 L. R. A. 515, *WESTERN U. TELEG. CO. v. COLLINS*, 45 Kan. 88, 25 Pac. 187.

Sufficiency of certificate of deposition.

Cited in *Atchison, T. & S. F. R. Co. v. Pearson*, 6 Kan. App. 828, 49 Pac. 681, holding certificate insufficient where fails to show by whom examination reduced to writing; *Gifford v. Ammer*, 7 Kan. App. 368, 54 Pac. 802, holding improper exclusion of deposition not ground for reversal where deponent examined on trial as to matters therein contained.

Secondary evidence.

Cited in *Carter v. Forbes Lithograph Mfg. Co.* 22 Tex. Civ. App. 551, 56 S. W. 227, holding guaranty provable by copy of telegram containing same when original lost; *Western U. Teleg. Co. v. Collins*, 7 Kan. App. 98, 53 Pac. 74, holding evidence from which delivery of telegram, undertaking to transmit same, and relationship of parties, inferable, admissible in action for failure to transmit message.

Cited in note (110 Am. St. Rep. 769) on admissibility of telegrams as evidence.

Measure of damages.

Reaffirmed on new trial without special discussion in 7 Kan. App. 101, 53 Pac. 74.

Cited in *Western U. Teleg. Co. v. Love Banks Co.* 73 Ark. 210, 83 S. W. 949, 3 A. & E. Ann. Cas. 712, holding loss of profits for failure to deliver telegram offering a price for a commodity to be an element of damage; *Western U. Teleg. Co. v. Coyle*, 24 Okla. 742, 104 Pac. 367, holding that measure of damages for loss of sale because of delay in delivery of telegram, is difference between price that would have been realized and price obtainable thereafter together with necessary expenses; *Barker v. Western U. Teleg. Co.* 134 Wis. 155, 14 L.R.A.(N.S.) 537, 126 Am. St. Rep. 1017, 114 N. W. 439, holding that a physician may recover loss of fee by reason of failure to deliver telegram summoning him to attend patient.

Cited in footnotes to *Fererro v. Western U. Teleg. Co.* 35 L. R. A. 548, which limits damage for mistake in telegram as to price in offer to sell goods, in difference in price; *McPeck v. Western U. Teleg. Co.* 43 L. R. A. 214, which holds loss of reward offered for capture of criminal within damages recoverable for failure to deliver telegram; *Western U. Teleg. Co. v. North Packing & P. Co.* 52 L. R. A. 274, which holds agent purchasing live stock because of delay in delivering telegram countermanding order, not required to resell before communicating with principal, to reduce damages; *Western U. Teleg. Co. v. Nye & S. Grain Co.* 63 L.R.A. 803, which holds difference in value between market value of corn and price at which it could have been sold the measure of damages for negligent delay of telegram; *Hays v. Western U. Teleg. Co.* 67 L.R.A. 481, which holds that change in telegram so as to quote price of mules at ten dollars per head less than market price resulting in sendee's ordering purchase of designated number, renders telegraph company liable for difference between price paid and that stated in telegram.

Cited in notes (4 L.R.A.(N.S.) 265) on right to recover against telegraph company loss sustained upon commercial transaction entered into in consequence of its breach of duty; (38 L. ed. U. S. 884) on damages for error in telegraph message, or failure to deliver.

Telegraph and telephone companies.

Cited in footnote to *State v. Central New Jersey Teleph. Co.* 11 L. R. A. 664, which holds company organized under act to regulate telegraph companies may condemn route for telephone lines.

Parol evidence of meaning of telegram.

Cited in *Western U. Teleg. Co. v. Merritt*, 55 Fla. 486, 127 Am. St. Rep. 169, 46 So. 1024, holding parol evidence admissible to show trade meaning of a telegram.

10 L. R. A. 520, *LAWRENCE v. MONROE*, 44 Kan. 607, 24 Pac. 1113.

Validity of municipal liquor regulations.

Cited in *Eureka v. Jackson*, 8 Kan. App. 51, 54 Pac. 5; *Re Jahn*, 55 Kan. 696, 41 Pac. 956; *Lincoln Center v. Linker*, 6 Kan. App. 371, 51 Pac. 807; *Lincoln Center v. Linker*, 7 Kan. App. 288, 53 Pac. 787,—upholding ordinance requiring sale of malt, hop ale, cider, etc., only in gallon or greater quantities and in rooms open to public; *Topeka v. Raynor*, 61 Kan. 12, 58 Pac. 557, Affirming 8 Kan. App. 283 55 Pac. 509, upholding ordinance by city of first class declaring place where intoxicating liquor sold, nuisance; *Re Thomas*, 53 Kan. 661, 37 Pac. 171, holding state prohibition law does not affect validity of municipal liquor regulation; *State ex rel. Jackson v. Topeka Club*, 82 Kan. 763, 29 L.R.A.(N.S.) 726, 109 Pac. 183, sustaining a statute regulating the keeping of liquor by social clubs; *Campbell v. Thomasville*, 6 Ga. App. 226, 64 S. E. 815, holding that a municipality may reasonably regulate the sale of nonintoxicating liquors; *State v. Fargo Bottling Works Co.* 19 N. D. 413, 26 L.R.A.(N.S.) 882, 124 N. W. 387, sustaining a malt liquor regulation; *Assaria v. Wells*, 68 Kan. 790, 75 Pac. 1026, on regulation of sale of liquors under authority of general welfare clause of municipal charter.

Cited in note (26 L.R.A.(N.S.) 890) on power of municipality to regulate sale of nonintoxicating alcoholic beverages.

Distinguished in *Fontana v. Grant*, 6 Kan. App. 464, 50 Pac. 104, denying validity of ordinance prohibiting sale of harmless alcoholic hop tea, etc.

Waiver of objections to criminal complaint.

Cited in *State ex rel. Poul v. McLain*, 13 N. D. 371, 102 N. W. 407, holding the furnishing of bail and taking charge of venue, to be a waiver of objection to sufficiency of showing of cause for issuance of complaint.

Cited in note (10 L.R.A.(N.S.) 162) on waiver of objections to complaint or information on information and belief as basis for issuance of warrant, or for examination preliminary thereto.

10 L. R. A. 521, *McFARLAND v. BATE*, 45 Kan. 1, 25 Pac. 238.

Validity of partial assignment.

Cited in *Limbocker v. Higinbotham*, 52 Kan. 701, 37 Pac. 783, upholding action against debtor personally on claim allowed in full in unclosed assignment proceedings.

Cited in note (58 Am. St. Rep. 80) on fraudulent assignments for creditors containing illegal reservations.

— By partnership.

Cited in *Wilson v. Sullivan*, 17 Utah, 348, 53 Pac. 994, upholding general assignment of only firm property by partnership; *McCord-Brady Co. v. Mills*, 8 Wyo. 265, 46 L. R. A. 741, footnote p. 737, 56 Pac. 1003, and *Swofford Bros. Dry Goods Co. v. Mills*, 86 Fed. 562, denying validity of assignment of only partnership property where participating creditors required by statute to release claims; *Birdsall, W. & P. Mfg. Co. v. Schwarz*, 3 App. Div. 304, 38 N. Y. Supp. 368, holding creditor, not assignee of firm property, entitled to attack conveyance of individual property by member to wife, for fraud.

Preference.

Cited in footnote to *Van Raalte v. Harrington*, 11 L. R. A. 424, which holds relationship of preferred creditors fact for consideration on question of fraud.

10 L. R. A. 526, *TUFTS v. GRIFFIN*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68.

Destruction of property before completion of conditional sale.

Cited in *Tufts v. Wynne*, 45 Mo. App. 45, holding vendee liable on purchase notes for soda fountain destroyed by fire before payment, where title being retained by vendor; *Osborn v. South Shore Lumber Co.* 91 Wis. 529, 65 N. W. 184, holding vendee liable for price of unmeasured logs lost after delivery by vendor, who retained title till payment; *White v. Solomon*, 164 Mass. 519, 30 L. R. A. 539, 42 N. E. 104, holding vendee's refusal to receive property does not relieve from liability for price when delivery made to express company by vendor according to contract; *Jessup v. Fairbanks, M. & Co.* 38 Ind. App. 676, 78 N. E. 1050; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 535, 55 Atl. 54; *National Cash Register Co. v. South Bay Club House Asso.* 64 Misc. 128, 118 N. Y. Supp. 1044; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 243, 8 L.R.A.(N.S.) 592, 99 S. W. 984, 12 A. & E. Ann. Cas. 707; *Phillips v. Hollenberg Music Co.* 82 Ark. 11, 99 S. W. 1105,—holding where a chattel is sold with reservation of title, and burned while in possession of the buyer that he is bound to pay balance of purchase price; *Whitlock v. Auburn Lumber Co.* 145 N. C. 123, 12 L.R.A.(N.S.) 1215, 58 S. E. 909, holding same where property is accidentally destroyed; *LaValley v. Ravenna*, 78 Vt. 156, 2 L.R.A.(N.S.) 99, 112 Am. St. Rep. 898, 62 Atl. 47, 6 A. & E. Ann. Cas. 684, holding same where horse which was subject of sale died; *Harley v. Stanley*, 25 Okla. 90, 138 Am. St. Rep. 900, 105 Pac. 188; *Lancaster v. Southern Ins. Co.* 153 N. C. 290, 138 Am. St. Rep. 665, 69 S. E. 214,—to the point that where goods are sold and delivered and notes taken for purchase price, and title retained as security, obligation to pay notes is absolute although goods are destroyed by fire; *Hesselbacher v. Ballantyne*, 28 Ont. Rep. 185, holding buyer liable where loss occurred while he had possession though title was not yet passed.

Cited in notes (32 L.R.A. 458) on right and liabilities of vendor and purchaser in conditional sale on default of payment; (2 L.R.A.(N.S.) 98) on right of conditional vendor to recover amount unpaid where property lost or destroyed without fault of purchaser; (138 Am. St. Rep. 903) on right of conditional vendor to recover price of property destroyed while in vendee's possession.

10 L. R. A. 527, *STATE v. MORTON*, 107 N. C. 890, 12 N. E. 112.

Corroboration of witness.

Cited in *Burnett v. Wilmington, N. & N. R. Co.* 120 N. C. 518, 26 S. E. 819, holding evidence of previous statement by witness to same effect as testimony on trial, competent without evidence as to when prior statement made; *State v. Jacobs*, 107 N. C. 876, 12 S. E. 248, holding previous statements to substantially same effect admissible to corroborate impeached witness; *State v. Brabham*, 108 N. C. 796, 13 S. E. 217, holding preliminary question as to party identifying article, unnecessary on corroborative evidence.

Cross-examination.

Cited in *Gulf, C. & S. F. R. Co. v. Matthews*, 100 Tex. 72, 93 S. W. 1068, holding that a witness may be cross-examined on his failure to speak of facts of which he testifies at a time where it is probable he would have so spoken.

10 L. R. A. 529, *CURTIS v. FORD*, 78 Tex. 262, 14 S. W. 614.

Garnishment of funds in custodia legis.

Cited in *Kreisle v. Campbell*, 89 Tex. 106, 33 S. W. 852, holding debtor's funds in hands of receiver not subject to garnishment under statute permitting "action against receiver;" *Allen v. Gerard*, 21 R. I. 469, 49 L. R. A. 352, 79 Am. St. Rep. 816, 44 Atl. 592; *Loftus v. Williams*, 24 Tex. Civ. App. 394, 59 S. W. 291, holding surplus funds in registry of court after satisfaction of execution not subject to garnishment; *Corbitt v. Farmers' Bank*, 114 Fed. 604, abating attachment of funds in registry of court after final decree, but before execution thereof; *Reger v. Manhattan Brass Co.* 6 Pa. Super. Ct. 379, 41 W. N. C. 422, holding goods taken under claim property bond not subject to garnishment; *Richardson v. Anderson*, 4 Tex. App. Civ. Cas. (Willson) 495, holding money taken for safe keeping by sheriff from person of prisoner not subject to garnishment; *First Nat. Bank v. Londonderry Min. Co.* 50 Colo. 90, 114 Pac. 313, holding that bank which borrows money from court, thereby becomes quasi party to cause in which the money is deposited, and subject to orders of court made therein as to disposition of such moneys.

Cited in footnotes to *McAlmond v. Bevington*, 53 L. R. A. 597, which holds money deposited with justice by third person as bail, not subject to garnishment for prisoner's debt; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L. R. A. 109, which holds amicable proceeding in state court does not prevent Federal court appointing receiver.

Cited in notes (12 L.R.A. 508) on property in custody of law not subject to garnishment; (13 L.R.A.(N.S.) 760) on right to attach or garnish fund in hands of officer of court after order to pay same to party.

Office of garnishment writ.

Cited in *Jones v. Cummins*, 17 Tex. Civ. App. 663, 43 S. W. 854, holding production of writ unnecessary in garnishment contest, where garnishee has answered.

10 L. R. A. 532, *MONTGOMERY COUNTY UNION AGRI. SOC. v. HARWOOD*, 126 Ind. 440, 26 N. E. 182.

Measure of damages.

Cited in *Lake Erie & W. R. Co. v. Griffin*, 25 Ind. App. 146, 53 N. E. 1042, holding diminution in rental value measure of damages for breach of covenant to fence right of way; *Jackson v. Byrnes*, 103 Tenn. 703, 54 S. W. 984, holding actual damage, not depreciation of property value, recoverable for breach of contract not to engage in competing business; *Collins v. Lavelle*, 19 R. I. 46, 31 Atl. 434, holding evidence of part profits realized while in possession admissible in action for breach of sale contract by ejectment; *Acme Cycle Co. v. Clarke*, 157 Ind. 279, 61 N. E. 561, holding damage through loss of speculative sales not recoverable in action based on failure to deliver machinery; *Connorsville Wagon Co. v. McFarlan Carriage Co.* 166 Ind. 132, 3 L.R.A.(N.S.) 713, 76 N. E. 294, holding loss of profits of a factory not measure of damages for failure to deliver wheels to be used in factory; *Lewis v. Collier*, 157 Ala. 538, 47 So. 790, holding loss of profits not measure of damages, for unlawfully restraining the running of a business for a certain time by injunction; *W. J. Holliday & Co. v. Highland Iron & Steel Co.* 43 Ind. App. 356, 87 N. E. 249 (dissenting opinion), on probable profits of a market as damages.

Cited in note (53 L. R. A. 97) on loss of profits as element of damages for breach of contract.

Distinguished in *Metzger v. Brincat*, 154 Ala. 402, 45 So. 633, holding depreciation in business to be measure of damages for breach of covenant not to lease space for another fruit stand at certain corner.

10 L. R. A. 534, *EURY v. STANDARD LIFE & ACCI. INS. CO.* 89 Tenn. 427, 14 S. W. 929.

Notice of nonpayment of premium.

Cited in *Pacific Mut. L. Ins. Co. v. Walker*, 67 Ark. 153, 53 S. W. 675, holding insured entitled to notice of nonpayment of order on employer for premium only in case wages due at maturity of order; *Pritchett v. Continental Casualty Co.* 117 Ky. 935, 80 S. W. 181, holding the leaving of instalment on a policy with paymaster according to agreement to be payment on policy until further notice by insurer.

Cited in footnotes to *Johnson v. New York L. Ins. Co.* 50 L. R. A. 99, which holds necessity of giving notice before forfeiting policy for nonpayment of premium dispensed with by converting life policy into nonforfeitable policy for fixed term of years; *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, which requires notice of accrual of premium before forfeiting policy for nonpayment; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default without notice of any condition affixed.

Cited in note (13 L. R. A. 266) on payment of insurance premium.

Distinguished in *Hagins v. Aetna L. Ins. Co.* 72 S. C. 220, 51 S. E. 683, holding where papers provide for actual payment of orders on employer that notice of nonpayment by insurer not necessary.

10 L. R. A. 535, *HELMS v. ELLIOTT*, 89 Tenn. 446, 14 S. W. 930.

Inheritance by adopted child.

Cited in *Murphy v. Portrum*, 95 Tenn. 609, 30 L. R. A. 264, 32 S. W. 633, holding mother in preference to father's next of kin inherits property which descended to adopted child from father; *Bray v. Miles*, 23 Ind. App. 457, 54 N. E. 446 (dissenting opinion), majority holding under statute that adopted child takes mother's share under devise to "children" on decease of devisee; *Boaz v. Swinney*, 79 Kan. 334, 99 Pac. 621, holding right of inheritance of an adopted child limited to that given it by law, under which it was adopted; *Merritt v. Morton*, 143 Ky. 135, 33 L.R.A.(N.S.) 141, 136 S. W. 133, holding that adopted child will not inherit from mother of deceased foster parent under statute, which provides that adopted child shall become heir at law; *Hockaday v. Lynn*, 200 Mo. 466, 8 L.R.A.(N.S.) 121, 118 Am. St. Rep. 672, 98 S. W. 585, 9 A. & E. Ann. Cas. 775; *Van Derlyn v. Mack*, 137 Mich. 150, 66 L.R.A. 438, 109 Am. St. Rep. 669, 100 N. W. 278, 4 A. & E. Ann. Cas. 879,—holding an adopted child not heir of foster parents' relatives.

Cited in footnote to *Van Matre v. Sankey*, 23 L. R. A. 665, which authorizes descent of land to child adopted in other state.

Cited in notes (17 L.R.A. 436) on legal status of adopted child; (109 Am. St. Rep. 675) on effect of adoption on kindred of adopting person; (39 Am. St. Rep. 226; 118 Am. St. Rep. 688) on right of adopted children to inherit.

Disapproved in *Shick v. Howe*, 137 Iowa, 253, 14 L.R.A.(N.S.) 982, 114 N. W. 916, holding under statute that adopted child should inherit from ancestors of foster parents.

10 L. R. A. 537, *HOWARD v. FIRST NAT. BANK*, 44 Kan. 549, 24 Pac. 983,

Subsequent taker "in good faith."

Cited in *Casner v. Crawford*, 4 Kan. App. 690, 46 Pac. 41; *Miltonvale State Bank v. Kuhnle*, 50 Kan. 423, 34 Am. St. Rep. 129, 31 Pac. 1057; *Farmers' & M. Bank v. Bank of Glen Elder*, 46 Kan. 380, 26 Pac. 680, holding party taking

second mortgage before expiration of year cannot take advantage of failure of prior mortgage to renew, as subsequent mortgage "in good faith;" *Union Nat. Bank v. Oium*, 3 N. D. 208, 44 Am. St. Rep. 533, 54 N. W. 1034, holding attachment issued after execution but before filing of mortgage inferior to mortgage lien, where attachment claim antedates execution of mortgage; *Aultman Engine & Thresher Co. v. Young*, 25 S. D. 221, 126 N. W. 245, Ann. Cas. 1912B, 1101, to the point that subsequent mortgagee is not incumbrancer in good faith under statute relating to renewal of chattel mortgages where he had notice that prior mortgage had not been paid.

Cited in footnote to *Dean v. Cushman*, 55 L. R. A. 959, which denies liability for conversion without demand, of purchaser in good faith of mortgaged chattels from mortgagor in possession.

Effect of taking additional security.

Cited in *Hobkirk v. Walrich*, 14 Colo. App. 186, 59 Pac. 414, holding mortgagee entitled to possession as against execution debtor though levy made after return of mortgage to debtor and before record of new; *Willette v. Gifford*, 46 Ind. App. 190, 92 N. E. 186, holding that taking mortgage to secure judgment does not operate to satisfy judgment; *Adams-Burks-Simmons Co. v. Johnson*, 51 Tex. Civ. App. 585, 113 S. W. 176, holding that taking of second mortgage to secure same debt secured by first mortgage and upon same property, does not operate as release of first mortgage.

Trover by mortgagee against third persons.

Cited in note (109 Am. St. Rep. 434) on right of mortgagee to maintain trover against third persons.

10 L. R. A. 541, *WOOD v. WATSON*, 107 N. C. 52, 12 S. E. 49.

Effect of death of defendant on judgment.

Cited in *Thomas v. Hunsucker*, 108 N. C. 724, 13 S. E. 221, holding purchaser at execution sale under judgment subsequently set aside for insanity of defendant at time of rendition, acquires good title; *Everett v. Reynolds*, 114 N. C. 368, 19 S. E. 233, refusing to set aside a sale irregular for failure to join heirs of defendant dying prior thereto, where no prejudice results.

Cited in notes (49 L.R.A. 161, 172) on effect of judgment entered against dead person; (60 Am. St. Rep. 656; 126 Am. St. Rep. 626, 631) on validity and effect of judgment for or against deceased person.

10 L. R. A. 542, *STATE v. SCOGGINS*, 107 N. C. 959, 12 S. E. 59.

Sale of liquor to minor.

Cited in *Nelson v. State*, 111 Wis. 397, 87 Am. St. Rep. 881, 87 N. W. 235; *State v. Best*, 108 N. C. 749, 12 S. E. 907, holding party furnishing liquor to minor, guilty, though paid for by adult; *State v. Kittelle*, 110 N. C. 561, 15 L. R. A. 695, 28 Am. St. Rep. 698, 15 S. E. 103 (distinguished in dissenting opinion), majority holding employer guilty even where sale made by employee without his knowledge and against instructions.

Cited in footnotes to *State v. Neelly*, 27 L. R. A. 503, which holds sale of liquor to minor claiming to buy as agent illegal; *Com. v. Stevens*, 11 L. R. A. 357, which holds employer not liable for clerk's sale of liquor to minor under honest mistake.

Cited in notes (41 L. R. A. 666) on criminal and penal liability for act of co-partner, servant, or agent in violating liquor laws; (12 L. R. A. 433) on sale of liquor to minor.

Distinguished in *State v. Powell*, 141 N. C. 785, 6 L.R.A.(N.S.) 482, 53 S. E.

515, holding one selling intoxicating liquor under a mistake of fact, believing it to be nonintoxicating not guilty of selling intoxicating liquor.

Intent as element of crime.

Cited in *State v. McLean*, 121 N. C. 595, 42 L. R. A. 729, 28 S. E. 140, holding bona fides of parties removing body from grave immaterial under statute making act felonious; *State v. Southern R. Co.* 122 N. C. 1061, 41 L. R. A. 249, 30 S. E. 133, holding free transportation of passenger criminal, irrespective of intention to violate statute.

10 L. R. A. 545, *STANLEY v. McELRATH*, 86 Cal. 449, 25 Pac. 16.

Effect of payment of obligation by surety.

Cited in *Yule v. Bishop*, 133 Cal. 579, 65 Pac. 1094, holding corporation and stockholders liable only in action for reimbursement, not on primary obligation, extinguished by surety's payment; *Crystal v. Hutton*, 1 Cal. App. 254, 81 Pac. 1115, holding where surety pays obligation, that obligation is extinguished and remedy is limited to action against principal; *Blanchard v. Blanchard*, 201 N. Y. 138, 37 L.R.A.(N.S.) 783, 94 N. E. 630, holding that right of action in favor of accommodation indorser against maker accrues at time he pays note.

Cited in notes (12 L.R.A. 370) on indorsement and transfer of commercial paper without recourse; (37 L.R.A.(N.S.) 785, 787, 788, 789) on right of accommodation party obliged to pay bill or note to recover from party accommodated.

Notice of nonpayment.

Cited in *Merchants' Nat. Bank v. Bentel*, 15 Cal. App. 173, 113 Pac. 708, holding that service of notice of dishonor on indorser and demand of maker is necessary to fix liability of indorser on negotiable note.

Cited in note (12 L. R. A. 732) on necessity of presentation, demand, and notice of nonpayment.

Judicial notice of other cases.

Cited in note (11 L.R.A.(N.S.) 616) on judicial notice of court's own records in other actions.

Payment by commercial paper.

Cited in note (35 L.R.A.(N.S.) 66, 105) on payment by commercial paper.

10 L. R. A. 550, *COWMAN v. ROGERS*, 73 Md. 403, 21 Atl. 64.

Presumption of simultaneous death.

Cited in *Faul v. Hulick*, 18 App. D. C. 22, holding representative of son in preference to charity, entitled under devise to latter in event of testatrix's survivorship, where son and testatrix perish in shipwreck; *Young Women's Christian Home v. French*, 187 U. S. 410, 47 L. ed. 236, 23 Sup. Ct. Rep. 184, holding deaths in common disaster presumed to be simultaneous; *Dunn v. New Amsterdam Casualty Co.* 141 App. Div. 484, 126 N. Y. Supp. 229 (dissenting opinion), on burden of proof as upon representative of insured to show death of beneficiary occurred prior to that of insured, where both insured and beneficiary died in common disaster; *Dunn v. Amsterdam Casualty Co.* 67 Misc. 114, 121 N. Y. Supp. 686 (dissenting opinion), on presumption of simultaneous death, where two persons die in the same disaster.

Cited in notes (51 L.R.A. 864, 871) on presumption of survivorship among those who perish in common calamity; (104 Am. St. Rep. 212; 8 Eng. Rul. Cas. 552) on same point.

— Rights to proceeds of policy.

Cited in *United States Casualty Co. v. Kacer*, 169 Mo. 317, 58 L. R. A. 442, 92 Am. St. Rep. 641, 69 S. W. 370, holding representatives of beneficiary entitled

as against heirs of insured; *Thomas v. Cochran*, 89 Md. 403, 46 L. R. A. 163, 43 Atl. 792, holding representatives of beneficiary, in preference to those of insured, entitled to proceeds of policy, where policy not altered on beneficiary's death; *Males v. Sovereign Camp W. W.* 30 Tex. Civ. App. 187, 70 S. W. 108, and *Hildenbrandt v. Ames*, 27 Tex. Civ. App. 384, 66 S. W. 128, holding insured's estate entitled to proceeds of policy in absence of proof that beneficiary survived insured in common disaster; *Supreme Council R. A. v. Kacer*, 96 Mo. App. 111, 69 S. W. 671, construing phrase "die before" to mean inability of beneficiary first named to take by reason of death in common disaster with insured.

Disapproved in effect in 92 Ill. App. 231, 198 Ill. 600, 59 L. R. A. 656, 92 Am. St. Rep. 284, 64 N. E. 1002, Affirming 92 Ill. App. 231, holding heirs of insured entitled under laws of association as against representatives of beneficiary perishing in same calamity, unless survivorship of beneficiary shown; *Southwell v. Gray*, 35 Misc. 746, 72 N. Y. Supp. 342, holding children entitled as against wife's representatives to proceeds of benefit certificate in her favor, where insured and wife perish together.

10 L. R. A. 552, *McSHANE v. HOWARD BANK*, 73 Md. 135, 20 Atl. 776.

Discharge of surety.

Cited in *Saint v. Wheeler & W. Mfg. Co.* 95 Ala. 378, 36 Am. St. Rep. 210, 10 So. 539, holding surety of officer of private corporation discharged where notice of principal's dishonesty not given on discovery by another official.

Cited in footnote to *Fidelity Mut. Life Assn. v. Dewey*, 54 L. R. A. 945, which holds sureties on bond of employee released by continuing him in employ without weekly reports required by contract.

— Creditor's laches.

Cited in *Taylor v. State*, 73 Md. 217, 11 L. R. A. 853, 20 Atl. 914, holding sureties not discharged by mere inactivity of creditor in pursuing debtor after maturity; *Warner v. Williams*, 93 Md. 521, 49 Atl. 559, holding mortgagor liable to mortgagee for entire balance due after foreclosure though greater sum realized had property been promptly sold on maturity; *Lake v. Thomas*, 84 Md. 623, 36 Atl. 437, holding change of time and manner of settlement after maturity of obligation does not discharge sureties; *Watertown Sav. Bank v. Mattoon*, 78 Conn. 393, 62 Atl. 622, holding that mere fact that directors fail to disclose to sureties of defalcation of treasurer of a bank no defense on bond; *Berman v. Elm Loan & Sav. Assn.* 114 Md. 195, 78 Atl. 1104, holding that creditor does not release surety by voluntarily forbearing prompt enforcement of claim against principal.

— Release of collateral.

Cited in *Sternback v. Friedman*, 23 Misc. 177, 50 N. Y. Supp. 1025, holding return of collateral to debtor by creditor does not discharge surety, where obtained by fraud.

Cited in footnote to *Brown v. First Nat. Bank*, 56 L. R. A. 870, which holds sureties on note released to extent of release of collateral security.

Admissibility of debtor's admissions against surety.

Cited in *Lynn v. Cumberland*, 77 Md. 459, 26 Atl. 1001, holding entries in tax book of collections made by official admissible in action against his sureties.

Construction of suretyship contract.

Cited in *Hooper v. Hooper*, 81 Md. 169, 48 Am. St. Rep. 496, 31 Atl. 508, holding circumstances accompanying whole transaction considered, to effect intention of parties.

Cashier's bond.

Cited in *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 381, 124 Fed. 175, holding cashier's admission in course of business that he had embezzled funds, competent evidence against surety.

Cited in footnotes to *Westervelt v. Mohrenstecher*, 34 L. R. A. 477, which holds defaults in subsequent note covered by cashier's bond; *Lieberman v. First Nat. Bank*, 48 L. R. A. 514, which denies release of surety on bank teller's bond for unauthorized statements by cashier.

Interest, when a question for jury.

Cited in *Weant v. Southern Trust & Deposit Co.* 112 Md. 473, 77 Atl. 289, holding payee on a dishonored check is entitled to interest thereon from date thereof as a matter of right.

10 L. R. A. 558, *HUTCHINSON v. LIVERPOOL & L. & G. INS. CO.* 153 Mass. 143, 26 N. E. 439.

Arbitration agreement; validity.

Cited in *Zalesky v. Home Ins. Co.* 102 Iowa, 620, 71 N. W. 566, upholding provision for appraisement before suit brought; *Fisher v. Merchants Ins. Co.* 95 Me. 490, 85 Am. St. Rep. 428, 50 Atl. 282, denying right of action on policy prior to award as to loss, or excuse for failure to obtain same; *Grady v. Home F. & M. Ins. Co.* 27 R. I. 441, 4 L.R.A.(N.S.) 293, 63 Atl. 173, holding that a provision in an insurance policy as to arbitration should be complied with as a condition precedent to bringing an action; *Brodline v. Revere*, 182 Mass. 603, 66 N. E. 607, holding that parties cannot bind themselves to settle controversies out of court; *Norcross Bros. Co. v. Vose*, 199 Mass. 94, 85 N. E. 468, holding where arbitration is not made a condition precedent that either party may go to court in first instance.

Cited in footnotes to *Brook v. Dwelling House Ins. Co.* 26 L. R. A. 623, which denies right of insurer uniting in appointment of appraisers to claim appointment premature; *Grand Rapids Fire Ins. Co. v. Finn*, 50 L. R. A. 555, which holds appraisal of loss not required by policy unless demand made by insurer.

Cited in note (15 L.R.A.(N.S.) 1063) on arbitration as condition precedent to action on insurance policy.

Distinguished in *Miles v. Schmidt*, 168 Mass. 340, 47 N. E. 115, denying validity of agreement to submit "violation of agreement," and amount of damage, to referees for final decision.

Waiver.

Cited in *Fravert v. Fesler*, 11 Colo. App. 392, 53 Pac. 288, holding agreement if binding, waived where not pleaded by either party; *Phenix Ins. Co. v. Stocks*, 149 Ill. 331, 36 N. E. 408, holding absolute condition precedent waived by denying claim on grounds not susceptible of arbitration; *Jones v. Brown*, 171 Mass. 324, 50 N. E. 648, holding arbitration waived where offer thereof as to only proper matter of arbitration refused by silence; *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* 171 Mass. 436, 50 N. E. 943, holding waiver for jury where verbal absolute denial of liability on policy without suggestion of arbitration.

Allowance of interest.

Cited in *American Casualty Ins. Co.'s Case*, 82 Md. 582, 38 L. R. A. 118, 34 Atl. 778, disallowing interest on claims not paid by reason of insolvency of company; *Gould v. Emerson*, 160 Mass. 441, 39 Am. St. Rep. 501, 35 N. E. 1065, holding interest on innocent overpayment to partner on settlement recoverable only from date of demand or suit.

Distinguished in *Hardy v. Lancashire Ins. Co.* 166 Mass. 215, 33 L. R. A. 244.

55 Am. St. Rep. 395, 44 N. E. 209, allowing interest from expiration of sixty days within which loss on policy is payable where only dispute is as to extent of insurer's liability.

Statutory provision or contract as to jurisdiction of court.

Cited in *Brodbine v. Revere*, 182 Mass. 603, 66 N. E. 607, sustaining statute giving board of park commissioners power to make rules for use of park streets, and making violations punishable; *Mittenthal v. Mascagni*, 183 Mass. 23, 60 L. R. A. 814, 97 Am. St. Rep. 404, 66 N. E. 425, upholding clause in contract for tour to conduct entertainments, that suits shall be brought where parties are domiciled.

10 L. R. A. 562, *VERMONT & C. R. CO. v. VERMONT C. R. CO.* 63 Vt. 1, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

Taxation of corporations.

Cited in *State v. Clement Nat. Bank*, 84 Vt. 190, 78 Atl. 944, holding that all contracts are made with reference to taxing power of state and in subordination to it.

Cited in footnote to *Cumberland & P. R. Co. v. State*, 52 L. R. A. 764, which sustains state tax on proportionate part of gross receipts of interstate railroad.

Cited in notes (57 L. R. A. 59, 63, 67) on taxation of corporate franchise in the United States; (60 L. R. A. 98) on corporate taxation in the United States as affected by the contract clause in the Federal Constitution; (60 L. R. A. 650, 673) on corporate taxation and the commerce clause.

Implied promise to repay.

Cited in *Hoadley v. Dumois*, 11 Misc. 55, 31 N. Y. Supp. 853, holding consignee under subcharter entitled to recover from original charterer sum due to owners from latter, paid in order to secure goods.

Cited in note (22 L.R.A.(N.S.) 564) on right of purchaser to recover amount paid to relieve land from tax lien, from one who should have paid but with whom he had no contractual relationship.

Interstate commerce.

Cited in *State v. Peet*, 80 Vt. 457, 14 L.R.A.(N.S.) 681, 130 Am. St. Rep. 998, 68 Atl. 661, holding that a state cannot prohibit the exportation out of the state of unwholesome meat.

— State taxation of interstate earnings.

Cited in *State v. Rutland R. Co.* 81 Vt. 512, 71 Atl. 197, on the unconstitutionality of a state law taxing the earnings from interstate commerce.

Effect of construction of statutes by decisions.

Cited in *State v. O'Neil*, 147 Iowa, 526, 33 L.R.A.(N.S.) 796, 126 N. W. 454, Ann. Cas. 1912B, 691, to the point that construction of statute by judicial decisions, so far as contracts are concerned, is as much part of statute as text itself.

10 L. R. A. 567, *Re McMANUS*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413.

Exemptions.

Cited in *Betz v. Maier*, 12 Tex. Civ. App. 222, 33 S. W. 710, holding insurance agent's iron safe exempt as tool or apparatus; *Re Petersen*, 95 Fed. 418, holding baker's implements exempt under statute exempting tools of mechanic or artisan; *Re Hindman*, 43 C. C. A. 559, 104 Fed. 333, holding horse and wagon of white-washer, used to transport tools and supplies, exempt under statute exempting horse and wagon to laborer habitually earning living thereby; *Elliot v. Hall*, 3 Idaho, 424, 35 Am. St. Rep. 285, 31 Pac. 796, holding debtor's earnings exempt while under his control; *Van Lue v. Wahrlich-Cornett Co.* 12 Cal. App. 753, 108

Pac. 717, holding that a statute exempting property from execution should be liberally construed; *Re Conley*, 162 Fed. 808, holding horse, wagon and scales of a dealer in produce exempt as tools and instruments of business; *Holmes v. Marshall*, 145 Cal. 779, 69 L.R.A. 69, 104 Am. St. Rep. 86, 79 Pac. 534, 2 A. & E. Ann. Cas. 88, holding that the deposit of exempt life insurance money in a bank does not destroy the exemption; *Re Klemp*, 119 Cal. 43, 39 L.R.A. 342, 63 Am. St. Rep. 69, 50 Pac. 1062, holding a combined harvester exempt as a farming utensil though farmer uses it in harvesting crops of his neighbors after his own.

Cited in footnotes to *Terry v. McDaniel*, 46 L. R. A. 559, which holds barber's chair and looking-glass exempt; *Davidson v. Hannon*, 34 L. R. A. 718, which holds photographic lens used by photographer exempt from attachment; *Re Klemp*, 39 L. R. A. 340, which holds combined harvester of farmer exempt from execution; *Equitable Life Assur. Soc. v. Goode*, 35 L. R. A. 690, which holds law library of attorney occupying part of time in legal business exempt; *Williams v. Vincent*, 68 L.R.A. 634, which holds bowling alley not exempt from execution as tools or implements of trade.

Cited in notes (102 Am. St. Rep. 103) on exemption of wages, salaries and earnings; (123 Am. St. Rep. 140, 146) on exemption of tools and implements.

10 L. R. A. 568, *ELIOT v. ELIOT*, 77 Wis. 634, 46 N. W. 806.

Validity of marriage of party under age.

Cited in *State ex rel. Scott v. Lowell*, 78 Minn. 168, 46 L. R. A. 442, 79 Am. St. Rep. 358, 80 N. W. 877, holding parent cannot restrain cohabitation of infant child with husband by marriage voidable only at child's request; *State v. Cone*, 86 Wis. 500, 57 N. W. 50, holding party guilty of bigamy where marries second time before prior marriage to minor annulled; *Western U. Teleg. Co. v. Procter*, 6 Tex. Civ. App. 303, 25 S. W. 811, holding telegraph company liable for damages for delay in delivery of message forbidding issuance of license for marriage of daughter under age; *Re Gregorson*, 160 Cal. 24, — L.R.A.(N.S.) —, 116 Pac. 60, Ann. Cas. 1912 D, 1124, to the point that statute declaring that marriage "shall be void from time its nullity is declared by court of competent authority," has effect of making marriage valid until decree of annulment.

Cited in notes (11 L.R.A. 587) on validity of marriage contract; (22 L.R.A. (N.S.) 1205; 23 Am. St. Rep. 874; 79 Am. St. Rep. 374, 375) on validity of marriage of infants.

Allowance of suit money and alimony.

Cited in *Arey v. Arey*, 22 Wash. 265, 60 Pac. 724, holding party to marriage voidable for her nonage, entitled to suit money and alimony in suit to dissolve; *Willits v. Willits*, 76 Neb. 233, 5 L.R.A.(N.S.) 770, 107 N. W. 379, 14 A. & E. Ann. Cas. 883; *Ricard v. Ricard*, 143 Iowa, 185, 26 L.R.A.(N.S.) 502, 121 N. W. 525,—holding that temporary alimony might be allowed in a suit to annul a marriage; *Buckley v. Buckley*, 50 Wash. 219, 126 Am. St. Rep. 900, 96 Pac. 1079, holding that a court on annulment of a marriage might make an equitable allowance of property to the plaintiff.

Estoppel.

Reaffirmed on second appeal, in 81 Wis. 295, 15 L. R. A. 259, 51 N. W. 81, holding infant not estopped, by fraudulent declaration of his age, to have marriage while under statutory age, annulled.

Residence as condition of jurisdiction of annulment of marriage.

Cited in note (30 L.R.A.(N.S.) 747) on local domicile or residence as condition of jurisdiction of action for annulment of marriage

10 L. R. A. 572, *WILSON v. CHICHESTER*, 107 N. C. 386, 12 S. E. 139.

Ancillary actions.

Cited in *Ross v. Ross*, 119 N. C. 111, 25 S. E. 792, holding it erroneous to appoint receiver in independent suit instead of ordering defendant to pay over specific fund discovered on supplementary proceedings to be in his possession; *Herman v. Watts*, 107 N. C. 652, 12 S. E. 437, dismissing action to enforce charge against land where previously determinable in partition proceedings.

10 L. R. A. 573, *ST. JAMES EDUCATIONAL INST. v. SALEM*, 153 Mass. 185, 26 N. E. 636.

Exemptions from taxation.

Cited in *Salem Lyceum v. Salem*, 154 Mass. 17, 27 N. E. 672, holding property not exempt where principal income therefrom received through rents for other purposes than educational, though such income so devoted; *Williams College v. Williamstown*, 167 Mass. 509, 46 N. E. 394, holding college properties occupied as residences by professors paying rent, not exempt; *Phi Beta Epsilon Corp. v. Boston*, 182 Mass. 460, 65 N. E. 824, denying exemption from taxation of literary corporation keeping dormitory and boarding house for students of institute.

Cited in footnotes to *Ramsey County v. Macalaster College*, 18 L. R. A. 278, which holds professors' residences on college grounds exempt, but not unused land in college tract; *Brown University v. Granger*, 36 L. R. A. 847, which holds real estate constituting part of endowment of Brown University within exemption of "college estate."

Cited in notes (19 L.R.A. 292) on effect of using property of religious, charitable, or educational institution in secular business or for revenue, on its right to exemption from taxation; (47 L. ed. U. S. 643) on exemption of property of educational institutions from taxation, as affected by use for other than educational purposes.

Distinguished in *Orono v. Sigma Alpha Epsilon Soc.* 105 Me. 219, 74 Atl. 19, holding a Greek letter Fraternity having house on State University Campus not a literary or scientific institution, so as to exempt its property as such from taxation.

Recovery of illegal taxes.

Cited in footnotes to *St. Anthony & D. Elevator Co. v. Soucie*, 50 L.R.A. 262, which sustains right to recover illegal taxes paid under protest to prevent tax collector's sale of personal property constructively; *C. & J. Michel Brewing v. State*, 70 L.R.A. 911, which holds that requiring foreign corporation to pay license fee as condition precedent to sale of products within state or subject itself to penalties supposed to be prescribed by statute not such compulsion as will entitle it to recover amounts paid on statute being held unconstitutional.

Cited in note (16 L.R.A.(N.S.) 687) on right to sue for taxes paid on erroneous assessments without previous resort to statutory remedies.

10 L. R. A. 576, *GREENE v. PHOENIX MUT. L. INS. CO.* 134 Ill. 310, 25 N. E. 583.

Limiting number of witnesses.

Cited in *Traders Ins. Co. v. Catlin*, 71 Ill. App. 573, holding exclusion of witnesses upon closely contested material issue, erroneous; *Illinois C. R. Co. v. Treat*, 179 Ill. 588, 54 N. E. 290 (dissenting opinion), as to error in refusing to permit introduction of all witnesses on controverted point; *Cooke Brewing Co. v. Ryan*, 98 Ill. App. 447, holding refusal to permit party to introduce all witnesses upon material controverted point, error; *Markham v. Herrick*, 82 Mo. App. 330, holding

it error to limit witnesses offered by defendant to impeach plaintiff's character on breach-of-promise action; *West Skokie Drainage Dist. v. Dauson*, 243 Ill. 180, 90 N. E. 377, 17 A. & E. Ann. Cas. 776, holding that power of court to limit number of witnesses must be reasonably exercised so as not to deprive parties of a material right; *People v. Arnold*, 248 Ill. 178, 93 N. E. 786, holding that court may limit number of witnesses concerning character of accused; *St. Louis, M. & S. E. R. Co. v. Aubuchon*, 199 Mo. 363, 9 L.R.A.(N.S.) 426, 116 Am. St. Rep. 499, 97 S. W. 867, 8 A. & E. Ann. Cas. 822, holding the limiting of number of witnesses on each side a question of damages to four while plaintiffs' third witness was on the stand to be a reversible error; *Campbell v. Campbell*, 30 R. I. 68, 73 Atl. 354, holding that court had no authority to demand that counsel name his witness which he would use in his case and then limit him to use of named witnesses.

Cited in note (116 Am. St. Rep. 516, 517) on right of court to limit number of witnesses.

Distinguished in *Burhans v. Norwood Park*, 138 Ill. 153, 27 N. E. 1088, holding limitations of witnesses matter solely in discretion of trial court on opening of default judgment.

Presumption of sanity.

Cited in *Fidelity & C. Co. v. Weise*, 80 Ill. App. 510, holding burden of proving insanity upon insurance company alleging suicide.

10 L. R. A. 577, *LANTZ v. VERMONT L. INS. CO.* 139 Pa. 546, 23 Am. St. Rep. 202, 21 Atl. 80.

Waiver of forfeiture of policy.

Cited in *Everett v. London & L. Ins. Co.* 142 Pa. 343, 24 Am. St. Rep. 499, 21 Atl. 819, holding waiver of time limit for action cannot be grounded on unauthorized agreement of adjuster and uncommunicated conditional instructions to agent; *Duffy v. Alta Friendly Soc.* 17 Pa. Super. Ct. 537, holding acceptance of arrear dues with signed certificate of good health fraudulently made during sickness, does not reinstate lapsed membership; *Carlson v. Supreme Council*, A. L. of H. 115 Cal. 480, 35 L. R. A. 646, 47 Pac. 375, holding notice of defaulted assessments ineffectual to waive default, as to beneficiary offering, after insured's death, to pay same; *Kenyon v. National Life Asso.* 39 App. Div. 302, 57 N. Y. Supp. 60 (dissenting opinion), majority holding that failure of insured to tender premiums uncertain in amount, after ineffectual declaration of forfeiture does not bar action on policy; *Dillon v. National Council K. & L. S.* 148 Ill. App. 130, holding that a waiver of policy forfeiture for nonpayment of premium does not take place by acceptance of unpaid premium by unauthorized collector after death of insured.

Cited in note (25 L.R.A.(N.S.) 80) as to whether breach which ipso factor terminates insurance can be waived.

Distinguished in *Murphy v. Prudential Ins. Co.* 30 Pa. Super. Ct. 565, holding waiver of forfeiturer for default in payment of premiums cannot be based on agreement by agent to extend time of payment where agent had no such authority and his act was not ratified.

Renewal of lapsed policy.

Cited in *Kearney v. Ætna L. Ins. Co.* 109 Ill. App. 614, holding actual payment of premium necessary to restore lapsed policy; *Pacific Mut. L. Ins. Co. v. Galbraith*, 115 Tenn. 478, 112 Am. St. Rep. 862, 91 S. W. 204, holding that a policy dates as of the date of reinstatement where a lapse has occurred the reinstatement creating in effect a new contract of insurance; *Sydnor v. Metropolitan L. Ins. Co.*

26 Pa. Super. Ct. 526, holding acceptance of premium after it had become due the policy holder being in good health did not constitute a waiver of conditions of policy, as to payment of future premiums regardless of health at time of future default.

Cited in footnotes to *Kocher v. Supreme Council* C. B. L. 52 L. R. A. 861, which denies power of officers of benefit society to waive judgment of assessments for death benefits; *McQuillan v. Mutual Reserve Fund Life Assn.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default without notice of any condition affixed.

Lapse of insurance by default in payment of premiums.

Cited in *Hay v. People's Mut. Benev. Assn.* 143 N. C. 259, 55 S. E. 623, holding that policy cannot be revived by payment of defaulted premiums on grounds of former leniency especially where insured's health has become impaired and his default has been for unreasonable length of time; *McGeachie v. North American Life Assur. Co.* 20 Ont. App. Rep. 194, holding that failure to pay renewal note at maturity avoids the policy no election to treat it as terminated being necessary on the part of the insurer at the death of insured; *Manufacturers' L. Ins. Co. v. Gordon*, 20 Ont. App. Rep. 316, on the termination of policy by default in payment of premiums on dates named in policy; *Beeman v. Supreme Lodge*, S. H. 29 Pa. Super. Ct. 396, construing "shall stand suspended" in insurance policy to mean a termination of the insurance relation ipso facto; *Crosby v. Vermont Acci. Ins. Co.* 84 Vt. 516, 80 Atl. 817, holding that recovery cannot be had under accident policy for accident occurring during period in which policy had lapsed, because of default in payment of premiums although, in ignorance of accident premiums were afterwards received.

Cited in note (17 L.R.A.(N.S.) 247) on necessity of affirmative action to terminate rights of member in mutual benefit society for nonpayment of dues.

10 L. R. A. 584, *ALBERTZ v. ALBERTZ*, 78 Wis. 72, 47 N. W. 95.

Action for breach of marriage promise.

Cited in footnote to *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years," not within statute of frauds.

Cited in note (40 Am. St. Rep. 175) on defenses to action for breach of promise.

— Damages.

Cited in footnote to *Chellis v. Chapman*, 11 L. R. A. 784, which authorizes punitive damages for breach of promise, when wedding day fixed and answer alleges intent to procure money from defendant.

Implied representations in contracts to marry.

Cited in note (44 Am. St. Rep. 382) on implied representations in contracts to marry.

10 L. R. A. 586, *MEINERS v. FREDERICK MILLER BREWING CO.* 78 Wis. 364, 47 N. W. 430.

Nuisance.

Cited in footnote to *Price v. Oakfield Highland Creamery Co.* 24 L. R. A. 333, which authorizes injunction against allowing filth to flow from creamery to adjoining premises.

— Prescriptive right to maintain.

Cited in *Taylor v. Chicago, M. & St. P. R. Co.* 83 Wis. 644, 53 N. W. 853, denying title of corporation to highway unlawfully occupied for prescriptive period, by its canal which constitutes nuisance; *Weeks-Thorn Paper Co. v. Glen-*

side Woolen Mills, 64 Misc. 214, 118 N. Y. Supp. 1027, on the obtaining of prescriptive rights to a nuisance as against private individuals.

Cited in notes (53 L.R.A. 892, 893, 894) on prescriptive right to maintain public nuisance; (25 L.R.A.(N.S.) 590, 591) on prescriptive right to pollute stream.

— **Abatement of public nuisance.**

Cited in footnote to *State v. Stark*, 54 L. R. A. 910, which denies right of private person to abate liquor nuisance without process of law.

10 L. R. A. 588, *STATE ex rel. DOLLARD v. HUGHES COUNTY*, 1 S. D. 292, 46 N. W. 1127.

Jurisdiction.

Cited in *State ex rel. Holmes v. Finnerud*, 7 S. D. 238, 64 N. W. 121, upholding original jurisdiction of supreme court in quo warranto proceeding to determine title of party to office of regent of education.

Certiorari.

Cited in *State ex rel. Clark v. Stakke*, 22 S. D. 230, 117 N. W. 129, holding that certiorari lies to review action of election canvassing board; *State ex rel. Bowen v. Sioux Falls*, 25 S. D. 5, 124 N. W. 963, to the point that function of certiorari is to correct proceedings where inferior boards and tribunals act without their jurisdiction.

Cited in notes (50 L. R. A. 792) on exceptions to rule that certiorari will not lie where there is an appeal; (51 L. R. A. 67) on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

Territory attached to county.

Cited in *Slutts v. Dana*, 138 Iowa, 249, 115 N. W. 1115, on the rule that territory may be a part of a county for some purposes, and not for other purposes.

10 L. R. A. 593, *CAMPBELL v. KANSAS CITY*, 102 Mo. 326, 13 S. W. 897.

Dedication of land.

Review of principal case refused, *Reinhardt v. Scarritt*, 115 Mo. 56, 21 S. W. 1116, on ground that points involved were not affected.

Cited in *Tracy v. Bittle*, 213 Mo. 311, 112 S. W. 45, 15 A. & E. Ann. Cas. 167, holding that a staking off of land and putting fence around it with a gate on public road, to be used as grave yard is a dedication to the public for burial purposes.

Cited in footnote to *Lake Erie & W. R. Co. v. Whitham*, 28 L. R. A. 612, which denies right of company to acquire right of way by common-law dedication.

Cited in note (27 L.R.A.(N.S.) 875) on what necessary to effect dedication of land as cemetery.

— **To public use, reversion.**

Cited in *Kansas City v. Scarritt*, 169 Mo. 485, 69 S. W. 283, holding presumptive enhancement of value of adjoining land at time of dedication of plot for graveyard does not bar reversion on abandonment of use; *Dickinson v. Arkansas City Improv. Co.* 77 Ark. 578, 113 Am. St. Rep. 170, 92 S. W. 21, holding revocation of dedication of land takes place on failure or abandonment of the purpose or scheme for which dedication was had; *Gaskins v. Williams*, 235 Mo. 573, 35 L.R.A.(N.S.) 609, 139 S. W. 1177, holding that county cannot divert to private use land dedicated for courthouse purposes; *Porter v. International Bridge Co.* 200 N. Y. 248, 93 N. E. 716, 21 Ann. Cas. 684, holding that property dedicated "public square" reverts to original owners when permission is given by city authorities for its use for railroad purposes; *Deepwater R. Co. v. Honaker*, 66 W.

Va. 146, 27 L.R.A.(N.S.) 393, 66 S. E. 104, on reversion of land dedicated for burial ground to the dedicator on abandonment or change of use.

Distinguished in *Goode v. St. Louis*, 113 Mo. 277, 20 S. W. 1048, holding heirs not entitled to reversion of property dedicated as public common where converted with growth of city to public wharves at great expense by city; *Hand v. St. Louis*, 158 Mo. 210, 59 S. W. 92, denying right of devisee under reversion theory, where deed of donation unconditional; *Mahoning County v. Young*, 8 C. C. A. 31, 16 U. S. App. 253, 59 Fed. 100, Reversing 51 Fed. 598, holding land quitclaimed as "burying ground" does not revert to grantor where use as such prevented by valid ordinance.

Burial grounds; municipal and public control.

Cited in *Young v. Mahoning County*, 51 Fed. 592, upholding ordinance requiring removal of burying ground, as matter of public safety; *Shiel v. Walker*, 114 Mo. App. 526, 90 S. W. 124, holding that an existing burial ground may be condemned for the public; *Iuszkewicz v. Luther*, 30 R. I. 575, 76 Atl. 829, holding that city councils may prohibit and regulate burials and burial grounds, through authority from legislature.

Cited in notes (38 L.R.A. 328) on municipal power over nuisances affecting safety, health, and personal comfort; (27 L.R.A.(N.S.) 263) on regulations of burials and cemeteries.

10 L. R. A. 602, *WITTING v. ST. LOUIS & S. F. R. CO.* 101 Mo. 631, 20 Am. St. Rep. 636, 14 S. W. 743.

Burden of proof as to negligence.

Cited in *Herf & F. Chemical Co. v. Lackawanna Line*, 78 Mo. App. 309, holding burden on plaintiff to take case out of exceptions of special contract of carriage; *Anderson v. Atchison, T. & S. F. R. Co.* 93 Mo. App. 679, 67 S. W. 707, holding shipper has burden of proving carrier's negligence taking case out of exceptions from liability for delay; *Otis Co. v. Missouri P. R. Co.* 112 Mo. 633, 20 S. W. 676, holding shipper has burden of proving carrier's negligence where loss occurs through excepted cause of fire; *E. O. Stanard Mill. Co. v. White Line Central Transit Co.* 122 Mo. 276, 26 S. W. 704, holding burden on plaintiff alleging loss of goods through negligence causing fire at carrier's warehouse; *Rayl v. Kreilich*, 74 Mo. App. 249, holding burden continuously on plaintiff where loss based on agister's negligence; *Casey v. Donovan*, 65 Mo. App. 527, overruling instruction that bailee for hire, not common carrier, has burden of proving freedom from negligence, although negligence prima facie established against him by proof of nonreturn of bailed article; *Nelson v. Great Northern R. Co.* 28 Mont. 325, 72 Pac. 642, holding that carrier must afford shipper accompanying stock opportunity to feed and water; *Hurst v. St. Louis & S. F. R. Co.* 117 Mo. App. 37, 94 S. W. 794, holding that under a limited liability contract for shipment the carrier must show that the damage came under an exception and owner of goods must show negligence constituting injury, such injury not being presumed from fact of bad condition on redelivery; *Fulbright v. Wabash R. Co.* 118 Mo. App. 486, 94 S. W. 992, holding that burden is on shipper to show negligence of carrier taking the injury resulting within the carrier's liability to shipper on special contract; *Lay v. Chicago, B. & Q. R. Co.* 157 Mo. App. 473, 138 S. W. 884; *Decker v. Missouri P. R. Co.* 149 Mo. App. 537, 131 S. W. 118,—holding that burden is upon shipper to show negligence where action for loss of goods is based on negligence and not upon common law duty as insurer; *Levi v. Missouri, K. & T. R. Co.* 157 Mo. App. 543, 138 S. W. 699, holding that on proof by carrier accounting for loss of property by fire, burden is on shipper to prove negligence as proximate cause of fire.

Cited in footnotes to *Mitchell v. Carolina C. R. Co.* 44 L. R. A. 515, which holds burden of proof as to negligence on carrier when goods shipped under contract limiting liability for negligence; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which holds carrier has burden of proving that delivery of goods in wet condition not due to its negligence.

Cited in note (22 Am. St. Rep. 789) on burden of proving carrier's negligence.

Inference of negligence from surrounding circumstances.

Cited in *Olfermann v. Union Depot R. Co.* 125 Mo. 414, 46 Am. St. Rep. 483, 28 S. W. 742, upholding instruction requiring proof of negligence, but not excluding inference from circumstances; *Otis Co. v. Missouri P. R. Co.* 112 Mo. 632, 20 S. W. 676, holding circumstantial evidence sufficient to support jury's finding of negligence; *Flynn v. St. Louis & S. F. R. Co.* 43 Mo. App. 441, holding burden of taking case out of exception satisfied by proof of circumstances showing negligence; *Heck v. Missouri P. R. Co.* 51 Mo. App. 534, holding delivery of article in damaged condition sufficient evidence of negligence to support verdict, though article within exception of bill of lading; *Crow v. Chicago & A. R. Co.* 57 Mo. App. 139, holding shipper of jack may prove circumstances tending to show negligence causing injury; *Cash v. Wabash R. Co.* 81 Mo. App. 114, holding arrival of stock in bruised and crippled condition sufficient to warrant submission of carrier's negligence to jury; *Hance v. Pacific Exp. Co.* 48 Mo. App. 184, holding negligence in carriage inferable where poultry, properly cooped and in good condition, died during short transit; *George v. Chicago, R. I. & P. R. Co.* 57 Mo. App. 363, holding instruction for carrier if loss occurred within exception unless contributed to by its negligence, erroneous, where no evidence as to manner of loss; *Bushnell v. Wabash R. Co.* 118 Mo. App. 627, 94 S. W. 1001, holding that an inference of negligent cause of delay may be drawn from circumstances, slightly tending in that direction because of nature of relation of carrier and shipper; *Gilbert v. Chicago R. I. & P. R. Co.* 132 Mo. App. 705, 112 S. W. 1002, holding that negligence of carrier causing delay may be shown by reasonable inference from circumstances; *Wernick v. St. Louis & S. F. R. Co.* 131 Mo. App. 52, 109 S. W. 1027, holding that damage may not be inferred from proof of delay in absence of establishment of negligent cause of such delay; *Clark v. St. Joseph & G. I. R. Co.* 138 Mo. App. 426, 122 S. W. 318, holding negligence not shown by mere proof of delay the burden being on the plaintiff to show negligent cause thereof; *A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.* 143 Mo. App. 58, 122 S. W. 362, as overruling decisions supporting the presumption of carrier's negligence from delay or damaged condition on redelivery of goods sound when delivered.

Sufficiency of complaint in justice's court.

Cited in *Lustig v. Cohen*, 44 Mo. App. 272, upholding statement of accounts showing defendant debtor for services as salesman, as per contract; *Haynes v. Wabash R. Co.* 54 Mo. App. 584, upholding general charge of negligence in use of defective car with defective slats; *Bell v. Boyd*, 66 Mo. App. 140, holding evidence of damage by negligent use of pole admissible under general charge of negligence in removal of safe.

Service of pleadings.

Cited in *Leonard v. Sparks*, 117 Mo. 114, 38 Am. St. Rep. 646, 22 S. W. 899, upholding condemnation proceeding against collateral attack for insufficiency of notice.

Waiver of defects by appeal.

Cited in *Meyer v. Phenix Ins. Co.* 92 Mo. App. 398, holding service of process beyond justice's jurisdiction, waived by appeal of appearing defendant; *Winer v.*

Maness, 94 Mo. App. 165, 67 S. W. 966, holding default judgment on defective service validated by defendant's appearance and appeal thereafter.

Cited in note (34 L.R.A.(N.S.) 668) on waiver of failure of, or defects in, service by appeal to courts where trial must be *de novo*.

Distinguished in Wencker v. Thompson, 96 Mo. App. 65, 69 S. W. 743, holding waiver of exhibition of claim in probate court, by administrator's appeal, dates, as to statute of limitation, only from appeal.

Demurrer to evidence.

Cited in Hopkins v. Nashville, C. & St. L. R. Co. 96 Tenn. 428, 32 L. R. A. 360, footnote, p. 354, 34 S. W. 1029, sustaining practice of demurring to evidence.

Limitation of carrier's liability.

Cited in Drey & K. Glass Co. v. Missouri P. R. Co. 156 Mo. App. 186, 136 S. W. 757, holding that contract to relieve carrier from any part of liability must be clear, special and express, and will not arise from inference.

Cited in notes (22 Am. St. Rep. 58; 22 Am. St. Rep. 452) on limitation of carrier's liability; (88 Am. St. Rep. 124) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 347) on special limitations of liability of carrier.

10 L. R. A. 606, MAXFIELD v. SCHWARTZ, 45 Minn. 150, 47 N. W. 448.

Report of later appeal in Seabury v. Schwartz, 50 Minn. 13, 52 N. W. 221.

Right to rely on vendor's representations.

Cited in Erickson v. Fisher, 51 Minn. 303, 53 N. W. 638, holding party entitled to recover purchase price of lots fraudulently located by vendor, though true location ascertainable on examination; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 224, 37 L. R. A. 612, 59 N. W. 1066, holding vendee entitled to rely upon vendor's representation as to condition of plant, wires, mains, profits, etc., in spite of opportunity to investigate; Redding v. Wright, 49 Minn. 330, 51 N. W. 1056, holding vendor of stock liable for fraudulent representations as to condition of corporation, though examination of books would have disclosed facts to vendee; Strand v. Griffith, 38 C. C. A. 446, 97 Fed. 854, sustaining action for fraud where vendor falsely represented stock of dry goods as new and showed false invoice thereof purporting to represent wholesale value; C. Aultman & Co. v. Falkum, 47 Minn. 416, 50 N. W. 471, upholding submission to jury of oral warranty of machine though defendant signed purchase contract containing different warranty; Alfred Shrimpton & Sons v. Philbrick, 53 Minn. 368, 55 N. W. 551, upholding defense that plaintiff agent fraudulently wrote order for "four great gross" instead of "four gross" as agreed; Colorado Invest. Loan Co. v. Beuchat, 48 Colo. 502, 111 Pac. 61, holding that confidence reposed by maker of document, in one at whose instance it is executed, may excuse neglect to read it; Stearns v. Kennedy, 94 Minn. 444, 103 N. W. 212, holding that the vendor can not avoid the effect of his false statements by claiming that the vendee might have ascertained their falsity by searching the public records; Eggleston v. Advance Thresher Co. 96 Minn. 247, 104 N. W. 891, holding that where one has been defrauded and induced by false statements to sign a contract, by the other party, he may defend against it even though he was negligent in signing it; Judd v. Walker, 215 Mo. 330, 114 S. W. 979, affirming 114 Mo. App. 142, 89 S. W. 558, holding that where one party to a contract has defrauded the other, the former can not set up as a defense against the fraud the negligence of the other in relying upon it, where the fraud is not palpable to the party.

Cited in notes (37 L.R.A. 600) on right to rely on representations made to effect contract as basis for charge of fraud; (25 Am. St. Rep. 506) on cancellation of contract for misrepresentation.

Rights of third person to enforce covenant.

Cited in *Gold v. Ogden*, 61 Minn. 90, 63 N. W. 266, holding mortgagee not entitled to benefit of assumption covenant by grantee of mortgagor subsequently released by mortgagor.

10 L. R. A. 607, *STATE v. McAFEE*, 107 N. C. 812, 12 S. E. 435.

Assault.

Cited in footnote to *People v. Lee Kong*, 17 L. R. A. 626, which holds firing pistol at hole in roof where policeman believed to be watching an assault.

False arrest.

Cited in *Kelly v. Durham Traction Co.* 132 N. C. 372, 43 S. E. 823, holding street car company liable for causing arrest of passenger for alleged nonpayment of fare.

Cited in footnote to *McCullough v. Greenfield*, 62 L. R. A. 906, holding that possession of warrant does not justify arrest by police of another town under direction by telephone by officer having warrant.

Cited in note (84 Am. St. Rep. 686) on right of policeman to make arrest without warrant.

Disclosure of cause for arrest.

Cited in *Roberson v. United States*, 4 Okla. Crim. Rep. 341, 111 Pac. 984, holding that peace officer may lawfully arrest without warrant for misdemeanor committed in his presence without giving information as to nature of charge.

Cited in notes (42 L.R.A. 676) on what information an accused is entitled to at time of his arrest; (84 Am. St. Rep. 696) on necessity of policeman making known cause of arrest.

10 L. R. A. 609, *ARFF v. STAR F. INS. CO.* 125 N. Y. 57, 21 Am. St. Rep. 721, 25 N. E. 1073.

Authority of agent's subordinates.

Approved in *Ætna L. Ins. Co. v. Fallon*, 110 Tenn. 738, 77 S. W. 937, holding that an insurance agent's clerk may bind the company by acceptance of overdue premium where such is in scope of his employment, and within authority of the agent.

Cited in *Goode & Co. v. Georgia Home Ins. Co.* 92 Va. 397, 30 L. R. A. 844, footnote, p. 842, 53 Am. St. Rep. 817, 23 S. E. 744, which holds insurance company represented by agents' clerk; *Carpenter v. German American Ins. Co.* 135 N. Y. 302, 31 N. E. 1015, holding notice of extent of ownership, to subordinate of general agent, binds company employing agent; *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 16, 26 S. W. 763, holding notice to agent's clerk of encumbrance notice to company, where clerk customarily solicited insurance, filled out policy, and collected premiums; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 517, 46 S. W. 95, holding notice of encumbrance to soliciting agent employed by general agent, imputable to company; *Bergeron v. Pamlico Ins. & Bkg. Co.* 111 N. C. 49, 15 S. E. 883, holding company bound by general agent's clerk's waiver of condition against insurance of leased property; *Cullinan v. Bowker*, 40 Misc. 441, 82 N. Y. Supp. 707, holding that clerk of local agent of indemnity company has power to give indemnity bond; *Fireman's Fund Ins. Co. v. Aachen & M. F. Ins. Co.* 2 Cal. App. 698, 84 Pac. 253, on the power of agent's clerks to bind the company by acts within the scope of their employment; *Springfield F. & M. Ins. Co. v. Price*, 132 Ga. 692, 64 S. E. 1074, holding knowledge of clerk of regularly authorized agent, as to facts material to the rest, before issuance of policy is notice thereof to the company; *Cullinan v. Bowker*, 180 N. Y. 102, 72 N. E. 911

(dissenting opinion), on binding effect of acts of agents' clerk within the scope of his employment; *Re Wright*, 151 Fed. 362, holding contract of insurance agency not broken by employment of clerk by agent to mail notices and collect renewal premiums.

Cited in footnotes to *Insurance Co. of N. A. v. Thornton*, 55 L. R. A. 547, which holds appointment of subagents within implied authority of insurance agent for territory with radius of 35 miles; *Franklin F. Ins. Co. v. Bradford*, 55 L. R. A. 408, which holds company liable on policy delivered without knowledge of duly authorized agent, by his subagent; *Bradford v. Hanover F. Ins. Co.* 49 L. R. A. 530, which denies insurance agent's liability for loss on forbidden policy on which clerk forged his name.

Cited in notes (21 L.R.A. 342) on effect of notice to subagent; (50 Am. St. Rep. 117, 118, 120) on subagents and their relation to agent appointing them; (107 Am. St. Rep. 129) on authority of clerks and assistants to waive provisions of nonwaiver on written waiver of conditions and forfeitures in policies.

Distinguished in *More v. New York Bowery F. Ins. Co.* 130 N. Y. 548, 29 N. E. 757, holding company not bound by parol contract of subagent whose authority known by insured to be limited.

Agency of brokers.

Cited in *Romberg v. Kouther*, 27 Misc. 229, 57 N. Y. Supp. 729, holding broker obtaining insurance for insured under special contract agent for latter; *Sellers v. Commercial F. Ins. Co.* 105 Ala. 291, 16 So. 798, holding insured bound by misstatements in application by brokers to whom he has applied to effect insurance; *Northrup v. Piza*, 43 App. Div. 289, 60 N. Y. Supp. 363, holding knowledge of brokers not binding on company.

Cited in note (38 L.R.A.(N.S.) 639) on insurance broker as agent for the insured.

Effect of custom on agent's authority.

Cited in *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 386, 49 Am. St. Rep. 467, 41 N. E. 658, holding delivery of proofs of loss to local agent binding on company, where sanctioned by custom; *Marshall v. Reading F. Ins. Co.* 78 Hun, 85, 29 N. Y. Supp. 334, holding company bound as to innocent insured. in spite of cancellation of agency, where signed policies left in agent's possession; *Forward v. Continental Ins. Co.* 142 N. Y. 389, 25 L. R. A. 640, 37 N. E. 615, holding conditions of policy against encumbrances not available as defense where ownership truly communicated to agent having apparent authority to waive same.

10 L. R. A. 613, *WHEELER v. WHEELER*, 134 Ill. 522, 25 N. E. 588.

Effect of statute conferring special jurisdiction.

Cited in *Keister v. Keister*, 178 Ill. 104, 52 N. E. 946, dismissing bill for partition which is in effect attempt to obtain statutory contest of will after lapse of prescribed period; *Chicago Title & T. Co. v. Brown*, 183 Ill. 49, 47 L. R. A. 801, 55 N. E. 632, denying jurisdiction of suit to annul probate where begun after period limited by statute; *Storrs v. St. Luke's Hospital*, 180 Ill. 372, 72 Am. St. Rep. 211, 54 N. E. 185, Affirming 75 Ill. App. 156, holding son of interested party dying *non compos mentis* not entitled to contest will where not personally interested thereunder; *Spaulding v. White*, 173 Ill. 130, 50 N. E. 224, upholding amendment to statute shortening time within which will contestable, where reasonable time allowed for pending contests; *Sharp v. Sharp*, 213 Ill. 334, 72 N. E. 1058, holding chancery courts to have only such jurisdiction in will contests as is conferred by statute of wills; *O'Brien v. Bonfield*, 220 Ill. 223, 77 N. E. 167, holding that the jurisdiction of equity courts being purely statutory in will

contests it must be construed in accordance with the conferring statute; *Selden v. Illinois Trust & Sav. Bank*, 239 Ill. 75, 130 Am. Ct. Rep. 180, 87 N. E. 860, holding that the jurisdiction of equity to hear will contest is purely statutory and not within its general jurisdiction; *Kanorowski v. People*, 113 Ill. App. 473, holding that a court of chancery has no jurisdiction to try a will contest case except by virtue of statute.

Limitation on time for will contest.

Cited in *Medill v. Snyder*, 71 Kan. 597, 81 Pac. 216, holding that a statute limiting the time in which a bill for will contest may be introduced in chancery is not a statute of limitation on an existing remedy but a creation of a new remedy.

Limitations in case of absent defendants.

Cited in *McNamara v. McAllister*, 150 Iowa, 247, 34 L.R.A.(N.S.) 439, 130 N. W. 26, holding that provision of statute of limitations that action may be brought within allotted time after return to state applies to nonresidents as far as actions on domestic contracts are concerned.

Distinguished in *Jamieson v. Potts*, 55 Or. 302, 25 L.R.A.(N.S.) 31, 105 Pac. 93, holding under different statute action was not barred where signer of notes lived out of state, and afterwards came into it for less than a year and again departed.

Conclusiveness of order of probate.

Cited in *Palmer v. Bradley*, 142 Fed. 197, holding order of probate conclusive on all parties property before the court.

Interpretation of meaning of words of statute.

Cited in *Culver v. Walters*, 248 Ill. 166, 93 N. E. 747, holding that words of statute must be given usual meaning unless court is certain that in denying them such meaning legislative intent is being followed.

10 L. R. A. 616, *STATE ex rel. COCHRAN v. WINTERS*, 44 Kan. 723, 25 Pac. 235.

"Original package."

Cited in *McGregor v. Cone*, 104 Iowa, 471, 39 L. R. A. 487, 65 Am. St. Rep. 522, 73 N. W. 1041, holding pine box in which packets of cigarettes shipped, "original package;" *Guckenheimer v. Sellers*, 81 Fed. 998, holding crate original package where bottled liquor shipped therein; *State v. Eckenrode*, 148 Iowa, 180, 127 N. W. 56, to the point that "original package" is bundle put up for transportation or commercial handling; *Henderson v. Ortte*, 114 La. 526, 38 So. 440, holding that person selling machines imported need not pay license though the machine is sold in parts in original separate packages.

Importation of intoxicating liquors.

Cited in footnotes to *State v. Rhodes*, 24 L. R. A. 245, which holds liquors in state on crossing boundaries; *Hopkins v. Lewis*, 15 L. R. A. 397, which holds sale of contents of packages in which liquor imported not sale by original packages.

State regulation of commerce.

Cited in footnotes to *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages act requiring marking on package of year in which seed grown; *Com. v. Zelt*, 11 L. R. A. 602, which holds state may make sale of liquor in original packages to intemperate person, a criminal offense; *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood; *Re Gooch*, 10 L. R. A. 830, which holds state cannot prohibit sale of oleomargarine as imported from other state.

Cited in notes (12 L. R. A. 624) on imports in original package subject to state

police power; (13 L. R. A. 107) on power of state law to regulate interstate commerce; (60 L.R.A. 664) on corporate taxation and the commerce clause; (27 Am. St. Rep. 553) on state regulation of interstate commerce.

Jurisdiction of Federal courts in habeas corpus.

Cited in footnote to *King v. McLean Asylum*, 26 L. R. A. 784, which sustains Federal jurisdiction of habeas corpus case between citizens of different states involving right to liberty from restraint as insane person.

10 L. R. A. 620, *STEPHENSON v. REPP*, 47 Ohio St. 551, 25 N. E. 803.

Anticipating breach of obligation.

Cited in *Sloss Marblehead Lime Co. v. Smith*, 11 Ohio C. C. 215, 5 Ohio, C. D. 80, sustaining action brought for breach of contract before expiration of period of performance, where it has been wholly repudiated; *Brown v. VanWinkle Gin & Mach. Works*, 141 Ala. 588, 6 L.R.A.(N.S.) 592, 39 So. 243, holding that on breach of contract to execute a mortgage or security, the mortgagee can at once sue for the breach, the measure of damage being amount of money to have been secured thereby; *Glesenkamp v. Radel*, 8 Ohio N. P. 277, 10 Ohio S. & C. P. Dec. 559; *Kelly v. Pierce*, 16 N. D. 239, 12 L.R.A.(N.S.) 184, 112 N. W. 995,—holding that vendor may sue vendee of personal property on breach of agreement to execute notes for purchase price and the measure of damages is the contract price.

Cited in note (12 L.R.A.(N.S.) 181, 182) on refusal to execute purchase-money notes as giving vendor immediate right of action.

Distinguished in *Hickle v. Hickle*, 6 Ohio C. C. 503, 3 Ohio C. D. 558, holding husband not entitled before divorce to damages for wife's breach of obligation to support, but to equitable lien only.

10 L. R. A. 621, *ANTCLIFF v. JUNE*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019.

Malicious prosecution.

Cited in *Kolka v. Jones*, 6 N. D. 465, 66 Am. St. Rep. 615, 71 N. W. 558, holding repeated prosecution for same cause of action gives right of action though no seizure of property, arrest of person, or special circumstances; *Gonsoulard v. Rosomano*, 100 C. C. A. 97, 176 Fed. 486, holding that malicious prosecution differs from abuse of process in that in latter case need not have terminated in plaintiff's favor; *Whitesell v. Study*, 37 Ind. App. 433, 76 N. E. 1010, holding that a malicious prosecution may be instituted either by process of attachment or summons; *Marlatte v. Wickgenant*, 147 Mich. 273, 110 N. W. 1061, on the abuse of process causing injury and damage sufficient to support action; *Krzyszke v. Kamin*, 163 Mich. 295, 128 N. W. 190, holding that gross and fraudulent abuse of process of court, resulting in damage, gives right of action; *Spear v. Pendill*, 164 Mich. 624, 130 N. W. 343, holding that malicious prosecution lies where action was malicious and without probable cause resulting in damage; *Ailstock v. Moore Lime Co.* 104 Va. 570, 2 L.R.A.(N.S.) 1106, 113 Am. St. Rep. 1060, 52 S. E. 213, 7 A. & E. Ann. Cas. 545, holding that one who institutes a void process wantonly maliciously and without probable cause does so at his peril.

Cited in footnotes to *McCormick Harvesting Mach. Co. v. Willan*, 56 L. R. A. 338, which authorizes suit for malicious prosecution of civil action without restraint of person or seizure of property; *Sneeden v. Harriss*, 14 L. R. A. 389, which authorizes action for malicious abuse of civil process to accomplish col-

lateral purpose; *Swepson v. Davis*, 59 L. R. A. 501, which denies right of defendant in partnership accounting against whom small judgment rendered, to sue for malicious prosecution though successful on some issues; *Abbott v. Thorne*, 65 L.R.A. 826, which denies right of action for malicious prosecution of civil action in which there was no arrest or attachment of property and no special injuries inflicted.

Cited in notes (13 L. R. A. 60) on general rules as to malicious prosecution; (13 L. R. A. 464) on what must be shown in action for malicious prosecution; (12 L. R. A. 760) on defense of reasonable and probable cause in action for malicious prosecution; (2 L.R.A.(N.S.) 1101) on lack of jurisdiction of court in which malicious prosecution begun as affecting right of action therefor; (15 L.R.A.(N.S.) 1146) on effect on presumption of probable cause for prosecution, of procurement of conviction by fraud, perjury, etc.; (36 L.R.A.(N.S.) 1112) on liability for procuring and enforcing judgment on spurious claim; (86 Am. St. Rep. 400, 401, 409) on abuse of lawful process and liability therefor; (93 Am. St. Rep. 455, 457, 467) on liability for malicious prosecution of civil action.

Distinguished in *Waring v. Fletcher*, 152 Ind. 629, 52 N. E. 203, holding no liability on undertaking in attachment though proceeding wrongful and malicious; *Powers v. Houghton*, 159 Mich. 374, 28 L.R.A.(N.S.) 331, 123 N. W. 1108, holding that the defendants having no property in the goods taken by replevin cannot sue the unsuccessful takers for malicious prosecution.

— Time of beginning suit.

Cited in *Dishaw v. Wadleigh*, 15 App. Div. 210, 44 N. Y. Supp. 207, sustaining action commenced before termination of prior suit in which subpoena was used to procure payment of claim instead of attendance of witness.

Cited in footnotes to *Luby v. Bennett*, 56 L. R. A. 261, which holds suit for malicious prosecution maintainable if material issues of prosecution decided in defendant's favor before suit commenced; *Zinn v. Rice*, 12 L. R. A. 288, which holds action for excessive attachment of goods maintainable before termination of suit.

Distinguished in *King v. Johnston*, 81 Wis. 580, 51 N. W. 1011, holding complaint insufficient where termination of criminal prosecution and abuse of process are not alleged.

— Evidence of malice.

Cited in *Severns v. Brainard*, 61 Minn. 267, 63 N. W. 477, holding repetition of actions for groundless cause admissible to show malice.

— Defenses.

Cited in footnote to *Le Clear v. Perkins*, 26 L. R. A. 627, which holds advice of counsel admissible as defense to malicious prosecution of civil suit.

Constitutionality of statute.

Cited in *O'Connell v. Menominee Bay Shore Lumber Co.* 113 Mich. 126, 71 N. W. 449, holding statute permitting service of process outside of jurisdiction of justice of peace in certain cases, void as class legislation.

10 L. R. A. 627, *HAVEMEYER v. SUPERIOR COURT*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121.

Cited in *Sullivan v. Gage*, 145 Cal. 761, 79 Pac. 537, hold narrating history of case in litigation over costs incurred therein.

Dissolution of corporation.

Cited in *Nelson v. Hubbard*, 96 Ala. 245, 17 L. R. A. 378, 11 So. 428, holding suits against corporation dissolved by vote of stockholders not thereafter maintainable under statutory provisions for suits against corporations dissolved by

forfeiture, etc; *Adams Cotton Mills v. Dimmick*, 96 Ala. 245, 17 L.R.A. 378, 11 So. 428, to same point; *Crossman v. Vivienda Water Co.* 150 Cal. 580, 89 Pac. 335, holding the statute providing for winding up of affairs of dissolved corporation by its managers or directors unless other persons are provided, applies to corporations both voluntarily and involuntarily dissolved; *State Invest. & Ins. Co. v. Superior Ct.* 101 Cal. 146, 35 Pac. 549, holding that superior court in the absence of statutory authority has no power whatever to dissolve a corporation; *Re Balfour v. Garrette*, 14 Cal. App. 271, 111 Pac. 615, holding that provisions of Code of Civil Procedure relating to dissolution of corporation is not inconsistent with section 400 of Civil Code; *Gibson v. Thornton*, 107 Ga. 563, 33 S. E. 895, holding court to have no authority to dissolve a corporation and appoint a receiver in the absence of express statutory provision therefor; *War Eagle Consol. Min. Co. v. Dickie*, 14 Idaho, 543, 94 Pac. 1034, on forfeiture of property of foreign corporation not complying with state statutes.

Cited in notes (56 Am. St. Rep. 864, 866) on application of law of lis pendens in dissolution proceedings; (134 Am. St. Rep. 313) on acts and proceedings of dissolved corporations.

Appointment of receiver.

Cited in *Ferrell v. Evans*, 25 Mont. 454, 65 Pac. 714, refusing to appoint receiver of corporation on expiration of charter, in absence of mismanagement by statutory trustees; *Weatherly v. Capital City Water Co.* 115 Ala. 173, 22 So. 140, refusing appointment of receiver of corporation forfeiting charter, where incompetency or untrustworthiness of statutory trustees not shown; *Gibson v. Thornton*, 107 Ga. 563, 33 S. E. 895, holding insolvency of corporation through director's mismanagement does not authorize order of dissolution and appointment of receiver in absence of statutory authority; *San Jose Safe Deposit Bank of Savings v. Bank of Madera*, 121 Cal. 545, 54 Pac. 85, holding appointment of receiver to collect rents improper where stay bond to amount of money judgment given, on appeal in action by mortgagee not asking foreclosure; *People ex rel. Building & L. Asso. Comrs. v. Union Bldg. & L. Asso.* 127 Cal. 407, 58 Pac. 822, striking out appointment of receiver, where record of judgment appealed from fails to show either pleading or finding of essential facts; *Weatherly v. Capital City Water Co.* 115 Ala. 173, 22 So. 140, holding that receiver will not be appointed unless the applicant show incompetency or untrustworthiness of statutory trustees; *Murray v. Superior Ct.* 129 Cal. 633, 62 Pac. 191, holding insolvency not sufficient cause for appointment of receiver for corporation on application of stockholder; *Hobson v. Pacific States Mercantile Co.* 5 Cal. App. 102, 89 Pac. 866, holding that receiver will not be appointed without notice to corporation except in case of irreparable injury; *Ferrell v. Evans*, 25 Mont. 454, 65 Pac. 714, holding that the intent of the legislature in providing for administration of affairs of defunct corporation by its directors as trustees was to provide a method most inexpensive and expeditious subject to accounting or removal of court of equity on application of person interested whose rights are jeopardized; *State ex rel. Barton v. Farmers' & M. Ins. Co.* 90 Neb. 668, 134 N. W. 284, holding that court of equity has power, independent of statute, to appoint receiver of corporation; *Murray v. American Surety Co.* 17 C. C. A. 138, 44 U. S. App. 43, 70 Fed. 344, holding that in absence of statutory authority a receiver cannot be appointed by court in action instituted by attorney general merely by virtue of right to appoint receiver in action instituted by creditors or shareholders.

Cited in notes (20 L.R.A. 211) on statutory proceedings for appointment of receiver; (71 Am. St. Rep. 355) on relation of receivers to pre-existing liens and

remedies for their enforcements; (72 Am. St. Rep. 40, 56, 59) as to when appointment of receiver is proper.

Distinguished in *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 126, 54 S. W. 289, holding that court may appoint receiver though no application be made for one, where statute provides clearly for such appointment on forfeiture by corporation of its corporate rights.

Who entitled to receiver.

Cited in *Yore v. Superior Ct.* 108 Cal. 436, 41 Pac. 477, on party entitled to apply for appointment of receiver.

Cited in note (118 Am. St. Rep. 199) as to when and at whose instance a receiver of a corporation may be appointed.

Distinguished in *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 126, 54 S. W. 289, holding court justified under statute in appointing receiver of corporate property on judgment forfeiting charter, although not applied for by interested party.

Allowance of extraordinary remedy.

Cited in *State ex rel. Hamilton v. Guinotte*, 156 Mo. 527, 50 L. R. A. 795, 57 S. W. 281, granting certiorari to review probate order revoking letters of administration, though review by appeal available; *Nail v. Superior Ct.* 11 Cal. App. 30, 103 Pac. 902, holding that the institution of an appeal does not deprive the trial court (if a court of record) of jurisdiction of proceedings therein, designated by code as provisional remedies; *Cronan v. District Ct.* 15 Idaho, 205, 96 Pac. 768, holding appeal inadequate where made from an appointment of a receiver in April which could not be heard until in October; *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Ct.* 22 Mont. 235, 56 Pac. 219, on the inadequacy of the remedy of appeal; *State ex rel. Reynolds v. Graves*, 66 Neb. 23, 92 N. W. 144, holding that mandamus will lie to compel district judge to vacate an injunction granted by him without jurisdiction or authority where the ordinary remedy is inadequate.

Cited in note (51 L. R. A. 36, 46, 54, 58, 75, 81, 107-109) on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

— Writ of prohibition.

Cited in *Fischer v. Superior Court*, 110 Cal. 140, 42 Pac. 561, issuing writ to prevent enforcement of void order placing receiver in possession of corporate property; *State ex rel. McCaffery v. Aloe*, 152 Mo. 484, 47 L. R. A. 399, 54 S. W. 494, granting writ although no application to lower court for regular remedies, where latter inadequate; *Board of Education v. Holt*, 51 W. Va. 436, 41 S. E. 337, issuing writ against execution of injunction by circuit court, where its lack of jurisdiction had been previously called to its attention; *State ex rel. Anheuser-Busch Brewing Asso. v. Eby*, 170 Mo. 521, 71 S. W. 52, holding that prohibition may issue to lower court to prevent trial of certain cases though lack of jurisdiction not raised below; *Hartigan v. West Virginia University*, 49 W. Va. 49, 38 S. E. 698 (dissenting opinion), majority holding writ cannot issue to prevent execution of order of board of regents removing professor; *Bruner v. Superior Ct.* 92 Cal. 267, 28 Pac. 341, holding that writ of prohibition should be granted where indictment is had by a grand jury not legally impaneled since appeal therefrom is inadequate remedy; *Grant v. Superior Ct.* 106 Cal. 326, 39 Pac. 604, holding a writ of prohibition will not lie against order of court fixing receiver's compensation, such order being subject to review on appeal or certiorari; *Cosby v. Superior Ct.* 110 Cal. 53, 42 Pac. 460, holding prohibition the proper remedy to test validity of an adjudication of contempt not yet executed; *Murry*

v. Superior Ct. 129 Cal. 635, 62 Pac. 191, holding writ of prohibition proper proceeding to arrest unauthorized appointment of receiver; *McAneny v. Superior Ct.* 150 Cal. 10, 87 Pac. 1020, holding that a writ of prohibition in aid of an appeal will not lie where a writ of supersedeas offers a speedy and adequate stay of proceedings; *Boca & L. R. Co. v. Superior Ct.* 150 Cal. 158, 88 Pac. 718, holding that a writ prohibiting a court from making any other order than one of dismissal will not lie where a hearing is in process on such an order, but not yet determined; *Primm v. Superior Ct.* 3 Cal. App. 210, 84 Pac. 786, holding that an order of court continuing an attachment involving a recurring injury is not so complete an act as to preclude writ of prohibition; *People ex rel Daniels v. District Ct.* 33 Colo. 305, 80 Pac. 908, holding that a writ of prohibition will be granted to undo unauthorized act of inferior court where something remains to be done to give full effect to judgment thereon as well as to prevent further illegal action; *Fayerweather v. Monson*, 61 Conn. 444, 23 Atl. 878, holding that the writ of prohibition checks further proceedings and quashes what has been already done without jurisdiction; *State ex rel. Amsterdamsch Trustees, Kantoov v. Superior Ct.* 15 Wash. 674, 37 L.R.A. 113, 55 Am. St. Rep. 907, 47 Pac. 31, following California in the interpretation of constitution and statutes as to the scope and office of prohibition as exercisable by supreme court; *Keefe v. District Ct.* 16 Wyo. 394, 94 Pac. 459, holding that where appeal from conviction is inadequate prohibition will issue against trial on second information charging same offense.

Cited in note (111 Am. St. Rep. 935, 949, 955, 962, 965, 966, 977, 978) on writ of prohibition.

Distinguished in *White v. Superior Court*, 110 Cal. 58, 42 Pac. 480, refusing writ where appeal from order prevents sale of property to satisfy decree for alimony; *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Court*, 22 Mont. 235, 56 Pac. 219, refusing writ to prevent removal of corporate trustees by court of doubtful jurisdiction where no injury imminent; *Board of Home Missions' v. Manghan*, 35 Utah, 526, 24 L.R.A. (N.S.) 878, 101 Pac. 581, holding that mere error however gross will not operate to deprive a court of jurisdiction by justifying a writ of prohibition; *Bishop v. Superior Ct.* 87 Cal. 235, 25 Pac. 435, holding that prohibition will not lie in favor of a defendant who has the right to have any ruling of court subjected to review on appeal.

— Person entitled.

Cited in *Hamberger v. Police Ct.* 12 Cal. App. 156, 107 Pac. 614 (dissenting opinion), on the writ of prohibition as being a writ of right in favor of party aggrieved, and to be granted only on discretion of court on application of other persons; *First Nat. Bank v. Superior Ct.* 12 Cal. App. 345, 107 Pac. 322, holding that prohibition should be allowed as of right in favor of party aggrieved by unauthorized appointment of receiver causing continuing injury for which there is no plain speedy or adequate remedy at law.

Objection to jurisdiction in trial court.

Cited in *People ex rel. Alexander v. District Ct.* 29 Colo. 189, 68 Pac. 242, holding that if want of jurisdiction is apparent on face of pleadings in lower court, no preliminary objection is necessary before suing out writ of prohibition; *State ex rel. Missouri P. R. Co. v. Williams*, 221 Mo. 247, 120 S. W. 740, holding that a formal denial of motion to dismiss proceedings need not appear of record to entitle applicants to a writ of prohibition against denying judge, where it appears that he claims jurisdiction; *State ex rel. McEntee v. Bright*, 224 Mo. 526, 123 S. W. 1057, holding that the writ of prohibition may be

granted even though the jurisdiction of the lower court has not been assailed; *Jennings v. Judge*, 56 W. Va. 148, 49 S. E. 23, holding that objection to jurisdiction need not be made where it appears that the court considered and decided that it had such jurisdiction.

Distinguished in *McAneny v. Superior Ct.* 150 Cal. 11, 87 Pac. 1020, holding that objection to jurisdiction must be brought to attention of superior court where there is an opportunity afforded to do so, to entitle petitioner to a writ of prohibition.

Service of parties in interest in prohibition or certiorari.

Cited in *Canadian Bank v. Wood*, 13 Idaho, 801, 93 Pac. 257, holding that a failure to serve parties in interest, with affidavit and notice of hearing on a proceeding in which a judge is named as respondent, at most calls only for postponement of hearing, until such parties have reasonable notice of time of hearing.

Immaterial issue.

Cited in *Taylor v. Hill*, 115 Cal. 151, 44 Pac. 336, holding failure to give judgment creditor notice of labor claim, waived by his appearance and answer in statutory attachment proceeding against proceeds of execution.

Summary seizure of property by court.

Cited in *Modern Loan Co. v. Police Ct.* 12 Cal. App. 587, 108 Pac. 56, holding that a police court cannot summarily seize property by warrant from person in possession on the grounds of theft and declare who is the owner thereof.

Transfer of cause.

Approved in *Howell v. Budd*, 91 Cal. 347, 27 Pac. 747, holding application for transfer of cause clearly insufficient.

Contracts in restraint of trade.

Cited in *California Cured Fruit Asso. v. Stelling*, 141 Cal. 720, 75 Pac. 320, holding that illegality of contract cannot be pleaded in defense to replevin of goods subject to such contract, no attempt being made thereby to enforce the contract.

10 L. R. A. 650, *HAVEMEYER v. SUPERIOR COURT*, 87 Cal. 267, 25 Pac. 433.

Cited in *Sullivan v. Gage*, 145 Cal. 762, 79 Pac. 537, narrating history of case in litigation over costs therein.

Right of possession by receiver.

Cited in note (20 L. R. A. 393) on exclusiveness of jurisdiction by appointment of receiver.

Writ of prohibition — allowance.

Cited in *Clark County v. Warner*, 116 Ky. 810, 76 S. W. 828, holding that a writ of prohibition will issue against a court of jurisdiction from which jurisdiction has passed at time of issuance of writ.

Cited in note (111 Am. St. Rep. 977) on writ of prohibition.

10 L. R. A. 653, *SLATTERY v. O'CONNELL*, 153 Mass. 94, 26 N. E. 430.

Imputed negligence and contributory negligence, of children.

Cited in *Creed v. Kendall*, 156 Mass. 293, 31 N. E. 6, holding no contributory negligence as matter of law where three-year-old child left playing in yard, strayed into street and injured by recently dug hole of which mother ignorant; *McNeil v. Boston Ice Co.* 173 Mass. 577, 54 N. E. 257, holding negligence for jury where mother permitted two-and-a-half-year-old child to play on unguarded street lot with five-year-old child; *Powers v. Quiney & B. Street R. Co.* 163 Mass. 7, 39

N. E. 345, holding negligence for jury where mother did not immediately follow small child into street; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 473, 52 L. R. A. 659, 79 Am. St. Rep. 226, 58 N. E. 367, Affirming 87 Ill. App. 640, holding negligence for jury where mother injured in attempt to rescue straying child from cable cars; *O'Brien v. Hudner*, 182 Mass. 383, 65 N. E. 788, holding mother not negligent by letting eight-year-old child go out with older sister to play in yard; *Mellen v. Old Colony Street R. Co.* 184 Mass. 401, 68 N. E. 679, holding father not negligent in allowing four-year old child to play in yard inclosed by fence; *Sullivan v. Boston Elev. R. Co.* 192 Mass. 44, 78 N. E. 382, holding that where child running across street is injured by car running at alleged rate of 15 miles per hour, a question as to his contributory negligence is raised for the jury; *Sullivan v. Boston Elev. R. Co.* 192 Mass. 45, 78 N. E. 82, holding that where parents ordered injured child to play in lower hall leaving door over which they had no control unlocked, a question for the jury as to their contributory negligence is raised.

Cited in footnote to *Worthington v. Mencer*, 17 L. R. A. 407, which holds contributory negligence not chargeable to one unable to apprehend danger.

Cited in notes (17 L. R. A. 78) on contributory negligence of parent; (12 L. R. A. 217) on contributory negligence of infant of tender years; (17 L. R. A. 79) on contributory negligence of child as question of fact for jury; (37 L. R. A. 74) on which of two or more persons is the master of another who is conceded to be the servant of one of them; (49 Am. St. Rep. 407) on negligence of parent as question for jury.

Distinguished in *Grant v. Fitchburg*, 160 Mass. 17, 39 Am. St. Rep. 449, 35 N. E. 84, refusing recovery by mother for injury to child permitted to stray upon street unattended for fifteen minutes.

10 L. R. A. 656, *ROBERTS v. FRENCH*, 153 Mass. 60, 25 Am. St. Rep. 611, 26 N. E. 416.

Falsity of representations as ground for relief.

Cited in *Whiting v. Price*, 169 Mass. 577, 61 Am. St. Rep. 307, 48 N. E. 772, holding detailed statement of securities of bond sold, entitles vendee to recover price, though unintentionally false; *Burns v. Dockray*, 156 Mass. 138, 30 N. E. 551, holding vendee may maintain action for false representations as to validity of title, though examination thereof made by third party at vendee's request prior to purchase; *Hoock v. Bowman*, 42 Neb. 83, 47 Am. St. Rep. 691, 60 N. W. 389, holding vendee may rescind purchase contract of lot falsely represented on chart by vendee as corner lot; *Keene v. Demelman*, 172 Mass. 22, 51 N. E. 188, holding vendor entitled to rescind, where his warranty of area of tract sold obtained by vendee's fraud; *Eichelberger v. Rills Land & Water Co.* 9 Cal. App. 634, 100 Pac. 117, holding that purchaser of land is warranted in relying on representations of owner as to acreage though he is shown the land and its boundaries; *Malarly v. McHugh*, 202 Mass. 149, 23 L.R.A.(N.S.) 496, 132 Am. St. Rep. 484, 88 N. E. 894, 16 A. & E. Ann. Cas. 500, as approving cases holding that false representation as to acreage is no ground for rescission when the purchaser has been shown the boundaries; *Odell v. Story*, 81 Neb. 439, 116 N. W. 269, holding that purchaser may not rely on opinion of vendor as to dimensions or on his statement as to distance from a known to an unknown corner; *Sipola v. Winship*, 74 N. H. 248, 66 Atl. 962, as showing a tendency on part of the state courts to limit the freedom of the vendor in making statements inducing purchase.

Cited in notes (37 L. R. A. 610) on right to rely on representations made to effect contract as basis for charge of fraud; (35 L. R. A. 429) on expression of

opinion as fraud; (23 L.R.A.(N.S.) 490) on actionability of fraudulent representation by vendor as to area within boundaries correctly pointed out; (34 L.R.A.(N.S.) 929) on relief from purchase at auction on ground of mistake; (131 Am. St. Rep. 496) on rescission by buyer for false representations by vendor or auctioneer.

Distinguished in *Way v. Ryther*, 165 Mass. 229, 42 N. E. 1128, holding vendor's statement of cost price to him no defense to vendee's purchase note on ground of fraud; *Long v. Athol*, 196 Mass. 504, 17 L.R.A.(N.S.) 99, 82 N. E. 665, holding that where an erroneous estimate is the basis of a contract-price and such estimate is not even approximately correct though not stated as of knowledge, rescission may be had.

10 L. R. A. 658, *COY v. JONES*, 30 Neb. 798, 47 N. W. 208.

Statutory liability of stockholders for debts.

Cited in notes (11 L.R.A.(N.S.) 905) on time of accrual of right of action as to stockholder's liability; (96 Am. St. Rep. 990) on statute of limitations in actions against corporate officers and stockholders.

Distinguished in *Pickering v. Hastings*, 56 Neb. 204, 76 N. W. 587, holding single creditor cannot enforce statutory liability against single stockholder for his benefit alone.

— Nature.

Cited in *Nebraska Nat. Bank v. Walsh*, 68 Ark. 440, 82 Am. St. Rep. 301, 59 S. W. 952, holding limitation applicable to civil liability governs stockholder's statutory obligation to pay corporate debts.

Overruled in *Globe Pub. Co. v. State Bank*, 41 Neb. 193, 27 L. R. A. 861, 59 N. W. 683, holding statute rendering stockholders liable for corporate debts on failure of directors to file annual report, penal in nature.

10 L. R. A. 659, *EDWARDS v. CLARK*, 83 Mich. 246, 47 N. W. 112.

Breach of covenant against encumbrances.

Cited in *Demars v. Koehler*, 62 N. J. L. 208, 72 Am. St. Rep. 646, 41 Atl. 720, holding grantee may maintain action on covenant though aware of outstanding encumbrance when deed accepted; *Browning v. Stillwell*, 42 Misc. 348, 86 N. Y. Supp. 707, and *Wragg v. Mead*, 120 Iowa, 322, 94 N. W. 856, holding rental value of land for unexpired term measure of damages when breach of covenant outstanding lease; *Simons v. Diamond*, 159 Mich. 247, 123 N. W. 1132, holding an outstanding lease for a term to be within covenant against incumbrances.

Cited in notes (4 L.R.A.(N.S.) 314) on effect of purchaser's knowledge of encumbrance in action for breach of covenant; (35 L.R.A.(N.S.) 779) on damages for breach of warranty by existence of unexpired lease.

Parol evidence.

Cited in *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 377, 38 S. E. 679, holding evidence inadmissible to prove oral agreement contradictory to contemporaneous written contract.

Cited in note (17 L. R. A. 271) on parol evidence to vary, add to, or alter written contract.

10 L. R. A. 660, *McNUTT v. DIX*, 83 Mich. 328, 47 N. W. 212.

Breach of fiduciary relationship by agent.

Cited in *Hogle v. Meyering*, 161 Mich. 485, 126 N. W. 1063, holding that a broker cannot be both principal on one side and agent on the other for the exchange of land; *Baars v. Laketon Twp.* 163 Mich. 666, 129 N. W. 7, Ann. Cas.

1912 A, 866, holding that highway commissioner cannot recover for services rendered in overseeing work of his own men and teams upon highway; *Kroll v. Coach*, 45 Or. 470, 78 Pac. 397, holding that where an agent in effect makes a purchase jointly with his principal any secret profit made by him may be recovered by the principal; *Nabours v. McCord*, 97 Tex. 533, 80 S. W. 595, holding purchase by assignee indirectly or directly of assets of estate is voidable at option of creditors whether assignee paid full consideration and acted in good faith or not.

Cited in footnotes to *Jansen v. Williams*, 20 L. R. A. 207, which denies agent's right to become purchaser without principal's acquiescence; *Boswell v. Cunningham*, 21 L. R. A. 54, which denies agent's right to acquire adverse interest in subject-matter of agency; *Strong v. Brennan*, 47 L. R. A. 792, which denies right of attorney to recover for services to association employing him when also engaged and paid by adverse party; *Holmes v. Cathcart*, 60 L. R. A. 734, which requires agent, authorized to make sale or exchange at specified terms, to disclose to principal facts as to more advantageous one learned of; *Trice v. Comstock*, 61 L. R. A. 176, which denies right of one employed to conduct probable customers to principals engaged in reselling at advances options procured from owners, to purchase for own benefit adversely to principals even after agency terminates; *Van Dusen v. Bigelow*, 67 L.R.A. 288, which holds that agent for collecting rent, paying tax, seeing to repairs, and giving advice as to value of farm lands, cannot purchase for himself without full disclosure of all facts bearing on the value of the land; *State v. Edwards*, 69 L.R.A. 667, which denies right of commission merchants to whom grain is consigned for sale on commission to purchase themselves after business hours at highest price of the day on the board of trade.

Cited in notes (80 Am. St. Rep. 559) on purchase by agent of principal's property; (2 Eng. Rul. Cas. 518) on right of principal to profits made and advantages gained by agent in execution of agency.

10 L. R. A. 662, *WOODWARD v. BLUE*, 107 N. C. 407, 22 Am. St. Rep. 897, 12 S. E. 453.

Legitimacy.

Cited in *State v. Liles*, 134 N. C. 742, 47 S. E. 750, holding legitimacy of child born of married woman issue of fact dependent on nonaccess of husband.

Cited in footnotes to *Cox v. State*, 41 L. R. A. 760, which holds bigamous cohabitation continues so long as parties live together ostensibly as husband and wife; *Re Picken*, 25 L. R. A. 477, which holds presumption of legitimacy very strong after lapse of ninety years from birth.

Cited in note (18 L. R. A. 377) on nature of antenuptial pregnancy or unchastity as ground for divorce or annulment of marriage.

Evidence of legitimacy.

Cited in *Erwin v. Bailey*, 123 N. C. 634, 31 S. E. 844, holding parent's quarrels about legitimacy of child and father's disclaim of paternity, admissible; *Mebane v. Capehart*, 127 N. C. 50, 37 S. E. 84, admitting evidence of frequent association of wife and putative father, husband's absence, and final separation by reason of quarrels concerning parentage of child; *Wallace v. Wallace*, 137 Iowa, 44, 14 L.R.A.(N.S.) 547, 126 Am. St. Rep. 253, 114 N. W. 527, 15 A. & E. Ann. Cas. 761, holding that testimony of wife is not admissible to show nonaccess of man she subsequently married during period when she became pregnant by another of child born in wedlock.

Cited in notes (36 L.R.A.(N.S.) 255) on proof establishing bastardy of married

woman's child; (11 Eng. Rul. Cas. 541) on admissibility of evidence tending to bastardize issue.

10 L. R. A. 665, *DEVLIN v. QUIGG*, 44 Minn. 534, 20 Am. St. Rep. 592, 47 N. W. 258.

Defense of no consideration on foreclosure of mortgage.

Cited in *Anderson v. Lee*, 73 Minn. 400, 76 N. W. 24, enjoining foreclosure of mortgage by assignee not bona fide at suit of administratrix of mortgagor, where mortgage executed without consideration.

Distinguished in *Moffett v. Parker*, 71 Minn. 143, 70 Am. St. Rep. 319, 73 N. W. 850, holding bona fide assignee may enforce mortgage given to defraud creditors, to extent of interest.

Review of special findings of fact.

Cited in *Merritt v. Temple*, 155 Ind. 498, 58 N. E. 699, upholding findings where supported by any evidence.

Injunction against action at law.

Cited in footnote in *Kaufmann v. Liggett*, 67 L.R.A. 353, which sustains right to injunction against proceedings at law to obtain possession of leased property where lessee has an equitable right to a continuance of possession.

10 L. R. A. 666, *COBB v. COVENANT MUT. BEN. ASSO.* 153 Mass. 176, 25 Am. St. Rep. 619, 26 N. E. 230.

Warranties in application for insurance.

Cited in *Sweeney v. Metropolitan L. Ins. Co.* 19 R. I. 172, 38 L. R. A. 297, 61 Am. St. Rep. 751, 36 Atl. 9, holding insured bound by falsity of statements of facts within his knowledge made warranties in application; *Cummings v. Kennebec Mut. L. Ins. Co.* 89 Me. 41, 35 Atl. 1032; *Aloe v. Mutual Reserve Life Assn.* 147 Mo. 579, 49 S. W. 553; *Nelson v. Nederland L. Ins. Co.* 110 Iowa, 603, 81 N. W. 807; *Stewart v. Equitable Life Assn.* 110 Iowa, 531, 81 N. W. 782, — holding falsity of warranty in medical examination avoids policy irrespective of materiality of answers; *National Union v. Arnhorst*, 74 Ill. App. 489, holding policy avoided by falsity of answers in medical examination though not warranties; *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 540, 25 S. W. 835, holding insured precluded from recovery on policy issued on false warranties in medical examination unless company estopped by knowledge of examiner; *Caruthers v. Kansas Mut. L. Ins. Co.* 108 Fed. 491, holding policy avoided by failure to correctly state physicians consulted, where answer under warranty; *Security Mut. L. Ins. Co. v. Webb*, 55 L. R. A. 129, 45 C. C. A. 651, 106 Fed. 811, holding policy avoided by false statement concerning previous application for insurance, though such previous application rejected by reason of insured's refusal to comply with certain tests; *Hubbard v. Mutual Reserve Fund Life Assn.* 40 C. C. A. 670, 100 Fed. 724, holding question of fraud avoiding policy for jury where insured falsely denies consulting physician, though in fact healthy; *Fidelity Mut. Life Assn. v. McDaniel*, 25 Ind. App. 620, 57 N. E. 645; *Ash v. Fidelity Mut. Life Assn.* 26 Tex. Civ. App. 504, 63 S. W. 944; *Flippen v. State L. Ins. Co.* 30 Tex. Civ. App. 364, 70 S. W. 787; *McDermott v. Modern Woodmen*, 97 Mo. App. 656, 71 S. W. 833, — holding policy vitiated by misstatements as to attendance by physician made warranties by policy; *Southern Ins. Co. v. White*, 58 Ark. 280, 24 S. W. 425, holding failure to keep barrel and pails of water called for by warranty in application, destroys validity of policy; *Northwestern Masonic Aid Assn. v. Bodurtha*, 23 Ind. App. 128, 77 Am. St. Rep. 414, 53 N. E. 787, holding policy avoided by breach of promissory warranty in application to abstain from use of

liquor; Central Acci. Ins. Co. v. Spence, 126 Ill. App. 41, holding that where the application is made part of the policy any statement therein is a warranty and it is of no consequence whether the statement falsely made therein is material to the risk or not; Smith v. Bankers' Life Asso. 157 Ill. App. 238, holding that answer by applicant for insurance as to condition of his health, will if untrue vitiate policy even though made unintentionally; Metropolitan L. Ins. Co. v. Brubaker, 78 Kan. 152, 18 L.R.A.(N.S.) 367, 130 Am. St. Rep. 356, 96 Pac. 62, 16 A. & E. Ann. Cas. 267, holding liability of insurer depends on the truthfulness of the answers to questions in the application which is a warranty, the materiality to the risk being of no consequence; Barker v. Metropolitan L. Ins. Co. 198 Mass. 383, 84 N. E. 490, distinguishing representations and warranties with respect to burden of proving truth thereof at common law; Everson v. General Acci. F. & Life Assur. Corp. 202 Mass. 173, 88 N. E. 658, on nonrecovery where the truth of a statement, although immaterial and not affecting the risk, is made the basis of a contract and it turns out to be false; Eminent Household, C. W. v. Prater, 24 Okla. 224, 23 L.R.A.(N.S.) 924, 103 Pac. 558, 20 Ann. Cas. 287, holding falsity of warranties in application avoids policy irrespective of materiality of answers.

Cited in footnotes to White v. Providence Sav. Life Assur. Soc. 27 L. R. A. 398, which holds technical warranties as well as representations included in provision against misrepresentations material; Globe Mut. L. Ins. Asso. v. Wagner, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead; Black v. Travelers' Ins. Co. 61 L. R. A. 500, which holds injury not bodily infirmity, as matter of law, unless physical health of insured affected.

Cited in notes (6 Eng. Rul. Cas. 833) on avoidance of insurance contract for failure of insured to disclose all material facts; (13 Eng. Rul. Cas. 546) on effect of representations by insured.

Statements material to risk.

Cited in Glidden v. United States Fidelity & G. Co. 198 Mass. 113, 84 N. E. 143, holding that where statement on the faith of which insurance is given is material to the risk any falsity therein whether intentional or from honest mistake precludes liability of insurer.

Consultation with physician.

Cited in Beard v. Royal Neighbors, 53 Or. 109, 19 L.R.A.(N.S.) 801, 99 Pac. 83, 17 A. & E. Ann. Cas. 1199, holding that insured consulted a physician for personal ailment where her husband sent one to her and she accepted his advice and assistance, with respect to la grippe.

Cited in note (18 L.R.A.(N.S.) 363) on what constitutes consultation with, or attendance by, physician, within meaning of application for insurance.

Instruction on the facts.

Cited in Partelow v. Newton & B. Street R. Co. 196 Mass. 33, 81 N. E. 894, holding that the statutory prohibition against charging with respect to matters of fact refers only to the summing up after close of case and does not apply to remarks made by judge during examination of a witness; Whitney v. Wellesley & B. Street R. Co. 197 Mass. 503, 84 N. E. 95, holding that the defeated party cannot complain if an unbiased analytical statement of the testimony and the law distinctly indicates the party entitled to verdict.

Cited in note (7 Eng. Rul. Cas. 293) on instructions upon facts.

10 L. R. A. 670, STEEL v. HOLLADAY, 20 Or. 70, 25 Pac. 69.

Power of county court in probate proceedings.

Cited in Mills's Estate, 40 Or. 430, 67 Pac. 107, holding attorney's fee allow-

able to administer prior to settlement of his accounts; *Decker v. Decker*, 3 Alaska, 124, holding that an action on administrators' bond will not lie in district court until the remedies of the probate court have been exhausted; *Brown v. Strom*, 113 Minn. 4, 129 N. W. 136, holding that probate court has original and exclusive jurisdiction in administration of affairs of deceased persons.

Devastavit.

Cited in *Re Padgett*, 114 Mo. App. 314, 89 S. W. 886, holding that the appropriation of Wood's money for the purchase of land by curator without consent of probate court constitutes a devastavit.

10 L. R. A. 673, *HOGUE v. ALBINA*, 20 Or. 182, 25 Pac. 386.

Dedication.

Cited in *Steel v. Portland*, 23 Or. 183, 31 Pac. 480, holding heirs not entitled to property platted as park by ancestor selling adjoining lots with reference thereto; *Spencer v. Peterson*, 41 Or. 259, 68 Pac. 519, holding owner considered as having dedicated to public use roads on recorded plat; *Nodine v. Union*, 142 Or. 616, 72 Pac. 582, holding recording unacknowledged plat not dedication of streets; *Oregon City v. Oregon & C. R. Co.* 44 Or. 176, 74 Pac. 924, holding that where the owners of city property make sales of lots according to a plot made out by a person having no title to land platted without making any changes therein such plat is as valid as if they themselves had made it; *Morse v. Whitcomb*, 54 Or. 418, 102 Pac. 788, holding plat admissible in connection with declarations of plattor to show intended dedication of certain tract thereon indicated as a street.

Distinguished in *Lewis v. Portland*, 25 Or. 155, 22 L. R. A. 740, 42 Am. St. Rep. 772, 35 Pac. 259, holding owner of tract not estopped as against city, by conveyances referring to name of alleged street by which strip in dispute platted, where not denominated as street therein, and possession never surrendered by grantor.

— Necessity of formal acceptance.

Cited in *Boise City v. Hon*, 14 Idaho, 281, 94 Pac. 167, holding that where a sale of lots is made with reference to plats filed showing streets and alleys an irrevocable dedication as platted takes place and there need be no acceptance on part of city to make it binding.

— Presumption of.

Cited in *Columbia & P. S. R. Co. v. Seattle*, 33 Wash. 519, 74 Pac. 670, holding that an intent to dedicate must clearly appear such intent not being presumable; *Brown v. Dickey*, 106 Me. 103, 75 Atl. 382, holding that burden of proof rests upon person claiming dedication of land to public use and acts and declarations must show clear and unequivocal intention to so dedicate.

10 L. R. A. 676, *CANAJOHARIE NAT. BANK v. DIEFENDORF*, 123 N. Y. 191, 33 N. Y. S. R. 389, 25 N. E. 402.

Bona fide purchaser of negotiable instruments before maturity.

Approved in *American Nat. Bank v. Fountain*, 148 N. C. 592, 62 S. E. 738, as being one of a line of well considered cases establishing the principles codified in *Revisal 1905 c. 54, §§ 2201, 2208* definitive of holders in due course.

Cited in *Lalor v. Yetter*, 34 N. Y. S. R. 63, 11 N. Y. Supp. 638, holding defense of fraud of payee admissible against party purchasing note after maturity from party receiving same from payee in settlement of antecedent debt; *Weiss v. Rieser*, 62 Misc. 296, 114 N. Y. Supp. 983, holding allegation of absence of con-

sideration a good defense against a holder taking note with knowledge of its dishonor for fraud.

Cited in footnote to *Lynchburg Nat. Bank v. Scott Bros.* 29 L. R. A. 827, which holds usury forming part of renewal note discounted at legal rate not available defense.

Cited in note (36 L. R. A. 441) on fraud in obtaining execution of note as defense against bona fide holder.

— **Who is a bona fide purchaser.**

Cited in *Hay v. Jaecle*, 90 Hun, 116, 35 N. Y. Supp. 650, holding purchaser for value in due course raises presumption of good faith, as matter of law, against accommodation maker; *Union Nut & Bolt Co. v. Doherty*, 32 Misc. 250, 65 N. Y. Supp. 786, holding purchaser of note in due course given by member of partnership for merchandise, not chargeable with knowledge of fraud by notice that transportation business carried on; *Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 53 App. Div. 635, 65 N. Y. Supp. 757, holding party making loan on stolen bonds given as collateral protected to extent of interest in absence of notice of theft; *Cheever v. Pittsburgh, S. & L. E. R. Co.* 28 App. Div. 89, 50 N. Y. Supp. 1067, holding directed verdict for indorsee erroneous where circumstances sufficient to have put him upon inquiry; *Wright v. Bartholomew*, 66 App. Div. 362, 72 N. Y. Supp. 706, holding bona fides for jury where party put on inquiry by peculiar circumstances of sale of notes; *Brook v. Teague*, 52 Kan. 126, 34 Pac. 347, holding one taking note under circumstances showing bad faith or with knowledge that maker has defense, not an innocent purchaser; *Franc v. Dickinson*, 3 Silv. Ct. App. 332, 34 N. Y. S. R. 864, 26 N. E. 250, holding good faith for jury where indorsee's inquiry met with answer sufficient to arouse suspicion; *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 66, 34 L. R. A. 72, footnote, p. 69, 55 Am. St. Rep. 646, 44 N. E. 701, holding bona fides of pledgee without actual notice not impeached, as matter of law, by fact that fraudulent note put in circulation by officer of corporate maker, where payee third party; *Drew v. Wheelihan*, 75 Minn. 72, 77 N. W. 558, holding negligence in cashing stranger's bank check, evidence of bad faith warranting submission to jury; *Close v. Potter*, 5 Misc. 547, 25 N. Y. Supp. 972, holding bona fides of purchase of notes of corporation known to be in straightened circumstances, for jury; *Cahen v. Everitt*, 67 App. Div. 88, 73 N. Y. Supp. 549, holding good faith of pawnbroker buying fraudulent note from notorious bookmaker at low price, for jury; *Perth Amboy Mut. Loan Homestead & Bldg. Asso. v. Chapman*, 80 App. Div. 563, 81 N. Y. Supp. 38, denying right of stockbroker to hold stolen bonds pledged as collateral by bank cashier whose title he knows was not good; *Petrie v. Williams*, 68 Hun, 592, 23 N. Y. Supp. 237, holding good faith for jury where defendants aware of infancy of party to whom sale at fraudulently exorbitant price made; *Thamling v. Duffey*, 14 Mont. 574, 43 Am. St. Rep. 658, 37 Pac. 363, holding bona fides of acquisition of note must be pleaded where answer shows fraud in inception thereof; *American Exch. Nat. Bank v. New York Belting & Pkg. Co.* 148 N. Y. 706, 43 N. E. 168, upholding directed verdict for plaintiff where defendant's only witness of fraud disproves notice thereof to plaintiff; *Bank of Monongahela Valley v. Weston*, 172 N. Y. 268, 64 N. E. 946, holding bank not chargeable with bad faith by discounting notes at 7 per cent; *Ward v. City Trust Co.* 117 App. Div. 140, 102 N. Y. Supp. 50, holding that the transferee of commercial paper of of a corporation acquires, not the actual title of transferor, but title as shown by transferor's apparent right to make the transfer, the transferee having no other knowledge; *Becker v. Hart*, 135 App. Div. 789, 120 N. Y. Supp. 270 holding that a purchase of a note for little more than one half its face value is alone sufficient to raise the question of bona fides; *Unaka Nat. Bank v. Butler*, 113 Tenn. 585, 83

S. W. 655, holding that the acceptor of a cheque from an unknown customer supposed to be payee, without further endorsement, or inquiry of identity is a bona fide holder; *Scandinavian American Bank v. Johnston*, 63 Wash. 194, 115 Pac. 102, to the point that where person who takes note as collateral security purposely refrained from making any inquiry into its origin he may be held not purchaser in due course.

Cited in footnote to *Brown v. Pettit*, 34 L. R. A. 723, which holds indorsement of firm name on own note to firm by partner discounting it for own benefit, notice of want of authority.

Distinguished in *Hurst v. Lee*, 143 App. Div. 616, 127 N. Y. Supp. 1040, holding that transferee of note not bearing interest who paid face value therefor shortly before maturity, in reliance upon statement of brother-in-law, president of payee, that they were valid, is holder in due course in absence of evidence to contrary.

— **Burden of proof.**

Approved in *Orr v. South Amboy Terra Cotta Co.* 45 Misc. 351, 92 N. Y. Supp. 521, holding that on a showing of illegality of note the holder must show that he holds for value and in good faith.

Cited in *Anderson v. Dundee State Bank*, 47 N. Y. S. R. 448, 20 N. Y. Supp. 511; *Bank of Montreal v. Richter*, 55 Minn. 365, 57 N. W. 61; *McCammon v. Shantz*, 49 App. Div. 462, 63 N. Y. Supp. 611; *Citizens' Nat. Bank v. Weston*, 162 N. Y. 118, 56 N. E. 494; *Hallock v. Young*, 72 N. H. 420, 57 Atl. 236; *Second Nat. Bank v. Weston*, 172 N. Y. 254, 64 N. E. 949,—holding burden of proving bona fide acquisition of instrument before maturity placed on indorsee by proof of fraud by payee upon makers; *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 211, 72 N. W. 467, and *Tompkins County Nat. Bank v. Bunnell & E. Invest. Co.* 8 App. Div. 92, 40 N. Y. Supp. 411, holding proof of fraud of agent holding bond places burden of proving bona fide acquisition on plaintiff; *Amsden v. Smith*, 48 N. Y. S. R. 306, 20 N. Y. Supp. 555, holding bona fides of holders of note for jury, where maker in addition to showing fraud of payee at inception produces evidence tending to show only colorable transfer to plaintiffs; *Smith v. Weston*, 159 N. Y. 199, 54 N. E. 38, Affirming *First Nat. Bank v. Weston*, 25 App. Div. 417, 49 N. Y. Supp. 542, holding burden of proving innocent purchase of firm note before maturity put upon holder by proof of indorsement outside firm business without authority of members; *Sixth Nat. Bank v. Lorillard Brick Works Co.* 46 N. Y. S. R. 236, 18 N. Y. Supp. 861, holding proof of diversion of note by payee from purpose for which executed, places burden on holder of proving innocent purchase for value before maturity; *Marine v. Peyser*, 6 Misc. 543, 27 N. Y. Supp. 226, holding direction of verdict for plaintiff error, where sufficient evidence of fraud at inception to go to jury and possibly shift burden of proof; *Grant v. Walsh*, 145 N. Y. 506, 45 Am. St. Rep. 626, 40 N. E. 209, reversing judgment for plaintiff where fraud of insolvent bank receiving check sued upon shown, but burden of proving innocent purchase not sustained and evidence of knowledge excluded; *Rossiter v. Loeber*, 18 Mont. 377, 45 Pac. 560, holding proof of bona fides may be reserved for rebuttal on trial, though fraud pleaded in answer; *Mitchell v. Baldwin*, 88 App. Div. 268, 84 N. Y. Supp. 1043, holding that proof of unlawful diversion of note shifts burden upon holder to show good faith; *Brown v. James*, 2 App. Div. 108, 37 N. Y. Supp. 529, holding burden on plaintiff to establish good faith in purchase of note, on proof that defendant's indorsement was procured by maker's false representation as to purpose for which he wanted proceeds of note; *Re Hill*, 187 Fed. 216, holding that holder of note given for gambling debt has burden of proving that he acquired it in due course; *Young v. Lowry*, 192 Fed. 828, to the point that person holding note has burden of showing that he holds in due course, where it appears that title of any person who negotiated it was defective; *Eisenberg v. Lefkowitz*,

142 App. Div. 577, 127 N. Y. Supp. 595 (dissenting opinion), on necessity of holder of note, that has been executed through fraud, showing that he received same without notice of facts constituting infirmity; *Engle v. Hyman*, 54 Misc. 253, 104 N. Y. Supp. 390, holding evidence of fraudulent inspection of note admissible though no evidence of malafides of holder is offered since proof of fraud throws burden of showing bona fides on holder; *German-American Bank v. Cunningham*, 97 App. Div. 247, 89 N. Y. Supp. 836, holding that testimony by maker that note sued on was negotiated by fraud in breach of agreement throws burden on holder to show that he holds for value in ordinary course of trade and had no knowledge of fraudulent negotiation; *Mee v. Carlson*, 22 S. D. 369, 29 L.R.A.(N.S.) 351, 117 N. W. 1033, holding that burden is on holder of note fraudulent in inception, to show that he was purchaser in good faith for value and without notice in regular course of business; *National Bank v. Chatfield*, 118 Tenn. 490, 10 L.R.A. (N.S.) 804, 101 S. W. 765, holding that proof of fraud in the inception of warehouse receipts though not strictly negotiable throws proof of bona fides in acquisition on the holder; *Re Hopper-Morgan Co.* 154 Fed. 261, holding burden of proving bona fides in acquisition thrown onto holder by proof of illegal or fraudulent inception of paper.

Cited in note (17 L. R. A. 329) on burden of proof in action on negotiable instrument by purchaser.

Disapproved in *First Nat. Bank v. Moore*, 78 C. C. A. 581, 148 Fed. 958, holding that endorsee of negotiable paper for value may recover on same as against maker unless it be shown that in the transaction by which title is acquired, the endorsee had knowledge of invalidating defects.

— Satisfaction of burden.

Cited in *Prouty v. Musquiz*, 94 Tex. 92, 58 S. W. 721, and *American Exch. Nat. Bank v. New York Belting & Pkg. Co.* 74 Hun, 447, 26 N. Y. Supp. 822, holding burden sustained by proof of purchase for value in usual course, in absence of evidence rebutting presumption arising therefrom; *National Bank v. Foley*, 54 Misc. 127, 103 N. Y. Supp. 553, holding that proof that holder parted with value for note before maturity is not conclusive of good faith; *Tischler v. Shurman*, 49 Misc. 257, 97 N. Y. Supp. 360, holding that where check sued upon is shown to be wholly without consideration, evidence that holder obtained it for full value is not conclusive of his bona fides; *Keene v. Behan*, 40 Wash. 508, 82 Pac. 884, holding that the burden of proof being thrown onto holder he must show acquisition for value before maturity in good faith and without notice at time, of any infirmity or defect in title of his transferror.

Testimony of interested party.

Cited in *Joy v. Diefendorf*, 130 N. Y. 9, 27 Am. St. Rep. 484, 28 N. E. 602, holding credibility of plaintiff testifying to ignorance of fraud in note sued on, for jury; *Bookheim v. Alexander*, 64 Hun, 462, 46 N. Y. S. R. 202, 19 N. Y. Supp. 776, holding error to refuse to submit to jury bona fides of transfer of note sued on, where testimony of plaintiff alone relied on to establish same; *Miller v. Boyer*, 79 Hun, 132, 29 N. Y. Supp. 479, holding bona fides of purchase of Bohemian seed note for jury where plaintiff's testimony unsupported by corroborative witnesses; *Duygan v. Third Ave. R. Co.* 6 Misc. 67, 28 N. Y. Supp. 79, reversing verdict rendered under instruction forbidding disbelief by jury of plaintiff's corroborated testimony; *Pelly v. Onderdonk*, 61 Hun, 316, 15 N. Y. Supp. 915, holding evidence of fraud at inception of note admissible where action supported by evidence of only plaintiff to fact of purchase for value before maturity; *Sonnentheil v. Christian Moerlein Brewing Co.* 172 U. S. 409, 43 L. ed. 495, 19 Sup. Ct. Rep. 233, holding acceptance of deed of trust for jury notwithstanding positive testimony of ac-

ceptance by creditors where their acceptance is closely connected with their participation in debtor's fraud; *Western Nat. Bank v. Flannagan*, 14 Misc. 320, 35 N. Y. Supp. 848, upholding directed verdict for indorsee where defense to accommodation note based only on testimony of maker and payee as to notice; *Kantrowitz v. Levin*, 14 Misc. 565, 35 N. Y. Supp. 1072, holding giving of consideration for notes sued upon for jury where testified to by plaintiff only; *Kingsland Land Co. v. Newman*, 1 App. Div. 3, 36 N. Y. Supp. 960, holding sending of notice of non-payment question for jury, where testified to only by cashier of bank holding note at time of dishonor; *Merchants' Nat. Bank v. Tracy*, 77 Hun, 454, 29 N. Y. Supp. 77, holding testimony of bank cashier insufficient to establish bona fides of transaction alleged by defendant to be tainted with fraud; *Tobin v. Manhattan Sav. Inst.*, 6 Misc. 112, 26 N. Y. Supp. 14, holding testimony of bank teller that comparison of signatures made at time of payment of forged draft, inconclusive, though uncontradicted; *First Nat. Bank v. McConnell*, 44 N. Y. S. R. 27, 17 N. Y. Supp. 422, holding credibility of testimony of financial officer of plaintiff bank for jury; *Union Bank v. Gilbert*, 83 Hun, 419, 31 N. Y. Supp. 945, holding usury in note for jury where testified to only by cashier of bank suing thereon; *Re Dimock*, 11 Misc. 616, 32 N. Y. Supp. 927, disregarding insolvent's testimony as to place of residence; *A. B. Cleveland Co. v. A. C. Nellis Co.* 45 N. Y. S. R. 290, 18 N. Y. Supp. 448, holding direction of verdict for defendant company properly refused, where motion therefor was based solely on testimony of company's manager; *Lowe v. Fidelity Printing Co.* 16 Misc. 551, 38 N. Y. Supp. 711, holding assumption of corporation's debts for jury, where testified to only by creditor and stockholder; *Re Lanehart*, 32 App. Div. 5, 52 N. Y. Supp. 671, refusing to review award of auditors for medical services to juror, where value stated only in affidavit of physician; *Wennerstrom v. Kelly*, 7 Misc. 174, 27 N. Y. Supp. 326, holding master's denial of authority of servant to have repairs made not conclusive in action to recover cost of repairs; *De Cernea v. Cornell*, 3 Misc. 244, 22 N. Y. Supp. 941, holding plaintiff's denial of knowledge of custom of his trade, not conclusive; *Finn v. Peterson*, 24 Misc. 738, 53 N. Y. Supp. 787, holding negligence for jury where proof of care dependent solely on testimony of defendants; *Willard v. Holmes*, 2 Misc. 310, 21 N. Y. Supp. 998, holding testimony of officers of corporation as to advice of counsel for jury, in action for malicious prosecution; *O'Neill v. Third Ave. R. Co.* 78 Hun, 185, 28 N. Y. Supp. 917, upholding verdict for defendant where charge of negligence testified to only by uncorroborated plaintiff, although testimony not impeached; *Van Houten v. Fleischman*, 1 Misc. 133, 48 N. Y. S. R. 766, 20 N. Y. Supp. 643, upholding verdict of jury though testimony of drivers of alleged negligently managed team must have been disregarded; *Brown v. Sullivan*, 1 Misc. 164, 48 N. Y. S. R. 687, 20 N. Y. Supp. 634, reversing finding against tenancy of defendant where same vests solely on defendant's uncorroborated denial of signature to lease; *McLaughlin v. O'Toole*, 1 Misc. 173, 48 N. Y. S. R. 683, 20 N. Y. Supp. 653, upholding on trial without jury, finding of judge against unimpeached testimony of defendant in regard to counterclaim; *Goldsmith v. Coverly*, 75 Hun, 50, 27 N. Y. Supp. 116, reversing directed verdict on conditional contract, where performance of condition affirmed solely by plaintiff's testimony; *Gair v. Cohen*, 26 Misc. 802, 56 N. Y. Supp. 180, holding unimpeached testimony of defendant and employee as to subsequent oral condition in contract sued upon, for jury; *Miner v. Hilton*, 15 App. Div. 58, 44 N. Y. Supp. 155, *dictum* that alleged readiness to perform contract sued upon, question for jury where testified to only by plaintiff; *Pharo v. Beadleston*, 2 Misc. 426, 21 N. Y. Supp. 989, holding evidence tending to discredit testimony of agent of defendant making contract sued upon, admissible; *McManus v. Woolverton*, 47 N. Y. S. R. 110, 19 N. Y. Supp. 545, holding no error to call jury's attention to conflict in statements of

defendant's witness where latter charged with negligence forming basis of action; *Corn v. Rosenthal*, 1 Misc. 170, 48 N. Y. S. R. 675, 20 N. Y. Supp. 632, holding direction of verdict for plaintiff erroneous though defense based only on uncorroborated evidence of defendant; *Van Doren v. Jelliffe*, 1 Misc. 363, 48 N. Y. S. R. 787, 26 N. Y. Supp. 636, holding jury justified in disregarding defendant's testimony in action for commissions; *Haas v. Green*, 7 Misc. 178, 27 N. Y. Supp. 347, upholding judgment of trial justice on conflicting testimony of interested witnesses; *Kinnear v. Powell*, 3 Misc. 453, 23 N. Y. Supp. 182, upholding final disposition by court, where testimony given only by interested parties and question treated as one of law; *Ireland v. Scharpenberg*, 54 Wash. 566, 103 Pac. 801, holding uncontradicted testimony of cashier of holding bank not conclusive as to bona fides in acquiring note and referring also to annotation on this point; *McNight v. Parsons*, 136 Iowa, 398, 22 L.R.A.(N.S.) 722, 125 Am. St. Rep. 265, 113 N. W. 858, 15 A. & E. Ann. Cas 665, holding directed verdict improper where burden of proving bona fides is attempted by testimony of interested witness, though uncontradicted; *Iowa Nat. Bank v. Sherman*, 19 S. D. 241, 117 Am. St. Rep. 941, 103 N. W. 19; *McGill v. Young*, 16 S. D. 363, 92 N. W. 1066,—on the rule that cashier of bank owning stock therein is such an interested party that in giving testimony as to good faith of purchase of negotiable paper his credibility may be questioned by the jury; *Engle v. Hyman*, 54 Misc. 253, 104 N. Y. Supp. 390, holding truth of testimony of interested witness as to his bona fides in obtaining note, though uncontradicted is a question for jury; *Fuller Buggy Co. v. Waldron*, 112 App. Div. 816, 99 N. Y. Supp. 561, holding question of fact raised precluding directed verdict where such verdict is directed on strength of uncontradicted testimony of interested witnesses.

Distinguished in *Kurz v. Fish*, 49 N. Y. S. R. 871, 21 N. Y. Supp. 656, upholding directed verdict for plaintiff where his testimony supported by that of disinterested witness; *Stevens v. Trask*, 44 N. Y. S. R. 650, 18 N. Y. Supp. 117, holding burden of proof sustained where plaintiff's personal testimony corroborated by collateral evidence; *Hauss v. Lake Erie & W. R. Co.* 46 C. C. A. 98, 105 Fed. 736, holding notice to brakeman of unblocked frog not for jury, where conductor's testimony thereto unimpeached.

Notice and good faith.

Cited in *Arnd v. Aylesworth*, 145 Iowa, 191, 29 L.R.A.(N.S.) 638, 123 N. W. 1000, holding that denial of notice by purchaser of note fraudulent in inception, though uncontradicted is not sufficient to justify direction of verdict in his favor; *Peirson v. McNeal*, 137 Mich. 175, 100 N. W. 458, on disregard of circumstances sufficient to put purchaser on inquiry as affecting bona fides; *Detroit Nat. Bank v. Union Trust Co.* 145 Mich. 668, 116 Am. St. Rep. 319, 108 N. W. 1092, holding that bad faith may be inferred from intentional failure to take notice of suspicious circumstances; *Custard v. Hodges*, 155 Mich. 366, 119 N. W. 583, holding that disregard of suspicious circumstances will not preclude bona fides of purchaser but warrants the submission of the question to the jury; *Jobs v. Wilson*, 140 Mo. App. 293, 124 S. W. 548, holding that a purchase of notes for about one half face value with no inquiry or knowledge of the seller raises a question of bona fides for jury; *Treadwell v. Clark*, 114 App. Div. 507, 100 N. Y. Supp. 1, holding transferee of stock chargeable with knowledge which reasonable inquiry would have revealed where appearance of certificate was such as to put him on inquiry; *Re Troy & C. Shirt Co.* 136 Fed. 430, on bona fides as affected by circumstances connected with the acquisition of negotiable paper.

Cited in notes (29 L.R.A.(N.S.) 368) on circumstances sufficient to put purchaser

of negotiable paper on inquiry; (3 Eng. Rul. Cas. 680) on notice to banker of equitable rights; (4 Eng. Rul. Cas. 435) on notice of fraud in issuance of accommodation paper by insolvent persons.

10 L. R. A. 684, *RIGGS v. COMMERCIAL MUT. INS. CO.* 125 N. Y. 7, 21 Am. St. Rep. 716, 25 N. E. 1058.

Insurable interest.

Cited in *Crawford v. Aachen & M. F. Ins. Co.* 100 Ill. App. 458, holding stockholder entitled to recover on policy insuring corporate property; *Donaldson v. Sun Mut. Ins. Co.* 95 Tenn. 283, 32 S. W. 251, holding stockholder to whom insurance by corporation is made payable "as his interest may appear" has insurable interest to extent of claims against corporation as creditor or otherwise; *Syndicate Ins. Co. v. Bohn*, 27 L. R. A. 617, footnote p. 614, 12 C. C. A. 535, 27 U. S. App. 564, 65 Fed. 169, holding sole stockholder's interest in corporate property not sole and unconditional ownership within condition of fire insurance policy; *Voisin v. Commercial Mut. Ins. Co.* 62 Hun, 6, 16 N. Y. Supp. 410, holding partner entitled to recover on policy insuring his interest in firm goods for whom it may concern; *Davis v. Phoenix Ins. Co.* 111 Cal. 414, 43 Pac. 1115, holding party in possession under contract of sale has insurable interest to extent of payment; *Foley v. Faragut F. Ins. Co.* 71 Hun, 371, 24 N. Y. Supp. 1131, and *Foley v. Manufacturers' & B. F. Ins. Co.* 152 N. Y. 135, 43 L. R. A. 667, 46 N. E. 318, holding owner of land has insurable interest in structure in process of erection, under contract obligating builder to furnish completed building; *Michael v. Prussian Nat. Ins. Co.* 171 N. Y. 38, 63 N. E. 810, holding sole ownership not changed by pooling scheme with other elevator companies; *Ætna F. Ins. Co. v. Kennedy*, 161 Ala. 605, 50 So. 73, holding stockholder's interest in corporation property insurable; *Dalton v. Milwaukee Mechanics' Ins. Co.* 126 Iowa, 385, 102 N. W. 120, holding that president of bank can take out insurance in his own name on goods mortgaged to him in his possession for money loaned by him belonging to bank.

Cited in notes (13 Eng. Rul. Cas. 277) on insurable interest of agent; (13 Eng. Rul. Cas. 334) on necessity of specifying in policy the interest of the assured.

Stockholder's interest in corporation.

Cited in *Richter v. Henningsan*, 110 Cal. 534, 42 Pac. 1077, holding stockholder liable to contribution to another paying entire Federal license tax on corporation; *Du Val v. School District*, 67 Ark. 79, 53 S. W. 562, upholding mortgage agreement between stockholder and creditor holding corporate mortgage, to prevent foreclosure; *Watson v. Bonfils*, 53 C. C. A. 546, 116 Fed. 168, denying power of sole creditor and stockholder to convey land without action of corporation; *Wailles v. Davis*, 158 Fed. 674, holding that stockholder's interest in mining property is such that work done by him thereon, if sufficient in amount, will prevent a forfeiture of claim.

Validity of stipulation.

Cited in *Smith v. Barnes*, 9 Misc. 370, 29 N. Y. Supp. 692, enforcing stipulation making judgment entered on report of referee, final; *Hoste v. Dalton*, 137 Mich. 526, 100 N. W. 750, holding an arbitration agreement providing that decision of circuit court be final, valid.

10 L. R. A. 686, *KELLEY v. YPSILANTI DRESS-STAY MFG. CO.* 44 Fed. 19.

Injunction against actions.

Cited in *Hawley v. State Bank*, 134 Ill. App. 107, holding that courts will not at instance of receiver enjoin a nonresident from prosecuting attachment proceedings against insolvent's property in the courts of another state.

Cited in footnote to *Kaufmann v. Liggett*, 67 L.R.A. 353, which sustains right to injunction against proceedings at law to obtain possession of leased property where lessee has an equitable right to a continuance of possession.

Suits to enjoin infringement of patent.

Cited in *American School-Furniture Co. v. I. M. Sauder Co.* 106 Fed. 732, refusing to enjoin infringement suits in other jurisdictions till determination of validity of patent; *Strait v. National Harrow Co.* 51 Fed. 820, refusing to enjoin infringement suits by monopoly corporation at suit of stranger to illegal combination; *Westinghouse Electric & Mfg. Co. v. Mutual L. Ins. Co.* 129 Fed. 222, holding previous decree against maker no defense to action for infringement against user; *Eldred v. Breitwieser*, 132 Fed. 252, holding decision adverse to patentee in action against maker not to estop suit against user for infringement in another circuit; *Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co.* 189 Fed. 613, to the point that court will not order complainant in action for infringement not interfere with other users of patented article unless it appears that he was acting in bad faith.

Cited in notes (20 Eng. Rul. Cas. 858) on right to injunction or damages in action for infringement of patent; (39 L.R.A.(N.S.) 2, 3) on doctrine of comparative injury in suit to enjoin infringement of patent.

Distinguished in *Commercial Acetylene Co. v. Avery Portable Lighting Co.* 152 Fed. 645, holding that a Federal court of equity has power to restrain institution of other suits, subsequently brought relating to same subject-matter although such suits be brought in other jurisdictions.

— By use of infringing device.

Cited in *United States Printing Co. v. American Playing-Card Co.* 70 Fed. 53, enjoining use of infringing machine though manufacturer had settled with patentee for damages for infringement; *Philadelphia Trust, S. D. & Ins. Co. v. Edison Electric Light Co.* 13 C. C. A. 43, 28 U. S. App. 325, 65 Fed. 554, Affirming 60 Fed. 399, issuing preliminary injunction against use of infringing article where validity of patent was determined in circuit court of appeals after protracted litigation though such injunction had been refused in other circuit.

— Petition by defendant in infringement suit for injunction.

Cited in *Mitchell v. International Tailoring Co.* 169 Fed. 146, denying petition by defendant to restrain complainant from sending out infringement notices to customers pending infringement suit, bad faith not being proved.

Right to issue warning notices.

Cited in *New York Filter Co. v. Schwarzwald*, 58 Fed. 579, refusing to enjoin party claiming patent from issuing warning notices to customers of alleged infringer; *Adriance, P. & Co. v. National Harrow Co.* 98 Fed. 118, and *A. B. Farquhar Co. v. National Harrow Co.* 49 L. R. A. 756, 42 C. C. A. 601, 102 Fed. 715, enjoining issuance of warning notices to customers of alleged infringer, where done in bad faith, and without intention to sue infringer; *Virtue v. Creamery Package Mfg. Co.* 102 C. C. A. 413, 179 Fed. 120, holding that owner of patent has right to notify infringers of his claims and warn them that suit will be brought to protect his rights.

Cited in note (16 L. R. A. 243) on injunction against false statements as to plaintiff's property or business.

10 L. R. A. 689, *ROBERTS v. BONAPARTE*, 73 Md. 191, 20 Atl. 918.

Sufficiency of evidence.

Cited in *Newbold v. Hayward*, 96 Md. 250, 54 Atl. 67, holding evidence as to

contract of guaranty and waiver of compensation for joining in contract, sufficient for submission to jury.

— **Determination of contract resting partly in parol.**

Cited in *Leftwich v. Royal Ins. Co.* 91 Md. 612, 46 Atl. 1010, holding determination of property covered by insurance policy for jury, where contract vests partly in parol; *Slingluff v. Andrew Volk Builders' Supply Co.* 89 Md. 562, 43 Atl. 759, holding existence of guaranty for court sitting as jury, where evidence thereof vests partly in parol; *Lewis v. Tapman*, 90 Md. 305, 47 L. R. A. 389, 45 Atl. 459, holding testimony of witness as to meaning of phrase in letter evidencing contract not reversible, where merely inconclusive supposition; *Joseph Joseph & Bros. Co. v. Schonthal Iron & Steel Co.* 99 Md. 392, 58 Atl. 205, holding construction of written contract for the court but if consisting partly in parol it is for interpretation by jury; *Ætna Indemnity Co. v. Waters*, 110 Md. 691, 73 Atl. 712, holding determination of liability under contract for court if in unambiguous writing but for jury under conditional instructions where resort must be had to parol also; *American Towing & Lightering Co. v. Baker-Whiteley Coal Co.* 111 Md. 522, 75 Atl. 341, holding it for the jury to find what a contract really is under hypothetical instructions, where the terms or provisions are in dispute supported by conflicting testimony; *Taplin v. Marcy*, 81 Vt. 452, 71 Atl. 72, holding that court may not select letters from a series of oral and written agreements and say what is the party's contract status; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 574, holding contract to be found by jury where made up of letters statements and oral testimony.

Distinguished in *Blakistone v. German Bank*, 87 Md. 318, 39 Atl. 855, holding evidence of contemporaneous parol agreement varying terms of acceptance of draft, inadmissible where too vague to justify finding; *Merritt v. Peninsular Const. Co.* 91 Md. 464, 46 Atl. 1013, holding proof of contemporaneous oral agreement contradicting terms of written contract inadmissible; *James Clark Distilling Co. v. Cumberland*, 95 Md. 476, 52 Atl. 661, holding assessment of shares of stock against corporation or stockholders determinable by court alone, where dependent solely on entries in assessment book.

Construction of contracts.

Cited in *Brown v. Deford*, 83 Md. 311, 34 Atl. 788, taking construction given to loan contract by parties and prior creditors, into consideration in determination of rights thereunder; *F. W. Dodge Co. v. H. A. Hughes Co.* 110 Md. 380, 72 Atl. 1036, construing a contract to call for prompt delivery of information where from the nature of the contract tardy action will defeat its purpose; *Furgeson v. Twisdale*, 137 N. C. 416, 49 S. E. 914, construing "crops cultivated by us" not to include a crop cultivated by only one of the parties described; *Van Camp Packing Co. v. Smith*, 101 Md. 573, 61 Atl. 284, holding construction of a word in written contract for the court in the light of the attendant circumstances; *Needy v. Middlekauff*, 102 Md. 183, holding question as to what is included in a lease is a matter for determination of the court in the light of circumstances existing at time of its execution; *Mutual L. Ins. Co. v. Murray*, 111 Md. 605, 75 Atl. 348, holding interpretation of written policy and written memorandum thereon for the court; *Meyer v. Frenkil*, 113 Md. 44, 77 Atl. 369; *Rapp v. Linebarger*, 149 Iowa, 438, 128 N. W. 555,—holding that where extrinsic evidence is required to aid in construction of written contract, and the same is controverted, its construction becomes question for jury.

Personal liability of shareholders.

Cited in *Rankin v. Fidelity Ins. Trust & S. D. Co.* 189 U. S. 253, 47 L. ed. 797,

23 Sup. Ct. Rep. 553, holding pledgee of national bank stock taken as collateral security not personally liable for debts as shareholder.

Parol evidence pertaining to contract.

Cited in *United R. & Electric Co. v. Wehr*, 103 Md. 339, 63 Atl. 475, holding parol evidence admissible to prove anything not covered by the writings and pertaining to the contract or to explain ambiguous and uncertain elements; *Chesapeake Brewing Co. v. Goldberg*, 107 Md. 488, 69 Atl. 37, 15 A. & E. Ann. Cas. 879, holding parol evidence admissible to indicate the meaning of a covenant in a lease.

Evidence received subject to objection.

Cited in *Baltimore & O. R. Co. v. County Comrs.* 111 Md. 188, 73 Atl. 656; *Moneyright Scale Co. v. McCormick*, 109 Md. 185, 72 Atl. 537,—holding the benefit of an objection to evidence lost where it is admitted subject thereto and there is no motion to strike out.

10 L. R. A. 693, *ARTHUR v. ISRAEL*, 15 Colo. 147, 22 Am. St. Rep. 381, 25 Pac. 81.

Reaffirmed on new trial in 18 Colo. 159, 32 Pac. 68.

Estoppel.

Cited in *Jones v. Langhorne*, 19 Colo. 212, 34 Pac. 997, holding party receiving and retaining proceeds of judgment estopped to deny validity of proceeding; *Re Swales*, 60 App. Div. 603, 70 N. Y. Supp. 220, holding wife estopped to deny validity of divorce obtained by her in another state on grounds not recognized at husband's domicile; *Mohler v. Shank*, 93 Iowa, 281, 34 L. R. A. 168, 57 Am. St. Rep. 274, 61 N. W. 981, holding wife estopped from claiming distributive share of estate, where she remarries after void divorce; *Marvin v. Foster*, 61 Minn. 160, 52 Am. St. Rep. 586, 63 N. W. 484, holding husband estopped in proceeding to establish property rights, to deny validity of divorce from deceased wife, where he has married again; *Re Amy*, 12 Utah, 328, 42 Pac. 1121, holding judgment of divorce not subject to collateral attack where parties thereto estopped by acquiescence to deny validity; *Hamill v. Talbott*, 81 Mo. App. 218, holding husband accepting divorce by marriage, etc., bound by invalid decree of alimony therein; *Handy Ditch Co. v. South Side Ditch Co.* 26 Colo. 336, 58 Pac. 30, and *Boulder & W. County Ditch Co. v. Lower Boulder Ditch Co.* 22 Colo. 119, 43 Pac. 540, holding party enjoying water rights under decree, estopped from subsequently attacking validity thereof; *Baird v. Connell*, 121 Iowa, 287, 96 N. W. 863, holding wife conveying to husband her separate property under void separation agreement, estopped to reclaim it until restoration of consideration; *Kerr v. Burns*, 42 Colo. 290, 93 Pac. 1120, holding person receiving water under decree estopped from assailing such decree even if it were void; *Brown v. Holloway*, 47 Colo. 466, 108 Pac. 25, holding person accepting benefits of a contract estopped from denying its validity as against himself; *Kipp v. Miller*, 47 Colo. 608, 108 Pac. 164, holding that where a banking corporation has accepted the benefit of dealings with customers it cannot set up *ultra vires* against a customer.

Cited in notes (19 L. R. A. 816) on validity of decree of divorce obtained by publication out of state where defendant did not appear; (57 L. R. A. 595) on right to contest validity of divorce decree after death of one or both of parties; (125 Am. St. Rep. 246) on attack on decree of divorce after death of one of parties; (60 Am. St. Rep. 659; 133 Am. St. Rep. 440, 441, 442, 444) as to when estoppel exists against urging invalidity of void or voidable divorce.

Distinguished in *Re Newman*, 124 Cal. 692, 45 L. R. A. 783, 57 Pac. 686, holding wife not estopped by bigamous marriage to claim widowhood, where no divorce.

Desertion.

Cited in *Mitchell v. Hughes*, 3 Colo. App. 48, 32 Pac. 185, questioning sufficiency of allegation to admit proof of desertion entitling wife to make valid will of property.

Jurisdiction for divorce.

Distinguished in *Sammons v. Pike*, 108 Minn. 297, 23 L.R.A.(N.S.) 257, 133 Am. St. Rep. 425, 120 N. W. 540, holding that non residence of both parties to a divorce render it not voidable but void.

10 L. R. A. 696, *CONSOLIDATED ICE MACH. CO. v. KEIFER*, 134 Ill. 481, 23 Am. St. Rep. 688, 25 N. E. 799.

Liability for injury caused by concurrent negligence.

Cited in *St. Louis Bridge Co. v. Miller*, 138 Ill. 478, 28 N. E. 1091, holding company liable for injury due to lack of guard rails, though negligent driving of cattle also efficient cause of injury; *McGary v. West Chicago Street R. Co.* 85 Ill. App. 612, holding railroad company liable for injury caused by its negligence combined with that of wagon driver; *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 489, 56 N. E. 796, Affirming 83 Ill. App. 533, holding railway liable for injury to employee due to negligent starting of car and pile of stones negligently placed near track by construction company; *Swisher v. Illinois C. R. Co.* 182 Ill. 549, 55 N. E. 555 (dissenting opinion), to proposition that master is liable where injury is result of concurrent negligence of master and fellow servant; *Hoye v. Great Northern R. Co.* 120 Fed. 714, upholding joinder of connecting carriers in action by employee of receiving carrier for injury due to defective car, where agreement between carriers for transfer of cars; *Pullman Palace Car Co. v. Laack*, 143 Ill. 260, 18 L. R. A. 220, 32 N. E. 285, holding employer liable for injury due to combined negligence of master and fellow servant; *Wisconsin C. R. Co. v. Ross*, 142 Ill. 15, 34 Am. St. Rep. 49, 31 N. E. 412, holding railroad liable to employee for injury due to defective track, expense of maintaining which borne by several roads jointly; *Carmi v. Ervin*, 59 Ill. App. 558, holding municipality liable for injury to passenger caused by defective road bed and unimputable negligence of driver aware of condition not imputable to person injured; *Joliet v. Shufeldt*, 144 Ill. 411, 18 L. R. A. 752, 36 Am. St. Rep. 453, 32 N. E. 969, holding municipality liable where injury result of defective street pavement and runaway horse; *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 170, holding railway liable to employee injured by reason of defects in engine, though himself negligent in temporary repair thereof; *Pautz v. Plankinton Packing Co.* 118 Wis. 51, 94 N. W. 654, holding finding that wooden wheel proximate cause of injury, inconsistent with finding that iron wheel, operated with former, was cause; *Eskildsen v. Seattle*, 29 Wash. 587, 70 Pac. 64, holding city liable for injuries to child who caught foot in hole in street and was struck by street car; *Weaver v. Northern P. R. Co.* 125 Fed. 155, denying separable recovery under petition charging concurrent acts of negligence against two defendants; *Donald v. Guy*, 127 Fed. 233, holding members of unincorporated pilot association jointly liable for negligence of member in causing collision; *Chicago & A. R. Co. v. Vipond*, 212 Ill. 205, 72 N. E. 22, holding that negligence of engineer concurring with defendant cannot be imputed to fireman injured thereby even though such fireman had put himself in care of engineer; *Chicago Union Traction Co. v. Leach*, 215 Ill. 186, 74 N. E. 119, holding street railway company not excused from causing injury by negligence to persons in carriage because driver thereof concurred in the negligence; *Ford v. Hine Bros. Co.* 237 Ill. 469, 86 N. E. 1051, on liability of defendant though negligence of another concurred; *Wells Bros. Co. v. Flanagan*, 139 Ill. App. 241, holding negligence of

third person no defense to defendant's negligence if injury would have happened had the third person's negligence not intervened; *Geraghty v. William Grace Co.* 157 Ill. App. 312, to the point that if negligence of two persons concur in producing injury they are jointly liable; *Gaffney v. Dixon*, 157 Ill. App. 594, holding that negligence of husband cannot be imputed to wife so as to defeat action against city for injury received while riding in street with husband in automobile; *Fliege v. Kansas City W. R. Co.* 82 Kan. 151, 30 L.R.A.(N.S.) 736, 107 Pac. 555, holding that where employee of railroad company was injured by negligence of a manufacturer in the operation of a machine sold to former company on condition subject to operation by latter the two are jointly and severally liable; *Shultz v. Old Colony Street R. Co.* 193 Mass. 316, 8 L.R.A.(N.S.) 605, 118 Am. St. Rep. 502. 79 N. E. 873, 9 A. & E. Ann. Cas. 402, holding negligence of driver concurring with negligence of defendant, no defense to personal injury action by rider in carriage; *Strauhel v. Asiatic S. S. Co.* 48 Or. 107, 85 Pac. 230, holding steamship and barge company severally concurring in injury to employee of barge jointly and severally liable to him.

Cited in notes (36 Am. St. Rep. 845) on intervening negligent acts; (66 L.R.A. 956) on liability for injuries occurring in performance of work by independent contractor where employee's own act is a proximate cause; (22 L.R.A.(N.S.) 858) on liability of owner to contractor or his employees for existing defects in building being erected; (30 L.R.A.(N.S.) 735) on joint liability of master and persons installing machine to employee injured during installation.

Distinguished in *Willard v. Red Bank Oil Co.* 151 Ill. App. 437, holding tortfeasors severally and independently contributing to injury not joint tortfeasors.

Master's liability for injury due to servant's disobedience of orders.

Cited in footnote to *Weber v. Lockman*, 60 L. R. A. 313, which holds master liable for servant's negligence in course of employment though without his knowledge and against his wishes.

Cited in notes (27 L.R.A. 181) on master's civil responsibility for wrongful or negligent act of servant or agent toward one who has no claim upon master by reason of a contract incipient or perfected; (18 L.R.A.(N.S.) 416) on liability for tort committed by servant with a view to furtherance of master's business, but contrary to express instructions.

Obligation to furnish suitable tools.

Cited in *North American Restaurant Oyster House v. McElligott*, 129 Ill. App. 507, holding owner is under duty to employees and others rightfully on the premises to keep machinery in reasonably safe condition of repair.

Distinguished in *Watts v. Hart*, 7 Wash. 185, 34 Pac. 423, holding railway not liable for injury where reasonably safe appliances supplied, and accident due to fellow-servant's negligence.

Disqualification by interest.

Cited in *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 565, 64 N. E. 1109, holding stockholder incompetent to testify in favor of corporation; *Ogden Bldg. & L. Asso. v. Mensch*, 196 Ill. 562, 89 Am. St. Rep. 330, 63 N. E. 1047, holding acknowledgment by stockholding notary, of mortgage to corporation, void; *C. H. Albers Commission Co. v. Sessel*, 193 Ill. 155, 61 N. E. 1075, Affirming 87 Ill. App. 380, holding incompetency of stockholder to testify in behalf of corporation as to conversation with deceased, available on trial by objection to deposition; *Huntington Nat. Bank v. Huntington Distilling Co.* 152 Fed. 243, on the incompetency of stockholder to testify in behalf of corporation adversely to plaintiff in tort action; *Brown v. First Nat. Bank*, 49 Colo. 397, 113 Pac. 483, to the point that president and stockholder of corporation is interested and therefore incompetent to testify

in behalf of corporation, when called adversely to representative of deceased person; *Bailey v. Robison*, 244 Ill. 25, — L.R.A.(N.S.) —, 91 N. E. 98 (dissenting opinion), on incompetency of stockholder as witness for corporation in action against corporation by representative of deceased person.

Cited in note (27 L.R.A.(N.S.) 819, 820) on competency of stockholder as witness where corporation is party to suit prosecuted by or against a personal representative.

Distinguished in *Dunham Towing & Wrecking Co. v. Christiansen*, 44 Ill. App. 525, holding party called to testify against interest may on cross-examination testify in his own interest.

Impeachment of witness.

Cited in *Central R. Co. v. Allmon*, 147 Ill. 482, 35 N. E. 725, upholding impeachment of witness on cross-examination as to previous statement containing opinion as well as fact, where objection not directed to opinion only.

Cited in note (82 Am. St. Rep. 45, 47) on evidence to show credibility or bias of witness.

— By record.

Cited in *Garrett v. St. Louis Transit Co.* 219 Mo. 93, 118 S. W. 68, 16 A. & E. Ann. Cas. 678, holding testimony of witness given at coroner's inquest admissible to impeach him when he testifies subsequently in court on same matter.

Cited in footnotes to *Cox v. Royal Tribe of Joseph*, 60 L.R.A. 620, which holds verdict of coroner's jury inadmissible to prove facts found; *State v. Coleman*, 69 L.R.A. 381, which holds reading of coroner's verdict by prosecuting attorney in propounding question to witness not ground for reversal in absence of exception merely because stated that the homicide was unjustifiable.

Distinguished in *Overtom v. Chicago & E. I. R. Co.* 181 Ill. 329, 54 N. E. 898, holding stenographer's notes of testimony before coroner inadmissible since not best evidence.

Extent of res judicata.

Cited in *Consolidated Coal Co. v. Peers*, 150 Ill. 361, 37 N. E. 937, holding all inferences deducible from evidentiary facts concluded by affirmance of judgment on appeal.

Limited use of evidence.

Cited in *State v. Greene*, 33 Utah, 499, 94 Pac. 987, holding party objecting generally to admission of evidence competent for some purposes and incompetent for others must ask for instructions limiting the scope of its consideration to the proper purposes.

Declarations of agents.

Cited in note (131 Am. St. Rep. 335) on admissibility of declarations and admissions of agents before transaction.

10 L. R. A. 700, *STATE ex rel. DEMPSEY v. NEWARK*, 53 N. J. L. 4, 20 Atl. 886.

Special legislation.

Cited in *Van Cleve v. Passaic Valley Sewerage Comrs.* 71 N. J. L. 193, 58 Atl. 571; *Howe v. Board of Education*, 72 N. J. L. 163, 60 Atl. 518,—as having left unsettled the question, since decided, that municipal corporations may be specially created if governed by general laws; *Rutten v. Paterson*, 73 N. J. L. 471, 64 Atl. 573, holding that readjustment of wards and ward lines in a city already divided into wards is a legislative matter.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *State v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating

between municipalities already having, and those not having, race course; Milwaukee County v. Isenring, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local.

Distinguished in State, Wood, Prosecutor v. Atlantic City, 56 N. J. L. 233, 28 Atl. 427, upholding statute prescribing size of ward for cities classified according to population; Miller v. Greenwalt, 64 N. J. L. 199, 44 Atl. 880, upholding act annexing town to city; Miller v. Camden, 64 N. J. L. 202, 44 Atl. 882, subsequent appeal 64 N. J. L. 723, 46 Atl. 1100, upholding division of territory annexed to city by statute into wards under general statute.

10 L. R. A. 703, WARDS v. SPARKS, 53 Ark. 519, 14 S. W. 898.

Protest.

Cited in Bank of Montpelier v. Montpelier Lumber Co. 16 Idaho, 730, 102 Pac. 685, holding "protest" in the business sense of the word to mean demand of payment, refusal to pay and notice.

10 L. R. A. 705, AKERS v. ROWAN, 33 S. C. 451, 12 S. E. 165.

Appeal from allowance of costs in 36 S. C. 90, 15 S. E. 350.

Insolvency.

Cited in Miller v. Southern Land & Lumber Co. 53 S. C. 366, 31 S. E. 281, holding corporation not insolvent, where assets exceeded liabilities though debts past due; Allen v. Cooley, 53 S. C. 444, 31 S. E. 634, upholding appointment of receiver of partnership, executions against which returned "*nulla bona*;" Fairly v. Wappoo Mills, 44 S. C. 247, 29 L. R. A. 223, 22 S. E. 108, holding broker entitled to commission on sales, where only defense is inability of purchaser to pay for drafts "at maturity;" Haynes v. Hoffman, 46 S. C. 166, 24 S. E. 103, upholding mortgage of homestead executed within ninety days of assignment in insolvency, where mortgagee ignorant of insolvency.

— What constitutes assignment.

Cited in footnotes to Manning v. Beck, 14 L. R. A. 198, which holds bona fide transfer by bill of sale to son, not affected by debtor's intention to make general assignment for creditors; Farwell v. Cohen, 18 L. R. A. 281, which holds voluntary transfer of specified property in trust to pay specified debts and return remainder, an assignment; Tatman v. Humphrey, 63 L.R.A. 738, which holds insolvent mortgagor's permitting mortgagee to take possession of mortgaged chattels under unrecorded mortgage an act of bankruptcy.

— Unlawful preference.

Cited in Mitchell v. Mitchell, 42 S. C. 483, 20 S. E. 405, setting aside mortgage to wife as undue preference where mortgagor's debts at time exceeded assets by half.

Cited in footnotes to Sandwich Mfg. Co. v. Max, 24 L. R. A. 524, which holds conveyance in absolute payment of debt not unlawful preference; *Re Fixen*, 50 L. R. A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business, an unlawful preference; Van Raalte v. Harrington, 11 L. R. A. 424, which holds relationship of preferred creditors fact for consideration on question of fraud; *Re George M. Hill Co.* 66 L.R.A. 68, which holds forbidden transfer not effected by bank's appropriation of balance of bankrupt's deposit account in payment of his indebtedness to it after knowledge of bankruptcy.

Cited in note (37 L. R. A. 483) on effect of insolvency statutes on mortgage or sale preferring creditors.

Imputation of agent's knowledge to principal.

Cited in *Steinmeyer v. Steinmeyer*, 55 S. C. 29, 33 S. E. 15, holding attorney's knowledge of lack of consideration for mortgage not chargeable to client, where obtained while acting for third parties; *Knobelock v. Germania Sav. Bank*, 50 S. C. 290, 27 S. E. 962, holding knowledge of nature of transaction not imputable to bank, where act of official fraudulent for his own benefit; *Rapley v. Klugh*, 40 S. C. 150, 18 S. E. 680, holding secretary chargeable with president's knowledge of claim to property, where both present at resolution conveying corporate property to secretary personally without warranty; *Norris v. Hartford F. Ins. Co.* 57 S. C. 365, 35 S. E. 572, holding notice to "soliciting agent" of foreclosure proceedings, notice to fire insurance company; *Wardlaw v. Troy Oil Mill*, 74 S. C. 374, 114 Am. St. Rep. 1004, 54 S. E. 658, holding knowledge by attorney of a corporation of lien on property purchased by corporation is not imputed to bank which made loan to corporation, though attorney was president of the bank; *Strickland v. Capital City Mills*, 74 S. C. 26, 7 L.R.A.(N.S.) 432, 54 S. E. 220, holding in order to constitute notice to client knowledge of the attorney must be acquired while acting for client and the information must relate to a matter within scope of his agency.

Cited in footnotes to *Fidelity & C. Co. v. Gate City Nat. Bank*, 33 L. R. A. 821, which holds cashier's knowledge of teller's dishonesty not knowledge of bank; *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company; *Wittenbrock v. Parker*, 24 L. R. A. 197, which holds knowledge by one member of firm of lawyers while transacting firm business imputed to other members.

Cited in note (57 Am. St. Rep. 916) on notice to attorney as notice to client.

Mortgage of after-acquired property.

Cited in *Armour v. Ross*, 75 S. C. 207, 55 S. E. 315, holding goods acquired after mortgage will not be covered thereby unless a description of the property manifests an intention to include such articles.

Cited in notes (18 L.R.A. 301) on efficacy of mortgage on chattels to be manufactured or acquired as independent articles, and not as the increase or fruits of existing property; (109 Am. St. Rep. 518) on mortgage of property to be subsequently acquired.

Construction of statutes.

Cited in *Wragge v. South Carolina & G. R. Co.* 47 S. C. 114, 33 L. R. A. 198, 58 Am. St. Rep. 870, 25 S. E. 76, holding proof that failure to give signal was efficient cause of injury unnecessary under statute requiring that failure "contribute" to injury.

Right to open and close.

Cited in note (61 L. R. A. 562) on effect of admissions to change burden of proof and right to open and close.

10 L. R. A. 717, *STATE v. BENNETT*, 102 Mo. 356, 14 S. W. 865.

Repeal by implication.

Cited in *St. Joseph & I. R. Co. v. Cudmore*, 103 Mo. 638, 15 S. W. 535, holding constitutional provision for jury trial in condemnation proceedings modifies procedure authorized in prior charter to railway; *Re Lorkowski*, 94 Mo. App. 629, 68 S. W. 610, holding special statute allowing only 50 cents of fine for day's penal labor repealed by general statute providing for credit of \$1 per day.

Distinguished in *State v. Daly*, 49 Mo. App. 185, holding provision of special law for filing affidavit to serve as basis for information with assistant prosecut-

ing attorney of St. Louis Court of Criminal Correction, not repeated by Mo. Laws 1877, p. 354.

Title of act.

Cited in *State v. Morgan*, 112 Mo. 212, 20 S. W. 456, upholding provision for form of indictment in statute "to punish cheats, frauds" etc.; *State ex rel. Keshlear v. Slover*, 134 Mo. 16, 31 S. W. 1054, upholding provision for jurisdiction by specified court in election contest, in statute to establish office of marshal and define his powers and duties; *Lynch v. Murphy*, 119 Mo. 171, 24 S. W. 774, upholding provision setting apart portion of income from liquor tax as road fund, in act "to increase state dramshop license and change distribution of county license;" *State ex rel. Smith v. State Bd. of Dental Examiners*, 31 Wash. 498, 72 Pac. 110, holding "act to regulate practice of dentistry" comprehensive enough to include penalty for its violation; *State ex rel. Equitable Life Assur. Soc. v. Vandiver*, 222 Mo. 221, 121 S. W. 45, holding title of act does not violate Constitution when it does not mislead those who read it as to what the bill contains and is not designed as a cover to vicious and incongruous legislation, even if title is not specific; *Coffey v. Carthage*, 200 Mo. 622, 98 S. W. 562; *State ex rel. Headley v. Delmar Jockey Club*, 200 Mo. 57, 92 S. W. 185,—holding all the Constitution requires is that the subjects embraced in the act shall be fairly and naturally germane to that recited in title; *State v. Murray*, 237 Mo. 166, 140 S. W. 899, holding that amendment act does not contain more than one subject where its provisions are directly related to each other and to subject of section amended.

Cited in note (64 Am. St. Rep. 106) on sufficiency of title of statute.

Amendatory acts.

Cited in *Montgomery v. State*, 107 Ala. 384, 18 So. 157, upholding amendatory statute numbering amended sections, but setting them out only as amended.

Distinguished in *Kansas City ex rel. North Park Dist. v. Scarritt*, 127 Mo. 656, 30 S. W. 111, holding attempted amendment of city charter by purported general statute local in effect, unconstitutional.

Sufficiency of information.

Cited in *State v. McClain*, 137 Mo. 307, 38 S. W. 906, upholding information charging acts essential in violation of statute regulating shooting of mines; *State v. Brennan*, 2 S. D. 392, 50 N. W. 625, holding omission of court to which information returnable immaterial defect of form; *State v. Randolph*, 139 Mo. App. 314, 123 S. W. 60, holding time not being of the essence of the offense of selling liquor in violation of local option law, the allegation as to date in the information is immaterial.

Verification of information.

Cited in *State v. Armstrong*, 106 Mo. 413, 13 L. R. A. 425, 27 Am. St. Rep. 361, 16 S. W. 604, upholding information verified on information and belief; *State v. Pruett*, 61 Mo. App. 159, holding unverified information insufficient; *State v. McCaffery*, 16 Mont. 38, 40 Pac. 63, holding information in assault verified on information and belief, sufficient.

Distinguished in *State v. Luman*, 66 Mo. App. 475, denying sufficiency of information founded upon affidavit on information and belief; *State v. Simpson*, 136 Mo. App. 666, 118 S. W. 1187, holding affidavit that facts contained in information are according to the "best knowledge, information and belief" of person making same not sufficient to support the information.

Fixtures.

Cited in *Louisville & N. R. Co. v. Com.* 112 Ky. 643, 66 S. W. 505, sustaining

legislatures power to provide for prosecution of offense of gambling on train by penal action.

Special legislation.

Cited in *St. Louis v. Dorr*, 145 Mo. 481, 42 L. R. A. 690, 68 Am. St. Rep. 575, 46 S. W. 976, denying constitutionality of boulevard act having effect solely in St. Louis.

10 L. R. A. 722, *OVERMAN v. SASSER*, 107 N. C. 432, 12 S. E. 64.

Trade fixtures.

Cited in *Asheville Woodworking Co. v. Southwick*, 119 N. C. 616, 26 S. E. 253, holding counter and bar fixtures property of lessee against lessor of hotel, as trade fixtures; *Causey v. Empire Plaid Mills*, 119 N. C. 181, 25 S. E. 863, holding evidence of temporary attachment of machinery with view to take if satisfactory, admissible in replevin by vendor against purchase from prospective vendee with notice; *Clark v. Hill*, 117 N. C. 13, 53 Am. St. Rep. 574, 23 S. E. 91, holding steam feed attachment to mill furnished under conditional sale lease, fixture as between vendor and purchaser on foreclosure of prior mortgage of mill property; *Belvin v. Raleigh Paper Co.* 123 N. C. 144, 31 S. E. 665, holding purchase-money mortgage by lessor to lessee for machinery put upon property by lessee takes precedence over prior mortgage of realty by lessor; *Best v. Hardy*, 123 N. C. 227, 31 S. E. 391, holding fixtures pass under owner's mortgage of realty in spite of subsequent mortgage purporting to convey fixtures; *Bullard v. Hopkins*, 128 Iowa, 706, 105 N. W. 197, holding as between vendor and vendee things personal in their nature but fitted and prepared to be used with real estate and essential to its beneficial enjoyment being on the land, and especially if attached thereto in some permanent way at the time of its conveyance by deed, passes with realty; *Watson v. North Carolina R. Co.* 152 N. C. 216, 67 S. E. 502, as to term "fixtures" having different shades of meaning in statutes according to its purpose and context; *State v. Marten*, 141 N. C. 838, 53 S. E. 874, holding there must be some kind of physical annexation to the land.

Cited in footnotes to *Wright v. Du Bignon*, 57 L. R. A. 669, which denies right of tenant to remove fixtures annexed by him to freehold; *Baker v. McClurg*, 59 L. R. A. 131, which sustains tenant's right to remove as trade fixtures, ovens, engine boilers, and shafting placed by him in bakery building with intent to remove; *Western & A. R. Co. v. State*, 14 L. R. A. 438, which holds railroad lessee not entitled to substitute old rails and appliances at end of term; *Demby v. Parse*, 12 L. R. A. 87, which holds buildings erected by third person on land in life tenant's possession not removable against remainderman's objection; *Neufelder v. Third Street & Suburban R. Co.* 53 L. R. A. 601, which holds machinery steadied by bolts and screws fastening it to building not fixture as to mortgagee; *Anderson v. Creamery Package Mfg. Co.* 56 L. R. A. 554, which holds mortgage to seller of machinery purchased for use in permanent building superior to existing real-estate mortgage; *Leonard v. Clough*, 16 L. R. A. 306, which holds a barn placed by owner on own land or stands resting on surface, a fixture; *Miller v. Waddingham*, 11 L. R. A. 510, which holds permanent building erected by vendee in possession, a fixture; *Miller v. Waddingham*, 13 L. R. A. 680, which holds vendee in possession authorized to remove buildings erected by him; *Murray v. Bender*, 63 L.R.A. 783, which holds chairs, stage fixtures, and drop curtains annexed to theater to make possible the use of the building, fixtures; *Giddings v. Freedley*, 65 L.R.A. 327, which holds main belt transmitting power from an engine so annexed to building as to be real estate, to machinery in mill, real estate; *Radey v. McCurdy*, 67 L.R.A. 359, which holds insertion in renewal lease of provision entitling tenant to remove trade fixtures not necessary to enable

him to remove such fixtures before termination of extended period; *Bergh v. Herring-Hall-Marvin Safe Co.* 70 L.R.A. 756, which holds boilers, engines, shafting, and heating apparatus placed in building by tenant to carry on business therein and capable of easy removal without injury to building removable as trade fixtures.

Cited in notes (21 L.R.A. 349) on mortgages on buildings on leased premises; (84 Am. St. Rep. 886) on fixtures retaining by agreement the character of personal property.

Improvements upon mortgaged property.

Cited in *Union Trust Co. v. Southern Sawmills & Lumber Co.* 92 C. C. A. 101, 166 Fed. 197, holding improvements placed upon mortgaged property by mortgagor inure to the benefit of the mortgagee.

10 L. R. A. 726, *STATE v. HOOVER*, 107 N. C. 795, 12 S. E. 451.

Tenancy by servant.

Cited in note (4 L.R.A.(N.S.) 702) on occupation of premises as a servant and as a tenant.

10 L. R. A. 726, *BROWNING v. BERRY*, 107 N. C. 231, 12 S. E. 195.

Statute of frauds.

Cited in *Haun v. Burrell*, 119 N. C. 547, 26 S. E. 111, holding parol promise to pay debt unenforceable by creditor where promisor pleads statute; *Loughran v. Giles*, 110 N. C. 425, 14 S. E. 966, holding defense waived by demurrer to complaint alleging oral contracts; *Vann v. Newsom*, 110 N. C. 125, 14 S. E. 519, holding charge for debts secondary to lien for improvements erected by parol donee during testator's life; *Miller v. Carolina Monazite Co.* 152 N. C. 609, 68 S. E. 1; *Winders v. Hill*, 144 N. C. 617, 57 S. E. 456,—holding where contract alleged in complaint is denied defendants may avail themselves of statutes of frauds without pleading it specially; *Henry v. Hilliard*, 155 N. C. 379, — L.R.A. (N.S.) —, 71 S. E. 439, holding that vendee, under parol contract in regard to land can compel execution of deed, when statute of frauds is not pleaded, contract is not denied, and no objection made to evidence.

Cited in note (78 Am. St. Rep. 650) as to when and how statute of frauds must be pleaded.

Liability for acts of independent contractor.

Cited in *Hunt v. Vanderbilt*, 115 N. C. 563, 20 S. E. 168, denying liability for personal injuries from explosions set off by independent contractor.

10 L. R. A. 728, *Re PEOPLE'S RAPID TRANSIT CO.* 125 N. Y. 93, 26 N. E. 25.

Construction of general railroad act of 1850.

Cited in *Schaper v. Brooklyn & L. I. Cable R. Co.* 124 N. Y. 631, 26 N. E. 311, enjoining construction of elevated road where consent of only municipal council obtained; *New York, L. & W. R. Co. v. Roll*, 32 Misc. 325, 66 N. Y. Supp. 748, holding right of railway to "cross" highway taxable under franchise tax law, though crossings not expressly included therein; *De Grauw v. Long Island Electric R. Co.* 43 App. Div. 505, 60 N. Y. Supp. 163, refusing to enjoin operation of cars used solely for carriage of express matter by street-surface road organized under general railroad law; *Bennett v. Long Island R. Co.* 89 App. Div. 383, 85 N. Y. Supp. 938, holding owner of house alone not entitled to enjoin maintenance of structure connecting surface road with elevated; *People ex rel. Erie R. Co. v. Woodbury*, 70 Misc. 264, 127 N. Y. Supp. 201, to the point that words "in" and "upon" streets as used in Railroad Law were

synonymous with "across" in defining place of railroad crossing highway; State ex rel. Schade Brewing Co. v. Superior Ct. 62 Wash. 117, 113 Pac. 576, holding that power to authorize location of railroad "in" street does not mean power to grant use of any part of surface thereof.

Cited in note. (15 L. R. A. 377) on right to construct elevated railroad in street.

Distinguished in Beekman v. Brooklyn & B. B. R. Co. 89 Hun, 16, 35 N. Y. Supp. 84, upholding elevation of street railway for portion of its length by corporation organized under such act; Leffman v. Long Island R. Co. 120 App. Div. 534, 105 N. Y. Supp. 487, where a steam surface road acting under legislative authority sought to elevate its tracks in order to improve street.

Criticized in People ex rel. New York, N. H. & H. R. Co. v. Railroad Comrs. 81 App. Div. 246, 81 N. Y. Supp. 20, than street railroads permissible under.

10 L. R. A. 734, THOMPSON v. QUINCY, 83 Mich. 173, 47 N. W. 114.

Admissibility of evidence under pleading.

Cited in Storrs v. Grand Rapids, 110 Mich. 486, 68 N. W. 258, admitting evidence of injuries under allegation that intestate received certain bruises, wounds, and contusions, and "certain internal injuries, whereby," etc.

Contributory negligence.

Cited in footnote to Suburban Electric Co. v. Nugent, 32 L. R. A. 700, which holds foot passenger not presumed negligent from fact of contact with wire coil on ground.

Cited in note (10 L. R. A. 250) on contributory negligence in use of sidewalk.

Liability of municipality for defective streets.

Cited in footnotes to Teager v. Flemingsburg, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians; Harden v. Jackson, 66 L.R.A. 986, which holds plank sidewalk not so unsafe as to render city liable to one falling thereon because his cane goes through, although the edges of planks have become so decayed as not to withstand pressure of cane.

Cited in notes (19 L. R. A. 454) on distinction between public and private functions of municipal corporations as to liability for negligence; (10 L. R. A. 477) on sufficiency of notice of injuries; (38 L.R.A.(N.S.) 282) on liability of municipality for tort in connection with quarry worked by it.

10 L. R. A. 742, BALLIN v. J. & E. B. FRIEND LACE IMPORTING CO. 78 Wis. 404, 47 N. W. 516.

Assets of insolvent as trust fund.

Cited in Gilman v. Ketcham, 84 Wis. 70, 23 L. R. A. 58, 36 Am. St. Rep. 899, 54 N. W. 395, holding appointment of receiver on voluntary dissolution of foreign corporation at domicile, enforced against foreign creditor garnishing corporation's debtor in forum; Speiser v. Merchants' Exch. Bank, 110 Wis. 509, 86 N. W. 243, holding receiver's expenses payable out of fund realized by him on sale of merchandise of insolvent corporation, though burdened with liens to amount greater than realized; Ford v. Plankinton Bank, 87 Wis. 372, 58 N. W. 766, holding funds realized by sheriff on sale of corporate property under execution secured by fraudulent preference of creditor, properly sequestered by court for distribution by receiver.

Distinguished in Ballin v. Merchants' Exch. Bank, 89 Wis. 285, 27 L. R. A. 360, 46 Am. St. Rep. 834, 61 N. W. 1118, upholding lien acquired by creditors of known insolvent by attachment prior to dissolution proceedings; Garden City

Bkg. & Trust Co. v. Geilfuss, 86 Wis. 623, 57 N. W. 349, holding voluntary assignment for benefit of creditors takes precedence over statutory dissolution instituted by creditor on judgment subsequently recovered; Cass v. Sutherland, 98 Wis. 553, 74 N. W. 337, holding lands in possession of receiver of insolvent corporation subject to sale under execution against fraudulent insolvent grantor.

— **Procedure.**

Cited in Gager v. Bank of Edgerton, 101 Wis. 596, 77 N. W. 920, holding all creditors must litigate rights in single action brought by one for settlement of affairs of insolvent bank where prayer that other creditors may be joined therein; Harrigan v. Gilchrist, 121 Wis. 272, 99 N. W. 909, holding creditor's bill lies to reach assets of insolvent corporation.

Cited in notes (66 Am. St. Rep. 280) on demands which will support creditor's bill; (23 L.R.A.(N.S.) 25) on conditions precedent to equitable remedies of creditors.

Liability of stockholders.

Cited in footnote to Vermont Marble Co. v. Declez Granite Co. 56 L. R. A. 728, which holds liability for unpaid subscription not defeated by transfer of stock without transferee's consent.

Judgment of Federal court as domestic judgment.

Cited in First Nat. Bank v. Sloman, 42 Neb. 354, 47 Am. St. Rep. 707, 60 N. W. 589, and Chicago & A. Bridge Co. v. Fowler, 55 Kan. 36, 39 Pac. 727, holding judgment of circuit court in state may be basis of creditor's bill in state court; Metcalf v. Watertown, 153 U. S. 679, 38 L. ed. 865, 14 Sup. Ct. Rep. 947, holding decision of circuit court within state subject to twenty-year limitation for actions upon judgment "of any court of record of this state."

10 L. R. A. 746, SNASHALL v. METROPOLITAN R. CO. 8 Mackey, 399.

Effect of coverture upon actions by married people.

Cited in Howard v. Chesapeake & O. R. Co. 11 App. D. C. 337, same case on subsequent appeal, 14 App. D. C. 291, holding wife's release under seal not bar to husband's independent action for special damage by reason of her injury.

Distinguished in Capital Traction Co. v. Rockwell, 17 App. D. C. 374, upholding under later statute, action by wife without joinder of husband, for injuries due to negligence.

Conflict of laws.

Cited in notes (56 L. R. A. 223) on conflict of laws as to action for death or for bodily injury; (57 L. R. A. 357) on conflict of laws to matrimonial property.

10 L. R. A. 749, STATE v. GIBBS, 10 Mont. 213, 25 Pac. 289.

Reasonable doubt.

Cited in State v. Clancy, 20 Mont. 502, 52 Pac. 267, disapproving explanation of "reasonable doubt" to jury, though no prejudice results to accused; State v. Harrison, 23 Mont. 80, 57 Pac. 647, holding mere definition of reasonable doubt does not take place of instruction against conviction, unless convinced beyond reasonable doubt; State v. Martin, 29 Mont. 279, 74 Pac. 725, as to definition of reasonable doubt.

Cited in notes (17 L.R.A. 710) on what constitutes a reasonable doubt in criminal cases; (48 Am. St. Rep. 575, 578) on reasonable doubt.

Unfair statements by counsel.

Cited in note (46 L. R. A. 648) on reversal of conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorney.

Denial of continuance to secure witnesses.

Cited in note (16 L. R. A. 239) on denial of continuance on admissions by prosecution as affected by right of accused to meet witnesses.

Evidence of witness on former hearing.

Cited in note (11 Eng. Rul. Cas. 507) on oral evidence of testimony of witness on former hearing.

10 L. R. A. 752, *STATE v. REDWOOD FALLS BLDG. & L. ASSO.* 45 Minn. 154, 47 N. W. 540.

Taxation of mortgages.

Cited in *State v. St. Paul Trust Co.* 76 Minn. 430, 79 N. W. 543, holding mortgages held by trust company taxable; *Territory v. Co-operative Bldg. & L. Asso.* 10 N. M. 340, 62 Pac. 1097, holding that mortgages held by the corporation to secure its loans, are personal property and subject to taxation as such.

Nature, powers and taxation of building associations.

Cited in *Lovelace v. Pratt*, 163 Mo. 75, 63 S. W. 383, holding purchaser at foreclosure by assignee of mortgage executed by member and assigned by association while going concern, acquires no title; *Washington Nat. Bldg. & L. Invest. Asso. v. Stanley*, 38 Or. 328, 58 L. R. A. 821, 84 Am. St. Rep. 793, 63 Pac. 489, holding loan tainted with usury unsanctioned by statute, where exacted premium and interest exceed lawful rate; *Albany Mut. Bldg. Asso. v. Laramie*, 10 Wyo. 75, 65 Pac. 1011, holding credits of mutual loan association represented by loans, taxable.

Cited in note (35 L.R.A. 290, 296) on withdrawal from building and loan associations.

10 L. R. A. 754, *CHAMPION v. HARTFORD INVEST. CO.* 45 Kan. 103, 25 Pac. 590.

Subrogation.

Cited in *New York Security & T. Co. v. Lombard Invest. Co.* 65 Fed. 276, holding company acquiring bond secured by trust deed subrogated to rights of payee, where bond paid by it to guaranteed assignee on maturity.

Distinguished in *J. B. Watkins Land Mortg. Co. v. Williams*, 63 Kan. 34, 64 Pac. 976, holding second mortgagee paying interest coupons on prior mortgage without taking assignment, not entitled to share *pro rata* to amount of interest paid, in proceeds of sale of mortgaged property.

10 L. R. A. 756, *KENT v. MORRISON*, 153 Mass. 137, 25 Am. St. Rep. 616, 26 N. E. 427.

Estate under power of disposition during life.

Cited in *Chase v. Ladd*, 153 Mass. 128, 25 Am. St. Rep. 614, 26 N. E. 429, holding only life estate coupled with power to use sufficient for reasonable maintenance, given wife by devise to her forever, with gift over of what remains undisposed of for her support and maintenance; *Baker v. Thompson*, 162 Mass. 42, 37 N. E. 751, holding fee does not pass to wife under devise for her support, with power of sale "as she may deem best," where balance at her death devised over to child; *Adams v. Lillibridge*, 73 Conn. 657, 49 Atl. 21, holding wife entitled to only life interest in property devised by husband for her use "as she may see fit," balance remaining at her death, over; *Mansfield v. Shelton*, 67 Conn. 399, 52 Am. St. Rep. 285, 35 Atl. 271, holding wife entitled to only life estate in residue devised by husband to her for her unrestricted use, balance remaining on her death, over; *Collins v. Wickwire*, 162 Mass. 145, 38 N. E. 365, holding only life estate taken under devise to wife for life with power to dispose of property by gift or will at

death, and devise over in event of wife's nonaction; *Barnes v. Marshall*, 102 Mich. 256, 60 N. W. 468, holding absolute title to legacies not vested in widow, where balance remaining at her death, disposed of by testator; *Keniston v. Mayhew*, 169 Mass. 168, 47 N. E. 612, holding estate for life with power of disposition by sale only, acquired under devise of residue "to be disposed of at her discretion, at her decease" over; *Walton v. Drumtra*, 152 Mo. 508, 54 S. W. 233, holding fee reverts to husband on death of wife to whom he conveys by trust deed with power to convey in fee, but providing for reversion on failure to exercise power; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 154, 64 N. E. 267, holding that power of sale given life tenant cannot be exercised by will; *Widows' Home v. Lippardt*, 70 Ohio St. 295, 71 N. E. 770, holding that widow has power to convey fee under will giving her all testator's estate with power of sale; *Meyer v. Weiler*, 121 Iowa, 67, 95 N. W. 254 (dissenting opinion), majority holding provision disposing of property left death of widow to whom testator gave entire estate, void; *Re Weien*, 139 Iowa, 672, 18 L.R.A.(N.S.) 474, 116 N. W. 791 (dissenting opinion) as to nature of estate; *Reed v. Reed*, 194 Mass. 218, 80 N. E. 219, holding where will gave estate for life with power of disposal if devisee deemed it expedient and contained a provision that at devisee's death the property was to be divided among other relations the devisee did not take absolutely but took a life estate with power to dispose of the remainder; *Raymond v. Com.* 192 Mass. 490, 78 N. E. 514, holding devisee of life estate with no devise over took life estate with power of disposal by deed or will; *Dana v. Dana*, 185 Mass. 160, 70 N. E. 49, holding where property was devised to wife with power of disposal in fee the wife took life estate with power of disposal in fee and devisees and legatees took a vested remainder dependent upon her right to determine their interest.

Cited in notes (10 L.R.A. 817) on devise by implication; (139 Am. St. Rep. 114, 116) on devise or bequest for life with power of disposal.

Distinguished in *Veeder v. Meader*, 157 Mass. 415, 32 N. E. 358, holding wife entitled to fee under devise "give and bequeath . . . with full power to sell and execute deed," where life estate in residue aptly given by another clause; *Foster v. Smith*, 156 Mass. 381, 31 N. E. 291, holding fee simple taken by wife under devise to her use with power to sell or devise regardless of testator's devise over in event of failure; *Barnard v. Stone*, 159 Mass. 226, 34 N. E. 272, upholding as against remainderman conveyance by widow to trustee in consideration of her support for life and burial expenses, under devise to her with directions to trustee to convey to her at any time she wished and devise over of any unexpended property; *Cornwell v. Wulff*, 148 Mo. 561, 45 L. R. A. 58, 50 S. W. 439, denying validity of devise over where wife given absolute power of appointment during her life.

Execution of power.

Cited in *Lardner v. Williams*, 98 Wis. 519, 74 N. W. 346, upholding mortgage by widow under power to "use, sell, dispose of" testator's property for management of business and education of children; *Manning v. Sereven*, 56 S. C. 87, 34 S. E. 22, upholding mortgage under unlimited power to convey or devise; *Hamilton v. Hamilton*, 149 Iowa, 330, 128 N. W. 380, holding that authority to mortgage may be inferred if power to sell is amplified by other words of more general meaning and circumstances be not such as to forbid that construction; *Lueft v. Lueft*, 129 Wis. 541, 7 L.R.A.(N.S.) 267, 109 N. W. 652, 9 A. & E. Ann. Cas. 639, as to power to mortgage being granted under power to sell; *Ware v. Minot*, 202 Mass. 517, 88 N. E. 1091, holding express gift of power to appoint by will by implication excludes the right to convey or dispose in any other way.

Distinguished in *Arlington State Bank v. Paulsen*, 57 Neb. 736, 78 N. W. 303, annulling mortgages for debts executed by heir, to whom executor empowered to

sell and convey to pay debts had conveyed in fee simple; *Campbell v. Foster Home Asso.* 163 Pa. 616, 26 L. R. A. 118, 43 Am. St. Rep. 818, 30 Atl. 222, denying validity of mortgage under power of attorney to sell and convey, not coupled with interest in land or fund; *Stocker v. Foster*, 178 Mass. 598, 60 N. E. 407, holding conveyance for fictitious consideration not execution of power to "sell, whenever conducive to his comfort;" *Lovett v. Farnham*, 169 Mass. 6, 47 N. E. 246, holding demand of principal under power ineffectual, where not necessary for use and support though so recited; *Warren v. Pazolt*, 203 Mass. 349, 89 N. E. 381, holding a trustee by virtue of power to change investments to whom property has been given to hold as an investment has no right to borrow money to add to the amount of the investments of the trust.

Construction of deed.

Cited in *Ricker v. Brown*, 183 Mass. 429, 67 N. E. 353, holding that deed of residue of property remaining at time of death, passes title in fee at grantor's death.

Subsequent limitation of fee.

Cited in *Fecht v. Henze*, 162 Mich. 58, 127 N. W. 26, holding that will creating estate in fee in testator's wife, limiting estate granted by charging it with payment of legacies after wife's death, does not create unqualified estate in fee simple.

Cited in note (23 Eng. Rul. Cas. 74) on invalidity for repugnancy of gift over after absolute gift to a designated person.

10 L. R. A. 758, *INTERNATIONAL TRUST CO. v. INTERNATIONAL LOAN & T. CO.* 153 Mass. 271, 26 N. E. 693.

Right to corporate name.

Cited in footnotes to *Grand Lodge, A. O. U. W. v. Graham*, 31 L. R. A. 133, which denies right of incorporated seceding body to claim right to use name "Grand Lodge of the Ancient Order of United Workmen" to the exclusion of the original incorporated body; *Supreme Lodge, K. of P. v. Improved Order, K. of P.* 38 L. R. A. 658, which authorizes seceding Knights of Pythias to use name "Improved Order, Knights of Pythias;" *International Committee, Y. W. C. Asso. v. Young Women's Christian Asso.* 56 L. R. A. 888, which sustains right of local Y. W. C. A. to enjoin deceptive use of similar name by organization subsequently incorporated; *Illinois Watch Case Co. v. Pearson*, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name; *Armington v. Palmer*, 43 L. R. A. 95, which sustains private suit in equity to prevent wrongful assumption by corporation of name belonging to plaintiff; *Paulino v. Portuguese Beneficial Asso.* 20 L. R. A. 272, which holds corporate right to use of name cannot be annulled at suit of private person; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, holding that Peck Bros. & Co. may enjoin use of name Peck Bros. Co. by another corporation; *York Card & Paper Co. v. York Wall Paper Co.* 15 Pa. Co. Ct. 555, 4 Pa. Dist. R. 129, holding "York Wall Paper Co.," not so similar to "York Card and Paper Co." as to warrant refusal of charter; *Virginia Baking Co. v. Southern Biscuit Works*, 111 Va. 230, 30 L.R.A.(N.S.) 167, 68 S. E. 261, holding that words "Crown" and "Jamestown" may when applied in combination with other words to manufactured article indicate origin and manufacture and be subject of valid trademark.

Cited in notes (15 L.R.A.(N.S.) 630) on relief against infringement of trade name not used in connection with manufactured article; (25 Eng. Rul. Cas. 221) on right to corporate name.

10 L. R. A. 763, *GRAVES v. GOLDTHWAIT*, 153 Mass. 268, 26 N. E. 860.

Rights of cotenants before partition.

Cited in *Barnes v. Boardman*, 157 Mass. 480, 32 N. E. 670, holding conveyance of specific portion of community property by rules and bounds by tenant in common, no bar to partition thereof by remaining cotenants.

Specific performance of oral contracts relating to land.

Cited in *John F. Fowkes Mfg. Co. v. Metcalf*, 169 Mass. 599, 48 N. E. 848, holding agreement for loan unenforceable where it rests on letters necessarily supplemented by oral evidence supplying description of land; *Williams v. Carty*, 205 Mass. 399, 91 N. E. 392, holding that specific performance of oral contract to sell land may be enforced where purchase money is paid and possession taken and loss is suffered by grantee by change in situation and where purchaser cannot be restored to original situation; *Jennings v. Miller*, 48 Or. 205, 85 Pac. 517, holding mere uninterrupted continuation of a former possession not sufficient part performance of oral contract for lease to warrant decree of specific performance of same; *Ball v. Millikin*, 31 R. I. 46, 37 L.R.A.(N.S.) 623, 76 Atl. 789, Ann. Cas. 1912 B, 30, refusing specific performance of contract to reconvey land on breach of condition in deed as to use of land, where prior owners violated condition leading defendant to believe that condition had been waived.

Cited in footnote to *Russell v. Briggs*, 53 L. R. A. 556, which holds superintendence of repairs on building, etc., insufficient to take out of statute of frauds, oral agreement to convey interest in land to be received in exchange.

Specific performance of oral contract.

Cited in *Sarkisian v. Tule*, 201 Mass. 608, 88 N. E. 333, holding to justify specific performance of a parol contract void under statute of frauds the part performance must have even much that the refusal of other party to perform would have worked a fraud upon him.

10 L. R. A. 764, *BILLINGS v. MARSH*, 153 Mass. 311, 25 Am. St. Rep. 635, 26 N. E. 1000.

Right of assignee in insolvency to trust interests.

Cited in *Wemyss v. White*, 159 Mass. 485, 34 N. E. 718, holding mortgagee cannot enforce beneficiary order for payment of income of fund placed in trust free from interference or control of creditors and divertible for beneficiary's advantage in trustee's discretion; *Munroe v. Dewey*, 176 Mass. 185, 79 Am. St. Rep. 304, 57 N. E. 340, holding trustee in bankruptcy not entitled to income from devise in trust with direction that neither income nor principal shall be assignable or alienable by anticipation.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Bull v. Kentucky Nat. Bank*, 12 L. R. A. 37, which determines liability of spendthrift trust to payment of beneficiary's debts; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Cited in note (13 L. R. A. 213) on limitation in trust estates.

Distinguished in *Evans v. Wall*, 159 Mass. 169, 38 Am. St. Rep. 410, 34 N. E. 183, holding income payable "for and during devisee's life," of beneficiary of devise, may be reached by his assignee in insolvency.

Choses in action of insolvent passing to assignee.

Cited in *Sibley v. Mason*, 146 Mass. 130, 12 L.R.A.(N.S.) 1173, 124 Am. St. Rep. 520, 81 N. E. 887, 12 A. & E. Ann. Cas. 938, holding claim for personal injuries upon which action had been brought prior to proceeding in bankruptcy did not pass to trustee in bankruptcy.

Distinguished in *Robinson v. Wiley*, 188 Mass. 536, 74 N. E. 923, holding right of action against a bank for refusal to honor a check, drawn by a depositor, who had sufficient funds to his credit to meet the same in consequence of which depositors credit is impaired and he is rendered insolvent, passes to his assignee.

Validity of spendthrift trust.

Cited in note (25 Eng. Rul. Cas. 625) on validity of spendthrift trust.

10 L. R. A. 766, *AMERICAN BIBLE SOC. v. HEALY*, 153 Mass. 197, 26 N. E. 404.

Right to bill to construe will.

Distinguished in *Austin v. Bailey*, 163 Mass. 271, 39 N. E. 1022, holding writ of entry, and not bill to construe will, proper remedy of parties claiming adverse interests thereunder.

Operation of statute limiting devises.

Cited in *Minot v. Winthrop*, 162 Mass. 126, 26 L. R. A. 265, 38 N. E. 512, holding statutory exemption of devises to religious, etc., corporations exempt from taxation, applies only to corporations exempt under local law.

Cited in notes (24 L. R. A. 291) on recognition or exclusion of foreign corporations; (24 L. R. A. 325) on right of foreign corporations to own real estate.

Qualification of trustee under devise to charitable uses.

Cited in *Rine v. Wagner*, 135 Iowa, 632, 113 N. W. 471, holding while for some purposes a Roman Catholic bishop is a corporation sole, yet he is an individual and may act as trustee.

Conflict of laws as to wills.

Cited in note (2 L.R.A.(N.S.) 441) on conflict of laws as to wills.

10 L. R. A. 768, *SMITH v. BERGENGREN*, 153 Mass. 236, 26 N. E. 690.

Obligation of promisor on repudiation of promise.

Cited in *White v. Solomon*, 164 Mass. 518, 30 L. R. A. 538, 42 N. E. 104, holding refusal to receive article ordered does not relieve vendee of obligation to pay where vendor has fully performed.

Good will as valuable possession.

Cited in *Earle v. Com.* 180 Mass. 583, 57 L. R. A. 294, 91 Am. St. Rep. 326, 63 N. E. 10, holding physician entitled to damages for loss of business through destruction of office under eminent domain proceedings.

Stipulated damages or penalty.

Cited in *Glynn v. Moran*, 174 Mass. 236, 54 N. E. 535, holding provision for payment of lower salary if business is discontinued by employer during term of contract, liquidated damages.

Cited in footnote to *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable.

Cited in note (108 Am. St. Rep. 60) on agreements purporting to liquidate damages.

Measure of damages for breach of executed contract.

Cited in *Acme Food Co. v. Older*, 64 W. Va. 269, 17 L.R.A.(N.S.) 817, 61 S. E. 235, as to the measure of damages for breach of executed contract.

10 L. R. A. 769, COATES v. BOSTON & M. R. CO. 153 Mass. 297, 26 N. E. 864.

Liability of railway for defective appliances.

Cited in McIntyre v. Boston & M. R. Co. 163 Mass. 189, 39 N. E. 1012, holding railway liable for injury due to defective stake on flat car, where properly used to assist brakeman in passing over train as well as to retain load; Lyle v. Alabama G. S. R. Co. 76 C. C. A. 301, 145 Fed. 614, as to duty of railroad to supply safe appliances; Wallace v. Seaboard Air Line R. Co. 141 N. C. 660, 13 L.R.A.(N.S.) 396, 54 S. E. 399, holding duty of railroad company to have cross piece on flat car in a reasonably safe condition for use of servants; St. Louis & S. F. R. Co. v. Morris, 76 Kan. 847, 13 L.R.A.(N.S.) 1105, 93 Pac. 153, holding when conductor orders brakeman to stop a moving car when there is apparent danger of collision the brakeman if he has no knowledge or notice to contrary may act on assumption that such car is furnished with ordinary and proper appliances for safety of employees in performing their duties; Ft. Worth & R. G. R. Co. v. Day, 55 Tex. Civ. App. 28, 118 S. W. 739, holding that master may be held liable for failure to inspect and repair appliance with reference to proper condition for customary use, by employees although such use was not such as was originally intended; Wood v. Southern R. Co. 104 Va. 654, 52 S. E. 371, holding where handhold on manhole was used by brakemen, with knowledge of railroad company, to assist them in getting on tender, it was duty of railway company to keep same in a reasonably safe condition, although such use was not its primary one.

Cited in notes (41 L.R.A. 114) on knowledge as element of employer's liability to injured servant; (37 L. ed. U. S. 151) on liability for injuries received by employee in coupling cars.

— Duty to warn.

Cited in Thomas v. Missouri P. R. Co. 109 Mo. 216, 18 S. W. 980 (dissenting opinion), majority holding railway liable to unwarned switchman injured by strange coupling of cars of another road in good condition.

Cited in notes (44 L. R. A. 55) on duty of master to instruct and warn servants as to peril of employment; (54 L. R. A. 58, 166) on vice principalship as determined with reference to character of act which caused injury.

10 L. R. A. 770, WESTERN PAVING & SUPPLY CO. v. CITIZENS' STREET R. CO. 128 Ind. 525, 25 Am. St. Rep. 42, 26 N. E. 188, 28 N. E. 88.

Impairment of contract by ordinance or statute.

Cited in Indianapolis v. Consumers Gas Trust Co. 140 Ind. 116, 27 L. R. A. 517, 49 Am. St. Rep. 183, 39 N. E. 433, denying validity of ordinance requiring gas company to obtain permission to open street for repairs, where such right existed under prior charter; Noblesville v. Noblesville Gas & Improv. Co. 157 Ind. 169, 60 N. E. 1032, holding ordinance attempting to regulate charges for gas void where prior charter gives company right to determine same; State *ex rel.* Keith v. Michigan City, 138 Ind. 467, 37 N. E. 1041, holding contractor cannot recover from city cost of paving portion of street between railway track where contract refers to ordinance imposing liability or in accordance with accepted charter; Muncie Natural Gas Co. v. Muncie, 160 Ind. 112, 60 L. R. A. 830, 66 N. E. 436, sustaining power of city to enjoin gas company using streets from violating contract as to rates; Indianapolis v. Central Trust Co. 27 C. C. A. 582, 53 U. S. App. 658, 83 Fed. 531, enjoining enforcement of statute reducing fares on street cars as in violation of vested rights under ordinance; Boerth v. Detroit City Gas Co. 152 Mich. 662, 18 L.R.A.(N.S.) 1204, 116 N. W. 628, holding city council had power to regulate charges for gas.

— **Contract arising out of prior ordinance.**

Cited in *St. Louis v. Western U. Teleg. Co.* 63 Fed. 70, holding ordinance imposing charge for use of streets for telephone poles unconstitutional where right previously given by ordinance stipulating for use of poles by city, accepted and acted upon by both company and city; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 563, 41 L. ed. 1116, 17 Sup. Ct. Rep. 653, Affirming 56 Fed. 748, holding municipal ordinance granting right to occupy streets to second railway void, where grant to previous company was of exclusive occupancy.

Cited in notes (50 L. R. A. 143) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts; (46 L. R. A. 200, 203) on liability of street railway for paving assessment.

Distinguished in *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 748, 50 L. R. A. 152, 35 S. E. 994, holding grant of exclusive right to convey electricity through streets not a contract though acted upon, where void under Constitution; *Pawcatuck Valley Street R. Co. v. Westerly*, 22 R. I. 310, 47 Atl. 691, holding railway bound by ordinance requiring change of rail, where charter provides for regulations by council, though prior ordinance prescribed rail laid; *Mercantile Trust & D. Co. v. Collins Park & B. R. Co.* 101 Fed. 350, upholding exercise of right to condemn railway tracks for use of another line, reversed in ordinance conferring right to construct railroad.

— **Federal jurisdiction.**

Cited in *Mercantile Trust & D. Co. v. Collins Park & B. R. Co.* 99 Fed. 816, upholding Federal jurisdiction of alleged impairment of rights under ordinance authorized by statute, by subsequent ordinance.

Construction of public grant.

Cited in *Cambria Iron Co. v. Union Trust Co.* 154 Ind. 297, 48 L. R. A. 45, 55 N. E. 745, holding duty to pave between tracks imposed by acceptance of charter requiring paving in same manner as street, when latter paved; *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 123, 84 N. W. 802, holding street railway not exempt from assessment for paving, by provision imposing obligation to conform tracks to grade and subjecting it to reasonable regulation in construction and use; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 727, holding railway incorporated for limited term cannot lengthen existence by purchase of railway having perpetual franchise, under statute permitting such purchase "on terms and conditions of original charter;" *Terre Haute & I. R. Co. v. State*, 159 Ind. 477, 65 N. E. 401, holding charter granted by state to railroad company, written contract; *Grand Trunk Western R. Co. v. South Bend*, 174 Ind. 211, 36 L.R.A.(N.S.) 855, 89 N. E. 885, to the point that city cannot by grant surrender any of their legislative or discretionary powers held in trust for public; *Columbus Street R. & Lighting Co. v. Columbus*, 43 Ind. App. 267, 86 N. E. 83; *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 198, 69 N. E. 1018,—holding grant construed most favorably to public.

Cited in note (60 L. R. A. 55) on corporate taxation in United States as affected by contract clause in Federal constitution.

Extent of obligation under duty to repair.

Cited in *Binghamton v. Binghamton & P. D. R. Co.* 61 Hun, 484, 16 N. Y. Supp. 225, holding expense of asphaltting cannot be imposed on railway under obligation to keep street "in repair," in absence of proof that same necessary to put street in repair; *White County v. Gwin*, 136 Ind. 589, 22 L. R. A. 414, 36 N. E. 237, holding court's authority to order repair of courthouse insufficient to warrant practical reconstruction; *Atty. Gen. ex rel. Gibson v. Montcalm County*, 141

Mich. 599, 104 N. W. 792, as to obligation to repair not including obligation to construct a new street.

Cited in note (104 Am. St. Rep. 648, 654) on obligation of street railway to repave and repair streets.

Distinguished in *Columbus Street R. & Light Co. v. Columbus*, 43 Ind. App. 267, 86 N. E. 83, holding under an ordinance granting the right to construct and operate a street railway which provided that the portion of the street between and adjacent to the tracks should be kept in as good repair as other parts of street are kept, the railway must repair those portions of street when necessary.

Estoppel.

Cited in *Willard v. Albertson*, 23 Ind. App. 163, 53 N. E. 1076, upholding estoppel, by failure to object where work for which assessment made, done in good faith under common council's direction and with defendant's knowledge; *Cass County v. Plotner*, 149 Ind. 120, 48 N. E. 635, holding party estopped to attack organization of board of commissioners laying special assessment, where acquiesced during construction of ditch and joined in petition for postponement of first assessment; *Martindale v. Rochester*, 171 Ind. 266, 86 N. E. 321, holding property owner who, without a proper objection permits a contractor to improve a street cannot restrain the collection of an assessment therefor, though the assessment be void, or statute providing therefor unconstitutional.

Parol evidence.

Cited in *Singer Mfg. Co. v. Sults*, 17 Ind. App. 641, 47 N. E. 341, holding parol evidence incompetent to establish oral agreement regarding sale of sewing machine different from that contained in subsequent written sale contract; *Osgood v. Skinner*, 111 Ill. App. 615, holding parol evidence admissible when written instruments are shown by their face not to include all understandings; *Gemmer v. Hunter*, 35 Ind. App. 507, 74 N. E. 586, holding that a written instrument becomes the repository of the entire contract and cannot be modified by parol evidence of prior verbal agreement; *McCasky Register Co. v. Curfman*, 45 Ind. App. 304, 90 N. E. 323, holding that parole evidence is not admissible to vary complete written contract, except upon showing of fraud or mistake.

Distinguished in *Hilgeman v. Sholl*, 21 Ind. App. 87, 51 N. E. 728, holding parol evidence of contract to pay for possible overplus on subsequent survey of land conveyed, admissible where contents of deed not proved.

Power to change grade.

Cited in *Warren County v. Mankey*, 29 Ind. App. 57, 63 N. E. 864, denying power of county commissioners to cut grade in one place to procure materials for another.

Ordinance granting franchise as contract.

Cited in *Indianapolis & E. I. R. Co. v. New Castle*, 43 Ind. App. 472, 87 N. E. 1067, holding an ordinance granting a street railroad franchise when accepted, is a contract between the parties.

Additional servitudes in highways.

Cited in note (106 Am. St. Rep. 233, 244, 246, 258, 259) on what are additional servitudes in highways.

10 L. R. A. 778, *BOWLING GREEN v. BARCLAY*, 91 Ky. 66, 14 S. W. 968.

10 L. R. A. 779, *STATE v. WHEELER*, 20 Or. 192, 23 Am. St. Rep. 119, 25 Pac. 394.

Forgery.

Cited in *Hocker v. State*, 34 Tex. Crim. Rep. 362, 53 Am. St. Rep. 716, 30 S. W. 783, upholding conviction for forgery of name of fictitious person; *People v.*

Chretien, 137 Cal. 453, 70 Pac. 305, holding execution of deed by fictitious name not forgery of instrument for payment of money or property; *State v. Kelliher*, 49 Or. 82, 88 Pac. 867, holding forgery may be committed by the use of fictitious names where the forged instrument is made with intent to defraud and is capable of effecting that end; *Randolph v. State*, 65 Neb. 523, 91 N. W. 356, holding the signing of a fictitious name of a person to an instrument, which is the subject of a forgery, with an intention to defraud, is a false and fraudulent making of such instrument and constitutes the offense of forgery.

Cited in footnote to *State v. Taylor*, 25 L. R. A. 591, which holds unauthorized signing of name to note with signed statement that act authorized not forgery.

Cited in notes (24 L.R.A. 33, 45) on forgery of worthless instruments; (1 L.R.A.(N.S.) 731) on forgery of recommendations or letters of introduction.

10 L. R. A. 782, *NATIONAL S. S. CO. v. SHEAHAN*, 122 N. Y. 461, 25 N. E. 858.

Amendment of complaint.

Cited in *Mea v. Pierce*, 63 Hun, 402, 18 N. Y. Supp. 293, holding amendment on trial changing action from tort to contract not allowable; *Riker v. Curtis*, 10 Misc. 126, 30 N. Y. Supp. 940, holding declaration for money loaned not amendable to action to recover for money paid by mistake or obtained through fraud.

Cited in (51 Am. St. Rep. 430) on amendments which are not admissible because changing cause of action.

Replevin.

Cited in *Hoffman v. Markham*, 88 Hun, 20, 34 N. Y. Supp. 508, holding plaintiff entitled to judgment for article alleged to have been wrongfully taken or its value, if it cannot be delivered, and not judgment for damages equivalent to value.

10 L. R. A. 784, *WATSON v. LANE*, 52 N. J. L. 550, 20 Atl. 894.

Conflict of laws.

Cited in *United States Sav. & L. Co. v. Shain*, 8 N. D. 141, 77 N. W. 1006, construing loan according to law of state in which valid where parties residents of different states; *Equitable Mut. F. Ins. Corp's Receiver v. Murray*, 131 Ky. 750, 115 S. W. 816, holding note executed and made payable in New York a New York contract.

Cited in notes (62 L.R.A. 44) on conflict of laws as to interest and usury; (16 L.R.A.(N.S.) 619) on applicability of statute forbidding corporation to set up usury, as affected by foreign or domestic character of corporation, situs of contract, or place of suit.

—Construction of foreign statute.

Cited in *Rosenbaum v. United States Credit System Co.* 64 N. J. L. 36, 44 Atl. 966, holding construction of foreign statute by courts of that jurisdiction controlling; *Alleghany Co. v. Allen*, 69 N. J. L. 274, 55 Atl. 724, holding same.

10 L. R. A. 785, *MacCULSKY v. KLOSTERMAN*, 20 Or. 108, 25 Pac. 366.

Custom as part of contract.

Cited in *Wood v. Allen*, 111 Iowa, 100, 82 N. W. 451, holding custom to exclude notions, clothing, hats, and caps from "dry goods" admissible to explain latter term in contract; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 254, 64 L.R.A. 447, footnote, p. 443, 79 S. W. 124, holding carrier liable for failure to notify consignee of arrival of fruit when business suspended next day; *McSherry v.*

Blanchfield, 68 Kan. 312, 75 Pac. 121, holding evidence of usage and custom may be introduced to elucidate the intention of parties when the meaning of contract cannot be clearly ascertained from language employed; *Savage v. Salem, Mills Co.* 48 Or. 11, 85 Pac. 69, 10 A. & E. Ann. Cas. 1065, holding proof of custom is never admissible to give an interpretation to a contract inconsistent with its language; *Harrison v. Birrell*, 58 Or. 420, 115 Pac. 141, holding that evidence of custom by which brokers securing marine insurance through agents of insurance companies undertook to pay premium, was admissible on issue of existence of contract; *Schmitt v. New Braunfelser Untersteuerrungs Verein*, 32 Tex. Civ. App. 14, 73 S. W. 568, holding facts showed that custom of beneficial association was known to assured and association and was binding.

Cited in footnotes to *Harris v. Sharples*, 58 L. R. A. 214, which denies right under contract to add lithographer's name for advertising purposes to lithographed cover design; *Baltimore Base Ball & Exhibition Co. v. Pickett*, 22 L. R. A. 690, which holds special contract for definite time not affected by custom to discharge ball players on ten days' notice; *German American Ins. Co. v. Commercial F. Ins. Co.* 16 L. R. A. 291, which holds custom in particular city as to what constitutes "building" or "risk" not presumed to be known to foreign company; *Pennsylvania R. Co. v. Naive*, 64 L.R.A. 443, which holds carrier not negligent in failing to notify consignee of arrival of perishable goods on legal holiday on which by general custom of locality all business is suspended; *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* 65 L.R.A. 388, which holds marine policy providing that no risk shall attach until amount and description is approved and indorsed thereon, not changed into open and unrestricted policy covering all property assured elects to report, by adopting agreement fixing uniform premium, supplying blanks on which to report risks, and a long continued custom of reporting risks by assured when convenient, and their uniform acceptance by insurer.

Cited in notes (12 L. R. A. 376) on construction of terms used in contracts; (13 L.R.A. 439, 440) on custom and usage as law; (14 Eng. Rul. Cas. 622) on parol evidence as to usage in interpretation of written contracts.

Distinguished in *Holmes v. Whitaker*, 23 Or. 323, 31 Pac. 706, holding custom of purchaser to furnish conveyance admissible in defense of action for non-63 Pac. 117, holding agent to lease has no authority to insert covenant to ir-delivery, where contract silent in regard thereto; *Durkee v. Carr*, 38 Or. 195, rigate in absence of custom of landlords to irrigate tenant's lands.

"Outstanding and open account."

Cited in *Kramer v. Gardner*, 104 Minn. 373, 22 L.R.A.(N.S.) 496, 116 N. W. 925, holding the expression has a well defined meaning in legal and commercial transactions and does not include bills of exchange, promissory notes, or other evidences of indebtedness.

10 L. R. A. 790, *Re ALLISON*, 13 Colo. 525, 16 Am. St. Rep. 224, 22 Pac. 820.
Independent prosecutions for same act.

Cited in note (31 L.R.A.(N.S.) 725) on right to convict for several offenses growing out of same facts.

Distinguished in *Carson v. People*, 4 Colo. App. 467, 36 Pac. 551, holding conviction for involuntary manslaughter on charge of murder, bars prosecution for assault with intent to kill.

Former jeopardy or recovery.

Cited in *State v. Costello*, 29 Wash. 370, 69 Pac. 1099, holding plea of former jeopardy bad, when jury in former trial discharged for failure to agree; *State*

v. Barnes, 54 Wash. 497, 23 L.R.A.(N.S.) 935, 103 Pac. 792, holding discharge of jury in criminal case without consent of accused for reason that jury are unable to agree will not permit retrial on same charge; Hovey v. Sheffner, 16 Wyo. 278, 15 L.R.A.(N.S.) 235, 125 Am. St. Rep. 1037, 93 Pac. 305, 15 A. & E. Ann. Cas. 318, holding habeas corpus not proper method of raising question of former jeopardy.

Cited in footnote to Dreyer v. People, 58 L. R. A. 869, which holds discharge of jury without consent of accused because jurors unable to agree, not former jeopardy.

Cited in notes (92 Am. St. Rep. 121) on identity of offenses on plea of former jeopardy; (11 L.R.A.(N.S.) 180) on time allowable for jury to deliberate before mistrial ordered in criminal case.

— Necessity of special plea.

Cited in People *ex rel.* Burchinell v. District Court, 22 Colo. 427, 45 Pac. 402, holding defense of former recovery waived unless specially pleaded; Guenther v. People, 22 Colo. 124, 43 Pac. 999, holding special plea necessary to raise defense of former acquittal.

Qualification of grand jurors.

Cited in note (28 L. R. A. 205) on qualification of grand juror.

Existence of court.

Cited in White County v. Gwin, 136 Ind. 570, 22 L. R. A. 409, 36 N. E. 237, holding clerk, sheriff, and judge assembled at customary place at time appointed by law constitutes court though place of assembly not declared by law; Day County v. Kansas, 19 Okla. 400, 91 Pac. 699; Marsden v. Harlocker, 48 Or. 97, 120 Am. St. Rep. 786, 85 Pac. 328,—holding a court consists of persons officially assembled under authority of law at the appropriate time and place for the administration of justice.

Cited in note (33 L. R. A. 87) on power of officials to act as determined by place of performance.

Location of county seat.

Cited in Coleman v. People, 7 Colo. App. 253, 42 Pac. 1041, holding omission to call special election after inconclusive general election does not invalidate choice at following general election; Territory v. Clark, 15 N. M. 41, 99 Pac. 697, holding that judgment of district court is not void because term was held at de facto county seat, as established by act of Legislative assembly of territory.

Questions reviewable on habeas corpus.

Cited in notes (22 Am. St. Rep. 660) on review on habeas corpus of lack of jurisdiction; (87 Am. St. Rep. 178) on review on habeas corpus of legal existence of court; (11 Eng. Rul. Cas. 16) on habeas corpus proceedings to review irregularities not impairing jurisdiction.

De facto officers.

Cited in note (15 L.R.A.(N.S.) 95) on de jure office as condition of de facto officer.

10 L. R. A. 794, HART v. CHARLOTTE, C. & A. R. CO. 33 S. C. 427, 12 S. E. 9.

Liability of railway for negligence of lessee.

Cited in Harden v. North Carolina R. Co. 129 N. C. 363, 55 L. R. A. 787, 85 Am. St. Rep. 747, 40 S. E. 184, holding lessor liable for negligence of lessee in failing to equip freight cars with self-coupling devices; Central Trust Co. v. Charlotte, C. & A. R. Co. 65 Fed. 260, holding judgment against lessor for negligence of lessee entitled to precedence of statutory lien over previous mortgage executed after passage of statute; Hawkins v. Central R. Co. 119 Ga. 161, 46 S. E.

82, holding without legislative exemption a corporation charged with a duty to the public remains responsible for the proper discharge thereof, even after a lawful sale or lease.

Cited in note (44 L. R. A. 740) on liability of lessor of railroad for injuries caused by negligence of another company using road under lease, license, or other contract.

Distinguished in *Moorshead v. United R. Co.* 203 Mo. 159, 100 S. W. 611, holding lessor authorized by statute to lease is not liable for lessee's torts.

Disapproved in *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 176, holding lessor not liable for injury caused by lessee's sole negligence; *Moorshead v. United R. Co.* 119 Mo. App. 570, 96 S. W. 261, holding under statute expressly authorizing a street railway company to lease its property a street railway company leasing its property and franchise to another street railway company is not liable for an injury to a passenger resulting from negligence of employees of latter company.

Expense of medical attendance as damages.

Distinguished in *San Antonio Street R. Co. v. Muth*, 7 Tex. Civ. App. 448, 27 S. W. 752, holding fee paid for services of unqualified practitioner not recoverable.

Opinion evidence.

Cited in *Price v. Richmond & D. R. Co.* 38 S. C. 213, 17 S. E. 732, upholding admission of testimony of nonexpert as to state of health and mental condition, where facts on which testimony based first stated.

Liability of corporation for exemplary damages.

Cited in notes (28 Am. St. Rep. 877; 37 L. ed. U. S. 99) on liability of railroad or other corporation for punitive or exemplary damages.

10 L. R. A. 796, *STATE ex rel. BENTON v. ELDER*, 31 Neb. 169, 47 N. W. 710.

When mandamus or quo warranto lies.

Cited in *State ex rel. Thayer v. Boyd*, 31 Neb. 705, 48 N. W. 739, upholding jurisdiction of Supreme Court in quo warranto proceedings to determine title to office of governor; *State ex rel. Wright v. Savage*, 64 Neb. 697, 90 N. W. 898, denying writ of mandamus to compel governor to appoint fire and police commissioners; *State ex rel. Norton v. Van Camp*, 36 Neb. 104, 54 N. W. 113, holding regularity of nomination of candidates or certificates thereof not subject of inquiry on mandamus proceeding.

Cited in footnote to *State ex rel. Miller v. Barber*, 27 L. R. A. 45, which holds secretary subject to mandamus to compel affixing of great seal to commission used by governor.

Cited in notes (6 L.R.A.(N.S.) 757) on mandamus to governor; (98 Am. St. Rep. 889; 16 Eng. Rul. Cas. 787) on right to mandamus against a public officer.

Ministerial duties.

Cited in *State ex rel. Welty v. McFadden*, 46 Neb. 672, 65 N. W. 800, ordering recanvass where canvassers accept unauthorized alteration instead of making count according to original return; *Re Moore*, 4 Wyo. 114, 31 Pac. 980, holding assumption of office by governor elect prior to declaration of result by canvassing board, premature and invalid; *State ex rel. Oldham v. Dean*, 84 Neb. 366, 121 N. W. 719, holding mandamus will lie to compel speaker of House of Representatives to open and publish election returns; *Lansdon v. State Canvassers*, 18 Idaho, 603, 111 Pac. 133, holding that determination as to result of election by canvass of returns by city council is not judicial act, but is purely ministerial.

Legislature and Judiciary.

Cited in *State v. South Kingstown*, 18 R. I. 262, 22 L. R. A. 67, 27 Atl. 599, issuing order for new election, although legality of previous election finally determinable in legislature; *Inglin v. Hoppin*, 156 Cal. 486, 105 Pac. 582, holding mandamus will lie to correct abuses of discretion and to force a particular action by the inferior tribunal or officer when the law and uncontroverted facts clearly establish the petitioner's right to such action.

Privilege as to service of process.

Cited in *Berlett v. Weary*, 67 Neb. 81, 60 L.R.A. 612, 108 Am. St. Rep. 616, 93 N. W. 238, 2 Ann. Cas. 610, holding that member of legislature may be served with summons on account while at seat of government.

Constitutional remedies.

Cited in *Zweibel v. Caldwell*, 72 Neb. 52, 99 N. W. 843, holding article of constitution providing that court shall be open to every person for any injury done, and that he shall have a remedy is broader than common law and entitles the courts to grant a remedy whenever a wrong has been done.

10 L. R. A. 803, *Re ELECTION OF EXECUTIVE OFFICERS*, 31 Neb. 262, 47 N. W. 923.

Jurisdiction of courts in election contracts.

Cited in *Whedon v. Brown*, 83 Neb. 133, 118 N. W. 1086, holding the district courts are without power to consider and determine an original action instituted for the purpose of contesting the nomination of a legislative candidate at a primary election.

Casus omissus supplied by court.

Cited in *Cram v. Chicago, B. & Q. R. Co.* 84 Neb. 619, 26 L.R.A.(N.S.) 1027, 122 N. W. 31 (dissenting opinion), as to casus omissus in statute not supplied by court.

10 L. R. A. 810, *SHELLENBERGER v. RANSOM*, 31 Neb. 61, 28 Am. St. Rep. 500, 47 N. W. 700.

Profiting by one's own wrong.

Cited in *Hannig v. Mueller*, 82 Wis. 242, 52 N. W. 98, construing trust deed so as to effect intention of grantor as to beneficiaries, where literal construction makes fraud of trustee as to beneficiary effective.

Cited in notes (25 L. R. A. 564) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

Descent of property to murderer.

Reversed on rehearing in 41 Neb. 632, 25 L. R. A. 564, 59 N. W. 935, holding daughter's title vests in father *eo instante* on her murder by him.

Cited in *Wellner v. Eckstein*, 105 Minn. 451, 117 N. W. 830, as to right of widow murdering her husband to inherit from him.

Cited in footnotes to *Lanier v. Box*, 64 L. R. A. 458, holding man murdering wife not entitled to succeed to her property; *New York L. Ins. Co. v. Davis*, 44 L. R. A. 305, which holds only assignee's interest in policy forfeited by his murder of insured.

Cited in note (3 L.R.A.(N.S.) 729) on homicide as affecting devolution of property.

Cited as reversed in *Carpenter's Estate*, 170 Pa. 210, 29 L. R. A. 149, 50 Am. St. Rep. 765, 32 Atl. 637, holding that son inherits estate of father whom he murdered.

Disapproved in *McAllister v. Fair*, 72 Kan. 539, 3 L.R.A.(N.S.) 732, 115 Am.

St. Rep. 233, 84 Pac. 112, 7 A. & E. Ann. Cas. 973, holding husband murdering wife may inherit from her.

Overruled in *Veeder v. McKinley-Lanning Loan & T. Co.* 61 Neb. 912, 86 N. W. 982, holding that title to property descending from mother, vests in surviving brother subject to father's life estate by curtesy, on death of other child.

Construction of statutes.

Cited in note (14 Eng. Rul. Cas. 831) on rules for interpretation of statute.

10 L. R. A. 814, *NORTH GERMAN LLOYD v. HENLE*, 44 Fed. 100.

Liability of consignee for charges imposed in bill of lading.

Cited in *Sutton v. Housatonic R. Co.* 45 Fed. 508, holding consignee liable for demurrage caused by default of third party employed to discharge, where cargo accepted under bill of lading imposing such liability; *Kenyon v. Tucker*, 17 R. I. 532, 23 Atl. 61, holding consignee chargeable with demurrage under bill of lading subsequent to report of vessel in port ready for delivery, though not at dock; *Maclay v. United States*, 43 Ct. Cl. 102, holding that holder of bill of lading becomes liable for any unreasonable delay in acceptance of cargo.

10 L. R. A. 815, *McGOVERN v. HERN*, 153 Mass. 308, 25 Am. St. Rep. 632, 26 N. E. 861.

Sufficiency of memorandum of sale.

Cited in *Lewis v. Wood*, 153 Mass. 322, 11 L. R. A. 144, 26 N. E. 862, refusing specific performance of agreement for sale of realty evidenced only by letter from vendor not naming purchaser or property to be sold; *Tobin v. Larkin*, 183 Mass. 391, 67 N. E. 340, holding principal liable under memorandum of sale by agent described as such; *Mertz v. Hubbard*, 75 Kan. 4, 8 L.R.A.(N.S.) 737, 121 Am. St. Rep. 352, 88 Pac. 529, 12 A. & E. Ann. Cas. 485, holding under a statute requiring contracts for the sale of lands to be evidenced by writing where written agreement for such a sale shows that one of the two persons by whom it is made incurs no individual liability, but acts merely as an agent of some one else who is not named or described, specific performance thereof cannot be compelled at a suit of the principal if his relation to the transaction can only be proved by parol.

Cited in notes (11 L.R.A. 98, 143) on essentials of memorandum of agreement to entitle to specific performance; (8 L.R.A.(N.S.) 735) on satisfaction of statute of frauds relating to sales of realty by memorandum showing one party acted for undisclosed principal.

Distinguished in *Kingsley v. Siebrecht*, 92 Me. 30, 69 Am. St. Rep. 486, 42 Atl. 249, holding parol evidence admissible to show undisclosed principal, where memorandum of contract signed only by agent; *Usher v. Daniels*, 73 N. H. 208, 69 L.R.A. 631, 60 Atl. 746, 6 A. & E. Ann. Cas. 296, holding where a memorandum of a sale within statute of frauds was signed by plaintiff's agent in his own name as he was authorized to do and plaintiff's name did not appear therein parol evidence was admissible in an action of assumpsit to recover for defendant's refusal to accept the goods to identify plaintiff as the real party in interest.

Necessity of acceptance by purchaser of third person's deed.

Cited in note (37 L.R.A.(N.S.) 1123) as to whether purchaser must accept third person's deed.

10 L. R. A. 816, *MASTERSON v. TOWNSHEND*, 123 N. Y. 458, 25 N. E. 928.

Devise by implication.

Cited in *Thomas v. Troy City Nat. Bank*, 19 Misc. 474, 44 N. Y. Supp. 1039,

holding devise of fee implied from devise of use and income of estate, where no disposition thereof by remainder; *Miller v. Von Schwarzenstein*, 51 App. Div. 22, 64 N. Y. Supp. 475, holding survival of party on whose death devise to another dependent does not prevent vesting of estate prior thereto in executory devisee, where intention to defeat heir thereby accomplished; *Ramsay v. De Remer*, 65 Hun, 214, 20 N. Y. Supp. 143, holding devisee under void trust takes estate through implied devise to children under provision "if she shall die without issue;" *Bailey v. Brown*, 19 R. I. 686, 36 Atl. 581, holding grandchild of testatrix takes under limitation over in event of death of son without leaving child surviving testatrix, where son, marrying after her death, dies before birth of grandchild; *Whitney v. Whitney*, 63 Hun, 78, 18 N. Y. Supp. 3, holding estate devised in trust to meet "personal necessities" of imprudent beneficiary, carries entire interest, where no disposition over made by testatrix except by residue; *Kimball v. Chappel*, 27 Abb. N. C. 443, 18 N. Y. Supp. 30, holding express gift to "grand nephews and grand neices" not modified by subsequent explanatory clause including nephews and neices; *Roosevelt v. Porter*, 36 Misc. 445, 73 N. Y. Supp. 800, holding shares of deceased nephews taken by survivors of class, though named individually, and not as class; *Lawrence v. Barber*, 116 Wis. 306, 93 N. W. 30, holding by implication balance of estate passed to surviving children after deduction of part bequeathed in codicil to children of deceased son; *Ball v. Phelan*, 94 Mass. 323, 23 L.R.A.(N.S.) 895, 49 So. 956, holding a devise by implication to children on arriving at age or marriage may be maintained, although there is nothing in the will to show any present interest devised to them during minority; *Close v. Farmers Loan & Trust Co.* 195 N. Y. 100, 86 N. E. 1005, holding where testator devised income of property to daughter with the provision that remainder should be divided among her brothers and sisters if she should die "without issue" her children took under will by implication; *Dreyer v. Reisman*, 202 N. Y. 481, 36 L.R.A.(N.S.) 621, 96 N. E. 90, to the point that gift may be sustained by implication although subject or object be imperfectly described; *Re Hull*, 97 App. Div. 265, 89 N. Y. Supp. 939, holding gift of use and income of estate, there being no disposition of the fee, constitute a devise of fee by implication; *Re Smith*, 46 Misc. 212, 94 N. Y. Supp. 90, holding if, notwithstanding unskilful and inaccurate phraseology the testator's intention can be clearly discovered from the writing itself, such intention must prevail; *Penniman v. Howard*, 71 Misc. 601, 128 N. Y. Supp. 910, holding that devise by implication may be upheld where no gift of premises seems to be made in will in formal language; *Griffin v. Fairmont Coal Co.* 59 W. Va. 582, 2 L.R.A.(N.S.) 1162, 53 S. E. 24, holding presumption is against devise by implication.

Cited in footnotes to *O'Hearn v. O'Hearn*, 58 L. R. A. 105, which denies devise by implication by devise of half of property to one of three children, without mentioning other property or children; *Balch v. Pickering*, 14 L. R. A. 125, which holds literal construction of will resulting in intestacy against evident intention of testator.

Cited in notes (15 L.R.A.(N.S.) 75) on devise or bequest by implication; (25 Eng. Rul. Cas. 676) on creation of life estate by implication by devise to testator's heirs after death of a specified person.

Distinguished in *Delaney v. McGuire*, 60 Hun, 96, 14 N. Y. Supp. 809, holding fee not impliedly devised by provision for maintenance during minority, over in case of death without issue before majority, where devisee survives majority; *Benedict v. Dunning*, 110 App. Div. 310, 97 N. Y. Supp. 259, holding to uphold a legacy by implication the inference from the will of testator's intention must be such as to leave no hesitation in the mind of the court and permit no other reasonable inference.

Construction of will.

Cited in *Eidt v. Eidt*, 142 App. Div. 736, 127 N. Y. Supp. 680, holding that circumstances under which will was drawn and scrivener's inexperience will be taken into consideration in construing it.

Admissions by demurrer.

Cited in *Manning v. Wells*, 8 Misc. 646, 29 N. Y. Supp. 1044, and *Keene v. Newark Watch Case Material Co.* 39 Misc. 7, 78 N. Y. Supp. 753, holding allegations of legal conclusions not admitted by demurrer; *Olivella v. New York & H. R. R. Co.* 31 Misc. 204, 64 N. Y. Supp. 1086, holding defense that plaintiff has "complete remedy at law" demurrable as stating conclusion of law, not admitted by demurrer; *Feeley v. Wurster*, 25 Misc. 547, 54 N. Y. Supp. 1060, holding construction of statute in complaint not admitted by demurrer; *Farrar v. Lee*, 10 App. Div. 133, 41 N. Y. Supp. 672, holding allegation that debt evidenced by bond is that of another than obligor of bond, not admitted by demurrer; *Stewart v. Blatchley*, 8 Misc. 476, 29 N. Y. Supp. 547, holding demurrer may not be interposed to answer of codefendant; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 467; *Delaware County Nat. Bank v. King*, 109 App. Div. 556, 95 N. Y. Supp. 956,—holding an allegation in a complaint, which is a conclusion from other facts therein stated is not admitted by demurrer; *People ex rel. New York C. & H. R. R. Co. v. Keno*, 61 Misc. 348, 114 N. Y. Supp. 1094; *Gray Lithograph Co. v. American Watchman's Time Detector Co.* 41 Misc. 208, 88 N. Y. Supp. 857,—holding demurrer admits only facts alleged and not legal conclusions.

10 L. R. A. 819, *KALAMAZOO HACK & BUS CO. v. SOOTSMA*, 84 Mich. 194, 22 Am. St. Rep. 693, 47 N. W. 667.

Validity of grant of exclusive privilege by carrier.

Cited in *State v. Reed*, 76 Miss. 222, 43 L. R. A. 136, 71 Am. St. Rep. 530, 24 So. 308, denying validity of exclusive privilege to hackman to solicit passengers within railway station limits; *Lindsay v. Anniston*, 104 Ala. 262, 27 L. R. A. 437, 53 Am. St. Rep. 44, 16 So. 545, upholding ordinance forbidding hackman to enter terminal though exclusive rights obtained by contract with carrier thereby nullified; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 12, 45 L. R. A. 428, 74 Am. St. Rep. 274, 53 N. E. 937, enjoining entrance of hackman within railway station to solicit business under void exclusive contract with railway; *Hedding v. Gallagher*, 69 N. H. 663, 76 Am. St. Rep. 204, 45 Atl. 96, refusing to enjoin competing baggage transfer company from entering railway station to secure patronage, though such privilege attempted to be exclusively conferred on plaintiff by carrier; *Pennsylvania Co. v. Chicago*, 181 Ill. 300, 53 L. R. A. 227, 54 N. E. 825, upholding ordinance licensing hack stand at railway station at place previously occupied exclusively by lessee of railway; *Oregon Short Line & U. N. R. Co. v. Ilwaco R. & Nav. Co.* 51 Fed. 612, compelling railway to allow landing of passengers and freight from independent steamship line at railway wharf; *Hedding v. Gallagher*, 72 N. H. 390, 64 L. R. A. 819, 57 Atl. 225, sustaining contract by railroad company giving transfer company exclusive privilege of entering depot; *Donovan v. Pennsylvania Co.* 61 L. R. A. 143, 57 C. C. A. 363, 120 Fed. 216, holding railroad company entitled to enjoin hackmen and hotel runners from congregating in station; *Com. v. Graw*, 16 Pa. Dist. R. 807, 24 Lane. L. Rev. 147, 10 Del. Co. Rep. 231; *Palmer Transfer Co. v. Anderson*, 131 Ky. 223, 19 L.R.A.(N.S.) 759, 133 Am. St. Rep. 237, 115 S. W. 182,—holding contract by which a railroad gave a transfer company exclusive use of a part of its station grounds, void; *Dingman v. Duluth, S. S. & A. R. Co.* 164 Mich. 331, 32 L.R.A.(N.S.) 1184, 130 N. W. 24, holding that railroad is not prevented from granting

to particular person exclusive right to solicit for transfer of passengers by statute requiring company to grant equal facilities for transportation of passengers.

Cited in notes (13 L.R.A. 848) on rights of hackmen and other solicitors of patronage at depots, wharves, etc.; (16 L.R.A.(N.S.) 782) on right to discriminate between solicitors of patronage at depots, wharves, etc.

Distinguished in *Lucas v. Herbert*, 148 Ind. 66, 37 L. R. A. 377, 47 N. E. 146, and *Cole v. Rowen*, 88 Mich. 223, 13 L. R. A. 850, 50 N. W. 138, upholding assignment of hackman to specified positions at railway terminal from which others excluded, for accommodation and convenience of public; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 196, 47 L. R. A. 535, 81 N. W. 835, upholding grant to hackman of exclusive right to solicit passengers within terminal, where regulation for accommodation of public; *Cosgrove v. Augusta*, 103 Ga. 840, 42 L. R. A. 714, 68 Am. St. Rep. 153, 31 S. E. 445, holding ordinance destroying exclusive contract right of hackman to enter railway station to solicit business, void; *State ex rel. Sheets v. Union Depot Co.* 71 Ohio St. 390, 68 L.R.A. 797, 73 N. E. 633, 2 A. & E. Ann. Cas. 186, holding a union depot company may grant to a transfer company the exclusive right to use a designated portion of its depot grounds for purpose of standing thereon its hacks and vehicles and of soliciting thereon the patronage of incoming passengers.

Disapproved in *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 649, 46 L. R. A. 437, 34 S. E. 372, upholding grant by railroad of exclusive privilege to hackman to enter trains and depot to solicit custom and handle baggage; *Brown v. New York C. & H. R. Co.* 75 Hun. 362, 27 N. Y. Supp. 69, upholding contract between railway and hackman granting latter exclusive privilege of entering station and trains to solicit custom; *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 374, 16 L.R.A.(N.S.) 782, 94 Pac. 10, 14 A. & E. Ann. Cas. 489, holding railroad company may grant exclusive privilege to certain persons to solicit business on its depot grounds.

Carrier's control of station.

Cited in *Exton v. Central R. Co.* 62 N. J. L. 13, 56 L. R. A. 511, 42 Atl. 486, holding carrier liable for injuries to passenger injured in passageway by scuffling cabman negligently permitted to be there.

Cited in note (39 L.R.A.(N.S.) 127) on right to exclude undesirable hackmen, draymen, etc., from depot.

10 L. R. A. 821, *HICKS v. WARD*, 107 N. C. 392, 12 S. E. 318.

Mode of executing power of appointment.

Cited in *Morrison v. State*, 116 Tenn. 550, 95 S. W. 494, holding act requiring under power to convey by deed or appoint by will.

10 L. R. A. 823, *McMILLAN v. CROATAN DIST. NO. 4*, 107 N. C. 609, 12 S. E. 330.

Exclusion of negro from schools.

Cited in *Hare v. Board of Education*, 113 N. C. 15, 18 S. E. 55, holding child whose great grandparent was negro of full blood not entitled to admission to schools for white.

Cited in notes (14 L.R.A. 581) on constitutional equality of privileges, immunities, and protection; (44 L. ed. U. S. 262) on constitutional equality of school privileges.

Race discrimination in public conveyances.

Cited in *Morrison v. State*, 116 Tenn. 550, 95 S. W. 494, holding act requiring the separation of white and colored passengers in street cars, constitutional.

10 L. R. A. 826, KING IRON BRIDGE & MFG. CO. v. ST. LOUIS, 43 Fed. 768.

Penalty or liquidated damages.

Cited in *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 104 Tenn. 578, 50 L. R. A. 732, 78 Am. St. Rep. 933, 58 S. W. 303, holding reasonable sum stipulated as penalty for default in building contract recoverable as liquidated damages against negligent carrier notified thereof; *Stroebel Steel Constr. Co. v. Sanitary Dist.* 160 Ill. App. 560, holding that delay by owner in delivering site upon which work is to be done either operates to waive time limit of contract or clause thereof providing for liquidated damages; *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 476, 97 S. W. 188; *Wallis v. Wenham*, 204 Mass. 88, 90 N. E. 396, 17 A. & E. Ann. Cas. 644,—holding an owner cannot hold a building contractor liable for stipulated damages for any delays due to owner's fault or for that of persons for whose conduct he is responsible.

Cited in footnotes to *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated specified time, liquidated damages; *Kilbourne v. Burt & B. Lumber Co.* 55 amount to be paid to city for failure to complete electric light plant within L. R. A. 275, which holds provision for retaining 15 cents per 100 feet for logs not delivered by specified date, one for liquidated damages; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for, by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, a penalty; *Wilkinson v. Colley*, 26 L. R. A. 114, which construes clause binding one in "penal sum of \$400" not to practise medicine within certain place, as a penalty; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable; *Krutz v. Robbins*, 28 L. R. A. 676, which holds agreement for greater rate of interest on default in paying principal, interest, etc., a penalty.

Forfeiture of right.

Cited in *Long v. Pierce County*, 22 Wash. 352, 61 Pac. 142, holding stipulation for liquidated damages for delay unenforceable, where party for whose benefit inserted fails to perform precedent conditions regarding delivery of tools; *Wyandotte & D. R. R. Co. v. King Bridge Co.* 40 C. C. A. 333, 100 Fed. 205, holding delay in construction caused by engineer employed by one of several joint promisees, not ground for damages in action by another of such promisees.

Construction of contracts.

Cited in *Lewis v. Chicago, S. F. & C. R. Co.* 49 Fed. 710, and *Williams v. Chicago, S. F. & C. R. Co.* 112 Mo. 493, 34 Am. St. Rep. 403, 20 S. W. 631, holding meaning of "hard pan" in contract grading recompense on character of material removed for court, where not defined by parties; *Sanitary District v. McMahon & M. Co.* 110 Ill. App. 523, holding one contracting to excavate canal entitled to damages for other party's delay in procuring right of way; *Collins v. United States*, 34 Ct. Cl. 332; *Lyons v. United States*, 30 Ct. Cl. 365,—holding provision in contract that "decision of the engineer officer in charge as to quality and quantity shall be final" referred only to his measurement in point of fact and not to the principle of law on which it was made; *Atchison v. Rackliffe*, 78 Kan. 327, 96 Pac. 477, as to province of court to construe building contract when decision of engineer is not made final and conclusive.

Cited in note (23 L.R.A.(N.S.) 324) on conclusiveness, as between municipality and contractor for public improvement, of decision of engineer or other empowered officers.

Time as of essence of contracts.

Cited in footnote to *Garrison v. Cooke*, 61 L. R. A. 342, which holds time of essence of subscription for cost of railroad in consideration of running of trains by specified date.

10 L. R. A. 830, *Re GOOCH*, 44 Fed. 276, 3 Inters. Com. Rep. 530.

Regulation of interstate commerce.

Cited in *Com. v. Schollenberger*, 2 Pa. Dist. R. 245, 12 Pa. Co. Ct. 536, holding state statute forbidding sale of oleomargarine inapplicable to sale in original packages imported from another state; *Re Ware*, 53 Fed. 784, holding statute requiring label on baking powder containing alum void regulation of interstate commerce as to original packages.

Cited in footnote to *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages act requiring marking on package of year in which seed grown.

Cited in notes (12 L.R.A. 624) on imports in original package subject to state police powers; (27 Am. St. Rep. 565) on state regulation of interstate commerce.

Distinguished in *Waterbury v. Egan*, 3 Misc. 357, 23 N. Y. Supp. 115, rendering judgment for vendor of oleomargarine in original package as imported, where sold as substitute for, and not in imitation of, butter.

Regulation of sale of articles of food.

Cited in footnotes to *State ex rel. Monnett v. Capital City Dairy Co.* 57 L. R. A. 181, which sustains statute forbidding sale of unmarked oleomargarine; *State v. Myers*, 35 L. R. A. 844, which sustains statute requiring oleomargarine and artificial butter to be colored pink; *State v. Hanson*, 54 L. R. A. 468, which holds sale of unlabeled cottolene forbidden by statute against selling unlabeled imitation of lard; *Frost v. Chicago*, 49 L. R. A. 657, which holds void, ordinance prohibiting colored netting over package of fruit, etc.; *State v. Layton*, 62 L. R. A. 164, sustaining statutory prohibition of manufacture or sale of baking powder containing alum; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food whereby damage or inferiority is concealed.

Cited in note (85 Am. St. Rep. 403) on oleomargarin and right of states to regulate manufacture and sale thereof.

10 L. R. A. 831, *PEOPLE ex rel. GORMAN v. HAVIRD*, 2 Idaho, 531, 25 Pac. 294.

Summary removal of officer.

Distinguished in *Rankin v. Jauman*, 4 Idaho, 60, 36 Pac. 502, sustaining statute providing for summary removal of member of board of county commissioners.

10 L. R. A. 833, *NEW YORK & R. CEMENT CO. v. COPLAY CEMENT CO.* 44 Fed. 277.

Trademark in geographical name.

Cited in *Telephone Mfg. Co. v. Sumter Teleph. Mfg. Co.* 63 S. C. 347, 41 S. E. 322, holding name of place of manufacture not subject to appropriation as trademark or corporate name; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 550, 34 L. ed. 1004, 11 Sup. Ct. Rep. 396, holding sign used to indicate quality, not origin or manufacture, incapable of appropriation as trademark; *Carlsbad v. Tibbetts*, 51 Fed. 856, enjoining sale of deleterious waters fraudulently represented to contain ingredients similar to "Carlsbad" waters, though latter name not subject of trademark; *American Washboard Co. v. Saginaw Mfg. Co.* 50

L. R. A. 614, 43 C. C. A. 238, 103 Fed. 286, holding "Aluminum" not subject of exclusive appropriation as trade name.

Cited in footnotes to *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, which authorizes injunction against use of geographical name on flour made elsewhere from wheat of different grade; *American Waltham Watch Co. v. United States Watch Co.* 43 L. R. A. 826, which authorizes injunction against deceptive use of word "Waltham" by other manufacturer of watches at same place; *Levy v. Waitt*, 25 L. R. A. 190, which refuses to enjoin as infringement uninterrupted and innocent use without question of local geographical name for five years; *McVey v. Brandel*, 13 L. R. A. 377, which holds equity will not protect labor union in use of nontrademark label.

Cited in notes (19 L.R.A. 56) on invalidity of deceptive trademark; (85 Am. St. Rep. 108, 110; 25 Eng. Rul. Cas. 222; 45 L. ed. U. S. 373) on trademark in geographical name.

Specific performance.

Cited in note (11 L. R. A. 98) on essentials of memorandum of agreement to entitle to specific performance.

Jurisdiction of libel suit.

Cited in *Edison v. Thomas A. Edison, Jr. Chemical Co.* 128 Fed. 963, denying jurisdiction of circuit court of action for mere defamation of business reputation not accompanied by threats.

10 L. R. A. 835, *ROSS v. ALLEN*, 45 Kan. 231, 25 Pac. 570.

Sufficiency of memorandum of agreement.

Cited in *Conroy v. Woodcock*, 53 Fla. 587, 43 So. 693, holding consideration for sale of land in "note or memorandum" satisfies statute where the total is given one fourth whereof is to be paid as provided therein and the "balance to be paid in one, two and three years respectively at 6 per cent interest."

Cited in notes (11 L. R. A. 98) on essentials of memorandum of agreement to entitle to specific performance; (11 L. R. A. 143) on defective memorandum of contract not enforceable; (8 L.R.A.(N.S.) 734) on satisfaction of statute of frauds relating to sales of realty by memorandum showing one party acted for undisclosed principal; (28 L.R.A.(N.S.) 696) as to who must sign memorandum of executory sale contract within statute of frauds; (31 Am. St. Rep. 169) on certainty of memorandum of contract as essential to specific performance.

Description of premises.

Cited in *Hartshorn v. Smart*, 67 Kan. 544, 73 Pac. 73, holding memorandum of sale of real estate described as "southwest of twenty-five-nine, Kingman, Kansas," insufficient; *Broadway Hospital & Sanitarium v. Decker*, 47 Wash. 591, 92 Pac. 445, holding a writing giving an option on real estate as "House No. 322, Broadway," too indefinite.

Distinguished in *Price v. McKay*, 53 N. J. Eq. 590, 32 Atl. 130, holding statute satisfied by memorandum signed by owner giving street number.

Signature of party.

Cited in *Guthrie v. Anderson*, 47 Kan. 386, 28 Pac. 164, holding sale contract unenforceable against vendee in whose writing drawn up, where not signed by himself or agent; *Mertz v. Hubbard*, 75 Kan. 6, 8 L.R.A.(N.S.) 738, 121 Am. St. Rep. 352, 88 Pac. 529, 12 A. & E. Ann. Cas. 485, holding under contract requiring contracts for sale of lands to be evidenced by writing where a written agreement for such sale shows that one of the two persons by whom it is made incurs no individual liability, but acts as agent for some one else not named, specific performance cannot be compelled at suit of principal.

10 L. R. A. 839, *BEESON v. BUSENBARK*, 44 Kan. 669, 35 Pac. 48.

Parties affected by Kan. Gen. Stat. 1889, par. 1251.

Distinguished in *Hornsby v. Eddy*, 5 C. C. A. 574, 12 U. S. App. 404, 56 Fed. 464, and *Rouse v. Harry*, 55 Kan. 595, 40 Pac. 1007, holding receiver liable in same manner as corporation for injury to employee through negligence of fellow servant; *Rouse v. Redinger*, 1 Kan. App. 362, 41 Pac. 433, holding receivers operating railway under order of court, subject to statutory liability for killing stock; *Latham v. Brown*, 48 Kan. 191, 29 Pac. 400, holding individuals found to have been operating train in conjunction with railway not prejudiced by refusal to allow separate trial, where evidence of negligence conclusive.

Construction of statute in derogation of common law.

Cited in *Hoysradt v. Delaware, L. & W. R. Co.* 183 Fed. 882, to the point that road of rails used in construction of real railroad is not a railroad within meaning of statute relating to railways; *Taylor v. Prairie Pebble Phosphate Co.* 61 Fla. 458, 54 So. 904, holding that terms of statutes regulating employer's liability for injuries should not be extended beyond real meaning and import as determined from subject and object of law.

Cited in note (12 L. R. A. 355) as to when statutes mandatory, when directory.

Fellow servant statutes applicable to railroads

Cited in *McKivergan v. Alexander & E. Lumber Co.* 124 Wis. 64, 102 N. W. 332, holding they do not apply to private logging road; *Bradford Constr. Co. v. Heflin*, 88 Miss. 351, 12 L.R.A.(N.S.) 1048, 42 So. 174, 8 A. & E. Ann. Cas. 1077, holding not apply to construction company authorized to own but not to operate a railroad.

Cited in notes (12 L.R.A.(N.S.) 1041) on validity of statute abrogating fellow-servant rule; (15 L.R.A.(N.S.) 481) on applicability to private railroad, of enactment abrogating fellow-servant rule as to "railroads."

10 L. R. A. 843, *CONTINENTAL INS. CO. v. VANLUE*, 126 Ind. 410, 26 N. E. 119.

Conditions in insurance policy.

Cited in *Ætna Ins. Co. v. Norman*, 12 Ind. App. 655, 40 N. E. 1116, holding policy not avoided by failure of insured to keep immaterial merchandise and cash accounts pursuant to promissory representation of application; *Conboy v. Railway Officials & E. Acci. Asso.* 17 Ind. App. 68, 60 Am. St. Rep. 154, 46 N. E. 363, holding insurance company liable where death occurred from unusual danger of which not shown that insured aware; *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 214, 44 N. E. 940, holding policy not forfeited by nonpayment of premium when due, in absence of express condition to that effect; *Columbian Relief Fund Asso. v. Hopper*, 24 Ind. App. 173, 53 N. E. 1051, holding nonpayment of monthly dues during sickness does not forfeit policy where accrued benefits owing from company; *Small v. Westchester F. Ins. Co.* 51 Fed. 792, holding creditor's suit against insolvent assignee of policy and property not "litigation involving property" within meaning of condition avoiding policy, though receiver appointed; *Gilchrist Transp. Co. v. Phoenix Ins. Co.* 95 C. C. A. 475, 170 Fed. 282; *German-American Ins. Co. v. Yeagley*, 163 Ind. 658, 71 N. E. 897, 2 A. & E. Ann. Cas. 275,—holding conditions providing for forfeiture strictly construed against insurer; *Supreme Council, C. B. L. v. Grove*, — Ind. —, 36 L.R.A.(N.S.) 918, 96 N. E. 159, holding that word "may" in provision that half of benefit insurance may be paid insured on permanent disability is compulsory on compliance with conditions; *Farmers Mut. F. Ins. Co. v. Jackman*, 35 Ind. App. 17, 73 N. E. 730, holding that provisions in policy or in by-laws providing for forfeitures will be

strictly construed against insurer; *Iowa L. Ins. Co. v. Haughton*, 46 Ind. App. 477, 87 N. E. 702, holding that if language of warranty admits of two interpretations, the one most favorable to assured will be adopted.

— **Against encumbrances.**

Cited in *Shaffer v. Milwaukee Mechanics' Ins. Co.* 17 Ind. App. 215, 46 N. E. 557, holding encumbrance avoids policy where not disclosed at time of application; *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 416, 64 N. W. 206, holding existence of undisclosed chattel mortgage at time of issuance of policy forfeits same; *Traders Ins. Co. v. Cassell*, 24 Ind. App. 242, 56 N. E. 259, holding subsequent execution of recorded chattel mortgages, without stipulated consent of insurer, defeats policy; *Raulet v. Northwestern Nat. Ins. Co.* 157 Cal. 217, 107 Pac. 292, to the point that lien may be created to take effect immediately as security for performance of obligation not at time in existence; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 146, 39 N. E. 757, upholding right to avoid policy for encumbrance.

Distinguished in *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 272, 33 N. E. 444, and *Bowlus v. Phenix Ins. Co.* 133 Ind. 109, 20 L. R. A. 401, 32 N. E. 319, permitting recovery on policy where encumbrance disclosed to agent but latter omitted same in filling out application; *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 625, 39 N. E. 534, holding policy not avoided by mortgage where no written application made, no questions asked, insured not aware of effect of encumbrance; *Read v. State Ins. Co.* 103 Iowa, 310, 64 Am. St. Rep. 180, 72 N. W. 665, holding lease not encumbrance within condition avoiding policy.

Waiver.

Cited in *Ft. Wayne Ins. Co. v. Irvin*, 23 Ind. App. 64, 54 N. E. 817, holding error to submit waiver to jury where not pleaded; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 146, 39 N. E. 757, on sufficiency of pleading of waiver; *Metropolitan L. Ins. Co. v. Wagner*, 50 Tex. Civ. App. 244, 109 S. W. 1120, holding that if insured relies on waiver of requirement that proof of loss be furnished, such waiver must be pleaded.

Distinguished in *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 564, 52 N. E. 821, holding lack of special plea cured where evidence of waiver admitted without objection.

Forfeiture of estate.

Cited in *Fouts v. Millikan*, 30 Ind. App. 301, 65 N. E. 1050, holding condition in deed that encumbrance by grantee shall work forfeiture of estate, not include tax lien.

10 L. R. A. 847, *Re LOSASSO*, 15 Colo. 163, 24 Pac. 1080.

Right to bail.

Cited in *State v. Crocker*, 5 Wyo. 405, 40 Pac. 681, holding statute denying bail after indictment regardless of evidence of guilt, unconstitutional; *Rigdon v. State*, 41 Fla. 314, 26 So. 711, holding burden on party indicted for capital offense, to show that proof of guilt is not evident nor presumption great.

Cited in note (39 L.R.A.(N.S.) 765, 766, 776, 782) on bail in capital cases.

Preliminary examination by magistrate.

Cited in *Re Dolph*, 17 Colo. 38, 28 Pac. 470, holding prosecution for policy on information due process of law, where preceded by certification of guilt by magistrate after preliminary examination.

10 L. R. A. 851, *KANSAS CITY v. KANSAS CITY BELT R. CO.* 102 Mo. 633, 14 S. W. 808.

Opening street across railway right of way.

Cited in *Kansas City v. Kansas City Belt R. Co.* 187 Mo. 156, 86 S. W. 190, as to duty of railroad to put in suitable crossings, lights, etc.

Cited in footnote to *Re Brooklyn*, 26 L. R. A. 270, which upholds act authorizing city to acquire property of water company.

Disapproved in *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 320, 22 L.R.A. (N.S.) 15, 113 N. W. 598, 15 A. & E. Ann. Cas. 10, holding railway company entitled to compensation for diminution in value of its exclusive right to use for railway purposes, of property sought to be condemned, caused by existence and use of street

— **Procedure.**

Cited in *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 80, 57 S. W. 742, holding condemnation proceedings unnecessary where railway has only easement in street.

— **Damages.**

Cited in *Kansas C. R. Co. v. Jackson County*, 45 Kan. 723, 26 Pac. 394, holding railway entitled to compensation for expense of constructing statutory cattle guards, etc., where highway opened across right of way; *Hook v. Chicago & A. R. Co.* 133 Mo. 322, 34 S. W. 549, holding error to allow offset of unfounded "benefits" to railway, against damages to which entitled through expense of putting in statutory improvements at crossing.

Distinguished in *Cleveland v. Augusta*, 102 Ga. 237, 43 L. R. A. 640, 29 S. E. 584, holding railway under obligation to alter grade to conform to new grade of street at its own expense, where street laid out at time railway constructed.

Maintenance of approaches to crossing.

Cited in *See v. Wabash R. Co.* 123 Iowa, 445, 99 N. W. 106, holding railroad company liable for failure to maintain sufficient crossing.

Elements of damages in eminent domain.

Cited in note (85 Am. St. Rep. 314) on elements of damages allowable in eminent domain proceedings.

10 L. R. A. 855, *EAST TENNESSEE, V. & G. R. CO. v. WEST*, 89 Tenn. 293, 14 S. W. 776.

Extinguishment of easement by adverse user.

Cited in *Mobile & O. R. Co. v. Donovan*, 104 Tenn. 477, 58 S. W. 309, refusing to enjoin inclosure and gardening of portion of right of way by grantor not needed for railway purposes, no adverse user being thereby made; *Virginia & S. W. R. Co. v. Crow*, 108 Tenn. 17, 64 S. W. 485, and *Northern Counties Invest. Trust Co. v. Enyard*, 24 Wash. 370, 64 Pac. 516, holding fencing and cultivation of land by grantor of easement of right of way, for statutory period, does not extinguish easement, in absence of acts actually tending to prevent enjoyment; *Louisville & N. R. Co. v. French*, 100 Tenn. 212, 66 Am. St. Rep. 752, 43 S. W. 771, denying damage by erection of water tank on portion of right of way inclosed and cultivated for statutory period by adjoining owner; *St. Joseph, St. L. & S. F. R. Co. v. Smith*, 170 Mo. 333, 70 S. W. 700, holding limitations do not apply to use of land appurtenant to operation of railroad; *McLucas v. St. Joseph & G. I. R. Co.* 67 Neb. 609, 93 N. W. 928, 2 A. & E. Ann. Cas. 715, holding if use of owner of servient estate be consistent with its use for an existing easement, the owner of servient estate cannot acquire title by such possession; *Roberts v. Sioux City & P. R. Co.* 73 Neb. 16, 2 L.R.A.(N.S.) 278, 102 N. W. 60, 10 A. & E. Ann. Cas. 992, holding use for agricultural purposes by adjoining land owners of the

right of way of railway company, is not inconsistent with or adverse to the enjoyment of the easement.

Distinguished in *Northern P. R. Co. v. Hasse*, 28 Wash. 356, 92 Am. St. Rep. 840, 68 Pac. 882, holding title to railway right of way acquired by adverse possession, where fenced and cultivated under homestead entry for statutory period; *Southern R. Co. v. Beaudrot*, 63 S. C. 269, 41 S. E. 299, holding nonsuit improper in suit to compel removal of fence from right of way, where erected with claim to exclusive title adverse to easement; *Matthews v. Lake Shore & M. S. R. Co.* 110 Mich. 173, 64 Am. St. Rep. 336, 67 N. W. 1111, holding title acquired by inclosure and cultivation of unused portion of right of way for statutory period; *Maysville & B. S. R. Co. v. Holton*, 100 Ky. 677, 39 S. W. 27, holding inclosure and cultivation of unused right of way creates adverse user founding title by lapse of statutory period, though way restaked within such time.

Rights of grantee of easement.

Cited in *Harvey v. Crane*, 85 Mich. 322, 12 L. R. A. 603, 48 N. W. 582, holding owner of easement of passage over adjoining land may fence right of way; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 627, 69 Am. St. Rep. 385, 52 N. E. 1008, holding railway may obstruct drainage of surface water in absence of prescriptive right to flow; *McLemore v. Memphis & C. R. Co.* 111 Tenn. 658, 69 S. W. 338, as to nature of easement for right of way purposes; *Union R. Co. v. Raine*, 114 Tenn. 572, 86 S. W. 857, as to right of railway company to occupy every portion of right of way for railway purposes; *Missouri, K. & T. R. Co. v. Anderson*, 36 Tex. Civ. App. 128, 81 S. W. 781, holding as incident to grant of right of way on each side of track railway company could construct switches and side tracks; *Murray v. Dickson*, 57 Tex. Civ. App. 625, 123 S. W. 179, holding that owner of fee subject to easement, may rightfully use land for any purpose not inconsistent with rights of owner of easement.

Eminent domain.

Cited in *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. 280, enjoining use of tracks forcibly laid without compensation by railway in place of others previously laid by terminal company and used for same purpose.

Distinguished in *Atlanta, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 601, 131 Fed. 665, holding under statute of Tennessee a railroad company could acquire no rights by going upon land and commencing construction work without owner's consent after it had filed a petition for condemnation.

Adverse possession of property devoted to public use.

Cited in *Kansas City & N. Connecting R. Co. v. Baker*, 183 Mo. 325, 82 S. W. 85, holding possession of lands dedicated to railroad company for depot purposes can never ripen into a title; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho, 785, 80 Pac. 401, holding adverse possession could not ripen into a right which would divest the use and occupation of right of way from that to which Congress made the dedication.

Cited in notes (1 L.R.A.(N.S.) 566) on inclosure of right of way as adverse possession; (2 L.R.A.(N.S.) 273) on adverse possession of railroad right of way.

Nature of railroad right of way.

Cited in note (66 L.R.A. 38) on nature of railroad right of way as realty or personality.

10 L. R. A. 857, *DOUGLASS v. BISHOP*, 45 Kan. 200, 25 Pac. 628.

Followed without discussion in *Douglass v. Carmean*, 49 Kan. 677, 31 Pac. 371.

Sufficiency of certificate of acknowledgment.

Cited in note (108 Am. St. Rep. 543) as to when defects in certificate of acknowledgment relating to venue are fatal.

Validity of tax deed.

Cited in *Baughman v. Harvey*, 76 Kan. 775, 93 Pac. 146, holding deed not literally following statutory form valid.

10 L. R. A. 859, *ALEXANDER v. STATE*, 86 Ga. 246, 12 S. E. 408.

Contracts for delivery of "futures."

Cited in *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 205, 81 Am. St. Rep. 28, 37 S. E. 485, upholding cotton planter's contract to sell specified number of bales for future delivery, where delivery actually contemplated; *Waldron v. Johnston*, 86 Fed. 758, holding contract for future delivery of cotton, without intent to buy, void as speculation; *Singleton v. Bank of Monticello*, 113 Ga. 530, 38 S. E. 947, holding bank chargeable with illegality of officer participating in wagering contract, so as to prevent recovery of loan, for such purpose.

Cited in note (14 L.R.A.(N.S.) 1081) on contracts for "futures" to be executed in other states as interstate commerce.

Traffic in lottery tickets.

Cited in *Lottery Case (Champion v. Ames)*, 188 U. S. 370, 47 L. ed. 507, 23 Sup. Ct. Rep. 321, sustaining prohibition of traffic in lottery tickets by express company engaged in interstate commerce.

Validity of license tax.

Cited in *Jones v. Stewart*, 117 Ga. 981, 44 S. E. 879, as to validity of tax on persons selling futures.

Cited in notes (26 Am. St. Rep. 595) on license tax as interference with interstate commerce; (129 Am. St. Rep. 280) on constitutional limitations on power to impose license or occupation taxes.

10 L. R. A. 861, *McGARVEY v. DARNALL*, 134 Ill. 367, 25 N. E. 1005.

Foreign judgment against executor or administrator.

Cited in *Smith v. Smith*, 174 Ill. 57, 43 L. R. A. 406, 50 N. E. 1083, Affirming 63 Ill. App. 540, holding judgment against foreign executrix establishing "family allowance" inadmissible to charge local assets; *Smith v. Goodrich*, 167 Ill. 51, 47 N. E. 316, Reversing 67 Ill. App. 422, holding foreign judgment on note against foreign administratrix inadmissible to prove claim against local assets of estate; *Elting v. First Nat. Bank*, 173 Ill. 389, 50 N. E. 1095, holding judgment of foreign court against domestic executrix void as charge against estate; *Strauss v. Phillips*, 189 Ill. 21, 59 N. E. 560, holding allowance of claim in another jurisdiction against estate of deceased does not place party in position of judgment creditor before local courts; *Burton v. Williams*, 63 Neb. 435, 88 N. W. 765, denying right to sue foreign executor; *Filer & S. Co. v. Rainey*, 120 Fed. 719, holding that lack of property deprives Illinois courts of jurisdiction of suit against foreign executor; *Richards v. Blaisdell*, 12 Cal. App. 109, 106 Pac. 732, holding judgment establishing a claim in another jurisdiction cannot be basis of claim in this state against an executor.

Cited in note (27 L. R. A. 102) on judgments of another state or country rendered against an executor or administrator.

Distinguished in *Ramsay v. Ramsay*, 97 Ill. App. 276, holding foreign creditor receiving dividend from foreign asset of insolvent deceased, postponed to extent of such dividend in distribution of local assets; *Lawrence v. Nelson*, 143 U. S. 222, 36 L. ed. 134, 12 Sup. Ct. Rep. 440, holding judgment of circuit court against

foreign administrator cured by his personal appearance therein to set aside same for want of jurisdiction, and enforceable in jurisdiction of his appointment.

10 L. R. A. 863, *SPRY v. WILLIAMS*, 82 Iowa, 61, 31 Am. St. Rep. 460, 47 N. W. 890.

Beneficiaries in insurance certificate.

Cited in *Schoep v. Bankers Alliance Ins. Co.* 104 Iowa, 359, 73 N. W. 825, holding action on benefit certificate in favor of "legal heirs" not maintainable by administrator; *Stake v. Stake*, 131 Ill. App. 638, holding marriage of a member of a fraternal benefit society to whom benefit certificate has been issued does not affect the certificate issued to him on the rights of beneficiary designated in such certificate.

Cited in footnote to *Scull v. Aetna L. Ins. Co.* 60 L. R. A. 615, which sustains right of afterborn children of subsequent marriage to share in benefit of insurance for benefit of children.

Construction of mutual benefit certificates.

Cited in note (52 Am. St. Rep. 555) on construction of mutual or membership life or accident insurance certificates.

L. R. A. CASES AS AUTHORITIES.

CASES IN 11 L. R. A.

11 L. R. A. 33, *BROSCART v. TUTTLE*, 59 Conn. 1, 21 Atl. 925.

Statutory action for treble damages.

Cited in *Stevens v. Kelley*, 66 Conn. 577, 34 Atl. 502, holding all essential elements of statutory offense of negligent driving must be alleged and proved to entitle to treble damages; *Rowell v. Crothers*, 75 Conn. 127, 52 Atl. 818, holding failure to allege that wagon was vehicle "for conveyance of persons" fatal to recovery of treble damages for collision; *Leone v. Kelly*, 77 Conn. 571, 60 Atl. 136, 1 A. & E. Ann. Cas. 947, holding that public statute, not penal, under which an action is brought need not be counted upon, nor recited in the complaint; *Dubreuil v. Waterman*, 84 Conn. 51, 78 Atl. 721, holding that person who claims double or treble damages must in complaint show that his action is based on statute, and that act complained of comes within its terms; *Jensen v. South Dakota C. R. Co.* 25 S. D. 513, 35 L.R.A.(N.S.) 1021, 127 N. W. 650, Ann. Cas. 1912 C, 700, holding that either court or jury may double damages in action against railroad for double damages for loss by fire.

Contributory negligence.

Cited in *Weller v. Chicago, M. & St. P. R. Co.* 120 Mo. 656, 23 S. W. 1061, holding driving at illegal speed, contributing to injury by collision with train, prevents recovery; *Farrington v. Cheponis*, 84 Conn. 8, 78 Atl. 652, holding that fact that person was injured while coasting in violation of ordinance does not as matter of law preclude him from recovering from person whose negligence caused injury unless such violation was proximate cause; *Miami Coal Co. v. Kane*, 45 Ind. App. 396, 90 N. E. 13, holding that violation of statute by servant precludes recovery of damages by him, where such violation was proximate cause of injury; *Bourne v. Whitman*, 209 Mass. 168, 35 L.R.A.(N.S.) 704, 95 N. E. 404, holding that person who is violating criminal law cannot recover for injury to which his criminality was directly contributing cause.

Annotation cited in *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 412, 56 Atl. 833, on rule of the road and contributory negligence under it.

Cited in footnotes to *State, Menger, Prosecutor, v. Lauer*, 20 L. R. A. 61, which holds it contributory negligence to leave surveyor's transit set up in street; *Brember v. Jones*, 26 L. R. A. 408, which holds failure to turn to right on highway does not render one liable for collision which other could have avoided by ordinary care; *Reipe v. Elting*, 26 L. R. A. 769, which holds horseback traveler not negligent *per se* in turning to left on dark night; *Perlstein v. American Exp. Co.* 52 L. R. A. 959, which holds violation of statute requiring drivers to turn to right shown by collision with one driving close to sidewalk on right hand side of highway; *Winter v. Harris*, 54 L. R. A. 643, which holds person on left of center of full width of road in fault though on right of center of macadamized part; *Neal v. Rendall*, 63 L.R.A. 668, which holds failure of driver to turn to right of highway evidence of negligence sufficient to go to jury.

Cited in notes (12 L.R.A. 281) on recovery defeated by contributory negligence; (48 Am. St. Rep. 370, 374, 380) on rights by travelers in road and presumption of negligence from being on wrong side.

Unlawful act not contributing to injury.

Cited in *Tackett v. Taylor County*, 123 Iowa, 153, 98 N. W. 730, holding one injured by reason of defective bridge entitled to recover, although himself violating statute at the time; *Deming v. Johnson*, 80 Conn. 557, 69 Atl. 347, holding that deviation from route by one hiring a horse from a livery will not bar recovery for owner's negligence in furnishing defective harness unless the deviation contributed to the injury; *Currelli v. Jackson*, 77 Conn. 122, 58 Atl. 762, on violation of statute as being no ground for recovery where not contributing to the injury; *Miner v. McNamara*, 81 Conn. 695, 21 L.R.A.(N.S.) 481, 72 Atl. 138, on violation of duty under common law or under ordinance, not being ground for recovery unless it is the proximate cause of the injury; *Monroe v. Hartford Street R. Co.* 76 Conn. 207, 56 Atl. 498, on the identity of principles governing liability under common law for injury and those governing liability under statute.

Statements relating to compromise of claim.

Cited in *Fowles v. Allen*, 64 Conn. 352, 30 Atl. 144, holding letter offering to settle, as compromise, inadmissible on question of damages; *Yager v. Bruce*, 116 Mo. App. 493, 93 S. W. 307, holding admissible statements made while rejecting offer to compromise.

Cause of action for breach of duty.

Cited in *Sharkey v. Skilton*, 83 Conn. 509, 77 Atl. 950, holding that cause of action which arises from breach of duty is same whether that duty is defined by common law principles or by statute.

11 L. R. A. 41, *Re WASHBURN*, 45 Minn. 242, 47 N. W. 790.

Extraterritorial privileges of foreign representatives.

Cited in *State ex rel. Security Trust Co. v. Probate Court*, 67 Minn. 53, 69 N. W. 609, holding fact that testator of foreign state has stock or bonds in corporation in Minnesota not necessarily warranting ancillary administration: *Re Southard*, 48 Minn. 39, 50 N. W. 932, holding, under statute, right to file will of nonresident testator not restricted to counties where he left real property; *Dexter v. Berge*, 76 Minn. 220, 78 N. W. 1111, holding foreign executor without complying with statutes may receive payment voluntarily made; *Cone v. Nimocks*, 78 Minn. 254, 80 N. W. 1056, holding assignee of foreign executor of mortgagee of lands in Minnesota may exercise power of sale, without filing copy of appointment of assignor; *Comstock v. Frederickson*, 51 Minn. 353, 53 N. W. 713, holding courts will permit nonresident receiver to prosecute action in Minnesota, no rights of domestic creditors being interfered with.

Cited in notes (24 L. R. A. 685) on what assets will give jurisdiction to appoint administrator; (48 L. R. A. 142, 148) on effect of probate of will in another state.

Law of domicile as to personal property.

Cited in *Babcock v. Collins*, 60 Minn. 77, 51 Am. St. Rep. 503, 61 N. W. 1020, holding that, unless paramount local rights intervene, law of domicile controls disposition of personal property; *Gilbert v. Hewetson*, 79 Minn. 336, 79 Am. St. Rep. 486, 82 N. W. 655, holding situs of debt is at domicile of creditor; *Parnell v. Thompson*, 81 Kan. 132, 33 L.R.A.(N.S.) 667, 105 Pac. 502, to the point that every state has plenary power with respect to administration of estates of de-

ceased person as to all property found within its jurisdiction; *Gregory v. Lansing*, 115 Minn. 76, 131 N. W. 1010, holding that situs of debt arising between depositor and bank is at residence of debtor, upon death of depositor.

Probating foreign will.

Cited in *Re Clark*, 148 Cal. 112, 1 L.R.A.(N.S.) 999, 113 Am. St. Rep. 197, 82 Pac. 760, 7 A. & E. Ann. Cas. 306, on the granting of original probate upon the will of deceased nonresidents, who leave property within the estate; *Rackemann v. Taylor*, 204 Mass. 401, 90 N. E. 552, dismissing petition for probate of foreign will before probate in state of testator's domicil.

Cited in notes (113 Am. St. Rep. 211) on probate of foreign wills; (33 L.R.A.(N.S.) 659) on jurisdiction to probate will not probated at testator's domicil.

Right of creditor to apply for ancillary administration.

Cited in *Re Williams*, 130 Iowa, 563, 107 N. W. 608, holding that a creditor resident in the state where deceased was domiciled cannot go to another state and apply for ancillary administration there.

11 L. R. A. 43, *RICHMOND & D. R. CO. v. ALLISON*, 86 Ga. 145, 12 S. E. 352.

Second appeal in 89 Ga. 569, 16 S. E. 116.

Rule of damages for personal injury.

Cited in *Rooney v. New York, N. H. & H. R. Co.* 173 Mass. 226, 53 N. E. 435, upholding instruction as to measure of damages in absence of objection by defendant; *Central of Georgia R. Co. v. Bell*, 135 Ga. 846, 70 S. E. 321, holding that injured person's age, habits, strength, sex, vocation, rate of wages earned in past, his prospects of steady employment, may be taken into account in arriving at damages for permanent injury; *Fuqua v. St. Louis & S. F. R. Co.* 82 Kan. 318, 108 Pac. 108, on rule of damages for personal injury and citing annotation also on this point; *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 247, 50 So. 428, holding that where verdict includes losses from diminished earning capacity in the future, such damages should be reduced to their present worth.

Cited in note (11 L. R. A. 690) on rule of damages for negligent acts or omissions.

Evidence as to chances of promotion.

Cited in *Central R. Co. v. Perkerson*, 112 Ga. 926, 52 L. R. A. 212, 38 S. E. 365, holding, in estimating value of life of deceased, evidence that he was in line for promotion improper; *Richmond & D. R. Co. v. Elliott*, 149 U. S. 269, 37 L. ed. 731, 13 Sup. Ct. Rep. 837, holding plaintiff's testimony as to chances of promotion improperly admitted; *Zibbell v. Southern P. Co.* 160 Cal. 249, 116 Pac. 513, to the point that testimony of mere hopes or mere prospects of advancement, is inadmissible to show damages resulting from permanent injury; *Ohio Valley T. Co. v. Wernke*, 42 Ind. App. 336, 84 N. E. 999, holding evidence of promotion and prospective earning capacity inadmissible; *Marshall v. Dalton Paper Mills*, 82 Vt. 503, 24 L.R.A.(N.S.) 133, 74 Atl. 108, holding evidence of increased pay upon prospective promotion inadmissible, where no vacancy existed nor any rule whereby promotion according to rank was required; *Southern R. Co. v. Scott*, 128 Ga. 246, 57 S. E. 504, holding that prospects of increased earnings should not be considered where there is no evidence to warrant it; *Central R. Co. v. Minor*, 2 Ga. App. 810, 59 S. E. 81, holding that probability of increased earning capacity of a young man of good habits may be considered by the jury in estimating damages

11 L. R. A. 51, *ELLIS v. DARDEN*, 86 Ga. 368, 12 S. E. 652.

Revocation of will by implication.

Cited in *Sutton v. Hancock*, 115 Ga. 859, 42 S. E. 214, holding birth of child revoked will in which no provision for it had been made; *Beeacke v. Beeacke*, 50 Neb. 21, 69 N. W. 303, holding will not revoked by divorce, birth of three children to child provided for therein, and death of such child; *Ingersoll v. Hopkins*, 170 Mass. 404, 40 L. R. A. 193, 49 N. E. 623, holding fact that will was made in contemplation of marriage must appear from will itself to prevent revocation thereby; *McWhorter v. Oneal*, 121 Ga. 539, 49 S. E. 592, holding married woman's will revoked where her husband died and she afterward remarried; *Re Pettridge*, 47 Wash. 84, 91 Pac. 634, holding will of feme sole revoked by marriage if her husband survives her, under statute so providing as to husband's will where wife survives; *Re Adler*, 52 Wash. 543, 100 Pac. 1019, holding will not revoked by marriage, under statute providing that will is revoked by marriage if wife be living at time of testator's death, unless she is provided for in the will, where the will contained bequest to person who afterward became the wife of testator.

Cited in footnotes to *Glascott v. Bragg*, 56 L. R. A. 258, which holds will in favor of third person revoked by marriage and adoption of child; *Re Kelly*, 56 L.R.A. 754, which holds woman's will not revoked by subsequent marriage; *Re Teopfer*, 67 L.R.A. 315, which holds antenuptial will revoked by testator's marriage.

Changes under the Code.

Cited in *Central R. Co. v. State*, 104 Ga. 853, 42 L. R. A. 527, 31 S. E. 531, holding law unconstitutional because of defective title, afterwards embodied in Code, constitutional.

11 L. R. A. 53, *BELDING v. JOHNSON*, 86 Ga. 177, 12 S. E. 304.

Proximate and remote causes of injury.

Cited in *Henderson v. Dade Coal Co.* 100 Ga. 572, 40 L. R. A. 97, 28 S. E. 251, holding custodians of state convict not liable for rape committed by him while at large; *Macon v. Dykes*, 103 Ga. 849, 31 S. E. 443, holding municipality not liable for injuries received in runaway caused by fright of horse by wagon wheels scraping on rails in street; *Andrews v. Kinsel*, 114 Ga. 392, 88 Am. St. Rep. 25, 40 S. E. 300, holding defendants not liable for leaving plaintiff's windows open, permitting burglary.

Cited in footnotes to *Gage v. Harvey*, 43 L. R. A. 143, which holds loss of money taken from intoxicated person's pocket not included in damages from sale of liquor to him; *Mastad v. Swedish Brethren*, 53 L. R. A. 803, which holds proprietor of place of amusement required to use reasonable care to protect other patrons from assaults by one rendered disorderly by liquor sold; *Curran v. Olson*, 60 L. R. A. 733, which holds saloon-keeper liable to guest over whose feet third person poured alcohol procured from bartender, setting fire to same.

Cited in notes in (36 Am. St. Rep. 811, 830) on proximate and remote cause; (85 Am. St. Rep. 450) on liability of liquor sellers for acts of intoxicated persons.

Distinguished in *Savannah Electric Co. v. Wheeler*, 128 Ga. 562, 10 L.R.A.(N.S.) 1184, 58 S. E. 38, holding pleading charging street railway company with negligence in placing a drunken conductor armed with a pistol in charge of a car, not demurrable.

11 L. R. A. 55, *MARION v. SKILLMAN*, 127 Ind. 130, 26 N. E. 676.

Dedication of land for public use.

Cited in *Rhodes v. Brightwood*, 145 Ind. 32, 43 N. E. 942, holding intent as to

dedication by recorded plat not contradictable by parol evidence; *Cromer v. State*, 21 Ind. App. 506, 52 N. E. 239, holding dedication of land for highway presumed by acquiescence of owner in public use, until public and private rights arise; *Evansville & T. H. R. Co. v. State*, 149 Ind. 281, 49 N. E. 2, holding that right of public to dedicated streets across railroad tracks, after general use as highway for five or six years, cannot be divested; *Hanger v. Des Moines*, 109 Iowa, 483, 80 N. W. 549, holding dedication of strip of land to public presumed where used over ten years by public as highway, with acquiescence of owner; *Houlton v. Carpenter*, 29 Ind. App. 647, 64 N. E. 939, holding that location of highway, becoming public by prescription, may be changed upon petition; *Savannah, F. & W. R. Co. v. Gill*, 118 Ga. 748, 45 S. E. 623, holding that right of public to use highway may be established by prescription; *German Bank v. Brose*, 32 Ind. App. 86, 69 N. E. 300; *McLaskey v. McDaniel*, 37 Ind. App. 72, 74 N. E. 1023, —holding that acceptance of dedication may be shown by use by the public, though no work has been done on the road; *Gillespie v. Duling*, 41 Ind. App. 221, 83 N. E. 728, holding, under statute, that twenty year's use of a way by the public establishes it as a highway by user regardless of any other evidence of dedication; *Pitser v. McCreery*, 172 Ind. 677, 89 N. E. 317, holding way established by user for statutory period, though owner occasionally obstructed the way by fencing for his own convenience, the public still continuing its use; *Smith v. Nofsinger*, 86 Neb. 839, 126 N. W. 659, holding highway not established by user unless the public has traveled a definite path without substantial change for the full statutory period; *Indianola Light, Ice & Coal Co. v. Montgomery*, 85 Miss. 312, 37 So. 958, holding municipality not deprived of right to use full width of street dedicated by platting, though only part had been in use for a long period; *Southern I. R. Co. v. Norman*, 165 Ind. 132, 74 N. E. 896, on inference of claim of right from evidence of use.

Cited in notes (129 Am. St. Rep. 578, 580, 586) on what constitutes dedication to, and acceptance of, a public street; (12 Eng. Rul. Cas. 524) on long use of public road as evidence of dedication; (12 Eng. Rul. Cas. 571) on presumption of dedication of highway for entire width.

Power of municipality over streets.

Cited in *Worthington v. Morgan*, 17 Ind. App. 604, 47 N. E. 235, holding town liable for injury to person caused by defective streets; *Keith v. Wilson*, 145 Ind. 152, 44 N. E. 13, holding injunction against execution of ordinance to compel lot owners to grade and pave or plank sidewalks properly refused; *Dugger v. Hicks*, 11 Ind. App. 384, 36 N. E. 1085, holding improvement assessment not invalidated by contract requiring street to be improved beyond its limits; *Clay City v. Bryson*, 30 Ind. App. 493, 66 N. E. 498, holding that town cannot enforce lien for work upon sidewalk not constructed as provided by statute.

Strict construction of statutes.

Cited in *Logansport v. Shirk*, 129 Ind. 358, 28 N. E. 538, holding that statutes providing for taking of private property for public uses must be strictly construed.

11 L. R. A. 61, *HAUCH v. RIPLEY*, 127 Ind. 151, 26 N. E. 70.

Priority of liens.

Cited in *Wright v. Sherman*, 3 S. D. 295, 17 L. R. A. 793, 52 N. W. 1093; *Stone v. Kelley*, 59 Mo. App. 220; *Pickett v. McCord*, 62 Mo. App. 473; *Lazarus v. Moran*, 64 Mo. App. 241; *Woodard v. Myers*, 15 Ind. App. 44, 42 N. E. 573, —holding agister's lien inferior to prior recorded chattel mortgage; *Wilson v. Donaldson*, 121 Cal. 9, 43 L. R. A. 525, 66 Am. St. Rep. 17, 53 Pac. 404, holding

statutory laborer's lien inferior to that of prior chattel mortgage; *Davis v. Elliott*, 7 Ind. App. 248, 34 N. E. 591, holding mechanic's lien does not attach to buildings on land held under executory contract for conveyance, afterward forfeited; *Bell v. Hiner*, 16 Ind. App. 203, 44 N. E. 576 (dissenting opinion), majority holding laborer's lien superior to prior chattel mortgage.

Cited in footnote to *Sullivan v. Clifton*, 20 L. R. A. 719, which holds livery-stable keeper's lien subject to prior recorded mortgage.

Cited in note (12 L.R.A.(N.S.) 311) on priority as between chattel mortgage and lien for food or care furnished animals.

Distinguished in *Watts v. Sweeney*, 127 Ind. 124, 22 Am. St. Rep. 615, 26 N. E. 680, holding mechanic's lien for repair of chattel superior to prior chattel mortgage.

11 L. R. A. 63, *BRYAN v. WATSON*, 127 Ind. 42, 26 N. E. 666.

Contracts made on Sunday.

Cited in *Hodges v. Nalty*, 113 Wis. 573, 89 N. W. 535, holding Sunday subscription to fund for building church within exceptions of statute forbidding Sunday labor; *First M. E. Church v. Donnell*, 110 Iowa, 6, 46 L. R. A. 859, footnote p. 858, 81 N. W. 171, sustaining subscription to church indebtedness made on Sunday; *Western U. Teleg. Co. v. Eskridge*, 7 Ind. App. 212, 33 N. E. 238, holding complaint not defective on demurrer in failing to allege necessity for contract to send telegram on Sunday.

Cited in footnotes to *Pepin v. Societe St. Jean Baptiste*, 60 L.R.A. 626, which authorizes hearing and determination on Sunday of charges against member of benefit society, resulting in expulsion; *Rodman v. Robinson*, 65 L.R.A. 682, which sustains Sunday contract for purchase and sale of real estate.

Cited in note (14 L. R. A. 194) on Sunday labor.

Subscriptions for religious objects.

Cited in *Garrigus v. Home Frontier & Foreign Missionary Soc.* 3 Ind. App. 94, 50 Am. St. Rep. 262, 28 N. E. 1009, holding promissory note given to advance cause of missions valid obligation.

11 L. R. A. 65, *MELDRUM v. MELDRUM*, 15 Colo. 478, 24 Pac. 1083.

Allowance of alimony.

Cited in *Hoagland v. Hoagland*, 19 Utah, 110, 57 Pac. 20, holding husband, in divorce action, need not allege he does not seek alimony in excess of \$2,000.

Cited in note (34 L. R. A. 111) on allowance to husband from property held by wife in divorce cases.

Acts procured by fraud.

Cited in *Basye v. Basye*, 152 Ind. 176, 52 N. E. 797, holding conveyance to wife upon fraudulent profession of love may be set aside; *Hursen v. Hursen*, 212 Ill. 380, 103 Am. St. Rep. 230, 72 N. E. 391, setting aside conveyance fraudulently obtained by wife from husband upon promises of good behavior but really with intention of leaving him; *Fischer v. Fischer*, 245 Ill. 430, 92 N. E. 283, setting aside conveyance by aged husband to young wife where procured by her upon false promises as to her future conduct; *Holt v. Holt*, 23 Okla. 668, 102 Pac. 187, holding wife entitled to relief from decree of alimony where through fraud and undue influence of husband, the amount secured to her is inadequate; *Jennings v. Jennings*, 48 Or. 74, 85 Pac. 65, holding husband entitled to relief from deed obtained from him by wife upon promise to resume marital relations, where she had no intention of so doing; *Vanderbilt v. Mitchell*, 72 N. J. Eq. 925, 14 L.R.A. (N.S.) 311, 67 Atl. 97, on novelty of incident as being no barrier to relief in equity; *Evans v. Evans*, 118 Ga. 894, 98 Am. St. Rep. 180, 45 S. E. 612, on right

of husband to revoke gift to wife upon discovery that she has prior thereto been guilty of adultery. Citing annotation also on this point; *Thomas v. Thomas*, 27 Okla. 793, 35 L.R.A.(N.S.) 129, 109 Pac. 825, 113 Pac. 1058, Ann. Cas. 1912 C, 713, holding that transaction will be declared invalid where one person who bears confidential relation to another gains advantage at expense of confiding party.

Cited in footnotes to *Girard v. St. Louis Car-Wheel Co.* 25 L. R. A. 514, which holds reply that release pleaded was obtained by fraud sufficient in action at law, without obtaining cancelation in equity; *Och v. Missouri. K. & T. R. Co.* 36 L. R. A. 442, which holds release by woman while dazed and nervous from shock in railway accident binding on her, though obtained by misrepresenting contents.

Cited in notes (73 Am. St. Rep. 271) on suit in equity between husband and wife for fraud; (69 L.R.A. 360) on conditions upon which conveyance by husband to wife is upheld; (35 L.R.A.(N.S.) 124) on marital misconduct of one spouse as avoiding gift by other.

Distinguished in *Davis v. Davis*, 18 Colo. 70, 31 Pac. 499, refusing specific performance of disputed contract by wife to convey to husband half interest in lot purchased with her money, after his building thereon.

Conclusiveness of judgments.

Cited in *Baird v. Connell*, 121 Iowa, 290, 96 N. W. 863, holding decree in divorce action as to alimony conclusive as to wife's interest in property therein involved.

Implied trusts.

Cited in note (24 L.R.A.(N.S.) 1043) on donor's expectation that donee will allow him to share in benefit of property, as raising implied trust.

11 L. R. A. 72, *BELKNAP v. BALL*, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674.

Publications reflecting upon persons before the public.

Cited in *Owen v. Dewey*, 107 Mich. 72, 65 N. W. 8, holding belief in truth of false charge of attempting to bribe legislator will not relieve publisher from liability; *Dunneback v. Tribune Printing Co.* 108 Mich. 77, 65 N. W. 583 holding statement that persons did not wish to become responsible as bondsmen if plaintiff had any share in handling public funds not libelous *per se*; *Smurthwaite v. News Pub. Co.* 124 Mich. 384, 83 N. W. 116, holding criticism by newspaper of acts of public officials must be with honest regard for the truth; *Field v. Magee*, 122 Mich. 558, 81 N. W. 354, holding charge of person with being one of ring's chief heelers, and remark that every one of certain class of voters was purchasable, libelous *per se*; *Dowling v. Livingstone*, 108 Mich. 327, 32 L. R. A. 107, 62 Am. St. Rep. 702, 66 N. W. 225, holding criticism of book before public, without misstatement of facts therein or attack upon character of author, not libelous; *Thibault v. Sessions*, 101 Mich. 283, 59 N. W. 624, holding language in publication implicating plaintiff in criminal practices of teacher upon pupils actionable *per se*; *Austin v. Hyndman*, 119 Mich. 620, 78 N. W. 663, holding malice implied from publication that supervisor wrongfully assessed tax upon poor woman; *Smedley v. Soule*, 125 Mich. 200, 84 N. W. 63, holding question of privilege excluded where there is no foundation for belief in truth of libelous publications; *Eikhoff v. Gilbert*, 124 Mich. 362, 51 L. R. A. 455, footnote p. 451, 83 N. W. 110, holding circular to voters, charging candidate with supporting measures opposed to moral interests of community, libelous *per se*; *Donahoe v. Star Pub. Co.* 4 Penn. (Del.) 183, 55 Atl. 337, holding that false charges of a criminal offense against a candidate for public office are not privileged; *Lawrence v. Herald Pub. Co.* 158 Mich. 463, 25 L.R.A.(N.S.) 800, 122 N. W. 1084, holding

that publication of false injurious statement regarding one who has been a public officer but is not such at time of publication, is not privileged.

Cited in footnotes to *Augusta Evening News v. Radford*, 20 L. R. A. 533, which holds newspaper article charging constable with soliciting business for magistrate's courts libelous; *Upton v. Hume*, 21 L. R. A. 493, which holds false imputation of crime to candidate for office not privileged; *State v. Hoskins*, 47 L. R. A. 223, which holds publication outside of judicial district of charges against candidate for office of judge not privileged; *Sullivan v. Strahorn-Hutton-Evans Commission Co.* 47 L. R. A. 859, which holds imputation of evil motives as dishonesty, in letter complaining of nonpayment of debt by third person through bank, not privileged; *Coffin v. Brown*, 55 L. R. A. 732, which denies right to falsely attack character of appointee of governor to prevent latter's re-election; *Wofford v. Meeks*, 55 L. R. A. 214, which holds libelous, publication imputing to county officials prostitution of county finances by awarding contracts to persons of same political faith; *Star Pub. Co. v. Donahoe*, 65 L.R.A. 980, which holds newspaper publication charging candidate for office with a criminal offense, not privileged.

Cited in note (104 Am. St. Rep. 135) on what libelous statements concerning candidates for office are privileged.

Explanation of meaning by innuendo.

Cited in *Quinn v. Prudential Ins. Co.* 116 Iowa, 526, 90 N. W. 349, holding that notice not to pay insurance agent, who is no longer employed, any premiums, cannot be made libelous by innuendo.

Privileged statements.

Cited in note (104 Am. St. Rep. 113, 119) on what libelous statements are privileged.

Words libelous per se.

Cited in notes (9 Eng. Rul. Cas. 15; 116 Am. St. Rep. 812) on what words are libelous per se.

11 L. R. A. 75, *PEOPLE v. POWELL*, 87 Cal. 348, 25 Pac. 481.

Right of defendant to constitutional jury.

Cited in *People v. Suesser*, 132 Cal. 632, 64 Pac. 1095, holding defendant in criminal case entitled to change of venue to secure fair jury; *Kohl v. Lehlback*, 160 U. S. 302, 40 L. ed. 435, 16 Sup. Ct. Rep. 304, holding that objection to juror may be waived by the defendant; *People v. Wong Ark*, 96 Cal. 137, 30 Pac. 1115, on absolute right of accused to trial by an impartial jury; *State v. Lewis*, 142 N. C. 639, 7 L.R.A. (N.S.) 677, 55 S. E. 600, 9 A. & E. Ann. Cas. 604, on meaning of "jury" and constitutional right to jury trial.

Distinguished in *Queenan v. Territory*, 11 Okla. 271, 61 L. R. A. 328, 71 Pac. 218, holding challenge to juror incompetent because convicted of felony may be waived.

Right to be tried in county where crime is committed.

Approved in *People v. Prather*, 134 Cal. 390, 66 Pac. 724 (dissenting opinion), majority holding indictment in county to which stolen property is taken, sufficient where it charges commission of offense in county where property was stolen, and its transference to county where indictment is found.

Cited in *Re Nelson*, 19 S. D. 222, 102 N. W. 885, holding unconstitutional act permitting prosecution to change place of trial to another county; *People v. Ebey*, 6 Cal. App. 771, 93 Pac. 379, on defendant only having right to change place of trial to another county; *People v. Loris*, 131 App. Div. 129, 115 N. Y. Supp. 236, on meaning of "neighborhood."

Cited in footnote to *Barry v. Truax*, 65 L.R.A. 762, which upholds statute providing for change of venue to another county on application of state's attorney when impartial trial cannot be had in the original county.

Disapproved in *State ex rel. Hornbeck v. Durlinger*, 73 Ohio St. 161, 76 N. E. 291, holding statute constitutional which gives prosecution right to change place of trial where constitution provides that trial shall be in county or district where crime was committed; *Barry v. Traux*, 13 N. D. 148, 65 L.R.A. 770, 112 Am. St. Rep. 662, 99 N. W. 769, 3 A. & E. Ann. Cas. 191, holding that state may change place of trial to county other than that in which the crime was committed.

Admissibility of threats of deceased in homicide cases.

Cited in *State v. Burton*, 63 Kan. 610, 66 Pac. 633, holding threats by deceased admissible in support of plea of self-defense in homicide case; *People v. Landis*, 139 Cal. 431, 73 Pac. 153; *People v. Driggs*, 12 Cal. App. 246, 108 Pac. 62,—holding evidence of declarations of deceased as to his feelings towards defendant inadmissible where not part of the *res gestae*.

Cited in notes (17 L.R.A. 661) on evidence in criminal case of threats of accused or of person injured or killed; (45 L. ed. U. S. 571) on evidence of threats against third persons by defendant.

— Dangerous character of deceased.

Cited in *State v. Churchill*, 52 Wash. 215, 100 Pac. 309, holding inadmissible evidence of particular quarrels and fights between third persons and deceased prior to the homicide.

Cited in notes (28 Am. St. Rep. 911) on evidence of bad character of person murdered; (3 L.R.A.(N.S.) 355, 369) on character and reputation of deceased as affecting homicide.

— Evidence that deceased was unarmed.

Cited in *People v. Sehorn*, 116 Cal. 509, 48 Pac. 495, holding evidence that deceased was unarmed admissible where defendant introduces evidence that he believed deceased armed; *People v. Adams*, 137 Cal. 581, 70 Pac. 662, holding admissible evidence that deceased was unarmed, and his declarations to that effect to defendant prior to the homicide; *State v. Churchill*, 52 Wash. 214, 100 Pac. 309, holding evidence that deceased did not own a revolver, admissible where defense was self-defense and evidence had been introduced tending to create impression that deceased was armed.

Burden of proof in homicide cases.

Cited in *State v. Hazlet*, 16 N. D. 436, 113 N. W. 374, holding that in prosecution for murder burden never shifts upon defendant to establish a defense by preponderance of evidence.

Right of court to permit outside attorney to assist in criminal prosecution.

Cited in *State v. Steers*, 12 Idaho, 182, 85 Pac. 104; *Thalheim v. State*, 38 Fla. 189, 20 So. 938,—holding that court may permit private attorneys to assist in criminal prosecution; *State v. Kent*, 4 N. D. 588, 27 L.R.A. 691, 62 N. W. 631, holding that court may permit, nonresident attorney employed by relatives of the deceased, to assist in the prosecution.

Application of rule of reasonable doubt to self-defense.

Cited in note (19 L.R.A.(N.S.) 490) on applicability of rule of reasonable doubt to self-defense in homicide.

11 L. R. A. 81, *DANIELS v. BRODIE*, 54 Ark. 216, 15 S. W. 467.

Pleadings.

Cited in *Kansas & A. Valley R. Co. v. Dye*, 16 C. C. A. 607, 36 U. S. App. 23,

70 Fed. 26, holding pleadings will be treated on appeal as parties elected to treat them in trial court.

Contracts by agents.

Cited in *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 613, 94 Am. St. Rep. 279, 64 N. E. 647, holding owner of property lost by express company limited to recovery of amount at which it was valued by agent when sent; *Denison & N. R. Co. v. Raney-Alton Mercantile Co.* 3 Ind. Terr. 153, 53 S. W. 496, holding acts of president and attorney of railway company, ratified where the company had knowledge of the acts and accepted benefits therefrom.

Cited in footnote to *Thompson v. New South Coal Co.* 62 L. R. A. 551, which holds principal not estopped from asserting invalidity of unauthorized contract by acceptance of portion of purchase money.

Contract in restraint of trade.

Cited in *Bloom v. Home Ins. Agency*, 91 Ark. 373, 121 S. W. 293, upholding contract in partial restraint of trade where reasonable and based upon valuable consideration.

Distinguished in *Bloom v. Home Ins. Agency*, 91 Ark. 378, 121 S. W. 293, holding that firm of which contracting party is a member, cannot be enjoined in proceeding to which it is not made a party.

Damages for breach of contract.

Cited in note (6 Eng. Rul. Cas. 625) on damages recoverable for breach of contract.

11 L. R. A. 83, *MATHERS v. UNION MUT. ACCI. ASSO.* 78 Wis. 588, 47 N. W. 1130.

Oral contract for insurance.

Cited in footnote to *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.* 17 L. R. A. 586, which holds insurer not rendered liable by insured instructing his cashier who is also insurer's agent, to renew policy.

Overruled in *Chamberlain v. Prudential Ins. Co.* 109 Wis. 8, 83 Am. St. Rep. 851, 85 N. W. 128, holding terms of written application and contract cannot be altered by oral contract.

Power of insurance agent to bind company.

Cited in *New York L. Ins. Co. v. Greenlee*, 42 Ind. App. 86, 84 N. E. 1101, holding policy valid though premium was only partly paid when agent of insurer had waived condition of prepayment of premium; *Wheaton v. Liverpool & L. & G. Ins. Co.* 20 S. D. 68, 104 N. W. 850, holding that where risk has been accepted by agent, policy made out, and premium paid, the contract is binding upon insurer though policy is still in hands of agent of insurer.

Cited in footnote to *Hall v. Union Cent. L. Ins. Co.* 51 L. R. A. 288, which holds admissions by insurance agent after death of insured, that all premiums paid, binding on company.

11 L. R. A. 85, *Re LAWRENCE*, 136 Pa. 354, 20 Am. St. Rep. 925, 20 Atl. 521.

Rule against perpetuities.

Cited in *Lennig's Estate*, 154 Pa. 214, 31 W. N. C. 236, 25 Atl. 1049, holding gift taking effect immediately at expiration of lives in being at death of testator not obnoxious to rule against perpetuities; *Johnston's Estate*, 185 Pa. 191, 64 Am. St. Rep. 621, 39 Atl. 879, holding devise in trust for seventy-five years to pay income to testator's children, with remainder over to any children then living and descendants of those who are dead, wholly void; *Gerber's Estate*, 196 Pa. 381, 46 Atl. 497, holding particular estate, created merely to tie up estate until

youngest grandchild shall become twenty-two years old, void; *Boyd's Estate*, 199 Pa. 493, 49 Atl. 297, holding gift by mother of life estate, with power of appointment, to son on reaching age of twenty-five, valid if such event occurred within twenty-one years from mother's death; *Owens's Petition*, 3 Pa. Dist. R. 328, 34 W. N. C. 355, holding devise to living person for life, with remainder to his unborn children, not repugnant to rule against perpetuities; *Ogden v. McLane*, 73 N. J. Eq. 163, 67 Atl. 695, holding power granted to beneficiary to appoint estate to husband for life or in fee, valid though the husband may have been born after the death of testator; *Bartlett v. Sears*, 81 Conn. 43, 70 Atl. 33, holding that question of remoteness depends upon condition existing at time of death of testator.

Cited in footnotes to *Murphy v. Whitney*, 24 L. R. A. 123, which holds agreement that land descending to brothers and sisters shall, on death of last survivor, pass to child of only married one, not void as perpetuity; *Andrews v. Lincoln*, 56 L. R. A. 103, which holds void, devise in trust for accumulation for thirty years.

Cited in notes (6 L.R.A.(N.S.) 333) on life estates to unborn children of living persons, as contravening rule against perpetuities; (21 Eng. Rul. Cas. 157; 49 Am. St. Rep. 119, 127, 133) on rule against perpetuities.

Effect of remainder void for remoteness on preceding estate.

Cited in *Van Syckel's Estate*, 24 Pa. Co. Ct. 243, 9 Pa. Dist. R. 368, holding validity of interests given to children under power not dependent upon validity of future limitations to their issue; *Graham v. Whitridge*, 99 Md. 281, 66 L.R.A. 416, 57 Atl. 609; *Clapier's Estate*, 15 Pa. Dist. R. 541,—holding life estate valid though limitation over is void under rule against perpetuities; *Lahey's Estate*, 30 Pa. Co. Ct. 288, 13 Pa. Dist. R. 534, on same point; *Pettebone v. Pettebone*, 15 Luzerne Leg. Reg. 443, to the point that prior estate neither receives enlargement nor suffers diminution when remainder expectant upon it is declared void for remoteness; *Loyd v. Loyd*, 102 La. 527, 46 S. E. 687, holding that a valid disposition of property is not invalidated because a limitation over may fail.

Cited in note (3 L.R.A.(N.S.) 640) on effect on particular estate of remainder void for remoteness.

Power to dispose of real property.

Cited in *Law Guarantee & Trust Co. v. Jones*, 103 Tenn. 251, 58 S. W. 219, holding devise to testator's grandchildren, with power to his two sons to dispose of property as they see proper, gives sons absolute power of disposition; *Mays v. Buch*, 114 Tenn. 549, 86 S. W. 713, 4 A. & E. Ann. Cas. 1189, holding that under power to appoint in fee, donee may appoint an estate for life.

Appointment under power.

Cited in *Rogers' Estate*, 31 Pa. Super. Ct. 633, holding appointment, in excess of power granted, invalid where the excess was not separable.

11 L. R. A. 90, *DAVIS v. GREEN*, 102 Mo. 170, 14 S. W. 876.

Referred to, but not cited in support of any legal propositions, in *Hickman v. Green*, 123 Mo. 179, 29 L. R. A. 46, 27 S. W. 440.

Right to dower.

Cited in *Long v. Kansas City Stock-Yards Co.* 107 Mo. 304, 28 Am. St. Rep. 413, 17 S. W. 656, holding adverse possession for statutory period under executory contract of sale bar to dower; *Young v. Thrasher*, 115 Mo. 229, 21 S. W. 1104, holding widow dowerable in all lands of which any person seised during her marriage, to use of husband; *McCrillis v. Thomas*, 110 Mo. App. 704, 85 S. W. 673, holding dower right not extinguished by sheriff's sale under execution against

husband; *Thomas v. Woods*, 26 L.R.A.(N.S.) 1188, 97 C. C. A. 535, 173 Fed. 593, on construction of statutes of Missouri relating to dower.

Cited in note (13 L. R. A. 442) on bar of inchoate right of dower.

Declarations as to title.

Cited in *Owensby v. Chewning*, 171 Mo. 230, 71 S. W. 122, holding resulting trust established by declarations of deceased owner that he purchased property with wife's money.

Evidence to establish trust in real property.

Cited in *Morrow v. Matthew*, 10 Idaho, 432, 79 Pac. 196, on trust in real estate being declared only upon clear and satisfactory evidence.

11 L. R. A. 95, *CORBETT v. LITTLEFIELD*, 84 Mich. 30, 22 Am. St. Rep. 681, 47 N. W. 581.

Effect given to valid foreign chattel mortgage.

Cited in *Snider v. Yates*, 112 Tenn. 314, 64 L. R. A. 360, 79 S. W. 796, holding lien of local attachment creditors without notice superior to that of holder of foreign chattel mortgage.

Cited in notes (17 L.R.A. 128) on extraterritorial force of unrecorded chattel mortgage; (109 Am. St. Rep. 454) on rights of mortgagee on removal of mortgaged property into another state.

Distinguished in *Littauer v. Houck*, 92 Mich. 164, 31 Am. St. Rep. 572, 52 N. W. 464, holding chattel mortgage recorded in wrong place superior to subsequent levy of judgment, on debt contracted before mortgage of which judgment creditor's attorneys had actual knowledge; *Vining v. Millar*, 109 Mich. 208, 32 L. R. A. 443, 67 N. W. 126, holding Canadian mortgage superior to prior Michigan mortgage recorded after property had been wrongfully taken from possession of former mortgagor and brought to Michigan; *F. E. Creelman Lumber Co. v. Lesh*, 73 Ark. 18, 83 S. W. 320, 3 A. & E. Ann. Cas. 108, holding that chattel mortgage valid in foreign state will be enforced upon property moved to this state without mortgagee's consent.

Disapproved in *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla. 362, 60 Pac. 249, and *Shapard v. Hynes*, 52 L. R. A. 678, 45 C. C. A. 275, 104 Fed. 453, holding, in absence of statute, valid foreign chattel mortgage will be given effect in state to which property is removed, although not recorded in latter state.

Rights as to property owned by nonresident.

Cited in *Wall v. Norfolk & W. R. Co.* 52 W. Va. 494, 64 L. R. A. 508, 94 Am. St. Rep. 948, 44 S. E. 294, holding cars received by railroad company under traffic agreement with foreign company for their use not attachable.

Priority of lien of chattel mortgage.

Cited in *People use of Esper v. Burns*, 161 Mich. 174, 125 N. W. 740, holding that attachment by creditor takes precedence over chattel mortgage not accompanied by statutory affidavit, though recorded.

11 L. R. A. 97, *MENTZ v. NEUWITTER*, 122 N. Y. 491, 19 Am. St. Rep. 514, 25 N. E. 1044.

Sufficiency of memorandum of sale under statute of frauds.

Cited in *Cameron v. Tompkins*, 72 Hun, 117, 25 N. Y. Supp. 305, holding memoranda relating to sale of stock, without specifying price, insufficient; *Marston v. French*, 43 N. Y. S. R. 539, 17 N. Y. Supp. 509, holding guaranty failing to show for whom made, insufficient; *Kittel v. Stueve*, 10 Misc. 698, 31 N. Y. Supp. 821, holding memorandum of sale validated by subsequent authorized signing of vendor's name by his attorney; *Hagedorn v. Lang*, 34 App. Div. 120, 54 N. Y.

Supp. 602, holding memorandum not invalidated by signing of terms of sale by vendor, before sale; *Seymour v. Warren*, 59 App. Div. 123, 69 N. Y. Supp. 236, holding lease memorandum not mentioning consideration inuring to benefit of lessees insufficient; *Ward v. Hasbrouck*, 169 N. Y. 411, 62 N. E. 434, holding collateral written contract to pay rent of third party, requiring parol evidence to connect landlord with it, insufficient; *Bekcer v. Krank*, 62 App. Div. 516, 71 N. Y. Supp. 78, holding memorandum to answer for debt of another, failing to express consideration therefor, insufficient; *Cheever v. Schall*, 87 Hun. 34, 33 N. Y. Supp. 751, holding guaranty in favor of general letter of credit sufficient, although not showing upon face in favor of whom made; *Nasanowitz v. Hanf*, 17 Misc. 158, 39 N. Y. Supp. 327, holding memorandum of lease, not referring to premises or specifying terms or covenants, insufficient; *Mantz v. Maguire*, 52 Mo. App. 154 (dissenting opinion), majority holding that agency being apparent on face of memorandum, unnamed principal may be shown by parol evidence; *Snow Storm Min. Co. v. Johnson*, 108 C. C. A. 615, 186 Fed. 754, holding that executory sale of certificates of stock is void under section 6009 Revised Codes unless in writing or unless there was delivery of some part of property or payment of some part of purchase price; *Mertz v. Hubbard*, 75 Kan. 3, 8 L.R.A.(N.S.) 736, 121 Am. St. Rep. 352, 88 Pac. 529, 12 A. & E. Ann. Cas. 485, holding memorandum insufficient where agent of one of the parties appears therein but without disclosing the principal; *Burrows v. Fischer*, 71 Misc. 170, 129 N. Y. Supp. 902, holding that written receipt, signed by landowner, that person named therein has paid certain sum, "on his contract with me in regard to his buying of me and my selling to him" certain land does not satisfy statute of frauds.

Cited in footnote to *White v. Breen*, 32 L. R. A. 127, which authorizes reading different writings together as constituent parts of memorandum.

Cited in notes (11 L.R.A. 143) on enforceability of contract where memorandum is defective; (8 L.R.A.(N.S.) 735) on satisfaction of statute of frauds relating to sales of realty by memorandum showing one party acted for undisclosed principal; (25 Am. St. Rep. 132) on sufficiency of memorandum to satisfy statute of frauds; (6 Eng. Rul. Cas. 254) on requisites of memorandum required by statute of frauds.

Distinguished in *Miller v. Tuck*, 95 App. Div. 138, 88 N. Y. Supp. 495, holding parol evidence admissible to identify property described by written agreement; *Rauch v. Donovan*, 126 App. Div. 56, 110 N. Y. Supp. 690, holding that agreement for partnership with respect to a specific parcel of land to be purchased and resold for profit, need not be in writing.

Ratification of parol contract.

Cited in *Hunt v. Hunt*, 55 App. Div. 433, 66 N. Y. Supp. 957, holding parol antenuptial agreement not ratified by will containing no mention of it; *Brauer v. Oceanic Steam Nav. Co.* 178 N. Y. 344, 70 N. E. 863, holding telegraphic correspondence purporting to confirm oral agreement not binding, where essential parts of agreement not mentioned.

11 L. R. A. 101, *MULHEARN v. PRESS PUB. CO.* 53 N. J. L. 153, 21 Atl. 186.

Privilege from service of process of person attending court.

Cited in *Powers v. Arkadelphia Lumber Co.* 61 Ark. 508, 54 Am. St. Rep. 276, 33 S. W. 842, holding resident of state attending taking of depositions in county not his residence privileged from service of summons there; *Ela v. Ela*, 68 N. H. 314, 36 Atl. 15, holding nonresident witness attending court privileged from service of civil writ; *Richardson v. Smith*, 74 N. J. L. 114, 65 Atl. 162, holding nonresident attending court privileged from service of civil process in summary

proceedings under landlord and tenant act; *Sewanee Coal, Coke & Land Co. v. W. W. Williams & Co.* 120 Tenn. 345, 107 S. W. 968, holding officer of corporation privileged from service of civil process while within the county as a witness in Federal court; *Jenkins v. Penn Bridge Co.* 73 S. C. 529, 53 S. E. 991, on distinction between employee and agent as affecting service of process upon corporation.

Cited in footnotes to *Parker v. Marco*, 20 L. R. A. 45, which holds exempt from service nonresident sued in Federal court; *Holyoke & S. H. Falls Ice Co. v. Amsden*, 21 L. R. A. 319, which holds party or witness not exempt from service of process in passing through other state to attend court; *Hoffman v. Circuit Court Judge*, 38 L. R. A. 663, which holds attorney exempt from service of process while going to own county from supreme court; *Monroe v. Atkinson*, 52 L. R. A. 189, which denies privilege from arrest to owner of libeled vessel going to court at request of purchaser, under contract for sale free from liens.

Cited in notes (23 L. R. A. 497) on who may be served with process in suit against foreign corporation; (25 L. R. A. 724, 726) on privilege of nonresident from suit; (24 L.R.A.(N.S.) 276) on validity of service in action against corporation, upon nonresident officer within state as party or witness; (76 Am. St. Rep. 539) on exemption from service of civil process.

Distinguished in *Rutledge v. Krauss*, 73 N. J. L. 399, 64 Atl. 988, holding person brought into state under extradition proceedings not exempt from service of civil process; *Breon v. Miller Lumber Co.* 83 S. C. 226, 24 L.R.A.(N.S.) 279, 65 S. E. 214, holding service on nonresident officer of domestic corporation, while such officer is in attendance as a witness, valid service upon the corporation.

11 L. R. A. 102, *WESTERN U. TELEG. CO. v. DAUGHERTY*, 54 Ark. 221, 26 Am. St. Rep. 33, 15 S. W. 468.

Stipulations in contracts with telegraph companies.

Cited in *Manier v. Western U. Teleg. Co.* 94 Tenn. 447, 29 S. W. 732, and *Kirby v. Western U. Teleg. Co.* 7 S. D. 629, 30 L. R. A. 622, 65 N. W. 37, upholding stipulation requiring sender of telegraph message to present damage claims within sixty days after filing message; *Sherrill v. Western U. Teleg. Co.* 109 N. C. 531, 14 S. E. 94, holding action begun within sixty days after notice of non-delivery sufficient compliance with stipulation; *Findlay v. Western U. Teleg. Co.* 64 Fed. 461, holding receiver, as well as sender, bound by stipulated sixty-day limitation as to presentation of claims for damages; *McGehee v. Western U. Teleg. Co.* 169 Ala. 128, 53 So. 205, Ann. Cas. 1912 B, 512 (dissenting opinion), on validity of stipulations relieving telegraph company from liability for negligence; *Western U. Teleg. Co. v. Moxley*, 80 Ark. 557, 98 S. W. 112; *Wheelock v. Postal Teleg. Cable Co.* 197 Mass. 124, 83 N. E. 313, 14 A. & E. Ann. Cas. 188; *Broom v. Western U. Teleg. Co.* 71 S. C. 509, 51 S. E. 259, 4 A. & E. Ann. Cas. 611,—holding valid stipulation that claim for damages must be presented within 60 days; *Postal Teleg.-Cable Co. v. Moss & Co.* 5 Ga. App. 511, 63 S. E. 590, on same point; *Western U. Teleg. Co. v. Greer*, 115 Tenn. 372, 1 L.R.A.(N.S.) 527, 89 S. W. 327, holding same but that institution of suit within specified time is sufficient; *St. Louis & S. F. R. Co. v. Keller*, 90 Ark. 314, 119 S. W. 254, holding valid stipulation in bill of lading that notice of loss or damage to goods must be given within 30 hours after unloading.

Cited in notes (13 L.R.A. 511) on effect of stipulations in contract to transfer night telegram; (38 L. ed. U. S. 884) on stipulations in contracts of telegraph companies.

Telegraph and telephone companies.

Cited in footnote to *State v. Central N. J. Teleph. Co.* 11 L. R. A. 664, which

holds company organized under act to regulate telegraph companies may condemn route for telephone lines.

11 L. R. A. 104, *STATE v. CHICHESTER*, 31 Neb. 325, 47 N. W. 934.

Construction of election law.

Cited in *Dooley v. Jackson*, 104 Mo. App. 32, 78 S. W. 330, holding that wager on result of primary election is not included under statute as to "bets and wagers on any election."

11 L. R. A. 105, *STATE v. LEWIS*, 107 N. C. 967, 12 S. E. 457, 13 N. E. 247.

Cited in *State v. Fulton*, 149 N. C. 487, 63 S. E. 145, as citing and approving a prior decision.

Officers de facto.

Cited in *State ex rel. Van Amringe v. Taylor*, 108 N. C. 201, 12 L. R. A. 204, footnote, p. 202, 23 Am. St. Rep. 51, 12 S. E. 1005, which holds mere intruder not officer *de facto*; *State v. Davis*, 109 N. C. 783, 14 S. E. 55, holding it sufficient, in trial for bigamy, to show marriage performed by *de facto* justice of peace; *State v. Davis*, 111 N. C. 734, 16 S. E. 540, holding defendant in criminal trial cannot impeach election of mayor issuing warrant; *Hughes v. Long*, 119 N. C. 55, 25 S. E. 743, holding that, to constitute *de facto* officer, there must be actual exercise of office and acquiescence of public authorities; *State v. Turner*, 119 N. C. 845, 25 S. E. 810, holding superior court judge presiding in another district by governor's appointment, *de facto* judge, and acts valid; *State v. Shuford*, 128 N. C. 592, 38 S. E. 808, holding judge appointed prior to taking effect of act creating judicial district neither *de facto* nor *de jure* officer; *State v. Holmes*, 12 Wash. 179, 40 Pac. 735, holding objection to jurisdiction of court because of ineligibility of judge waived by submission to jurisdiction; *Dredla v. Baache*, 60 Neb. 663, 83 N. W. 916, holding temporary acting county judge, appointed by county commissioners, *de facto* officer; *Franklin v. Vandervort*, 50 W. Va. 416, 40 S. E. 374, holding new trial properly denied by special judge hearing case after appointment to fill vacancy during same session of court; *State v. Sutherlin*, 165 Ind. 350, 75 N. E. 642, holding acts of *de facto* jury commissioner valid as to third parties and the public; *Usher v. Western U. Teleg. Co.* 122 Mo. App. 112, 98 S. W. 84, holding acts of *de facto* judge valid though his election might have been improper or irregular; *Tillman v. State*, 58 Fla. 117, 50 So. 675, holding question of jurisdiction of judge waived where not raised at trial.

Cited in footnote to *Oliver v. Jersey City*, 48 L. R. A. 412, which holds unauthorized acceptance of second office not prevent one being *de facto* officer on continuing performance of duties of first office.

Cited in notes (13 L. R. A. 178) on officers *de facto* and *de jure* distinguished; (17 L. R. A. 250) on who are public officers.

Distinguished in *State v. Hall*, 142 N. C. 715, 55 S. E. 806, holding that legal existence of a court cannot be questioned by a plea to the jurisdiction.

Assignments of judges.

Cited in *State v. Turner*, 119 N. C. 845, 25 S. E. 810, holding exchanges of judges for special terms, with governor's sanction, not forbidden.

"Accident."

Cited in *Massucco v. Tomassi*, 78 Vt. 197, 62 Atl. 57, on definition of accident.

11 L. R. A. 110, *CROW v. BROWN*, 81 Iowa, 344, 25 Am. St. Rep. 501, 46 N. W. 993.

Action to enjoin sale of real estate under execution; in 86 Iowa, 742, 53 N. W. 131.

Exempt property and proceeds.

Cited in *Dean v. Clark*, 81 Iowa, 753, Appx., 46 N. W. 995, holding property purchased with pension money exempt from execution; *Fayette County v. Hancock*, 83 Iowa, 697, 49 N. W. 1040, holding pension money in hands of guardian of insane person's estate not liable for expense incurred by county in support of lunatic; *Marquardt v. Mason*, 87 Iowa, 138, 54 N. W. 72, holding property purchased with pension money given by pensioner to wife exempt from his debts, whether gift valid or not; *People ex rel. Scott v. Williams*, 6 Misc. 188, 27 N. Y. Supp. 23, holding real estate purchased with pension money by soldier's widow exempt from taxation; *Reiff v. Mack*, 160 Pa. 268, 40 Am. St. Rep. 720, 28 Atl. 699, holding proceeds of pension check in bank as deposit not attachable; *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 472, 27 L. R. A. 811, 48 Am. St. Rep. 885, 39 Pac. 962, holding proceeds of insurance on exempt property, exempt from execution for reasonable time; *Cook v. Allee*, 119 Iowa, 229, 93 N. W. 93, holding property bought with proceeds of life insurance policy exempt from debts of beneficiary; *Manning v. Spry*, 121 Iowa, 195, 96 N. W. 873, holding pension money investments in hands of guardian of insane pensioner not taxable; *Smyth v. Hall*, 126 Iowa, 629, 102 N. W. 520, holding land purchased with pension money exempt, though part of the price has been paid from sale of coal rights therein; *Bednar v. Carroll*, 138 Iowa, 340, 116 N. W. 315, holding interest and profits received from pension money not exempt from taxation; *Dargan v. Williams*, 66 Neb. 5, 91 N. W. 862, holding property purchased with pension money exempt where not exceeding \$2,000.00 in value.

Cited in notes (13 L.R.A. 34) on how far proceeds of exempt property retain exempt character; (5 L.R.A.(N.S.) 473) as to whether statute exempting money "due or to become due" or "to be paid" etc. protects money after payment; (66 Am. St. Rep. 386) on exemption of proceeds of exempt personalty; (46 L. ed. U. S. 834, 835, 836) on exemption of property purchased with pension money, or of pension money after payment to pensioner.

Disapproved in *McIntosh v. Aubrey*, 185 U. S. 124, 46 L. ed. 837, 22 Sup. Ct. Rep. 561, holding real estate purchased with pension money not exempt from execution; *Ferguson's Estate*, 140 Wis. 586, 123 N. W. 123, 17 A. & E. Ann. Cas. 1189, holding property purchased with pension money, not exempt.

11 L. R. A. 113, *HARBACH v. DES MOINES & K. C. R. CO.* 80 Iowa, 593, 44 N. W. 348.

Right to injunction.

Cited in *Snyder v. Ft. Madison Street R. Co.* 105 Iowa, 292, 41 L. R. A. 349, 75 N. W. 179, upholding mandatory injunction to compel removal of improperly placed electric light pole.

Cited in note (15 L. R. A. 65) on injunction against interfering with public agency.

Actions for damages.

Cited in *Fowler v. Des Moines & K. C. R. Co.* 91 Iowa, 537, 60 N. W. 116, holding successive actions for damages will not lie against railroad for tracks laid in alley with city's permission.

Statute of limitations.

Cited in *Augusta v. Lombard*, 101 Ga. 729, 28 S. E. 994, holding statute of limitations begins to run against action for nuisance from time of accrual.

Cited in notes (20 Am. St. Rep. 178) on running of limitations as to nuisances; (36 L.R.A.(N.S.) 836) on statute of limitations as to actions by abutters against street railroads.

Damages upon condemnation.

Cited in *Van Husen v. Omaha Bridge Terminal R. Co.* 118 Iowa, 382, 92 N. W. 47, holding damages upon condemnation to be fixed as of time railroad company entered upon land.

Cited in notes (27 Am. St. Rep. 402) on damage to property without taking; (36 L.R.A.(N.S.) 803) on abutter's right to compensation for railroads in streets.

Liability of successor of street railroad to abutter.

Cited in note (16 L.R.A.(N.S.) 874) on liability of successor of railroad company for damages from construction of road in street.

11 L. R. A. 115, *WILLETT v. YOUNG*, 82 Iowa, 292, 47 N. W. 990.

Personal liability of agent intending to bind principal.

Cited in *Thilmany v. Iowa Paper Bag Co.* 108 Iowa, 363, 75 Am. St. Rep. 259, 79 N. W. 261, holding contract signed "Iowa National Bank, by William Daggett," contract of bank.

11 L. R. A. 116, *BRADFORD, E. & C. R. CO. v. NEW YORK, L. E. & W. R. CO.* 123 N. Y. 316, 25 N. E. 499.

Followed without comment in *Tonawanda Valley & C. R. Co. v. New York, L. E. & W. R. Co.* 123 N. Y. 641, 25 N. E. 503.

Breach of contract to make demand loan.

Cited in *Kelly v. Fahrney*, 38 C. C. A. 106, 97 Fed. 179, holding substantial damages not recoverable for breach of contract to loan money payable on demand; *Jones v. Vance Shoe Co.* 115 Fed. 710, holding action not maintainable for damages for breach of contract to provide loan for whatever additional capital needed to provide working fund for corporation; *Doushness v. Burger Brewing Co.* 20 App. Div. 377, 47 N. Y. Supp. 312, and *Goldsmith v. Holland Trust Co.* 5 App. Div. 107, 38 N. Y. Supp. 1032, holding plaintiff entitled to prove damages for breach of contract by defendant to make demand loan, where intention was not to enforce payment immediately; *Clark v. Howard*, 74 Hun, 233, 26 N. Y. Supp. 620, holding action not maintainable by plaintiff or third party on guaranty by defendant to latter to pay his indebtedness to plaintiff.

Cited in note (29 L.R.A.(N.S.) 196) on damages recoverable for breach of contract to lend money.

Equitable relief.

Cited in *Nutting v. Atwood*, 53 N. Y. S. R. 153, 23 N. Y. Supp. 816, holding action at law proper remedy for breach of contract of defendant to pay plaintiff certain sum when earnings of business had reached certain amount; *Richardson Shoe Machinery Co. v. Essex Mach. Co.* 207 Mass. 225, 93 N. E. 650, holding that specific performance of contract will not be enforced at suit of party, who by his acts after making of contract destroyed common purpose of the parties; *Marklove v. Utica, C. & B. R. Co.* 48 Misc. 272, 96 N. Y. Supp. 795, on difficulty of obtaining specific performance of contract where the contract has not been repudiated and the party may perform without a decree.

Cited in notes (128 Am. St. Rep. 413) on refusal of specific performance of valid contract for other reason than that property is of a particular class; (18 Eng. Rul. Cas. 289) on specific enforcement of executory agreement to borrow or lend money.

11 L. R. A. 121, *BROWN v. GUYANDOTTE*, 34 W. Va. 299, 12 S. E. 707.

Injuries by municipalities in governmental capacity.

Cited in *Charleston v. Beller*, 45 W. Va. 48, 30 S. E. 152, holding, in prosecu-

tion for violation of municipal ordinance, costs not recoverable against municipality; *Ritz v. Wheeling*, 45 W. Va. 264, 43 L. R. A. 150, 31 S. E. 993, sustaining direction of verdict for defendant, sued for death of young child drowned in city reservoir; *Bartlett v. Clarksburg*, 45 W. Va. 395, 43 L. R. A. 296, 72 Am. St. Rep. 817, 31 S. E. 918, holding incorporated town not liable for personal injuries through firing of fireworks and firearms in streets by citizens with its consent; *Wood v. Hinton*, 47 W. Va. 649, 35 S. E. 824, holding city not liable for damages caused by abatement of nuisance theretofore authorized by it; *Gray v. Griffin*, 111 Ga. 364, 51 L. R. A. 132, 36 S. E. 792, holding municipality not liable for injury to prisoner by negligent construction and maintenance of lockup; *Ulrich v. St. Louis*, 112 Mo. 148, 34 Am. St. Rep. 372, 20 S. W. 466, refusing recovery where prisoner in workhouse was kicked by vicious mule which superintendent negligently ordered him to harness; *McAuliffe v. Victor*, 15 Colo. App. 339, 62 Pac. 231, holding city not liable for injury to prisoner through negligent burning of jail; *Eddy v. Ellicottville*, 35 App. Div. 262, 54 N. Y. Supp. 800, holding village not liable for death of prisoner from pneumonia, caused by negligent care of jail; *Wilcox v. Rochester*, 190 N. Y. 145, 17 L.R.A.(N.S.) 745, 82 N. E. 1119, 13 A. & E. Ann. Cas. 759, holding city not liable for injury caused by the negligence of its employees in caring for police station and lockup; *Carty v. Winooski*, 78 Vt. 109, 2 L.R.A.(N.S.) 95, 62 Atl. 45, 6 A. & E. Ann. Cas. 436, holding city not liable for damages for death of one confined in its lockup caused by the burning of such lockup; *Shaw v. Charleston*, 57 W. Va. 434, 50 S. E. 527, 4 A. & E. Ann. Cas. 515, holding city not liable for injuries caused by the unsanitary condition of its jail, to one placed therein for violation of city ordinance.

Cited in footnote to *Wilson v. Mitchell*, 65 L.R.A. 158, which holds that municipality cannot ratify act of waterworks superintendent in wrongfully connecting well with city water mains so as to become liable for water taken from the well.

Cited in notes (36 L.R.A. 294) on prisoner's right of action for imprisonment in unlawful or unfit prison; (25 L.R.A.(N.S.) 182) on liability of municipality for tort of keeper or inmate of prison; (38 L.R.A.(N.S.) 152) on liability of municipality for death caused by negligence in the performance of a governmental function; (25 Am. St. Rep. 369) on municipal liability for negligence; (30 Am. St. Rep. 383) on liability of cities for negligence and other misconduct of officers and agents.

11 L. R. A. 122, *HITE v. WHITLEY COUNTY CT.* 91 Ky. 168, 15 S. W. 57.

Negligence in performing governmental acts.

Cited in *Vigo County v. Daily*, 132 Ind. 74, 31 N. E. 531, holding county not liable for negligence of its officers in care and control of courthouse; *Simons v. Gregory*, 120 Ky. 122, 85 S. W. 751, holding county officials not liable for damages for injuries from defective court house elevator; *Blue Grass Traction Co. v. Grover*, 135 Ky. 688, 123 S. W. 264, holding traction company under contract with county to keep bridge in repair, not liable for injuries from defective bridge; *Schneider v. Cahill*, — Ky. —, 27 L.R.A.(N.S.) 1010, 127 S. W. 143, holding contractor having charge of construction of public road, not liable for injuries to traveler from ditch left open and unguarded.

Cited in notes (36 L.R.A. 293) on prisoner's right of action for imprisonment in unhealthy or unfit prison; (2 L.R.A.(N.S.) 95) on liability of county or municipality for injuries received by confinement in unfit prison.

Injuries due to defective highways.

Cited in *Moss v. Rowlett*, 112 Ky. 128, 65 S. W. 153, holding contractor not

liable on his bond for injury to traveler due to defect in road; *Sinkhorn v. Lexington, H. & P. Turnp. Co.* 112 Ky. 210, 65 S. W. 356, holding county not liable for injury due to failure to keep leased turnpike road in repair; *Hardwick v. Franklin*, 120 Ky. 81, 85 S. W. 709, holding special commissioner having charge of construction of public bridge, not liable for injuries resulting from defective construction.

Suits against counties.

Cited in *Com. use of Devoe v. Baske*, 124 Ky. 474, 11 L.R.A.(N.S.) 1107, 99 S. W. 316, holding that taxpayer cannot maintain suit against the county to recover taxes illegally collected and subsequently paid out; *Marion County v. Rives*, 133 Ky. 483, 118 S. W. 309, holding that county cannot be sued except upon its express contract.

11 L. R. A. 123, *KINGMAN v. BROCKTON*, 153 Mass. 255, 26 N. E. 998.

What is a public purpose.

Cited in *Opinion of the Justices*, 155 Mass. 601, 15 L. R. A. 810, 30 N. E. 1142, holding legislature powerless to authorize municipalities to buy fuel to sell to inhabitants; *Atty. Gen. v. Williams*, 174 Mass. 479, 47 L. R. A. 317, 55 N. E. 77, upholding act restricting height of buildings adjacent to public park; *Opinion of the Justices*, 175 Mass. 600, 49 L. R. A. 564, 57 N. E. 675, holding public benefit only justification for appropriation for payment of services of person dying while holding public office; *Parsons v. Van Wyck*, 56 App. Div. 340, 67 N. Y. Supp. 1054, upholding act providing for erection of soldiers' and sailors' monument; *Sutherland-Innes Co. v. Evart*, 30 C. C. A. 311, 58 U. S. App. 335, 86 Fed. 603, holding legislation authorizing contract by municipality to encourage private manufacturing concern void; *Dodge v. Mission Twp.* 54 L. R. A. 247, 46 C. C. A. 667, 107 Fed. 833, holding township bonds issued to promote manufacture of sugar void.

Cited in notes (14 L. R. A. 474) on public purposes for which money may be appropriated or raised by taxation; (33 L. R. A. 119) on lease or license of public buildings for private purposes; (26 L.R.A.(N.S.) 427) on power of municipality to construct assembly, convention, exhibition or amusement hall.

Appropriations for public use.

Cited in *Young v. Falmouth*, 183 Mass. 81, 97 Am. St. Rep. 418, 66 N. E. 419, holding money appropriated for erection and maintenance of free public library appropriated for public use; *Denver v. Hallett*, 34 Colo. 407, 83 Pac. 1066, holding that city may expend moneys and issue bonds for an auditorium; *Wheelock v. Lowell*, 196 Mass. 224, 124 Am. St. Rep. 543, 81 N. E. 977, 12 A. & E. Ann. Cas. 1109, sustaining expenditure of public money for building of large hall to be used for political rallies, conventions and other public meetings; *Lowry v. Forest City*, 39 Pa. Super. Ct. 281, sustaining expenditure for alteration of public building though part thereof was rented to private parties; *Brooks v. Brooklyn*, 146 Iowa, 143, 26 L.R.A.(N.S.) 431, 124 N. W. 868, holding that city has no power to erect building designed chiefly for use as opera house, although part of building is to be used for fire department; *First State Bank v. Shallenberger*, 172 Fed. 1003, on invalidity of acts discriminating against or in favor of any special business; *Opinion of the Justices*, 186 Mass. 606, holding unconstitutional act granting bounties to veterans of the Civil War who received no bounties at time of enlistment.

11 L. R. A. 125, *TAFFT v. PRESIDIO & F. R. CO.* 84 Cal. 131, 18 Am. St. Rep. 166, 24 Pac. 436.

Transfer of stock.

Cited in *Nicholls v. Reid*, 109 Cal. 632, 42 Pac. 298, holding firm possessing undorsed certificate of stock in name of deceased member cannot sell same.

Distinguished in *Peck v. Providence Gas Co.* 17 R. I. 291, 15 L.R.A. 650, 21 Atl. 543, holding corporation protected in permitting transfer of shares by trustee and that transfer to banks was not notice to the corporation that such transfer was in pledge.

Imputed notice to principal.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

11 L. R. A. 128, *CAMPION v. CANADIAN P. R. CO.* 43 Fed. 775.

11 L. R. A. 130, *MITCHELL v. SOUTHERN P. R. CO.* 87 Cal. 62, 25 Pac. 245

Presumption of negligence.

Cited in *Bonneau v. North Shore R. Co.* 152 Cal. 410, 125 Am. St. Rep. 68, 93 Pac. 106, holding negligence presumed from overturning of train by which passenger was injured; *Kline v. Santa Barbara Consol. R. Co.* 150 Cal. 747, 90 Pac. 125, holding that proof of injury to passenger during transportation casts upon carrier burden of rebutting presumption of negligence unless plaintiff's own proof tends to overcome it; *Roberts v. Sierra R. Co.* 14 Cal. App. 195, 11 Pac. 519, holding that presumption of negligence arises from proof of injury of passenger from derailment of car; *Knuckey v. Butte Electric R. Co.* 41 Mont. 324, 109 Pac. 979, holding that mere fact that passenger was injured while on journey is not sufficient to raise presumption of negligence on part of carrier.

Cited in notes (15 L.R.A. 36) on presumption of negligence from occurrence of accident; (22 Am. St. Rep. 789) on burden of proving carrier's negligence; (113 Am. St. Rep. 1027) on presumption of negligence from happening of accident causing personal injuries.

Contributory negligence of passenger.

Cited in *Thomas v. San Pedro, L. A. & S. L. R. Co.* 95 C. C. A. 371, 170 Fed. 131, holding that riding on platform of car is not necessarily negligence as a matter of law; *Priutt v. San Pedro, L. A. & S. L. R. Co.* 161 Cal. 34, 36 L.R.A. (N.S.) 334, 118 Pac. 223, holding that passenger who goes upon platform to avoid anticipated danger is not guilty of contributory negligence.

Cited in footnotes to *Fisher v. West Virginia & P. R. Co.* 33 L. R. A. 69, which holds riding on car, platform and refusing to go inside at request negligence; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 34 L. R. A. 141, which holds it negligence to go on lower step of rapidly moving railroad car to vomit; *Graham v. McNeill*, 43 L. R. A. 300, which holds riding on platform when no vacant seats inside not negligence *per se*; *Gannon v. New York, N. H. & H. R. Co.* 43 L. R. A. 833, which holds carrier liable for injury to passenger while impulsively trying to escape from car in which oil lamp caught fire; *Tuttle v. Atlantic City R. Co.* 54 L. R. A. 582, which authorizes recovery for fall while trying to escape from derailed car; *Benedict v. Minneapolis & St. L. R. Co.* 57 L. R. A. 639, which holds exposure of body beyond side of moving train, by passenger on platform, negligence; *Jackson v. Natchez & W. R. Co.* 70 L.R.A. 294, which holds excursionists not negligent in riding home on platform of train taking them out if no safer position can be obtained because of crowd; *Morgan v. Lake Shore & M. S. R. Co.* 70 L.R.A. 609, which holds it not negligence *per se* for passenger on crowded

train to seek relief on platform on becoming sick from lack of proper ventilation and tobacco smoke.

Conduct of passengers during impending danger.

Cited in *Holman v. Union Street R. Co.* 114 Mich. 212, 72 N. W. 202, holding evidence of what passengers other than plaintiff did to avoid danger of collision admissible.

Cited in footnote to *Palmer v. Warren Street R. Co.* 63 L.R.A. 507, which holds passenger not negligent in jumping from moving car to avoid impending collision.

Cited in note (37 L.R.A.(N.S.) 48) on care required in sudden emergency.

Distinguished in *Cincinnati L. & A. Electric Street R. Co. v. Lohe*, 68 Ohio St. 111, 67 N. E. 161, holding interurban railroad not liable for negligent derailment of car causing death of passenger warned off platform.

11 L. R. A. 134, *FLICKINGER v. SHAW*, 87 Cal. 126, 22 Am. St. Rep. 234, 25 Pac. 268.

Revocability of license.

Cited in *Blankenship v. Whaley*, 124 Cal. 304, 57 Pac. 79, holding executed parol agreement for enlargement and use of ditch enforceable against subsequent purchaser of land on which ditch is located with notice; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 736, Affirming 88 Fed. 745, and *Los Angeles v. Los Angeles City Water Co.* 124 Cal. 379, 57 Pac. 210, holding city could not withdraw consent to taking of certain quantity of water from river after long acquiescence, and expenditure of large sums of money by waterworks company in reliance thereon; *Wallace v. Dodd*, 136 Cal. 211, 68 Pac. 693, holding mortgagee permitting nursery stock to remain on premises after expiration of redemption period cannot refuse to allow its removal; *Stoner v. Zucker*, 148 Cal. 519, 113 Am. St. Rep. 301, 83 Pac. 808, 7 A. & E. Ann. Cas. 704, holding irrevocable license to enter upon land pursuant to which money or labor has been expended in its execution; *Maple Orchard Grove & Vineyard Co. v. Marshall*, 27 Utah, 220, 75 Pac. 369, holding parol license to construct pipe line for irrigation purposes irrevocable after the line has been constructed pursuant thereto; *Sloan v. Glancy*, 19 Mont. 76, 47 Pac. 334, holding that parol agreement as to use of water from ditch, based upon valuable consideration and acted upon for a long time passes with a grant of the land; *Churchill v. Russell*, 148 Cal. 5, 82 Pac. 440, holding parol contract for transfer of water right enforceable in equity where transfer under it has been executed; *Foster v. Bear Valley Irrig. Co.* 65 Fed. 845; *Bree v. Wheeler*, 4 Cal. App. 112, 87 Pac. 255,—holding parol agreement as to water rights enforceable in equity, where the parties have acted pursuant to it; *Title Guarantee & T. Co. v. New York Juvenile Asylum*, 133 App. Div. 547, 118 N. Y. Supp. 302 (dissenting opinion), on enforcement of parol grant of easement where money has been expended in reliance thereon.

Cited in notes (49 L.R.A. 512, 524) on revocability of license to maintain burden on land after licensee has incurred expense in creating burden; (33 L.R.A. (N.S.) 534) on specific performance of oral contract to convey in consideration of making improvements, where possession not taken; (136 Am. St. Rep. 692) on parol grant of easements appurtenant perfected by part performance; (18 Eng. Rul. Cas. 80) on revocability of license.

Distinguished in *Grieseza v. Terwilliger*, 144 Cal. 462, 77 Pac. 1034, on abandonment of water right.

11 L. R. A. 136, *SEABURY v. CROWELL*, 52 N. J. L. 413, 21 Atl. 952.

Partnership agreements.

Cited in *Meehan v. Valentine*, 145 U. S. 623, 36 L. ed. 841, 12 Sup. Ct. Rep.

972, holding lender of money to partnership, receiving contingent percentage of profits in addition to interest, not liable for partnership debts; *Jernee v. Simonson*, 58 N. J. Eq. 289, 43 Atl. 370, holding mere agreement to divide profits not partnership *inter esse*, in absence of showing of such intention; *Webster v. Clark*, 34 Fla. 644, 27 L. R. A. 128, footnote, p. 126, 43 Am. St. Rep. 217, 16 So. 601, and *Carey v. Marshall*, 67 N. J. L. 238, 51 Atl. 698, holding person held out as partner not liable to one having no knowledge thereof; *Rider v. Hammell*, 63 Kan. 738, 66 Pac. 1026, holding agreement not giving parties joint interest in business and profits not a partnership; *Waggoner v. First Nat. Bank*, 43 Neb. 92, 61 N. W. 112, holding question for jury where facts necessary to constitute partnership are disputed; *Sheldon v. Bigelow*, 118 Iowa, 590, 92 N. Y. 701, holding that one holding himself out as a partner is not liable as such unless the party alleging liability had knowledge of such holding out; *Jackson v. Hooper*, 76 N. J. Eq. 195, 74 Atl. 130, holding that there can be no partnership unless agreement contemplates an agency whereby each is agent for the other or others.

Cited in footnotes to *Dutcher v. Buck*, 20 L. R. A. 776, which holds partnership created between landowner and one cutting timber under contract for equal division of profits; *Webster v. Clark*, 27 L. R. A. 126, which holds person held out as partner not liable to one having no knowledge thereof; *Shrum v. Simpson*, 49 L. R. A. 792, which holds no partnership created by contract for working farm and dividing proceeds; *Willis v. Crawford*, 53 L. R. A. 904, which holds undertaking by two lawyers to conduct litigation for client does not make special partners authorizing suit for accounting; *Brandon v. Connor*, 63 L.R.A. 260, which holds partnership as to third persons constituted by agreement with contractors for construction of railroad to furnish services and part of necessary animals for use.

Cited in notes (20 L.R.A. 598) on proof against one person of declarations by another to show partnership; (18 L.R.A.(N.S.) 988, 989, 1067, 1079, 1083) on effect of agreement to share profits to create partnership.

Costs.

Cited in *Smith v. Holshauer*, 68 N. J. L. 138, 52 Atl. 308, on costs in certiorari proceedings under statute.

11 L. R. A. 138, **HIGGINS v. MINAGHAN**, 78 Wis. 602, 23 Am. St. Rep. 428, 47 N. W. 941.

Unlawfulness of charivari gatherings.

Cited in *Gilmore v. Fuller*, 198 Ill. 137, 60 L. R. A. 289, footnote, p. 286, 65 N. E. 84, holding participant in charivari party cannot recover for personal injuries received through negligence of another participant; *Cherryvale v. Hawman*, 80 Kan. 174, 23 L.R.A.(N.S.) 647, 133 Am. St. Rep. 195, 101 Pac. 994, holding charivari party to be a "mob" within meaning of statute making city liable for damages from mob violence.

Provocation as defense to assault.

Cited in note (38 L.R.A.(N.S.) 518) on provocation less than an assault as a defense to a civil action for an assault and battery.

Private right of resistance to riotous attack.

Cited in note (23 Eng. Rul. Cas. 140) as to private right of resistance to riotous attack.

Right to use deadly weapon in resisting trespass.

Cited in note (22 L.R.A.(N.S.) 727) on right to use deadly weapon in resisting trespass.

11 L. R. A. 141, *NEW ORLEANS v. ROBIRA*, 42 La. Ann. 1098, 8 So. 402.

Burden of establishing exemption from taxation.

Cited in *Louisiana & N. W. R. Co. v. State Appraisers*, 108 La. 19, 32 So. 184, holding road lacking but 20 per cent of completion substantially completed, so as not to entitle it to exemption from taxation; *Gast v. Board of Assessors*, 43 La. Ann. 1108, 10 So. 184, holding manufacturers of wire furniture not exempt under law exempting manufacturers of furniture and other articles of wood.

Cited in footnote to *Springfield v. Smith*, 37 L. R. A. 446, which denies implied exemption from license tax by contract giving street railway company right to operate road for term of years.

Property subject to taxation.

Cited in *State v. New Orleans R. & Light Co.* 116 La. 148, 40 So. 597, 7 A. & E. Ann. Cas. 724, holding that electric company is not a "manufacturer" within meaning of occupation tax law; *Rees-Scott Co. v. New Orleans*, 124 La. 157, 49 So. 1012, holding staves held in the state for an indefinite period liable to taxation, though intended for export; *Frankel v. German Tyrolean Alps Co.* 121 Mo. App. 56, 97 S. W. 961, on "photography" as not a "mechanical process" within meaning of exemption statute.

Presumptive constitutionality of statute.

Cited in *State ex rel. Hensley v. Plasters*, 74 Neb. 665, 3 L.R.A.(N.S.) 894, 105 N. W. 1092, 13 A. & E. Ann. Cas. 154 (dissenting opinion), on presumption in favor of constitutionality of legislative act.

11 L. R. A. 143; *LEWIS v. WOOD*, 153 Mass. 321, 26 N. E. 862.

11 L. R. A. 144, *McCARTHY v. NEW ENGLAND O. OF P.* 153 Mass. 314, 25 Am. St. Rep. 637, 26 N. E. 866.

Relation of dependency.

Cited in *Sargent v. Supreme Lodge, K. of H.* 158 Mass. 564, 33 N. E. 650, holding person falsely designated as "dependent" upon insured not entitled to proceeds of certificate; *Lavigne v. Ligue des Patriotes*, 178 Mass. 29, 54 L. R. A. 816, 86 Am. St. Rep. 460, 59 N. E. 674, holding no relation of dependency exists between child and putative father; *Alexander v. Parker*, 144 Ill. 364, 19 L. R. A. 193, 33 N. E. 183, holding question for jury whether affianced wife dependent upon insured; *Supreme Lodge, A. O. U. W. v. Hutchinson*, 6 Ind. App. 409, 33 N. E. 816, holding beneficiary living with insured as wife, without knowledge that he had a lawful wife living, entitled to proceeds of policy; *Ownby v. Supreme Lodge K. of H.* 101 Tenn. 19, 46 S. W. 758, holding child to whom insured had made presents, but who was not related to him, not dependent upon him; *Royal League v. Shields*, 251 Ill. 254, 36 L.R.A.(N.S.) 211, 96 N. E. 45, holding that girl not daughter by nature or adoption of member of benefit society and neither related to him nor ever member of his household is not "dependent" within meaning of benefit society law; *Royal League v. Shields*, 159 Ill. App. 62, holding that stranger, who holds no relationship to member and to whom member owes no legal obligation of support is not eligible as beneficiary under statute of classification; *Wilber v. Supreme Lodge New England O. of P.* 192 Mass. 479, 78 N. E. 445, holding sister-in-law living with insured, but contributing her earnings to a common fund for maintaining the family, dependent within meaning of statute; *Goff v. Supreme Lodge, R. A.* 90 Neb. 585, 37 L.R.A.(N.S.) 1195, 134 N. W. 239, holding that woman performing duties of housekeeper for member of fraternal order, under agreement that he will support her and at his death leave her his estate, is eligible as beneficiary in his certificate of mem-

bership; *Federkiewicz v. National Slavonic Soc.* 59 Pittsb. L. J. 512, holding that boarding house mistress with whom member of benefit society lived was not a "dependent" within meaning of by-law; *Crosby v. Ball*, 4 Ont. L. Rep. 499, holding woman living with man in belief that she was his wife entitled to proceeds of policy as "dependent" as against insured's real wife; *Morey v. Monk*, 145 Ala. 305, 40 So. 411, holding stepson, of age and married and earning a good salary not a "dependent;" *Caldwell v. Grand Lodge*, U. W. 148 Cal. 197, 2 L.R.A.(N.S.) 656, 113 Am. St. Rep. 219, 82 Pac. 781, 7 A. & E. Ann. Cas. 356, holding woman, not a relative whose only claim was a promise that insured would support her during his life time, and who had a husband capable of caring for her, not a "dependent."

Cited in notes (19 L.R.A. 188) on validity of life insurance for benefit of betrothed wife; (2 L.R.A.(N.S.) 654) as to who may be considered as "dependent" within restrictions as to beneficiaries of benefit associations; (52 Am. St. Rep. 560, 571) on dependency of beneficiary of mutual or membership life or accident insurance.

Distinguished in *Modern Woodmen v. Comeaux*, 79 Kan. 497, 25 L.R.A.(N.S.) 817, 101 Pac. 1, 17 A. & E. Ann. Cas. 865, holding hotelkeeper with whom insured stayed under agreement that he was to be the beneficiary of a benefit certificate, not a "dependent" within rules of the order.

— **Massachusetts employers' liability act.**

Cited in *Daly v. New Jersey Steel & Iron Co.* 155 Mass. 5, 29 N. E. 507, holding invalid sister receiving on average over \$30 a month from brother dependent within meaning of employers' liability act; *Welch v. New York, N H. & H. R. Co.* 176 Mass. 401, 57 N. E. 668, holding mother receiving all wages of her son may be found dependent within liability act of 1887, although also receiving money from husband; *Mulhall v. Fallon*, 176 Mass. 267, 54 L. R. A. 938, 79 Am. St. Rep. 309, 57 N. E. 386, holding partial dependence for necessities of life sufficient to support action for death without conscious suffering; *Hodnett v. Boston & A. R. Co.* 156 Mass. 87, 30 N. E. 224, holding receiving money from half brother for support, and every other week to pay rent, not sufficient to establish dependence upon him.

Procedure for change of beneficiary.

Cited in *Independent Foresters v. Kelisher*, 36 Or. 507, 78 Am. St. Rep. 785, 59 Pac. 324, holding rules of benefit association must be complied with to change beneficiary; *Clark v. Supreme Council R. A.* 176 Mass. 471, 57 N. E. 787, holding widow not named as beneficiary could not recover proceeds of husband's certificate, although she had paid premiums supposing she had been so named; *Abbott v. Supreme Colony U. O. of P. F.* 190 Mass. 69, 76 N. E. 234; *St. Louis Police Relief Asso. v. Tierney*, 116 Mo. App. 470, 91 S. W. 968,—holding strict compliance with rules of society governing change of beneficiary essential unless waived by the society; *French v. Provident Sav. Life Assur. Soc.* 205 Mass. 428, 91 N. E. 577, holding that change of beneficiary is not effected unless rules of society are complied with; *Brown v. Ancient Order of U. W.* 208 Pa. 104, 57 Atl. 176, on right of member of benefit society to change beneficiary by complying with rules of the society.

Cited in notes (52 Am. St. Rep. 563) on change of beneficiary of mutual life or accident insurance; (4 L.R.A.(N.S.) 942) on right to change beneficiary by will.

Remedy of contestants for proceeds of benefit certificate.

Cited in *Pease v. Supreme Assembly Royal Soc. of G. F.* 176 Mass. 507, 57 N. E. 1003, holding bill in equity proper to determine rights of contestants for proceeds of benefit certificate, association admitting liability.

Insurable interest in life.

Cited in footnote to *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as not having insurable interest.

11 L. R. A. 146, *THOMPSON v. LOUISVILLE & N. R. CO.* 91 Ala. 496, 8 So. 406.

Cause of injury or death.

Cited in *Postal Teleg. Cable Co. v. Hulsey*, 132 Ala. 462, 31 So. 527, holding rebreaking of leg while injured person was turning in bed to keep from vomiting, natural result of first breaking; *Koeh v. Fox*, 71 App. Div. 298, 75 N. Y. Supp. 913, holding person negligently causing injury producing insanity liable for death of lunatic caused by his own acts; *Pautz v. Plankinton Packing Co.* 118 Wis. 51, 94 N. W. 654, holding defective wooden wheel, causing iron wheel to break, proximate cause of resulting injury; *Home Teleph. Co. v. Fields*, 150 Ala. 314, 43 So. 711, holding that where electric wire was left hanging loose in proximity to a fence, the company was liable for injury therefrom though some one may have fastened the loose wire to the fence; *Guenther v. Metropolitan R. Co.* 23 App. D. C. 516, holding injury to be cause of death though deceased had heart disease which would eventually have caused death; *Cudahy Packing Co. v. Broadbent*, 70 Kan. 541, 79 Pac. 126, holding that under general allegation of negligence causing the fracture of plaintiff's leg, evidence is admissible showing that after the leg was first set, it had to be rebroken and reset; *Alabama G. S. R. Co. v. Vail*, 155 Ala. 388, 46 So. 587, as discussing proximate and remote cause; *Scherer v. Schlager*, 18 N. D. 437, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, on cause where two or more acts unite in contributing to an injury; *Murphy v. Southern P. Co.* 31 Nev. 135, 101 Pac. 322, 21 Ann. Cas. 502, to the point that railroad was liable in action for injury "resulting" in death, where employee was mortally injured in accident and afterwards by mistake was given poison.

Cited in footnotes to *People v. Lewis*, 45 L. R. A. 733, which holds suicide of person mortally wounded does not relieve assailant from guilt of manslaughter; *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors, blown on track by severe gale, not proximate cause of derailment of engine.

Cited in notes (12 L. R. A. 283) on causal connection broken by intervening agency; (17 L. R. A. 76) on contributive causes of death.

Degree of proof required in civil action.

Cited in *Louisville & N. R. Co. v. Davis*, 99 Ala. 603, 12 So. 786, and *Rowe v. Baber*, 93 Ala. 426, 8 So. 865, holding erroneous, instruction that if proof leaves disputed fact in doubt, to find against one asserting it; *Battles v. Tallman*, 96 Ala. 406, 11 So. 247, holding jury in civil case not bound to be without doubt and with "abiding conviction" that fact has been established before finding its establishment.

Exemplary and punitive damages.

Cited in note (17 L. R. A. 73) on measure of recovery for death caused by negligence.

11 L. R. A. 148, *ROSS v. PARKS*, 93 Ala. 153, 30 Am. St. Rep. 47, 8 So. 368.

Specific enforcement of contract.

Cited in *Christian & C. Grocery Co. v. Bienville Water Supply Co.* 106 Ala. 128, 17 So. 352, holding contract with consumer to supply water, with optional provision accepted by consumer, specifically enforceable; *McPherson v. Fargo*, 10 S. D. 616, 66 Am. St. Rep. 723, 74 N. W. 1057, holding written contract for

sale of land, signed by vendor, accepted and recorded although not signed by vendee, specifically enforceable; *Chadsey v. Condley*, 62 Kan. 855, 62 Pac. 663, holding optional and unilateral contract to sell becomes enforceable upon acceptance by vendee; *Laughead v. Beale*, 24 Pa. Co. Ct. 474, holding, if third person purchase property with notice of option, he may be compelled to convey to person having option; *Marthinson v. King*, 82 C. C. A. 360, 150 Fed. 51; *Mier v. Hadden*, 148 Mich. 495, 118 Am. St. Rep. 586, 111 N. W. 1040, 12 A. & E. Ann. Cas. 88; *Jones v. Barnes*, 105 App. Div. 291, 94 N. Y. Supp. 695,—holding that specific performance of promise to sell based upon valuable consideration may be decreed where promisee tenders the purchase price; *Johnson v. Wilkerson*, 96 Ark. 324, 131 S. W. 690, holding that one consideration is sufficient to support several undertakings; *Smith v. Bangham*, 156 Cal. 364, 28 L.R.A.(N.S.) 526, 104 Pac. 689, holding inadequacy of consideration for option immaterial in action for specific performance where consideration for sale is adequate; *Rease v. Kittle*, 56 W. Va. 275, 49 S. E. 150, denying specific performance of an offer to sell based upon valuable consideration where plaintiff was an assignee of the holder of option to purchase; *Frank v. Stratford-Handcock*, 13 Wyo. 55, 67 L.R.A. 576, 110 Am. St. Rep. 963, 77 Pac. 134, on specific performance of agreement to sell, though there was no obligation to purchase; *Marsh v. Lott*, 8 Cal. App. 389, 97 Pac. 163, on option to sell based upon valuable consideration being enforceable if accepted within time limited.

Cited in notes (21 L.R.A. 132) on rights conferred by "refusal" or "option;" (6 L.R.A.(N.S.) 398) on right of party, not bound because he did not sign contract, to enforce specific performance; (6 L.R.A.(N.S.) 404) on right to specific performance of option as affected by lack of mutuality; (118 Am. St. Rep. 592, 601) on specific performance of options.

— Sufficiency of writing.

Cited in *Gann v. Long*, 2 Ala. App. 277, 56 So. 606, holding that contract to sell cotton to be paid for at certain price and acceptance of memorandum, which was signed only by vendor is complete and binding contract; *Sprague v. Schotte*, 48 Or. 611, 87 Pac. 1046, holding writing by which signer agrees to sell for a certain sum before a specified date, and to give sufficient conveyance thereof, not a contract.

11 L. R. A. 149, *FLOWER v. BARNEKOFF*, 20 Or. 132, 25 Pac. 370.

Parol partnership agreement.

Cited in *Willis v. Crawford*, 38 Or. 526, 53 L. R. A. 906, 63 Pac. 985, holding attorney's agreement to share profits of litigation, clients to bear expense, not a partnership as to such litigation in absence of an understanding; *Davenport v. Buchanan*, 6 S. D. 381, 61 N. W. 47, holding parol agreement to purchase real property and to share expenses and profits of resale, special partnership not within statute of frauds; *Case v. Seger*, 4 Wash. 494, 30 Pac. 646, upholding parol partnership agreement to become interested in buying and improving real estate for resale; *Jones v. Patrick*, 140 Fed. 406, holding that agreement to share in profits of speculation in land need not be in writing; *Garth v. Davis*, 120 Ky. 110, 117 Am. St. Rep. 571, 85 S. W. 692, on reason for rule sustaining parol agreement for partnership to deal in lands; *Bond v. Taylor*, 68 W. Va. 327, 49 S. E. 1000, holding that verbal contract of partnership to deal in real estate is not within the statute of frauds.

Cited in notes (16 L. R. A. 749) on validity of parol partnership for dealing in lands; (27 L. R. A. 466) on when real estate will be considered partnership

property; (102 Am. St. Rep. 239; 4 L.R.A.(N.S.) 429) on validity of parol partnership to deal in real property.

Distinguished in *Dodson v. Dodson*, 26 Or. 362, 37 Pac. 542, holding parol partnership agreement for interest in realty, for which nothing was paid by partnership, invalid.

Elements of partnership.

Cited in *Wheeler v. Lack*, 37 Or. 244, 61 Pac. 849, holding agreement to divide commissions, without provision for dividing losses or expenses, not a partnership; *Hanthorn v. Quinn*, 42 Or. 8, 69 Pac. 817, holding lease of fishery grounds, lessee to advance certain moneys, lessor to receive half of net proceeds, each to bear half cost of improvements, etc., not partnership agreement; *Williamson v. Nigh*, 58 W. Va. 636, 53 S. E. 124, holding that agreement by which one is to furnish the capital and the other the labor in purchasing and delivering logs, the profits or losses to be shared constitutes a partnership; *North Pacific Lumber Co. v. Spore*, 44 Or. 470, 75 Pac. 890, holding that, as regards the parties thereto actual intent is necessary to the formation of a partnership.

Cited in footnotes to *Shrum v. Simpson*, 49 L. R. A. 792, which holds no partnership created by contract for working farm and dividing proceeds; *Brandon v. Connor*, 63 L.R.A. 260, which holds partnership as to third persons constituted by agreement with contractors for construction of railroad to furnish services and part of necessary animals for use.

Cited in notes (115 Am. St. Rep. 409, 431) on what constitutes a partnership; (5 L.R.A.(N.S.) 505) on what constitutes a partnership to deal in real estate; (18 L.R.A.(N.S.) 976, 978, 982, 993, 1030, 1033, 1085) on effect of agreement to share profits to create partnership.

11 L. R. A. 155, *MORRILL v. MORRILL*, 20 Or. 96, 25 Am. St. Rep. 95, 25 Pac. 362.

Collateral attack upon judgments.

Cited in *McCulloch v. Estes*, 20 Or. 351, 25 Pac. 725, 25 Pac. 724, holding defect or irregularity of guardian's sale not jurisdictional, cannot be taken advantage of collaterally; *Finley v. Houser*, 22 Or. 565, 30 Pac. 494, holding judgment of court having jurisdiction cannot be attacked collaterally; *Meinert v. Harder*, 39 Or. 618, 65 Pac. 1056, holding judgment cannot be attacked collaterally as to insufficiency of notice, record showing colorable notice; *Cochrane v. Parker*, 12 Colo. App. 174, 54 Pac. 1027, holding judgment of appellate court in favor of plaintiff, dead when rendered, cannot be attacked collaterally; *Chudleigh v. Chicago, R. I. & P. R. Co.* 51 Ill. App. 495, holding infant cannot attack collaterally judgment obtained by his legal representative; *Weeks v. McPhail*, 128 N. C. 133, 38 S. E. 472, holding judgment cannot be impeached collaterally, although party complaining be lunatic or infant at rendition; *Lovitt v. Russell*, 138 Mo. 483, 40 S. W. 123, holding, in action to quiet title, title of purchaser at execution sale cannot be attacked for irregularities not jurisdictional; *Edgerton v. Edgerton*, 12 Mont. 149, 16 L. R. A. 103, 33 Am. St. Rep. 557, 29 Pac. 966, holding decree of divorce, valid on face, cannot be attacked in action by wife for maintenance; *Hovey v. Elliott*, 145 N. Y. 143, 39 L. R. A. 463, 39 N. E. 841, holding decree, void for want of jurisdiction, open to collateral attack; *Johnson v. Stebbins-Thompson Realty Co.* 167 Mo. 341, 66 S. W. 933, holding grantee of land of corporation, in action to set aside deed, cannot attack judgment against corporation upon which plaintiff bases his suit; *Kalb v. German Sav. & L. Soc.* 25 Wash. 353, 87 Am. St. Rep. 757, 65 Pac. 559, holding infant's action seeking to be decreed tenant in common, against prior decree quieting defendant's title, collateral at-

tack thereon; *Peyton v. Peyton*, 28 Wash. 300, 68 Pac. 757, holding action to secure separate maintenance, collateral attack on prior divorce decree; *Coffin v. Bell*, 22 Nev. 185, 58 Am. St. Rep. 738, 37 Pac. 240, holding action to quiet title by successor to owner, direct attack upon voidable judgment of sale against first owner, ground being lack of jurisdiction; *McFarlane v. Cornelius*, 43 Or. 528, 73 Pac. 325, holding divorce decree warranted upon facts alleged in complaint not open to collateral attack; *Baker v. Williams Bkg. Co.* 42 Or. 218, 70 Pac. 711, holding order, upon petition of creditor, passing upon validity of claim in receivership matter, conclusive upon parties as to right to participate; *Hoover v. Bartlett*, 42 Or. 146, 70 Pac. 378, holding action in equity not maintainable to set aside judgment based solely upon void decree; *Weiss v. Coudrey*, 102 Mo. App. 68, 76 S. W. 730, holding action maintainable to vacate judgment against minor obtained without appointment of guardian; *Stevens v. County Comrs.* 97 Me. 125, 53 Atl. 985, holding record conclusive, in certiorari, to quash proceedings before commissioners in matter of laying out road; *Handley v. Jackson*, 31 Or. 556, 65 Am. St. Rep. 839, 50 Pac. 915, holding equity may restrain enforcement of unconscionable judgment of sale of property, procured through fraud, accident, or unavoidable mistake; *Belle v. Brown*, 37 Or. 593, 61 Pac. 1024, holding partition judgment, in absence of actual fraud, not open to collateral attack in equity; *Smith v. Morrill*, 12 Colo. App. 238, 55 Pac. 824, holding proceeding to enjoin enforcement of judgment on ground of no service of summons maintainable as direct attack thereon; *Mosby v. Gisborn*, 17 Utah, 279, 54 Pac. 121, holding suit to annul decree for fraud maintainable as direct attack thereon; *Ebner v. Heid*, 2 Alaska, 605, holding that parties or their privies cannot collaterally attack a judgment for fraud aliunde the record; *Baldwin v. Foster*, 157 Cal. 648, 108 Pac. 714, holding that objection that single referee was appointed instead of three cannot be collaterally urged under section 797 of Code of Civil Procedure; *Stewart Lumber Co. v. Downs*, 142 Iowa, 422, 29 L.R.A.(N.S.) 1191, 120 N. W. 1067, holding that third party may attack a judgment by independent suit upon showing of fraud and collusion; *Cohen v. Portland Lodge No. 142*, B. P. O. E. 144 Fed. 268, holding that suit to redeem by party to foreclosure suit on ground that he was not properly served with notice, is a collateral attack; *McKinney v. Adams*, 95 Miss. 845, 50 So. 474, holding that collateral attack on judgment is any proceeding to impeach judgment which is not instituted for express purpose of annulling, correcting, modifying such judgment or enjoining its execution; *State ex rel. Dorgan v. Fisk*, 15 N. D. 225, 107 N. W. 191, holding writ of prohibition to be direct attack; *Smith v. Whiting*, 55 Or. 397, 106 Pac. 791, holding that action in ejectment to recover land claimed by defendant under administrator's sale is collateral attack upon order of sale; *Mansfield v. Hill*, 56 Or. 408, 107 Pac. 471, holding that probate of will by court of competent jurisdiction cannot be collaterally attacked.

Annotation cited in *McHenry v. State*, 91 Miss. 578, 16 L.R.A.(N.S.) 1070, 44 So. 831, on want of authority under jurisdiction conferred.

Cited in notes (23 Am. St. Rep. 118) on collateral attack upon judgment; (55 Am. St. Rep. 269) on validity of unauthorized sentence on collateral attack, by habeas corpus, on excessive sentence; (60 Am. St. Rep. 642) on vacation of judgments on motion when not specially authorized by statute; (87 Am. St. Rep. 169) on release of prisoner on habeas corpus after judgment and sentence; (124 Am. St. Rep. 768) on collateral attack on judgment because of false return of service by sheriff; (36 L.R.A.(N.S.) 986) on character and kinds of judgments and orders not collaterally assailable for fraud not affecting jurisdiction.

Distinguished in *Saylor v. Commonwealth Bkg. Co.* 38 Or. 210, 62 Pac. 652, holding fraudulent default judgment, void on its face, may be attacked collaterally.

Conclusiveness of judgments.

Cited in *Crabill v. Crabill*, 22 Or. 590, 30 Pac. 320, holding judgment of court having jurisdiction conclusive on parties until reversed in direct proceeding; *Ruckman v. Union R. Co.* 45 Or. 581, 69 L.R.A. 482, 78 Pac. 748, holding that judgment on the merits is a bar to subsequent action between the same parties upon the same claim as to any matter which might have been litigated in such prior action.

Cited in footnote to *Draper v. Medlock*, 69 L.R.A. 483, which holds burden of proving that particular matter in controversy was necessarily or actually determined in former litigation upon party pleading judgment as an estoppel.

Cited in notes (27 Am. St. Rep. 839) on relief in equity from judgment; (29 Am. St. Rep. 791) on who are estopped by judgments; (101 Am. St. Rep. 872; 124 Am. St. Rep. 714) on conclusiveness of judgment in partition suit; (111 Am. St. Rep. 948) on issuing of writ of prohibition because of acts in excess of jurisdiction; (124 Am. St. Rep. 757, 767) on relief in equity from judgment based on false return of service by sheriff; (11 Eng. Rul. Cas. 15) on estoppel by judgment.

Adverse possession by tenant in common.

Cited in *Beers v. Sharpe*, 44 Or. 394, 75 Pac. 717, holding actual ouster necessary before possession can become adverse to a cotenant; *Roberts v. Templeton*, 48 Or. 67, 3 L.R.A. (N.S.) 792, 80 Pac. 481, holding that possession by a tenant in common is presumed to be for the benefit of his cotenants.

11 L. R. A. 162, *POSNETT v. MARBLE*, 62 Vt. 481, 22 Am. St. Rep. 126, 20 Atl. 813.

Plea of good faith.

Cited in *Smith v. Johnson*, 69 Vt. 233, 39 Atl. 198, holding plea to declaration in slander defective for not alleging truth of words, where defendant must have known whether they were true.

Offense of keeping house of ill fame.

Cited in *State v. Plant*, 67 Vt. 458, 48 Am. St. Rep. 821, 32 Atl. 237, holding reputation of house not an element of offense of keeping house of ill fame.

Practice in supreme court on motion to arrest.

Cited in *Baker v. Sherman*, 73 Vt. 32, 50 Atl. 633, holding, on motion to arrest judgment for insufficient declaration, defendant entitled to costs in supreme and lower court; *Dean v. Cass*, 73 Vt. 316, 50 Atl. 1085, granting plaintiff new trial on terms on motion to arrest, as alternative; *Rowley v. Shepardson*, 83 Vt. 173, 138 Am. St. Rep. 1078, 74 Atl. 1002, holding that where verdict is rendered on all counts, one of which is insufficient, motion in arrest will be granted unless venire de novo is accepted.

Distinguished in *Massucco v. Tomassi*, 80 Vt. 194, 67 Atl. 551, holding motion to arrest not sustainable upon sole ground that the counts are not all for the same cause of action.

Actions for slander and libel.

Cited in *Logan v. Hodges*, 146 N. C. 40, 59 S. E. 349, 14 A. & E. Ann. Cas. 103, holding that words charging a felony are actionable per se; *Gordon v. Journal Pub. Co.* 81 Vt. 244, 69 Atl. 742, holding that charge of "unprovoked and brutal assault" cannot by innuendo be extended to charge an assault with intent to kill; *Gordon v. Journal Pub. Co.* 81 Vt. 243, 69 Atl. 742, on necessity of showing that defamatory words referred to plaintiff.

Cited in notes (24 L.R.A.(N.S.) 585, 604) on slander and libel in charging woman with unchastity; (9 Eng. Rul. Cas. 96) on necessity of pleading and proving actual words used in action for libel or slander.

Privileged communications.

Cited in *Coleman v. MacLennan*, 78 Kan. 729, 20 L.R.A.(N.S.) 372, 130 Am. St. Rep. 390, 98 Pac. 281, holding newspaper comment on candidate for office privileged unless malice be shown.

Cited in notes (104 Am. St. Rep. 145) on what libelous statements are privileged; (27 L.R.A.(N.S.) 1042) on privileged character of complaints to public officer against subordinate; (9 Eng. Rul. Cas. 82) as to what communications enjoy a qualified privilege.

11 L. R. A. 166, *WALLACE v. WALSH*, 125 N. Y. 26, 25 N. E. 1076.

Corporation reports.

Cited in *Whitney v. Cammann*, 137 N. Y. 344, 33 N. E. 305, holding mere making of report, neglecting to file, insufficient compliance with statute; *Manhattan Co. v. Kaldenberg*, 165 N. Y. 12, 58 N. E. 790, Reversing 27 App. Div. 36, 50 N. Y. Supp. 265, and *Noble v. Euler*, 20 App. Div. 552, 47 N. Y. Supp. 302, holding report verified by president acting also as secretary and treasurer, substantial compliance with statute requiring verification by two of such officers; *Uptegrove v. Schwarzwaelder*, 46 App. Div. 25, 61 N. Y. Supp. 623, holding report filed in office of secretary of state and county, of changed place of business of corporation, no certificate of change being filed, sufficient; *Lilienthal v. Betz*, 61 App. Div. 604, 70 N. Y. Supp. 920, holding report that corporation assets did not exceed certain sum not compliance with statute requiring report to state amount; *Western Nat. Bank v. Faber*, 29 Misc. 472, 62 N. Y. Supp. 82, holding annual report made in good faith, dated January 25, sufficient, though not in terms speaking as of January 1; *International Bank v. Faber*, 30 C. C. A. 180, 57 U. S. App. 153, 86 Fed. 444, holding mere failure of officer to sign jurat does not make report defective; *Hoboken Beef Co. v. Hand*, 104 App. Div. 392, 93 N. Y. Supp. 834, holding that statute, imposing upon directors liability for debts for failure to make reports, is to be construed strictly in their favor; *Katz v. H. & H. Mfg. Co.* 109 App. Div. 50, 95 N. Y. Supp. 663, on estoppel against corporation to deny validity of its acts; *Lord v. Equitable L. Assur. Soc.* 57 Misc. 426, 108 N. Y. Supp. 67, on power of de facto directors to act for corporation.

11 L. R. A. 170, *HOLMES v. WILLARD*, 125 N. Y. 75, 25 N. E. 1083.

Action for malicious prosecution, in *Willard v. Holmes*, B. & H. 142 N. Y. 499, 37 N. E. 480, Reversing 2 Misc. 308, 21 N. Y. Supp. 998.

Actions against corporation officers.

Cited in *Hutchinson v. Stadler*, 85 App. Div. 438, 83 N. Y. Supp. 509, holding liability of director of foreign corporation for illegal dividends paid, enforceable under § 60 of stock corporation law; *People ex rel. Perkins v. Moss*, 187 N. Y. 422, 11 L.R.A.(N.S.) 532, 80 N. E. 383, 10 A. & E. Ann. Cas. 309, Affirming 113 App. Div. 329, holding officer contributing corporation funds for political purposes, with knowledge of corporation, not guilty of grand larceny; *Roth v. Robertson*, 64 Misc. 344, 118 N. Y. Supp. 351, holding that money paid by corporation officer for an unlawful purchase may be recovered from him at suit of a stockholder who acquiesced in the payment; *Davenport v. Crowell*, 79 Vt. 429, 65 Atl. 557, holding officer of bank not liable in action by stockholder for loss from ultra vires act done according to a general practice adopted by the corporation

and acquiesced in by the stockholder; *Gause v. Commonwealth Trust Co.* 124 App. Div. 462, 108 N. Y. Supp. 1080 (dissenting opinion), on liability for *ultra vires* act where acquiesced in by corporation.

Distinguished in *Seventeenth Ward Bank v. Smith*, 51 App. Div. 262, 64 N. Y. Supp. 888, holding action maintainable by bank against its president for negligence in making loan.

Powers of corporation officers.

Cited in *Oakes v. Cattaraugus Water Co.* 143 N. Y. 436, 26 L. R. A. 551, 38 N. E. 461, holding president of private corporation in full charge of business has *prima facie* power to do what directors could authorize or ratify; *Hastings v. Brooklyn L. Ins. Co.* 138 N. Y. 479, 34 N. E. 289, holding waiver of prompt payment of premium within general powers of secretary of life insurance company; *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 220, 54 U. S. App. 290, 82 Fed. 516, holding agreement that no alteration in policy shall be valid unless in writing may be changed by parol agreement with general officer; *Rochester & K. F. Land Co. v. Roe*, 7 App. Div. 371, 40 N. Y. Supp. 72, holding action not maintainable for unpaid subscription, stock being purchased on corporation officer's representations that it was fully paid.

Distinguished in *Cook v. American Tubing & Webbing Co.* 28 R. I. 50, 9 L.R.A.(N.S.) 201, 65 Atl. 641, on officers of corporation having no power to issue accommodation paper.

Availability of defense of *ultra vires*.

Cited in *Powell v. Murray*, 3 App. Div. 276, 38 N. Y. Supp. 233, holding contract for right to sell product of different corporation, not authorized by charter, *ultra vires*; *Koehler v. Reinheimer*, 26 App. Div. 4, 49 N. Y. Supp. 755, and *Holn v. Claus Lipsius Brewing Co.* 21 App. Div. 207, 47 N. Y. Supp. 518, holding guaranty by brewing company, of payment of rent by tenant selling its beer, not *ultra vires*; *Snow, C. & Co. v. Hall*, 19 Misc. 658, 44 N. Y. Supp. 427, holding collection agency has incidental power to employ lawyers to conduct suits for its clients; *Curtis v. Natalie Anthracite Coal Co.* 39 Misc. 588, 80 N. Y. Supp. 603, upholding act of president of successor company through foreclosure, to assume indebtedness for advances of selling agents of old company; *M. V. Monarch Co. v. Farmers & T. Bank*, 105 Ky. 439, 88 Am. St. Rep. 310, 49 S. W. 317, holding guaranty of commercial paper by manufacturing corporation *ultra vires*; *Wittmer Lumber Co. v. Rice*, 23 Ind. App. 590, 55 N. E. 868, holding corporation signing, as surety, bond to secure owner of building against mechanic's lien, in order to furnish lumber for building, cannot set up *ultra vires*; *Flint & W. Mfg. Co. v. Kerr-Murray Mfg. Co.* 24 Ind. App. 355, 56 N. E. 858, holding guaranty cannot be avoided on ground of *ultra vires*, defendant having profited by plaintiff's work for third person in pursuance thereof; *Linkauf v. Lombard*, 137 N. Y. 423, 20 L. R. A. 50, 33 Am. St. Rep. 743, 33 N. E. 472, holding corporation having benefit of contract performed in good faith cannot escape on plea of *ultra vires*; *McNab v. McNab & H. Mfg. Co.* 62 Hun, 22, 16 N. Y. Supp. 448, holding stockholder estopped from raising question of *ultra vires* after acquiescence and receipt of dividends; *Vought v. Eastern Bldg. & L. Asso.* 172 N. Y. 518, 92 Am. St. Rep. 761, 65 N. E. 496, holding *ultra vires* not a defense to executed contract of loan association with certificate holder; *Eastern Bldg. & L. Asso. v. Williamson*, 189 U. S. 129, 47 L. ed. 741, 23 Sup. Ct. Rep. 527, holding *ultra vires* not a defense to action of certificate holder against loan association to recover face value of certificate; *H. Scheerer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 831, holding corporation estopped to assert *ultra vires* as defense to accommodation notes

in hands of innocent holders; *Perkins v. Trinity Realty Co.* 69 N. J. Eq. 732, 61 Atl. 167, holding that corporation cannot set up ultra vires as defense to accommodation notes given with consent of all the stockholders; *Wormser v. Metropolitan Street R. Co.* 184 N. Y. 88, 112 Am. St. Rep. 596, 76 N. E. 1036, 6 A. & E. Ann. Cas. 123, holding that officer sued on ground of ultra vires act may show consent or acquiescence by stockholders as defense; *Akers v. Mutual L. Ins. Co.* 59 Misc. 276, 112 N. Y. Supp. 254, holding that agreement *malum prohibitum* as to a corporation may be enforced against it where the other party is not in *pari delicto*.

Cited in note (55 L. R. A. 761) on liability of directors for acts in excess of their power.

Loans or advances by business corporation.

Cited in *Whitehead v. American Lamp & Brass Co.* 70 N. J. Eq. 585, 62 Atl. 554, holding that manufacturing company may loan its credit for purpose of fostering its business.

11 L. R. A. 172, *ODD FELLOWS HALL ASSO. v. McALLISTER*, 153 Mass. 292, 26 N. E. 862.

Actions relating to possession of personal property.

Cited in *Hayes v. Tidsbury*, 181 Mass. 293, 63 N. E. 890, holding evidence of possession in the case insufficient to support replevin; *Pallen v. Bogy*, 78 Mo. App. 97, holding possession sufficient for maintenance of action of replevin; *Plymouth Stove Foundry Co. v. Fee*, 182 Mass. 33, 64 N. E. 419, holding attachment of range by creditor of vendee, while title in vendor, invalid.

Cited in footnote to *Mitchell v. Georgia & A. R. Co.* 51 L. R. A. 622, which holds possession of property as agent does not authorize action for its conversion.

Individual rights and liabilities of trustees.

Cited in *Shepard v. Creamer*, 160 Mass. 498, 36 N. E. 475, holding description of defendant as trustee in action for personal injuries by fall of snow from building, surplusage; *Bromley v. Mitchell*, 155 Mass. 512, 30 N. E. 83, holding absolute grantee on certain trusts need not describe himself as trustee in bill to recover possession of notes and deeds; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 464, 41 L. R. A. 254, 75 N. W. 911, holding trustee ordinarily personally liable on all contracts made as trustee; *Packard v. Kingman*, 109 Mich. 507, 67 N. W. 551, upholding power of trustee to bind trust estate so as to exclude personal liability; *Connally v. Lyons*, 82 Tex. 671, 27 Am. St. Rep. 935, 18 S. W. 799, holding trustee personally liable for goods purchased by him for, and charged to, trust; *O'Malley v. Gerth*, 67 N. J. L. 613, 52 Atl. 563, holding trustees liable individually for negligence in management of trust property, causing personal injuries; *Hampton v. Foster*, 127 Fed. 468, holding description of party in action at law, as trustee, surplusage; *Meyer v. Ross*, 119 Ill. App. 487, holding that description of plaintiff as "trustee" in a writ, is surplusage; *Bangor v. Pierce*, 106 Me. 534, 29 L.R.A. (N.S.) 773, 138 Am. St. Rep. 363, 76 Atl. 945, to the point that person holding legal title to personalty, need not be declared against as trustee in action concerning such property although it is held in trust.

11 L. R. A. 174, *McVEETY v. ST. PAUL, M. & M. R. CO.* 45 Minn. 268, 22 Am. St. Rep. 728, 47 N. W. 809.

Relationship of carrier and passenger.

Cited in *Alward v. Oakes*, 63 Minn. 194, 65 N. W. 270, holding person knowingly inducing conductor to allow him to ride on train not carrying passengers,

not a passenger; *Purple v. Union P. R. Co.* 57 L. R. A. 703, 51 C. C. A. 564, 114 Fed. 123, and *Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 752, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 523, holding person fraudulently evading payment of fare to carrier not a passenger; *Florida Southern R. Co. v. Hirst*, 30 Fla. 26, 16 L. R. A. 636, 32 Am. St. Rep. 17, 11 So. 506, holding burden upon passenger to show justification for riding in express car; *Berry v. Missouri P. R. Co.* 124 Mo. 250, 25 S. W. 229, holding rights of passenger cannot be obtained by knowingly procuring consent of conductor to ride in violation of rules; *Louisville & M. R. Co. v. Hailey*, 94 Tenn. 385, 27 L. R. A. 550, 29 S. W. 367, holding person knowingly riding on freight train in violation of carrier's rules assumes risk of accident; *Baltimore & O. S. W. R. Co. v. Cox*, 66 Ohio St. 289, 90 Am. St. Rep. 583, 64 N. E. 119, holding conductor's permission to person to ride on freight train cannot charge carrier with duty owing to passengers; *Great Northern R. Co. v. Bruyere*, 51 C. C. A. 578, 114 Fed. 544 (dissenting opinion), majority holding carrier liable for proximate injury to trespasser without fraud, through wrongful act of conductor; *McNeill v. Durham & C. R. Co.* 135 N. C. 736, 47 S. E. 765 (dissenting opinion), majority holding carrier liable for injury to one riding illegally, as gratuitous passenger; *Sessions v. Southern P. Co.* 159 Cal. 603, 114 Pac. 982, holding that railroad is not liable for injury to person who gains ride through false representations in absence of wilful acts; *Greenfield v. Detroit & M. R. Co.* 133 Mich. 561, 95 N. W. 546, holding a plaintiff could not become a passenger by permission to ride from conductor, contrary to rule of company known to both; *Fitzmaurice v. New York, N. H. & H. R. Co.* 192 Mass. 161, 6 L.R.A.(N.S.) 1148, 116 Am. St. Rep. 236, 78 N. E. 418, 7 A. & E. Ann. Cas. 586, holding a shop girl over eighteen years of age, who fraudulently purchased a ticket as student, not entitled to passenger's rights; *McNeill v. Durham & C. R. Co.* 135 N. C. 728, 67 L.R.A. 248, 47 S. E. 765 (dissenting opinion), on absence of rights as a passenger in one knowingly inducing conductor to carry him without charge.

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Headland*, 20 L. R. A. 822, which holds presumption that person on train a passenger not applicable to one riding in caboose attached to freight train; *Walker v. Hannibal & St. J. R. Co.* 24 L. R. A. 363, which holds baggageman not serving master in delivering drills carried to accommodate third persons; *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended, a passenger; *Chattanooga Rapid Transit Co. v. Venable*, 51 L. R. A. 886, which holds night watchman at depot, getting on train to announce readiness to resume duty, a passenger; *Mendenhall v. Atchison, T. & S. F. R. Co.* 61 L. R. A. 120, which holds one riding on platform of baggage car at direction of brakeman, to whom money paid, not a passenger.

Cited in notes (61 Am. St. Rep. 87, 104) on who are passengers and when they become such; (37 L.R.A.(N.S.) 419, 423) on liability of railroad to person wrongfully on train by collusion with employee.

Effect of false representations as to age generally.

Cited in *Norfolk & W. R. Co. v. Bondurant*, 107 Va. 524, 15 L.R.A.(N.S.) 447, 122 Am. St. Rep. 867, 59 S. E. 1091, holding an infant, who obtained employment contrary to a known rule by false representations, was entitled to rights of trespasser only.

11 L. R. A. 175, **RAMSEY COUNTY v. CHURCH OF THE GOOD SHEPHERD**, 45 Minn. 229, 47 N. W. 783.

Property exempt from taxation.

Cited in *Hibernian Benev. Soc. v. Kelly*, 28 Or. 195, 30 L. R. A. 170, 52 Am.

St. Rep. 769, 42 Pac. 3, holding building only partly used as charitable institution not exempt from taxation; *Broadway Christian Church v. Gross*, 112 Ky. 453, 66 S. W. 32, holding parsonage not occupied by the minister not exempt; *People ex rel. Thompson v. First Congregational Church*, 232 Ill. 164, 83 N. E. 536, holding that a law exempting church parsonages from taxation was unconstitutional; *State v. Bishop Seabury Mission*, 90 Minn. 98, 95 N. W. 882, holding that the endowment fund of a seminary of learning is exempt from taxation.

Cited in notes (19 L. R. A. 291) on effect of using property of religious, charitable, or educational institution in secular business or for revenue on right of exemption from taxation; (39 L.R.A.(N.S.) 437) on exemption of parsonage from taxation.

Distinguished in *Ramsey County v. Mascalester College*, 51 Minn. 440, 18 L. R. A. 270, 53 N. W. 704, holding buildings on college campus, used solely as residences for faculty, exempt from taxation.

11 L. R. A. 176, *BROOKS v. BLACK*, 68 Miss. 161, 24 Am. St. Rep. 259, 8 So. 332.

Breach of covenant of title.

Cited in *Aird v. Alexander*, 72 Miss. 360, 18 So. 478, holding obligee in title bond no right of action after eviction, where payment was completed by, and deed executed to, another.

Measure of damages.

Cited in *Copeland v. McAdory*, 100 Ala. 560, 13 So. 545, holding measure of damages for breach of covenant of seisin by subjection of land to easement, depreciation of value of land thereby; *Aiken v. McDonald*, 43 S. C. 35, 49 Am. St. Rep. 817, 20 S. E. 796, holding, on breach of full warranty after termination of life estate, value of life estate must be deducted from damages; *Hazelett v. Woodruff*, 150 Mo. 544, 51 S. W. 1048, holding, on breach of covenant of seisin and warranty to defend, reasonable costs and attorneys' fees recoverable; *Hollingsworth v. Mexia*, 14 Tex. Civ. App. 365, 37 S. W. 455, and *Lewis v. Ross*, 95 Tex. 363, 67 S. W. 405, holding remote vendor liable to evicted vendee for breach of warrant, to amount received for property from immediate vendee; *Matheny v. Stewart*, 108 Mo. 79, 17 S. W. 1014, holding damages for breach of warranty upon total failure of title to be purchase money, interest, and costs; *Madden v. Caldwell Land Co.* 16 Idaho, 64, 21 L.R.A.(N.S.) 335, 100 Pac. 358, holding measure to be "actual damages sustained" where vendor conveys by warranty deed and subsequently conveys to another party whose deed is recorded first.

Distinguished in *Yazoo & B. Valley R. Co. v. Banister*, 89 Miss. 809, 42 So. 345, holding measure of damages where vendee is evicted by holder of paramount title from unproductive wild lands, is purchase price with legal interest.

11 L. R. A. 179, *AMERICAN FERTILIZING CO. v. BOARD OF AGRICULTURE*, 3 Inters. Com. Rep. 532, 43 Fed. 609.

Unlawful restraint upon commerce.

Cited in footnotes to *Re Sanders*, 18 L. R. A. 550, which holds void as to original packages, act requiring marking on package of year in which seed grown; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil.

Cited in note (60 L. R. A. 680) on corporate taxation and the commerce clause.

Distinguished in *State v. Stevenson*, 109 N. C. 732, 26 Am. St. Rep. 595, 14 S. E. 385, and *Ex parte Brown*, 48 Fed. 442, upholding act requiring merchants to pay as license percentage upon purchases in or out of state.

Amount of license fees.

Cited in *Patapsco Guano Co. v. North Carolina Bd. of Agri.* 171 U. S. 347, 43 L. ed. 192, 18 Sup. Ct. Rep. 862, Affirming 52 Fed. 691, upholding state tonnage tax on fertilizers to defray inspection expenses; *State v. Bixman*, 162 Mo. 56, 62 S. W. 828 (dissenting opinion), majority upholding inspection fees charged brewers for privilege of carrying on their business, though large revenue to state results; *Red C. Oil Mfg. Co. v. Board of Agriculture*, 172 Fed. 707, holding valid act imposing tax of $\frac{1}{2}$ cent per gallon upon illuminating oils, proceeds to pay expenses of inspecting and testing.

Cited in footnote to *Littlefield v. State*, 28 L. R. A. 588, which limits power to license sales of milk to regulation, and not raising of revenue.

Cited in notes (13 L. R. A. 588) on municipal ordinances unconstitutional and void; (30 L. R. A. 421, 431) on limit of amount of license fees.

State inspection law.

Cited in footnote to *State v. Duckworth*, 39 L. R. A. 365, which holds statute requiring inspection and dipping of all sheep brought into state, exempting those in state, void.

Cited in note (51 L. ed. U. S. 83) on inspection laws as regulations of commerce.

Value determining jurisdiction.

Cited in *Whitman College v. Berryman*, 156 Fed. 117, holding that in determining value upon question of jurisdiction, the value of the matter in dispute, is the test, and not amount incident to the particular case.

11 L. R. A. 182, *COWELL v. PHILLIPS*, 17 R. I. 188, 20 Atl. 933.

Liability of husband for necessities furnished wife.

Cited in *Senft v. Carpenter*, 18 R. I. 548, 28 Atl. 963, holding husband liable for support and care of wife, at her sister's house, after refusing her support at any other place than insane hospital; *Watts v. Moffett*, 12 Ind. App. 401, 40 N. E. 533, holding third parties without notice not bound by husband's revocation of wife's authority to contract for necessities.

Cited in note (98 Am. St. Rep. 632, 649) on wife's implied authority to act for husband and charge him for necessities.

11 L. R. A. 183, *JUNKER v. RUSH*, 136 Ill. 179, 26 N. E. 499.

Surety's right to subrogation.

Cited in *Schmitt v. Henneberry*, 48 Ill. App. 326, holding right of surety to subrogation not enforceable at expense of legal right.

Limitation of action by surety.

Cited in *Schroeder v. Bozarth*, 224 Ill. 323, 79 N. E. 583, holding right to contribution barred in five years; *Burrus v. Cook*, 215 Mo. 509, 114 S. W. 1065, Reversing 117 Mo. App. 385, holding that surety upon payment of debt acquires only right of subrogation which he must assert before barred by limitation.

11 L. R. A. 185, *HUNT ex rel. STREATOR v. EVANS*, 134 Ill. 496, 25 N. E. 579.

Erroneous recitals in wills.

Cited in *Benson v. Hall*, 150 Ill. 63, 36 N. E. 947, holding nondelivery of deeds not aided by recital in will; *Stodder v. Hoffman*, 158 Ill. 489, 41 N. E. 1082, holding recital in will that testator had conveyed lands to daughter not vest title where daughter had reconveyed to him; *Hawes v. Kepley*, 28 Ind. App. 310, 62 N. E. 720, refusing to construe will as giving \$500 legacy by implication; *Zimmerman v.*

Hafer, 81 Md. 355, 32 Atl. 316, holding erroneous recital in will cannot operate to create estate intended to be created by another instrument; *Noble v. Tipton*, 219 Ill. 187, 3 L.R.A.(N.S.) 648, 76 N. E. 151, holding that recital in will that testator had deeded certain property to a person named cannot be given effect as a devise thereof; *Smith v. Smith*, 113 Md. 505, 31 L.R.A.(N.S.) 926, 140 Am. St. Rep. 435, 77 Atl. 975, to the point that erroneous recital in will that certain property has been conveyed to designated person is not effective to pass title.

Cited in footnote to *O'Hearn v. O'Hearn*, 58 L. R. A. 105, which denies devise by implication by devise of half of property to one of three children, without mentioning other property or children.

Cited in notes (107 Am. St. Rep. 73, 74; 68 L.R.A. 379) on incorporation of extrinsic document into will; (3 L.R.A.(N.S.) 646) on recital in will of conveyance of land as devise where conveyance not in fact made as ineffectual; (15 L.R.A.(N.S.) 76) on devise or bequest by implication by recital in will; (25 Eng. Rul. Cas. 466) on incorporating into will by reference an unattested or imperfectly attested paper.

Distinguished in *Lander v. Lander*, 217 Ill. 294, 75 N. E. 487, holding that erroneous recital that testator has deeded certain property will be given effect as a devise where testator adds that it is his will that the person mentioned shall so take.

Creation of trust.

Cited in *Stodder v. Hoffman*, 158 Ill. 489, 41 N. E. 1082, holding declarations in will not evidence of creation of trust.

Estoppel.

Cited in footnote to *Stone v. Cook*, 64 L. R. A. 287, which holds that residuary legatee receiving amount of legacy under protest cannot, upon offer to bring amount into court, assail will.

11 L. R. A. 188, *FORTNER v. DUNCAN*, 91 Ky. 171, 15 S. W. 55.

Ordinances relating to liquor traffic.

Cited in footnote to *Campbellsville v. Odewalt*, 60 L. R. A. 723, which holds void, ordinance subjecting the fine possessor of premises on which liquor furnished in violation of law, although without his knowledge or consent.

Cited in note (35 L. R. A. 574) on cruel and unusual punishments.

Right to convict for several offenses for same act.

Cited in notes (92 Am. St. Rep. 100) on identity of offenses on plea of former jeopardy where act violates statute and ordinance; (31 L.R.A.(N.S.) 707) on right to convict for several offenses growing out of same facts.

11 L. R. A. 189, *RICHARDSON v. CAMPBELL*, 27 Neb. 644, 43 N. W. 405.

Maximum rate of interest reduced by statute.

Modified on rehearing in 34 Neb. 182, 33 Am. St. Rep. 633, 51 N. W. 753, holding that, contract rate of interest on notes being 10 per cent, additional rate as penalty not enforceable.

Interest on coupon interest notes.

Modified on rehearing in 34 Neb. 182, 33 Am. St. Rep. 633, 51 N. W. 753, holding coupon interest notes not void for usury.

Cited in *Steen v. Stretch*, 50 Neb. 575, 70 N. W. 48, and *Rose v. Munford*, 36 Neb. 151, 54 N. W. 129, holding coupon notes providing for interest after maturity not usurious.

Cited in note (33 L.R.A.(N.S.) 302, 303) on validity of agreement before interest due to pay interest on interest.

Mortgagee's right of reimbursement for taxes and insurance paid.

Cited in *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 202, 77 N. W. 667, holding mortgagee may be reimbursed for taxes and insurance paid to save security.

11 L. R. A. 191, *STATE v. CORNISH*, 66 N. H. 329, 21 Atl. 180.

Cited without special discussion in *State v. Lewis*, 66 N. H. 623, 32 Atl. 151, case being dismissed as premature.

Absence of guilty intent.

Cited in *State v. Ryan*, 70 N. H. 196, 85 Am. St. Rep. 629, 46 Atl. 49, holding absence of guilty intent no defense to indictment against hotelkeeper for furnishing oleomargarine to guest.

11 L. R. A. 193, *GRIFFITH v. VENTRESS*, 91 Ala. 366, 24 Am. St. Rep. 918, 8 So. 312.

Acknowledgments.

Cited in *American Freehold Land Mortg. Co. v. James*, 105 Ala. 350, 16 So. 887, and *Grider v. American Freehold Land Mortg. Co.* 99 Ala. 285, 42 Am. St. Rep. 58, 12 So. 775, holding certificate of acknowledgment in due form conclusive as judicial act, until impeached; *Hodges v. Winston*, 95 Ala. 517, 36 Am. St. Rep. 241, 11 So. 200, holding certificate of acknowledgment cannot be altered after delivery without another acknowledgment; *Winston v. Hodges*, 102 Ala. 312, 15 So. 528, holding reacknowledgment to cure defective deed cannot defeat rights of intervening creditors; *Durham v. Stephenson*, 41 Fla. 120, 25 So. 284, holding officer taking acknowledgment cannot change certificate after delivery without reacknowledgment; *Ogden Bldg. & L. Asso. v. Mensch*, 196 Ill. 563, 89 Am. St. Rep. 330, 63 N. E. 1047, and *Kothe v. Krag-Reynolds Co.* 20 Ind. App. 301, 50 N. E. 594, holding acknowledgment taken by stockholder to corporation mortgage void; *Alford v. Doe*, 156 Ala. 441, 22 L.R.A.(N.S.) 219, 47 So. 230, holding officer cannot make and attach a valid certificate of acknowledgment of mortgagor and his wife without recalling parties though the parties were before him at an earlier date while he attested their signature.

Cited in note (58 Am. St. Rep. 708) on disqualification of officer to take acknowledgment.

Disapproved in effect in *Horbach v. Tyrrell*, 48 Neb. 518, 37 L. R. A. 436, 67 N. W. 485, holding acknowledgment of deed ministerial act.

Necessity of guardian ad litem to represent persons under legal disability.

Cited in *Huddleston v. Perryman*, 150 Ala. 631, 43 So. 807, holding, unless represented in the proceedings by a guardian ad litem, it is not allowable to proceed to judgment or decree affecting the person or estate of a non compos mentis, or an infant; *Shehane v. Caraway*, 154 Ala. 392, 45 So. 469, holding answer of minor or heirs not before the court, and filed in their name or by them, cannot be considered,—no guardian ad litem being appointed.

Cited in note (29 Am. St. Rep. 644) on invalidity of judgment against minor without appointment of guardian ad litem.

Wife's contract to alienate homestead.

Cited in *Lyon v. Hardin*, 129 Ala. 646, 29 So. 777, holding equity without power to compel specific performance of wife's contract for alienation of homestead.

11 L. R. A. 196, *MEEKS v. GARNER*, 93 Ala. 17, 8 So. 378.

False representation as to title.

Cited in *Johnson v. Rogers*, 112 Ala. 579, 20 So. 929, holding, in action to rescind, proof not strong enough to show misrepresentation of material facts; *Perry v. Boyd*, 126 Ala. 169, 85 Am. St. Rep. 17, 28 So. 711, holding tender of deed not prerequisite to action to rescind for fraud; *Fields v. Clayton*, 117 Ala. 541, 67 Am. St. Rep. 189, 23 So. 530, holding rescission will not be decreed in absence of fraud or insolvency of vendor; *Coleman v. First Nat. Bank*, 115 Ala. 312, 22 So. 84, holding vendee in possession under bond for warranty deed cannot defend against payment of purchase money in absence of fraud or insolvency of vendor; *Union Stave Co. v. Smith*, 116 Ala. 422, 67 Am. St. Rep. 140, 22 So. 275, holding vendee in possession under purchase from executor cannot defend against payment of purchase money; *Rarden v. Badham*, 142 Ala. 502, 38 So. 1029, holding one deceived by fraudulent representations as to title not ascertainable by reasonable diligence, may have relief in equity, without abandoning possession of land purchased; *Shanan v. Brown*, 167 Ala. 538, 52 So. 737, holding that statements of facts which could be assumed to be within knowledge of grantor may be relied upon by grantee, in absence of knowledge of his own which would arouse suspicion.

Cited in footnote to *Nash v. Minnesota Title Ins. & T. Co.* 28 L. R. A. 753, which requires intent to deceive to sustain action for false representations inducing execution of contract.

Defects in title subsequently cured.

Cited in *Coleman v. First Nat. Bank*, 115 Ala. 313, 22 So. 84, holding, in absence of fraud, valid title in vendor at hearing sufficient answer to action to rescind for defects.

Adverse possession.

Cited in *McClenahan v. Stevenson*, 118 Iowa, 112, 91 N. W. 925, holding possession by grantors under claim that deed was in trust for them not adverse.

11 L. R. A. 199, *BARNDT v. FREDERICK*, 78 Wis. 1, 47 N. W. 6.

Liability of agent for fraud.

Cited in *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 60, 74 N. W. 633, reversing judgment against agent for full amount in action to recover consideration paid, for fraud, principal receiving full amount excepting small commission.

False representations inducing sale.

Cited in *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 224, 37 L. R. A. 613, 59 N. W. 1066, holding buyer had right to rely on representations of seller as to condition of electric light plant sold.

Cited in notes (14 L.R.A.(N.S.) 1178) on duty of purchaser of stock to verify statements as to corporation's condition; (12 Eng. Rul. Cas. 297) on distinction between mere opinion and statement of fact.

Intelligence of party deceived as affecting a recovery.

Cited in *Jacobsen v. Whitely*, 138 Wis. 437, 120 N. W. 285, holding intelligence and acuteness of a plaintiff is an important element in determining whether a recovery should be had for deceit; *Kaiser v. Nummendor*, 120 Wis. 239, 97 N. W. 932; *Bowe v. Gage*, 127 Wis. 253, 115 Am. St. Rep. 1010, 106 N. W. 1074,—holding effectiveness of deceit is to be tested by its influence on the person deceived, not by its probable weight with another; *Rollins v. Quimby*, 200 Mass. 164, 86 N. E. 350, holding degree of care required of an inexperienced person would be different from that required of those whose knowledge and skill put

them on equal footing with party practicing the deception; *New England Mut. L. Ins. Co. v. Swain*, 100 Md. 573, 60 Atl. 469, holding fact that statement relied on was absurd or improbable does not preclude recovery by one who was credulous and was deceived by the statement.

11 L. R. A. 204, *STANSBURY v. HUBNER*, 73 Md. 228, 20 Am. St. Rep. 584, 20 Atl. 904.

Restraint of alienation.

Cited in *Blackshere v. Samuel Ready School for Female Orphans*, 94 Md. 777, 51 Atl. 1056, holding absolute estate given by will not limited by testator's expressed wish that the land should be rented, etc., for period of years; *Van Osdel v. Champion*, 89 Wis. 667, 27 L. R. A. 775, 46 Am. St. Rep. 864, 62 N. W. 539, holding condition in devise that the property shall be in no wise subject to any debt void; *Troutman v. De Boissiere Odd Fellows' Orphans' Home*, 66 Kan. 27, 71 Pac. 286 (dissenting opinion), majority holding invalid, gift in perpetual trust for orphan home for children of deceased members of secret society; *Loosing v. Loosing*, 85 Neb. 76, 25 L.R.A.(N.S.) 924, 122 N. W. 707, holding a general restraint against alienation cannot be successfully attached to an estate in fee simple; *Clark v. Clark*, 99 Md. 360, 58 Atl. 24, holding such restraint is repugnant to the inherent nature and qualities of the estate granted and tend to public inconvenience; *Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Asso.* — Kan. —, 5 L.R.A.(N.S.) 692, 64 Pac. 33 (dissenting opinion), on effect to be given restraints on power of alienation; *Starr v. Starr Methodist Protestant Church*, 112 Md. 183, 76 Atl. 595, holding where the condition or limitation over is void as being impossible, repugnant or contrary to law, the estate vests in the first taker, freed of the condition or limitation over.

Cited in note (49 Am. St. Rep. 126) on rule against perpetuities.

"To have and to hold."

Cited in *Scott v. Scott*, 137 Iowa, 241, 23 L.R.A.(N.S.) 720, 126 Am. St. Rep. 277, 114 N. W. 881, holding the words, "have" and "hold" manifest an intention that legatee shall receive and retain property in custody during the period named.

11 L. R. A. 205, *SCHMIDT v. IOWA K. OF P. INS. ASSO.* 82 Iowa, 304, 47 N. W. 1032.

Change of beneficiary of insurance.

Cited in *Carpenter v. Knapp*, 101 Iowa, 729, 38 L. R. A. 133, 70 N. W. 764, holding beneficiary in life insurance policy acquires no vested, assignable interest until death of assured; *Shuman v. Ancient Order*, U. W. 110 Iowa, 645, 82 N. W. 331, holding beneficiary cannot be changed except in manner provided by contract of insurance; *Delaney v. Delaney*, 175 Ill. 201, 51 N. E. 961, holding benefit society may waive surrender of certificate as condition of changing beneficiary; *Hall v. Allen*, 75 Miss. 213, 65 Am. St. Rep. 601, 22 So. 4, holding person intended by insured to be beneficiary entitled to proceeds of certificate, association waiving compliance with formalities as to change of beneficiary; *Waldum v. Homstad*, 119 Wis. 319, 96 N. W. 806, holding change in beneficiary not defeated by failure of local secretary to forward benefit association certificate and fee; *Wandell v. Mystic Tailors*, 130 Iowa, 643, 105 N. W. 448, holding beneficiary named in a benefit certificate has no standing to object to a change actually consummated or to failure of member during life time to comply with formalities required by the contract.

Cited in notes (22 L. R. A. 298) on signing by proxy; (49 L. R. A. 746, 750, 751) on power of insured to destroy rights of beneficiary; (15 L. R. A. 352) on changing designation in benefit certificate otherwise than in prescribed method; (34 L.R.A.(N.S.) 277) on effect of assured's death before contemplated change of beneficiary complete; (52 Am. St. Rep. 562) on change of beneficiary of mutual or membership life or accident insurance.

11 L. R. A. 207, *CORINTH v. LOCKE*, 62 Vt. 411, 20 Atl. 809.

Injunction to restrain trespass.

Cited in footnote to *Lowery v. Pekin*, 51 L. R. A. 301, which sustains injunction against city taking possession of embankment built and owned by lessor from city.

Who may purchase at judicial sale.

Cited in footnotes to *Ackerman v. Rubens*, 53 L. R. A. 867, which holds price at which yacht was sold to vendor at public sale, after vendee's refusal to complete purchase, basis for assessing damages for breach; *Douglass v. Blount*, 58 L. R. A. 699, which sustains right of attorney for plaintiff, with client's consent, to purchase at execution sale.

11 L. R. A. 210, *SCHOOL LAND COMRS. v. WADHAMS*, 20 Or. 274, 25 Pac. 720.

Charitable uses and trusts.

Cited in *John v. Smith*, 42 C. C. A. 279, 102 Fed. 222, Affirming 91 Fed. 829, and *Re John*, 30 Or. 507, 36 L. R. A. 247, 47 Pac. 341, upholding bequest in trust for maintenance of public schools; *Franklin v. Hastings*, 253 Ill. 53, 97 N. E. 265, holding that gift in trust for charity not in existence and beginning of whose existence is uncertain will be upheld provided there is no gift of property meanwhile; *Troutman v. De Boissiere Odd Fellows' Orphans' Home*, 66 Kan. 12, 5 L.R.A.(N.S.) 699, 71 Pac. 286, holding a gift to trustees and successors to provide home for children of deceased members of a society is a private trust and governed by rules prohibiting perpetuities; *Rader v. Stubblefield*, 43 Wash. 350, 86 Pac. 560, 10 A. & E. Ann. Cas. 20, holding a trust created by will for establishment of a home for orphans with management and control wholly in hands of trustees is valid.

Cited in footnotes to *Re Sellers Chapel M. E. Church*, 11 L. R. A. 282, which holds trust for charitable use created by conveyance to trustees for erection of church; *Kelly v. Nichols*, 19 L. R. A. 413, as to what constitutes charitable use or trust; *Crerar v. Williams*, 21 L. R. A. 454, which holds gift of free public library in great city charitable.

Cited in notes (11 L. R. A. 214) on authority of trustees of religious corporation; (6 L.R.A.(N.S.) 323) on validity of trust to propagate particular religious belief; (14 L.R.A.(N.S.) 54, 95, 118) on enforcement of general bequest for charity or religion; (64 Am. St. Rep. 760) on certainty and unity required in charitable trusts.

Equity jurisdiction over charitable uses and trusts.

Cited in *Re John*, 30 Or. 510, 36 L. R. A. 247, 47 Pac. 341, holding that equity courts not prohibited by statute have original inherent jurisdiction over charitable trusts; *Re Stewart*, 26 Wash. 38, 66 Pac. 148, upholding inherent original jurisdiction of equity courts over trusts for charitable uses.

11 L. R. A. 214, *FINLEY v. BRENT*, 87 Va. 103, 12 S. E. 228.

Charitable uses and trusts.

Cited in footnotes to *School Land Comrs. v. Wadhams*, 11 L. R. A. 210, which holds valid, gift to trustees to erect church and parsonage for church society not

in existence; *Re Sellers Chapel M. E. Church*, 11 L. R. A. 282, which holds trust for charitable use created by conveyance to trustees for erection of church.

Cited in notes (12 L.R.A. 415) on charitable uses and trusts; (14 L.R.A. (N.S.) 146) on enforcement of general bequest for charity or religion.

Acts and powers of church societies.

Cited in footnotes to *Schlichter v. Keiter*, 22 L. R. A. 161, which holds two-thirds majority of those voting on proposition to change constitution of church sufficient; *Franke v. Mann*, 48 L. R. A. 856, which denies right of majority of church members to employ pastor whose teachings inconsistent with those of sect to which local church belongs.

Cited in notes (32 L. R. A. 95) on power of local church society to withdraw from general body; (13 L. R. A. 198) on church property; in whom title vests; (24 L.R.A.(N.S.) 713) on litigation growing out of schism in religious society; (5 Eng. Rul. Cas. 702) on property rights on division in religious society.

Relation of civil courts to churches.

Cited in footnotes to *Lamb v. Cain*, 14 L. R. A. 518, which holds decision of ecclesiastical tribunal as to adoption of revised confession of faith binding on courts; *Smith v. Pedigo*, 19 L. R. A. 433, which holds decision of association of churches, to which both factions have submitted claims, entitled to great weight.

Cited in note (68 Am. St. Rep. 866) on jurisdiction of equity over voluntary unincorporated associations.

11 L. R. A. 216, *MYERS v. MURRAY*, N. & CO. 43 Fed. 695.

Right of removal as affected by nominal party.

Cited in *Reeves v. Corning*, 51 Fed. 778, holding right of removal not affected where one defendant, a mere stakeholder or interested with plaintiff, is resident of plaintiff's state; *Sidway v. Missouri Land & Live Stock Co.* 116 Fed. 386, holding right of removal not affected by presence on record of nominal defendant, citizen of state of venue.

Federal jurisdiction for diverse citizenship.

Cited in *National Typographic Co. v. New York Typographic Co.* 44 Fed. 711, holding circuit court will decline jurisdiction where defendant corporation was created in another state; *Miller v. Wheeler & W. Mfg. Co.* 46 Fed. 883, holding corporation within act of 1887 cannot be resident of state other than that in which incorporated; *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. 180, holding agency in state of nonresident corporation does not affect right of removal of cause to Federal court; *Campbell v. Duluth, S. S. & A. R. Co.* 50 Fed. 242, holding nonresident corporation not suable in plaintiff's state because of agencies there; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 610, 37 L. ed. 302, 13 Sup. Ct. Rep. 444, holding foreign corporation during business in Missouri nonresident thereof.

Cited in notes (14 L. R. A. 186) on residence or citizenship for purpose of Federal jurisdiction over corporation in state other than that where created; (85 Am. St. Rep. 918) on jurisdiction of foreign corporations.

Distinguished in *Minford v. Old Dominion S. S. Co.* 48 Fed. 1, holding, under act of 1888, suit may be brought in district wherein plaintiff resides and corporation maintains office.

Disapproved in *Thompson v. Southern R. Co.* 130 N. C. 144, 41 S. E. 9, and *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578, holding averment that defendant corporation is citizen of another state not sufficient allegation of nonresidence for removal of cause.

11 L. R. A. 219, *STATE v. EMERT*, 103 Mo. 241, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81.

Affirmed in 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 77, 15 Sup. Ct. Rep. 367.

Definition of peddler.

Cited in *State v. Parsons*, 124 Mo. 441, 5 Inters. Com. Rep. 252, 46 Am. St. Rep. 457, 27 S. W. 1102, holding person going from place to place selling and delivering medicine, a peddler; *State v. Snoddy*, 128 Mo. 528, 31 S. W. 36, holding person going from place to place selling and delivering machines owned by citizen of another state, a peddler; *State v. Hoffman*, 50 Mo. App. 589 (dissenting opinion), majority holding person going from house to house selling goods of foreign firm by sample not a peddler; *Re Houston*, 14 L. R. A. 720, 47 Fed. 542, holding agent not constituted a peddler by offer to sell to one person and sale to another of one of his samples.

Constitutionality of vendor's licensing acts.

Cited in *State v. Snoddy*, 128 Mo. 528, 31 S. W. 36, holding act requiring peddler of sewing machines owned in another state, to procure license, constitutional; *State v. Smithson*, 106 Mo. 153, 17 S. W. 221, upholding act requiring peddler's license, making no distinction between foreign and domestic articles; *Laurens v. Elmore*, 55 S. C. 481, 45 L. R. A. 250, 33 S. E. 560 (concurring opinion), holding ordinance requiring license of agent of foreign corporation selling picture frames for pictures previously sold, unconstitutional; *Preston v. Finley*, 72 Fed. 863, upholding constitutionality of act taxing sale of newspaper; *State v. Coop*, 52 S. C. 513, 41 L. R. A. 503, 30 S. E. 609 (dissenting opinion), majority holding sale of frame for portrait made in other state to fill order taken by solicitor in state of delivery, not peddling; *Saulsbury v. State*, 43 Tex. Crim. Rep. 94, 96 Am. St. Rep. 837, 63 S. W. 568, upholding constitutionality of act requiring peddlers to be licensed; *State v. Webber*, 214 Mo. 283, 113 S. W. 1054, 15 A. & E. Ann. Cas. 983, holding law requiring vendors of certain articles to take out peddler's license and not itinerant vendors of other articles is not for that reason unconstitutional.

Cited in footnote to *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though vendors of own products exempt.

Cited in notes (14 L.R.A. 98) on peddlers and drummers as related to interstate commerce; (46 L. ed. U. S. 785) on same point; (19 L.R.A.(N.S.) 313) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause; (39 L. ed. U. S. 540; 26 Am. St. Rep. 595) on license tax as interference with interstate commerce; (27 Am. St. Rep. 563) on license tax discriminating in favor of state products.

Liability of agent selling goods for unlicensed principal.

Cited in *Troy v. Harris*, 102 Mo. App. 60, 76 S. W. 662, holding agent not liable to prosecution for failure of principal to pay occupation tax.

Effect of tax on goods outside state.

Cited in *State v. Looney*, 214 Mo. 221, 29 L.R.A.(N.S.) 413, 97 S. W. 934, holding a tax on goods before they are brought into the state, is in effect, a tax upon the goods themselves.

Court having jurisdiction in construction of revenue laws.

Cited in *State v. Looney*, 116 Mo. App. 593, 96 S. W. 316, holding where case involves construction of United States revenue laws or interstate commerce clause of the National Constitution, it is within jurisdiction of the Supreme Court.

11 L. R. A. 222, *SKOGLUND v. MINNEAPOLIS STREET R. CO.* 45 Minn. 330, 22 Am. St. Rep. 733, 47 N. W. 1071.

Single and separate causes of action.

Cited in *Helms v. Northern P. R. Co.* 120 Fed. 397, holding joint action not maintainable against carrier and employee for sole negligence of latter; *Texas & P. R. Co. v. Nelson*, 9 Tex. Civ. App. 159, 29 S. W. 78, holding husband may bring separate actions for personal injuries to himself and wife resulting from same act at same time; *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 89, 50 L. R. A. 168, 81 Am. St. Rep. 238, 82 N. W. 1113, holding injuries to person and property through same wrong constitute but single cause of action.

Cited in footnote to *Emerson v. Nash*, 70 L.R.A. 326, which holds making of contract between two or more persons on each side which creates a situation involving presently or proximately separate rights on one side each of which with violation thereof by other side would constitute complete ground of complaint for judicial redress a "transaction" within meaning of statute permitting joinder of causes of action arising from same transaction.

Right of action for injuries to wife.

Cited in *Belyea v. Minneapolis, St. P. & S. S. L. M. R. Co.* 61 Minn. 224, 63 N. W. 627, holding wife not entitled to recover expense for medical treatment for injuries; *Blair v. Bloomington & N. R. Electric & Heating Co.* 130 Ill. App. 403, holding husband has a separate right of action for loss of services and consortium, occasioned by injury of wife; *Libaire v. Minneapolis & St. L. R. Co.* 113 Minn. 523, 130 N. W. 8, holding that wife may sue in her own name for her injuries, which are direct.

Cited in footnotes to *McFadden v. Santa Ana, O. & T. Street R. Co.* 11 L. R. A. 252, which holds husband's negligence will defeat action for injuries to wife; *Kelley v. New York, N. H. & H. R. Co.* 38 L. R. A. 631, which sustains husband's common-law right of action for loss of consortium through injury to wife; *Roberts v. Detroit*, 27 L. R. A. 572, which denies right to recover against city for loss of wife's services and expense incurred by her injury.

Cited in note (33 L.R.A.(N.S.) 1046) on right to recover for loss of consortium through personal injury to wife.

11 L. R. A. 224, *ULMAN v. BALTIMORE*, 72 Md. 587, 597, 20 Atl. 141, 21 Atl. 709.

Bill to have special assessment under subsequent curative acts declared null and void in 79 Md. 476, 30 Atl. 43.

Due process of law.

Cited in *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 101, 23 Atl. 74, holding notice necessary in taking of property under right of eminent domain; *Monticello Distilling Co. v. Baltimore*, 90 Md. 428, 45 Atl. 210, holding act authorizing valuation of property for taxation, without notice or hearing, unconstitutional; *Baltimore v. Stewart*, 92 Md. 544, 48 Atl. 165, upholding paving ordinance providing for notice at three stages of the proceeding; *Nugent v. Jackson*, 72 Miss. 1056, 18 So. 493, holding act providing notice for hearing at three stages of special assessment proceeding sufficient; *Rolph v. Fargo*, 7 N. D. 672, 42 L. R. A. 658, 76 N. W. 242, holding constitutional requirement as to notice not violated by legislature's establishment of foot-front rule; *Allman v. District of Columbia*, 3 App. D. C. 24, holding reasonable notice necessary to validate special improvement tax levy; *Sears v. Street Comrs.* 173 Mass. 356, 53 N. E. 876, holding sewerage works act unconstitutional through failure to grant owners of property hearing as to liability; *Mallory v. La Crosse Abattoir Co.* 80 Wis.

186, 49 N. W. 1071 (dissenting opinion), majority upholding act giving subcontractors liens regardless of contract price of building; Corry v. Baltimore, 96 Md. 322, 53 Atl. 942, holding notice to corporation of tax assessment on stock owned by nonresidents sufficient; Modern Loan Co. v. Police Ct. 12 Cal. App. 593, 108 Pac. 56, holding if property susceptible of a beneficial use has been perverted to an unlawful use, and is therefore subject to forfeiture, such forfeiture can only be declared after owner has had his day in court; Baltimore v. Gahan, 104 Md. 151, 64 Atl. 716, As overruling Mayor v. Hopkins, 56 Md. 1, on right of property owner to be heard.

Cited in footnotes to Gulf, C. & S. F. R. Co. v. Ellis, 17 L. R. A. 286, which holds valid, act authorizing attorneys' fees against railroad corporations in suits on claims; Branson v. Gee, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice, for highway repairs, valid; Davis v. St. Louis County, 33 L. R. A. 432, which holds void, act authorizing location and marking of section corners without notice to persons to be assessed for cost of same; Chicago & E. R. Co. v. Keith, 60 L. R. A. 525, which holds void, statute for construction of ditch to drain off water along railroad right of way on petition of adjoining owner, without giving company opportunity to be heard.

Distinguished in English v. Wilmington, 2 Marv. (Del.) 97, 37 Atl. 158, holding legislature may, without notice, fix amount of per foot frontage and square foot area assessable for sewer system.

Class legislation.

Cited in Herbert v. Baltimore County, 97 Md. 642, 55 Atl. 376, upholding constitutionality of act regulating fees of justices of the peace in specified county.

Foot-front assessment rule.

Cited in Rolph v. Fargo, 7 N. D. 664, 42 L. R. A. 655, 76 N. W. 242, and Baltimore v. Stewart, 92 Md. 552, 48 Atl. 165, upholding validity of foot-front rule.

Cited in note (28 L.R.A.(N.S.) 1126) on assessments for improvements by front-foot rule.

11 L. R. A. 230, BALKHAM v. WOODSTOCK IRON CO. 43 Fed. 648.

Adverse possession.

Cited in notes (19 L. R. A. 851) on adverse possession against remaindermen and owners of future estates; (8 L.R.A.(N.S.) 356) on effect of void proceedings for sale of realty to start statute running in favor of purchaser in possession; (88 Am. St. Rep. 725) on color of title.

11 L. R. A. 233, WELCH v. TRIBUNE PUB. CO. 83 Mich. 661, 21 Am. St. Rep. 629, 47 N. W. 562.

Rejection of qualified juror.

Cited in Stevens v. Union R. Co. 26 R. I. 99, 66 L.R.A. 469, 58 Atl. 492, holding unless prejudicial error is shown a new trial will be refused though court permits challenges to a jury in excess of number allowed by law.

Cited in note (15 Eng. Rul. Cas. 63) on right to peremptorily challenge jurors.

Distinguished in Brennan v. O'Brien, 121 Mich. 497, 80 N. W. 249, holding error in excluding qualified juror harmless, appellant not having exhausted peremptory challenge; Searle v. Roman Catholic Bishop, 203 Mass. 500, 25 L.R.A. (N.S.) 996, 89 N. E. 809, 17 A. & E. Ann. Cas. 340, holding it prejudicial error

in trial of a Roman Catholic for judge to rule no person of Catholic faith shall sit on jury when two of such faith are drawn.

Right to question juror as to former verdict.

Cited in *People v. Albers*, 137 Mich. 686, 100 N. W. 908, holding a juror cannot be questioned respecting his verdict; *People v. Mol*, 137 Mich. 700, 68 L.R.A. 885, 100 N. W. 913, 4 A. & E. Ann. Cas. 960, holding jurors cannot be asked on their voir dire, question as to opinion formed as to previous verdict arising out of same conspiracy.

Individual right of action for general libel.

Cited in *Boehmer v. Detroit Free Press Co.* 94 Mich. 10, 34 Am. St. Rep. 318, 53 N. W. 822, holding question for jury whether general libelous charge against township board included highway commissioner.

Evidence of malice.

Cited in note (9 Eng. Rul. Cas. 84) on evidence of malice.

11 L. R. A. 236, *THOMPSON v. CHRISTIE*, 138 Pa. 230, 20 Atl. 934.

Assignment by client to attorney.

Cited in *Fellows v. Loomis*, 170 Pa. 423, 33 Atl. 266, holding attorney procuring assignment of trust property from client to himself cannot escape obligations thereof.

Forfeiture of rights under lease.

Cited in *Drake v. Lacoe*, 157 Pa. 39, 27 Atl. 538, holding delay of twelve years fatal to right of forfeiture for nonpayment of royalties; *Lynch v. Versailles Fuel Gas Co.* 165 Pa. 522, 35 W. N. C. 561, 30 Atl. 984, holding lessee, under circumstances of case, entitled to notice of nonpayment before forfeiture; *Duffield v. Michaels*, 42 C. C. A. 653, 102 Fed. 823, and *Steiner v. Marks*, 172 Pa. 404, 33 Atl. 695, holding lessor cannot enforce forfeiture for default after throwing lessee off his guard; *Verdolite Co. v. Richards*, 7 Northampton Co. Rep. 117, holding demand for compliance necessary before forfeiture; *McCarty v. Mellon*, 5 Pa. Dist. R. 429, holding forfeiture impliedly waived will not be enforced; *Rose v. Lanyon Zinc Co.* 68 Kan. 133, 74 Pac. 625, holding lease of property with right of drilling and operating for gas or oil is not forfeited by breach of one of its terms in absence of an express stipulation; *McGraw Oil Co. v. Kennedy*, 65 W. Va. 599, 28 L.R.A.(N.S.) 964, 64 S. E. 1027, holding lessor cannot declare a forfeiture of lease because he thinks property is furnishing gas in paying quantities, where lessee is paying annually the required amount of rent; *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 327, 70 N. E. 363, holding equity looks with disfavor upon forfeitures, and will interpose to prevent it when its enforcement will operate inequitably or unconscionably; *Homet v. Singer*, 35 Pa. Super. Ct. 495, holding a lease could not be forfeited for failure to quarry a certain amount of stone each year where only that average for ten years was required.

Cited in notes (31 L. R. A. 673) on forfeiture of oil and gas lease; (65 Am. St. Rep. 520) on reformation of lease to enable plaintiff to assert forfeiture.

Effect of parol, upon written, agreement.

Cited in note (17 L. R. A. 274) on parol evidence to vary, add to, or alter written contract.

Notice.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

11 L. R. A. 238, *LEE v. FIRST NAT. BANK*, 45 Kan. 8, 25 Pac. 196.

Commercial paper of partnerships.

Cited in *Schellenbeck v. Studebaker*, 13 Ind. App. 440, 55 Am. St. Rep. 240, 41 N. E. 845, holding partner of nontrading firm has no implied authority to execute firm note for horses used in business, in absence of necessity or usage; *First Nat. Bank v. Stadden*, 103 Minn. 405, 115 N. W. 198, holding members of trading copartnerships have implied authority to pledge credit of firm by issue of negotiable paper in furtherance of copartnership business.

Cited in notes (48 Am. St. Rep. 441, 442) as to when partnership is bound by loan effected by one member; (19 Eng. Rul. Cas. 438) on power of partner to bind firm by issue of negotiable paper.

Limitation of partner's authority.

Cited in note (88 Am. St. Rep. 323) on limitation of partner's authority by articles of partnership.

11 L. R. A. 240, *THOMAS v. BLAND*, 91 Ky. 1, 14 S. W. 955.

Demurrer.

Cited in *Cassidy v. Young*, 92 Ky. 231, 17 S. W. 485, holding court's action in sustaining demurrer exercise of judgment and discretion upon the merits.

Covenants running with land.

Cited in *Wright v. Phipps*, 90 Fed. 562, holding that original covenants run to purchase under mortgage; *Jacobs v. Fowler*, 135 App. Div. 717, 119 N. Y. Supp. 647, holding a covenant of quiet possession or of warranty runs with the land and they and the right of action upon them are assignable; *Snadon v. Salmon*, 135 Ky. 50, 121 S. W. 970, holding one who has suffered such loss as would entitle him to maintain action upon a general warranty may bring action for breach against a remote vendor who conveyed with covenant of warranty.

Cited in footnotes to *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land; *Wiggins v. Pender*, 61 L. R. A. 772, which holds assignee entitled to benefit of covenant of warranty not naming him, if assigns named in habendum clause of deed.

Cited in notes (82 Am. St. Rep. 687, 688) on what covenants run with the land; (15 Eng. Rul. Cas. 250) on right of assignee to sue covenantor.

11 L. R. A. 241, *Re SPEAKERSHIP*, 15 Colo. 520, 25 Pac. 707.

Ex parte questions submitted to court.

Cited in *Re Penitentiary Comrs.* 19 Colo. 413, 35 Pac. 915, refusing to give *ex parte* opinion in answer to question from governor in relation to controversy which had already risen; *Re Fire & Excise Comrs.* 19 Colo. 500, 36 Pac. 234, refusing to answer question by governor as to right of police commissioner to retain office, after governor had removed him.

Removal of officers.

Cited in *Pueblo County v. Smith*, 22 Colo. 546, 33 L. R. A. 470, 45 Pac. 357, holding power to remove or abolish not incidental to power of appointment of justices of peace under special act; *Gillett Trustees v. People*, 13 Colo. App. 560, 59 Pac. 72, holding elected mayor of town not removable at arbitrary will of its board of trustees; *State ex rel. Childs v. Kiichli*, 53 Minn. 155, 19 L. R. A. 783, 54 N. W. 1069, holding president of city council removable at its pleasure; *State ex rel. Haviland v. Beadle*, 42 Mont. 179, 111 Pac. 720, holding that members of legislative assembly are not liable to impeachment.

Cited in footnote to *French v. Senate*, 69 L.R.A. 556, which sustains right of state legislature to remove member thereof.

Amendments to Constitution.

Cited in *People ex rel. Elder v. Sours*, 31 Colo. 398, 74 Pac. 167, holding constitutional limitation as to number of amendments applicable to express amendments only.

Right to vote as affected by election to chair.

Cited in *Harris v. People*, 18 Colo. App. 162, 70 Pac. 699, holding selection of a member of a board of trustees of a town as mayor pro tem does not deprive him of his right to vote.

11 L. R. A. 246, *BULLARD v. NORTHERN P. R. CO.* 10 Mont. 168, 3 Inters. Com. Rep. 536, 25 Pac. 120.

Illegal discrimination within Federal act.

Cited in *Kizer v. Texarkana & F. S. R. Co.* 66 Ark. 355, 50 S. W. 871, holding that contract by carrier to transport lumber to point beyond state for stipulated rate which is less than he will carry lumber for others under same conditions is void under interstate commerce act; *Haurigan v. Chicago & N. W. R. Co.* 80 Neb. 143, 117 N. W. 100, 16 A. & E. Ann. Cas. 450, holding a discrimination in rate even though made and agreed to by mistake is void; *State v. Martyn*, 82 Neb. 234, 23 L.R.A.(N.S.) 222, 117 N. W. 719, 17 A. & E. Ann. Cas. 659, holding issuance of an annual pass to a physician by a railroad company is in violation of "anti pass law," though stipulation is that he shall receive \$25 a month and such pass for his services; *Interstate Commerce Commission v. Chesapeake & O. R. Co.* 128 Fed. 71, holding carrier may cease to perform contracts made in good faith whenever the cost of the article or other cost items go to such a point that contract price does not equal the cost items and the carrier's published freight rates.

Cited in footnote to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* 66 L.R.A. 453, which holds milling in transit agreement between manufacturer and carrier by which former is to be credited on freight bills for manufactured goods shipped freight paid on raw materials shipped to mill not prohibited rebate.

Cited in notes (12 L.R.A.(N.S.) 609) on invalidity of rebates and discriminations; (14 L.R.A.(N.S.) 403; 52 L. ed. U. S. 681) on effect of statutory provisions against rebates upon contracts for transportation at less than regular rate.

Police power over railroad rates.

Cited in *Portland R. Light & P. Co. v. Railroad Commission*, 56 Or. 478, 105 Pac. 709, holding that right of railroad to collect reasonable fares is vested right, but it is subject to police power of state.

11 L. R. A. 252, *McFADDEN v. SANTA ANA, O. & T. STREET R. CO.* 87 Cal. 464, 25 Pac. 681.

Torts by and against married women.

Cited in *Williams v. Casebeer*, 126 Cal. 82, 58 Pac. 380, holding action for malicious prosecution not maintainable by wife alone; *Henley v. Wilson*, 137 Cal. 277, 58 L. R. A. 943, 92 Am. St. Rep. 160, 70 Pac. 21, upholding husband's common-law liability for tort of wife committed without his knowledge or consent; *Paine v. San Bernardino Valley Traction Co.* 143 Cal. 658, 77 Pac. 659, holding husband necessary party to action for recovery of damages for injury to wife; *Justis v. Atchison, T. & S. F. R. Co.* 12 Cal. App. 642, 108 Pac. 328, holding right to recover damages from common carrier for breach of contract is property and when acquired after marriage by husband or wife is community

property; *McKune v. Santa Clara Valley Mill & Lumber Co.* 110 Cal. 487, 42 Pac. 980, holding where damages are sought for injuries done to the wife she is a necessary party to the action; *Lamb v. Harbaugh*, 105 Cal. 692, 39 Pac. 56, holding in an action to recover damages for personal injuries to the wife, the husband is a necessary party; *Neale v. Depot R. Co.* 94 Cal. 429, 29 Pac. 954, holding in such case judgment may properly be given in favor of both husband and wife jointly; *Gomez v. Scanlan*, 155 Cal. 530, 102 Pac. 12, holding though action is to recover community property the husband and wife may properly join and after husband's death wife may be joined with husband's personal representative.

Cited in notes (28 Am. St. Rep. 80) on joinder of husband and wife in action for personal injury; (126 Am. St. Rep. 119) on damages recovered for personal injuries to either spouse as community property.

Distinguished in *Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 290, 42 Pac. 1063, holding statutory right of action for death caused by negligence to the "heirs or personal representatives" is to those capable of inheriting generally without reference to distribution of community property.

Imputing husband's negligence to wife.

Cited in *Basler v. Sacramento Gas & Electric Co.* 158 Cal. 518, 111 Pac. 530, Ann. Cas. 1912 A, 642, holding that contributory negligence of husband bars right of recovery by either husband or wife, for injury to wife who at time was in care of husband.

Cited in notes (14 L. R. A. 733) on imputing contributory negligence of driver of private vehicle to wife injured while riding with him; (22 L. R. A. 460) on husband's negligence as bar to recovery for wife's personal injuries; (8 L.R.A.(N.S.) 656) on imputed negligence of husband as driver to wife as passenger.

Disapproved in *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 388, 26 L.R.A. 559, 44 Am. St. Rep. 145, 20 S. E. 550, holding negligence of the father is not chargeable to the mother who sues in her own right for injuries to her minor child.

Cross-examination of material witness.

Cited in *Re Kasson*, 127 Cal. 500, 59 Pac. 950, reversing for improper restriction of cross-examination of material witness.

11 L. R. A. 254, *ISAACS v. McNEIL*, 44 Fed. 32.

Right to damages for being prevented from voting.

Cited in *Morris v. Colorado Midland R. Co.* 48 Colo. 149, 31 L.R.A.(N.S.) 1110, 139 Am. St. Rep. 268, 109 Pac. 430, 20 Ann. Cas. 1006, holding that carrier is not liable for so negligently operating train that passenger does not reach voting place in time to vote at general election.

Cited in notes (11 L.R.A.(N.S.) 501) on personal liability of election officer for rejecting ballots; (31 L.R.A.(N.S.) 1107) on right to damages for being prevented from voting.

11 L. R. A. 255, *Re HOBSON*, 81 Iowa, 392, 46 N. W. 1095.

Marshaling of assets.

Cited in *Dickson v. Back*, 32 Or. 239, 51 Pac. 727, holding creditor with lien upon two pieces of real estate not required to resort to one of them to protect later lien on other; *Webb v. Hunt*, 2 Ind. Terr. 622, 53 S. W. 437, holding right to marshaling of assets not enforceable to prejudice of third parties

Cited in note (39 L.R.A.(N.S.) 1001) on right of junior to compel paramount creditor to resort primarily to property of third person.

Proof of claim against two estates.

Cited in *Re Meyer*, 78 Wis. 622, 11 L. R. A. 843, 23 Am. St. Rep. 435, 48 Pac. 55, sustaining right of holder of promissory note to prove full face value against insolvent estates of both maker and indorser.

Cited in note (54 L. R. A. 349) on creditor's right to participate under assignment or deed of trust for benefit of creditors, which he has repudiated.

11 L. R. A. 257, *DEFORD v. HUTCHISON*, 45 Kan. 318, 25 Pac. 641.

Correction of former opinion by eliminating all reference to counterclaim on rehearing in 45 Kan. 332, 26 Pac. 60.

General denial in replevin.

Cited in *Street v. Morgan*, 64 Kan. 86, 67 Pac. 448, holding additional averments in answer in replevin after general denial immaterial; *Aultman v. Forgey*, 10 Ind. App. 402, 36 N. E. 939, holding breach of warranty matter of defense provable under general denial in replevin; *Payne v. McCormick Harvesting Mach. Co.* 11 Okla. 330, 66 Pac. 287, holding any defense which will defeat plaintiff's claim in replevin provable under general denial.

Counterclaim.

Cited in *Tracy v. Kerr*, 47 Kan. 663, 28 Pac. 707, holding, in action against owner by lumberman succeeding to contractor's rights, damages for wrongful suit by plaintiff against owner to foreclose mechanic's lien, without making contractor a party, rightfully pleaded as counterclaim; *Frick Co. v. Stephens*, 7 Kan App. 747, 53 Pac. 378, holding counterclaim improperly allowed against mortgagee for damages in failing to deliver engine in time, where notes therefor were given after such delivery; *Wyman v. Herard*, 9 Okla. 59, 51 Pac. 1009, holding counterclaim sufficient if it arises out of transaction which is basis of plaintiff's action; *Harden v. Lang*, 110 Ga. 399, 36 S. E. 100, holding damage claim for breach of contract not allowable under plea of recoupment in defense to action for trover; *McCormick Harvesting Mach. Co. v. Hill*, 104 Mo. App. 556, 79 S. W. 745, holding a counter claim may be set up on a money demand for affirmative relief in action of replevin; *Zimmerman, Wells-Brown Co. v. Sunset Lumber Co.* 57 Or. 312, 32 L.R.A.(N.S.) 124, 111 Pac. 690, to the point that counter claim may be set up and judgment for excess given in action of replevin.

Distinguished in *Bartlett v. Ridgley Nat. Bank*, 70 Kan. 131, 78 Pac. 414, holding in replevin an answer does not state a defense which seeks to defeat recovery by asserting claim of damages by showing wrong-doing on part of plaintiff after commencement of action.

11 L. R. A. 264, *Re OSBORN*, 87 Cal. 1, 25 Pac. 157.

Liability of executors and administrators.

Cited in *Re Carver*, 123 Cal. 104, 55 Pac. 770, holding executor does not lose commission by reason of loss to estate through negligence; *Hewlett v. Beede*, 2 Cal. App. 566, 83 Pac. 1086, holding an executor liable to the heirs if through inexcusable neglect he permits loss of estate in intrusting it to his coexecutor.

Cited in note (11 L.R.A.(N.S.) 334, 338, 340, 341) on liability of coexecutor for default of one permitted to manage estate.

11 L. R. A. 267, *SIMMONS HARDWARE CO. v. WAIBEL*, 1 S. D. 488, 36 Am. St. Rep. 755, 47 N. W. 814.

Right to protection of trade secrets.

Cited in *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 154, 38 L. R. A. 203, 68 Am. St. Rep. 469, 72 N. W. 140, upholding injunction restraining employee from revealing trade secrets learned during employment.

Cited in notes (13 L. R. A. 652) on property in secrets, processes, and recipes; (12 L.R.A.(N.S.) 104) on protection of trade secrets.

Rights in literary property.

Cited in footnotes to *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* 41 L. R. A. 846, which holds lease of reference books of mercantile agency to subscriber a publication defeating common-law copyright; *National Teleg. News Co. v. Western U. Teleg. Co.* 60 L. R. A. 805, which holds market quotations and sporting news, gathered by telegraph company, protected by copyright laws.

Cited in notes (51 L. R. A. 366, 380) on common-law rights of authors and others in intellectual productions.

Preventing advantage from abuse of process.

Cited in footnote to *Rosenthal v. Muskegon Circuit Judge*, 22 L. R. A. 693, which upholds right to compel attorneys to surrender books and papers obtained by abuse of process.

Appointment of receivers.

Cited in *Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co.* 96 Ala. 477, 38 Am. St. Rep. 109, 11 So. 439, holding receiver will not be appointed unless necessity therefor reasonably clear and free from doubt.

Cited in note (72 Am. St. Rep. 34, 40) as to when appointment of receiver is proper.

11 L. R. A. 271, *STEFFENSON v. CHICAGO, M. & ST. P. R. CO.* 45 Minn. 355, 47 N. W. 1068.

Reports of later appeals in 48 Minn. 288, 51 N. W. 610, 51 Minn. 533, 53 N. W. 800.

Negligence of fellow servant in operation of railroad.

Cited in *Slette v. Great Northern R. Co.* 53 Minn. 345, 55 N. W. 137, holding question of negligence of fellow servant properly submitted to jury under statute of 1887; *Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 10, 49 N. W. 302, holding railroad not liable for injury to section man while loading car, caused by fellow employee letting iron fall upon him; *Stubbs v. Omaha, K C. & E. R. Co.* 85 Mo. App. 196, holding damages recoverable by servant for injury through negligence of fellow servant while replacing old rails on track with new; *Lindgren v. Minneapolis & St. L. R. Co.* 86 Minn. 154, 90 N. W. 381, upholding complaint alleging injury received by section hand through negligence of fellow servant in removing hand car from track; *Northern P. R. Co. v. Behling*, 6 C. C. A. 682, 12 U. S. App. 662, 57 Fed. 1038, holding negligence of fellow servant in operation of hand car not a defense under Minnesota statute; *Perez v. San Antonio & A. P. R. Co.* 28 Tex. Civ. App. 258, 67 S. W. 137, holding operation of hand car within statute making railroads liable for injury to employees while engaged in "operation of its cars," etc; *Cahill v. Illinois C. R. Co.* 148 Iowa, 245, 28 L.R.A.(N.S.) 1123, 125 N. W. 331, holding that railroad fellow-servant statute applies to repair gang removing hand car from track to permit train to pass; *Slette v. Great Northern R. Co.* 53 Minn. 345, 55 N. W. 137, holding negligence of a coservant might constitute a ground for recovery

against master under the statute; *Kibbe v. Stevenson Iron Min. Co.* 69 C. C. A. 145, 136 Fed. 149; *Kline v. Minnesota Iron Co.* 93 Minn. 69, 100 N. W. 681,—holding private railroad used in operation of a mine was within the purview of the statute; *Jemming v. Great Northern R. Co.* 96 Minn. 311, 1 L.R.A.(N.S.) 703, 104 N. W. 1079, holding danger of a pitman assisting in operation of steam shovel in gravel pit owned by a railroad was not a hazard peculiar to railroading; *Hider v. Minneapolis, St. P. & S. Ste. M. R. Co.* 115 Minn. 327, 132 N. W. 316, to the point that railroad fellow servant statute applies to section-men while operating hand car for use in their work.

Operation of hand cars.

Cited in *Wallin v. Eastern R. Co.* 83 Minn. 154, 54 L. R. A. 483, 86 N. W. 76, which holds failure to make suitable rules for operation of hand cars used by bridge gangs negligence.

11 L. R. A. 272, *STATE ex rel. TAYLOR v. SULLIVAN*, 45 Minn. 309, 22 Am. St. Rep. 729, 47 N. W. 802.

Rights and obligations of incumbent of office.

Cited in *State ex rel. Dowdall v. Dahl*, 69 Minn. 112, 71 N. W. 910, denying right of private person without personal interest, to information in nature of quo warranto to test right to office; *Batterton v. Fuller*, 6 S. D. 268, 60 N. W. 1071, holding incumbent of office entitled to contest election of successful candidate on ground of ineligibility; *Stevens v. Carter*, 27 Or. 559, 31 L. R. A. 352, 40 Pac. 1074, holding incumbent of office cannot hold over until right to office is established in proper proceeding; *Baker City v. Murphy*, 30 Or. 415, 35 L. R. A. 94, 42 Pac. 133, holding sureties liable for defalcation of public official while holding over; *State v. Fabrick*, 16 N. D. 98, 112 N. W. 74, holding, where statute fixed term at certain time and until successor was duly elected and qualified, that holding over was a part of the term; *State ex rel. Doolittle v. Hays*, 91 Miss. 767, 45 So. 728, holding same, and where ineligible successor is elected, that there is right to hold over until the next general election; *State ex rel. Engelhard v. Weber*, 96 Minn. 424, 113 Am. St. Rep. 630, 105 N. W. 490, on right to hold over in office by virtue of prior incumbency.

Cited in notes (30 Am. St. Rep. 213) on right of officer to hold over; (124 Am. St. Rep. 218) on effect of election where successful candidate is ineligible.

Eligibility to office.

Cited in *State ex rel. Childs v. Streukens*, 60 Minn. 326, 62 N. W. 259, upholding title to office of county auditor, of alien who had ratified declaration of intention to become citizen, made while a minor; *Demaree v. Scates*, 50 Kan. 282, 20 L. R. A. 99, 34 Am. St. Rep. 113, 32 Pac. 1123, holding statutory eligibility refers to capacity to hold office, and not to eligibility to election; *State ex rel. Broatch v. Moores*, 52 Neb. 786, 73 N. W. 299, holding that statutory eligibility refers to capacity to be elected to office; *State ex rel. Thompson v. McAllister*, 38 W. Va. 513, 24 L. R. A. 353, 18 S. E. 770, holding that statute requiring officers to be freeholders does not relate to qualifications for election; *State ex rel. Thayer v. Boyd*, 31 Neb. 708, 48 N. W. 739, holding plurality of votes for ineligible candidate makes election void; *Roane ex rel. Tunstall v. Matthews*, 75 Miss. 99, 21 So. 665, holding town marshal entitled by quo warranto to oust ineligible successor; *Finklea v. Farish*, 160 Ala. 237, 49 So. 366, holding that word "eligible" in constitution means capacity to hold office at time of election; *Dodson v. Bowlby*, 78 Neb. 194, 110 N. W. 698, holding provision that county treasurer should be ineligible for more than two terms meant that he should be incapable of being elected and not appointed.

Cited in footnotes to *State ex rel. Goodell v. McGeary*, 44 L. R. A. 446, which holds building and furnishing new house with intention of living in same does not make owner elector of ward while renting elsewhere; *Kirkpatrick v. Brownfield*, 29 L. R. A. 703, which holds certificate of eligibility to office, obtained after election, sufficient.

Cited in note (23 L.R.A.(N.S.) 1229) on time as to which eligibility of officer to be determined.

11 L. R. A. 274, *BEVILL v. COX*, 107 N. C. 175, 12 S. E. 52.

Second appeal in 109 N. C. 265, 13 S. E. 800.

Effect of coverture upon contract for services.

Cited in *Beville v. Cox*, 109 N. C. 269, 13 S. E. 800, holding coverture of defendant's intestate could not, in any event, defeat claim for services rendered by her before marriage.

Jurisdiction of justice of peace.

Cited in *Wilson Cotton Mills v. Randleman Cotton Mills*, 116 N. C. 649, 21 S. E. 431, holding defendant in answer to creditor's bill may, by way of counterclaim, impeach judgment of justice of peace upon which action is founded.

11 L. R. A. 275, *Re SECRETARY OF TREASURY*, 45 Fed. 396.

Subsequent petition by same petitioner to condemn same land in 12 C. C. A. 235, 26 U. S. App. 240, 64 Fed. 472.

Conformity of Federal to state practice in condemnation proceedings.

Cited in *Carlisle v. Cooper*, 12 C. C. A. 235, 26 U. S. App. 240, 64 Fed. 473, holding costs not recoverable against United States in conformity to practice in state courts; *Judson v. United States*, 57 C. C. A. 105, 120 Fed. 637, holding United States bound by agreement of district attorney to submit to arbitration condemnation proceeding for land for public building.

11 L. R. A. 278, *BENEDICT v. TORRENT*, 83 Mich. 181, 21 Am. St. Rep. 589, 47 N. W. 129.

Conveyance by cotenant.

Cited in *Mee v. Benedict*, 98 Mich. 261, 22 L. R. A. 643, 39 Am. St. Rep. 543, 57 N. W. 175, holding tenant in common of grantor of timber may be compelled to institute proceedings for partition of land and timber as a whole; *Nevels v. Kentucky Lumber Co.* 108 Ky. 553, 49 L. R. A. 417, footnote, p. 416, 94 Am. St. Rep. 388, 56 S. W. 969, denying cotenant's right to enforce against purchaser unauthorized sale of logs; *Burt & B. Lumber Co. v. Clay City Lumber Co.* 111 Ky. 729, 64 S. W. 652, holding that purchaser from one cotenant, not authorized to sell, cannot recover value of logs taken by other tenant; *Harrell v. Mason*, 170 Ala. 286, 54 So. 105, holding that conveyance of timber on moiety of land by tenant in common does not create cotenancy in timber district from that in land which will give right to partition; *Fredrick v. Fredrick*, 219 Ill. 582, 76 N. E. 856, holding conveyance of whole or any part of any specific portion of the common estate by a tenant in common is void so far as prejudicial to interests of the other; *Jonas v. Weires*, 134 Iowa, 56, 111 N. W. 453, holding a tenant in common may make a valid sale of an undivided fraction of his undivided interest, but he cannot sell his interest, or any portion thereof.

Cited in notes (16 L. R. A. 326) on parol partition to give legal title or color of title; (136 Am. St. Rep. 681) on creation and conveyance of easements appurtenant by cotenant.

Partition.

Cited in *Oneal v. Stimson*, 61 W. Va. 556, 56 S. E. 889, holding where no averment is made and proof showing an equitable division cannot be made, court will not in a partition proceedings decree sale and distribution of proceeds.

11 L. R. A. 280, *EQUITABLE LIFE ASSUR. SOC. v. HUGHES*, 125 N. Y. 106, 26 N. E. 1.

Taxable costs.

Cited in *Stevens v. Central Nat. Bank*, 168 N. Y. 566, 61 N. E. 904, holding costs not duly awarded not taxable; *Shaver v. Eldred*, 86 Hun, 56, 33 N. Y. Supp. 158, and *Whitney v. Roe*, 75 Hun, 510, 27 N. Y. Supp. 511, holding cost of stenographer's minutes used on motion for new trial in county court not taxable as disbursement; *Hausauer v. Machawicz*, 54 App. Div. 24, 66 N. Y. Supp. 340, holding that under acceptance of offer of judgment for chattel and \$2 damages for detention, costs cannot exceed \$2; *Hudson v. Erie R. Co.* 57 App. Div. 100, 68 N. Y. Supp. 28, holding expense of stenographer's fees for minutes of one trial for use at another not taxable; *Park v. New York C. & H. R. R. Co.* 57 App. Div. 571, 68 N. Y. Supp. 460, Affirming 33 Misc. 321, 68 N. Y. Supp. 460, holding necessary expense of stenographer's minutes for preparing amendments to case taxable; *Gilmour Mfg. Co. v. Stettler*, 58 Misc. 362, 109 N. Y. Supp. 667, holding expense of producing stenographic minutes for use in a subsequent trial is not properly taxed as a disbursement; *Rose v. Swarthout*, 73 Misc. 586, 133 N. Y. Supp. 557, holding that under section 3256 of Civil Code Procedure expense of official search which is part of record in action made by officer of sister state is taxable as disbursement.

11 L. R. A. 282, *Re SELLERS CHAPEL M. E. CHURCH*, 139 Pa. 61, 21 Atl. 145.

Gifts for charitable uses.

Cited in *Com. v. Connellsburg*, 25 Pa. Co. Ct. 437, holding grant of land for use of inhabitants of town not defeated because not made to trustees; *De Veaux College for Orphan & Destitute Children v. Highlands Land Co.* 63 App. Div. 467, 71 N. Y. Supp. 857, upholding power of trustees of land for charitable use to sell part of same; *Funck's Estate*, 16 Pa. Super. Ct. 438, holding gift of burial ground for burial purposes trust for charitable use; *Riggs v. New Castle*, 229 Pa. 494, 140 Am. St. Rep. 733, 78 Atl. 1037, holding that instrument which provides that borough, its lessees and assigns, "may and shall occupy forever for purposes of wharf" certain lands passes fee to borough; *Weber's Estate*, 25 Mortg. Co. L. Rep. 119, granting petition to sell trust property devised for home for widows; *Re Ryan*, 26 Mortg. Co. L. Rep. 53, holding that trustee of property held for benefit of certain Catholic church may be empowered to sell same where such sale is for benefit of church; *Handy v. Bailey*, 11 Del. Co. Rep. 370, holding that non-user of property donated for religious purposes does not operate as forfeiture of title.

Cited in footnote to *School Land Comrs. v. Wadhams*, 11 L. R. A. 210, which holds valid, gift to trustees to erect church and parsonage for church society not in existence.

Cited in notes (11 L. R. A. 214) on authority of trustees of religious corporation; (19 L. R. A. 264) on condition in deed that land is to be used for specified charitable public or quasi public purpose; (2 L.R.A.(N.S.) 174) on necessity of word "heirs" in deed or devise in trust to pass fee to trustee; (7 L.R.A.(N.S.) 1120) on effect of provision directing particular purposes to which gift to or for religious or charitable organization shall be devoted; (11

L.R.A.(N.S.) 517) on effect of specifying use of real estate in devise to religious society.

Distinguished in *Congregation Shaarai Shomayim v. Moss*, 20 Lanc. L. Rev. 178, upholding right of grantee, for consideration of land in trust for burial purposes, to grant exclusive burial privileges.

Construction of words in grant.

Cited in *Dempwolf v. Greybill*, 213 Pa. 170, 62 Atl. 645, holding where words can be construed either as a condition, reservation or covenant, the latter construction is favored.

11 L. R. A. 284, *Re WHITE*, 3 Inters. Com. Rep. 531, 43 Fed. 913.

Interference with interstate commerce.

Followed in *Re Nichols*, 48 Fed. 166, holding borough ordinance requiring foreign book agent to procure license void; *Re Tinsman*, 95 Fed. 651, holding ordinance requiring license of agents soliciting for portrait enlargement orders for foreign principal void.

Cited in notes-(13 L. R. A. 588) on municipal ordinances unconstitutional and void; (14 L. R. A. 98) on peddlers and drummers as related to interstate commerce; (39 L. R. A. 455) on decision against constitutional right, as nullity subject to collateral attack; (60 L. R. A. 692) on corporate taxation and the commerce clause; (19 L.R.A.(N.S.) 308) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

Habeas corpus in Federal courts.

Cited in *Ex parte Martin*, 180 Fed. 213, holding that Federal court has jurisdiction to issue writ of habeas corpus to determine jurisdiction of state court to deprive citizen of liberty, and will exercise it in its discretion.

11 L. R. A. 285, *OWENSBORO & N. R. CO. v. TODD*, 91 Ky. 175, 15 S. W. 56.

Railroad fences and cattle guards.

Cited in *Ringo v. Chesapeake & O. R. Co.* 111 Ky. 681, 64 S. W. 522, holding act requiring railroads to fence right of way acquired by gift inapplicable to lands acquired before passage of act.

Cited in notes (9 L.R.A.(N.S.) 355) on duty of railroad to fence right of way; (31 L.R.A.(N.S.) 862) on constitutionality of statutes requiring railroad to fence tracks and build cattle guards.

Distinguished in *Steadd v. Southern R. Co.* 109 Ky. 219, 58 S. W. 581, upholding constitutionality of statute requiring railroad company to fence right of way acquired by gift, as to land acquired after its passage.

Criticized in *Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 666, 27 L. R. A. 265, 46 Am. St. Rep. 92, 13 So. 602, upholding act requiring railroads to build cattle guards on demand of land owners.

Equal protection and freedom of contract.

Cited in notes (14 L. R. A. 585) on constitutional equality of privileges, immunities, and protection; (21 L. R. A. 792) on constitutionality of statutes restricting contracts and business.

Nondelegable legislative powers.

Cited in *James v. United States Fidelity & G. Co.* 133 Ky. 305, 117 S. W. 406, holding the power to fix the rate of taxation is in the general assembly and it cannot be delegated to any subordinate body, or even to the court.

Validity of statute depending on individual action.

Cited in *Morton v. Holes*, 17 N. D. 159, 115 N. W. 256; *Rouse v. Thompson*, 228

Ill. 536, 81 N. E. 1109,—holding that operation of statute cannot be made to depend upon action of private individual.

11 L. R. A. 287, HUTCHINSON v. McLAUGHLIN, 15 Colo. 492, 25 Pac. 317.
Court's protecting care over minors.

Cited in Lusk v. Patterson, 2 Colo. App. 311, 30 Pac. 253, holding guardian of infant cannot bind him by consent to payment of invalid debt against estate; People *ex rel.* Porteus v. Barton, 16 Colo. 78, 26 Pac. 149, upholding issuance of writ of *ne exeat respublica* on behalf of minor; Seaton v. Tohill, 11 Colo. App. 217, 53 Pac. 170, holding infant not bound by admissions or pleadings of guardian *ad litem* against his interest; Lusk v. Kershow, 17 Colo. 488, 30 Pac. 62, refusing to enforce agreement by guardian on behalf of wards, with approval of probate court, undertaking to assume debt of another; Stevens v. Continental Casualty Co. 12 N. D. 473, 97 N. W. 862, holding a guardian cannot make admissions against the interest of his wards.

Interpleader.

Cited in footnote to Northwestern Mut. L. Ins. Co. v. Kidder, 66 L.R.A. 89, which denies right of insurance company which has delivered check to beneficiary to compel her to interplead in suit to enforce payment of check with creditors of a corporation of which insured was a member who assert right to proceeds of policy because premiums were paid out of corporate funds.

11 L. R. A. 290, BATTRELL v. OHIO RIVER R. CO. 34 W. Va. 232, 12 S. E. 699.

Direct averments in pleading.

Cited in Spiker v. Bohrer, 37 W. Va. 264, 16 S. E. 575, holding declaration stating under a *quod cum* facts necessary to maintain trespass, fatally defective on general demurrer; Rogers v. Coal River Boom & Driving Co. 41 W. Va. 598, 23 S. E. 919, upholding declaration on demurrer, using "whereas" as to matters of inducement merely, in action for tort.

Damages allowable by jury for tort.

Cited in Mayer v. Frobe, 40 W. Va. 266, 22 S. E. 58, holding \$750 not excessive damages for injury to wife's means of support by unlawful sales of intoxicating liquor to her husband; Turner v. Norfolk & W. R. Co. 40 W. Va. 694, 22 S. E. 83, holding jury's verdict will not be set aside unless evincing wrongful motives; Hawkins v. Nuttallburg Coal & Coke Co. 66 W. Va. 416, 66 S. E. 520, to the point that in actions for damages for torts, amount of damages is to be left largely to jury.

Permanent damages.

Cited in Pickens v. Coal River Boom & Timber Co. 66 W. Va. 17, 24 L.R.A. (N.S.) 354, 65 S. E. 865, as illustrating permanent damages.

Excessive damages as ground for new trial.

Cited in note (8 Eng. Rul. Cas. 460) on excessive damages as ground for new trial.

11 L. R. A. 293, EAST TEXAS F. INS. CO. v. CLARKE, 79 Tex. 23, 15 S. W. 166.

Second appeal in 1 Tex. Civ. App. 239, 21 S. W. 277.

Conditions affecting contract of insurance.

Cited in Fire Asso. v. Flournoy, 84 Tex. 635, 31 Am. St. Rep. 89, 19 S. W. 793, holding policy avoided by conditional sale of insured property without con-

sent of insurer; *Excelsior Foundry Co. v. Western Assur. Co.* 135 Mich. 473, 98 N. W. 9, 3 A. & E. Ann. Cas. 707, holding policy avoided by conditional sale where fire occurs before delivery of bill of sale; *Wright v. Hartford F. Ins. Co.* 54 Tex. Civ. App. 9, 118 S. W. 191, holding that vendor's lien on property is incumbrance thereon, which avoids policy of insurance containing stipulation against incumbrances.

Cited in notes (11 L. R. A. 341) on construction of insurance contract; (11 L. R. A. 344) on acts and agreements of insurance agent binding on company; (38 L. R. A. 563) on change of interest in insured property.

11 L. R. A. 295, *FIRST NAT. BANK v. WEVER* (Tex. App.) 15 S. W. 41.

Place of demand.

Cited in footnote to *Leonard v. Olson*, 35 L. R. A. 381, which requires demand to be made at particular place, if any, at which note is payable.

11 L. R. A. 296, *COFFER v. TERRITORY*, 1 Wash. 325, 25 Pac. 632.

Abatement of brothel.

Distinguished in *Ingersoll v. Rousseau*, 35 Wash. 100, 76 Pac. 513, 1 A. & E. Ann. Cas. 35, holding equity has power to interfere by injunction at suit of private person specially injured, to enjoin maintenance of a bawdy house.

11 L. R. A. 297, *TRAVELERS INS. CO. v. McCARTHY*, 15 Colo. 351, 22 Am. St. Rep. 410, 25 Pac. 713.

Cause of death or injury.

Cited in *Orr v. Travelers' Ins. Co.* 120 Ala. 651, 24 So. 997, and *Johnson v. Travelers' Ins. Co.* 15 Tex. Civ. App. 316, 39 S. W. 972, holding insurer not liable where insured was murdered; *Continental Casualty Co. v. Morris*, 46 Tex. Civ. App. 399, 102 S. W. 773, holding where language of accident policy is "death or injury" company is protected against either death or injury when caused by intentional injuries inflicted by the insured or any other person.

Cited in footnote to *Jarnagin v. Travelers' Protective Assn.* 68 L.R.A. 499, which holds that failure of police officers to protect insured while in their charge from assaults by other persons will not take his killing out of provision against recovery in case of death from intentional injuries.

Cited in notes (13 L. R. A. 265) on intentional injury to insured; (30 L. R. A. 208) on what constitutes accident within meaning of accident insurance policy.

11 L. R. A. 299, *HOBBS v. IOWA MUT. BEN. ASSO.* 82 Iowa, 107, 31 Am. St. Rep. 466, 47 N. W. 983.

Laws forming part of insurance contract.

Cited in *Moore v. Union Fraternal Acci. Assn.* 103 Iowa, 428, 72 N. W. 645, holding policy absolute on face limited by articles of incorporation and by-laws, referred to by indorsement on back; *Corey v. Sherman*, 96 Iowa, 133, 32 L. R. A. 519, 64 N. W. 828, holding member of mutual insurance company presumed to know its articles of incorporation and by-laws; *Fitzgerald v. Metropolitan Acci. Assn.* 106 Iowa, 459, 76 N. W. 809, holding by-laws of accident insurance association admissible to show insured not entitled to benefits.

Changes in insurer's laws after issuance of certificate or policy.

Cited in *Sieverts v. National Benev. Assn.* 95 Iowa, 715, 64 N. W. 671, holding that health certificate could not be added to reinstatement requirements by change in by-laws after issuance of policy; *Carnes v. Iowa State Traveling Men's*

Asso. 106 Iowa, 283, 68 Am. St. Rep. 306, 76 N. W. 683, holding existing certificates of insurance not affected by amendment of constitution of insurer limiting liability; *Farmers Mut. Hail Ins. Asso. v. Slattery*, 115 Iowa, 414, 88 N. W. 949, holding insured not bound by subsequent amendment to by-laws, providing for suspension; *McNeil v. Southern Tier Masonic Relief Asso.* 40 App. Div. 588, 58 N. Y. Supp. 119, declaring new by-law relating to forfeiture void, as unreasonable and destructive of vested rights; *Ancient Order, U. W. v. Brown*, 112 Ga. 551, 37 S. E. 890, construing subsequent by-law requiring change in beneficiaries of certificates, to have prospective operation in absence of clear contrary intent; *Supreme Tent of K. of M. v. Hammers*, 81 Ill. App. 568, holding subsequent by-laws binding on insured and beneficiary, power to enact forming part of original contract; *Dornes v. Supreme Lodge K. of P.* 75 Miss. 481, 23 So. 191, holding subsequent amendment exempting insurer from liability for suicide binding where insured contracted to be bound by future laws; *Ross v. Modern Brotherhood*, 120 Iowa, 694, 95 N. W. 207, holding member of benefit association bound by subsequent change in by-laws; *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 199, 90 N. W. 717, holding rights of certificate holder of building association unaffected by change in by-laws, right to amend not being reserved; *Hexom v. Knights of Maccabees*, 140 Iowa, 49, 117 N. W. 19, holding every member of a mutual insurance company is presumed to know the laws thereof in force during the period of his membership; *Norton v. Catholic Order of Foresters*, 138 Iowa, 467, 24 L.R.A.(N.S.) 1034, 114 N. W. 893, holding members are bound to take notice of by-laws of such association though adopted after the contract is made; *Fort v. Iowa Legion of Honor*, 146 Iowa, 195, 123 N. W. 224, holding that amount payable under mutual benefit certificate cannot be reduced by subsequent amendment of Constitution of society; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 811, 90 N. W. 926, holding he is bound by subsequent by-laws in same manner as by those in existence at time of issuance of his certificate of membership; *Hall v. Western Travelers' Acci. Asso.* 69 Neb. 603, 96 N. W. 170, holding a member of a mutual insurance company, who agrees to be bound by reasonable by-laws cannot complain of a reasonable amendment subsequent to the issuance of his certificate.

Cited in footnote to *Shipman v. Protected Home Circle*, 63 L.R.A. 347, which holds former members bound by adoption of by-laws relieving benefit society from liability for death benefits in case of suicide.

Cited in notes (52 Am. St. Rep. 556, 557, 575; 83 Am. St. Rep. 706, 711; 1 L.R.A.(N.S.) 1066) on effect of adoption of by-laws by fraternal insurance order upon benefit certificates already issued.

Disapproved in *Zimmerman v. Supreme Tent, K. M.* 122 Mo. App. 598, 99 S. W. 817, holding subsequent by-laws, apply only to duties of person as a member of the order and cannot avoid his contract of insurance.

11 L. R. A. 302, *SWIFT v. WARD*, 80 Iowa, 700, 45 N. W. 1044.

Power of partner to dissolve firm.

Cited in note (77 Am. St. Rep. 320) on power of partner to dissolve partnership for definite period.

11 L. R. A. 305, *JACKSON v. JACKSON*, 153 Mass. 374, 25 Am. St. Rep. 643, 26 N. E. 1112.

Construction of words "issue" and "family."

Followed in *Coates v. Burton*, 191 Mass. 181, 77 N. E. 311, holding a devise upon death of daughter of testator "to her lawful issue share and share alike"

means a distribution per stirpes where various provisions of will point to distribution by right of representation.

Cited in *Townsend v. Townsend*, 156 Mass. 457, 31 N. E. 632, excluding grandchildren from bequest of remainder of estate to family; *Pearce v. Rickard*, 18 R. I. 147, 19 L. R. A. 474, 49 Am. St. Rep. 755, 26 Atl. 38, holding bequest to lawful issue of life tenant distributable *per capita* among children and grandchildren; *Drake v. Drake*, 134 N. Y. 225, 17 L. R. A. 668, footnote p. 664, 32 N. E. 114, construing words "lawful issue" as embracing grandchild; *Blagge v. Balch*, 162 U. S. 465, 40 L. ed. 1038, 16 Sup. Ct. Rep. 853, construing words "next of kin," in proviso of French claims act, to mean next of kin living at date of act; *Ridley v. McPherson*, 100 Tenn. 404, 43 S. W. 772, construing provision in deed of remainder of interest in lands to "issue" of life tenant living at her death, to include grandchildren; *Gardiner v. Savage*, 182 Mass. 524, 65 N. E. 851, holding that upon termination of life estate, with fee to issue of life tenant, if any, property descended to issue, *per stirpes*; *Clark v. Fay*, 205 Mass. 232, 27 L.R.A.(N.S.) 458, 91 N. E. 328, holding that words "then living" refers to death of child and not of testator under will directing trustees upon death of each of testators children, to convey to such child's "lawful issue" then living; *Union S. D. & T. Co. v. Dudley*, 104 Me. 306, 72 Atl. 166, holding word "issue" in a will primarily imports descendants; *Brisbin v. Huntington*, 128 Iowa, 173, 103 N. W. 144, 5 A. & E. Ann. Cas. 931, holding words "lawful issue" do not include bastards; *Gray v. Whitemore*, 192 Mass. 377, 10 L.R.A.(N.S.) 1149, 116 Am. St. Rep. 246, 78 N. E. 422, holding where remainder becomes a vested interest in testator's children either before or at their death a further limitation to the heirs at law is to be disregarded; *Dary v. Grau*, 190 Mass. 488, 77 N. E. 507, holding same where will provided that share of a child dying shall go to the issue of that child and if none to the surviving children of testator.

Cited in footnotes to *McIlhinny v. McIlhinny*, 24 L. R. A. 489, which holds word "issue" a word of purchase, and not of limitation; *Collins v. Feather*, 61 L. R. A. 660, which holds legatees take *per capita* under bequest to one or more persons living, and children of one who is dead.

11 L. R. A. 308, *SHORES v. HOOPER*, 153 Mass. 228, 26 N. E. 846.

Conclusiveness of judgment or decree.

Cited in *Harris v. Starkey*, 176 Mass. 447, 79 Am. St. Rep. 322, 57 N. E. 698, upholding power of probate court by proper proceeding to correct mistake in decree of distribution; *Starkey v. Kingsley*, 69 N. H. 294, 39 Atl. 1017, holding assumpsit not maintainable against distributees for share of estate after distribution, with notice by publication; *Morris v. Virden*, 57 Ark. 236, 21 S. W. 223, holding personal representative of deceased distributee necessary party on distribution of assets of estate; *Tyler v. Registration Court Judges*, 175 Mass. 90, 51 L. R. A. 441, 55 N. E. 812, majority upholding constitutionality of proceeding *in rem* without personal service to quiet title to land; *Snow v. Blount*, 182 Mass. 490, 65 N. E. 845, raising, but not deciding, question whether decree ordering sale of decedent's land can be attacked only in probate court; *Minot v. Purrington*, 190 Mass. 341, 77 N. E. 630, holding a decree of distribution has no effect upon the rights of parties to other parts of fund remaining in hands of the trustees; *Mace v. Duffy*, 39 Wash. 599, 81 Pac. 1053, holding a foreign decree of distribution is not competent evidence of heirship as against one having real property beyond jurisdiction; *Sorensen v. Sorensen*, 68 Neb. 496, 98 N. W. 837, holding a judgment in rem as to matters involved in collateral litigation, is binding only upon those who actually litigated matters necessarily involved, and their privies; *Cleveland v. Draper*, 194 Mass. 122, 80 N. E. 227, holding a petition for an order

of distribution is in the nature of a proceeding in rem, and the court unquestionably has jurisdiction; *Hilton v. Snyder*, 37 Utah, 387, 108 Pac. 698, Ann. Cas. 1912 C, 241, holding that judgment in action for dower, in which widow's marriage was in issue, is not admissible in subsequent action against strangers to that judgment to prove marriage.

Cited in footnotes to *Greenstreet v. Thornton*, 27 L. R. A. 735, which holds void, decree based on summons against dead man; *Ruckman v. Union Railway*, 69 L.R.A. 480, which holds judgment for defendant in action to compel surrender of corporate bonds to successor of corporation issuing same on ground of wrongful transfer a bar to a claim of payment in subsequent suit to foreclose mortgage securing same.

Acts and declaration of grantor.

Cited in *O'Donnell v. Hall*, 154 Mass. 431, 28 N. E. 349, holding title not impeachable by acts and declarations of grantor recording deed at grantee's request.

11 L. R. A. 313, *CHILDRY v. HUNTINGTON*, 34 W. Va. 457, 12 S. E. 536.

Injuries caused by defective streets.

Cited in *Phillips v. Huntington*, 35 W. Va. 410, 14 S. E. 17, holding usage by city of highway as public street imposes prima facie liability for injury due to defects thereof; *Waggener v. Point Pleasant*, 42 W. Va. 800, 26 S. E. 352, holding allegation of duty of defendant town to keep sidewalk in repair sufficient allegation of control; *Parrish v. Huntington*, 57 W. Va. 294, 50 S. E. 416, holding it must be alleged in declaration, and proved on the trial, that the street or sidewalk has been opened, controlled and treated as a public street or sidewalk in order to give recovery against the city.

Cited in footnotes to *Teagar v. Flemingsburg*, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians; *Harden v. Jackson*, 66 L.R.A. 986, which holds plank sidewalk not so unsafe as to render city liable to one falling thereon because his cane goes through, although the edges of planks have become so decayed as not to withstand pressure of cane.

Cited in note (20 L.R.A.(N.S.) 567, 569, 734) on liability of municipality for defects or obstructions in streets.

Proof of acts of municipal authorities.

Cited in *Jordan v. Benwood*, 42 W. Va. 321, 36 L. R. A. 522, 57 Am. St. Rep. 859, 26 S. E. 266, holding records of city council best evidence of action of city authorities; *Devanney v. Hanson*, 60 W. Va. 8, 53 S. E. 603, holding oral evidence is not admissible to prove acts of city council, unless the absence of the record is satisfactorily explained.

Distinguished in *Ray v. Chesapeake & O. R. Co.* 57 W. Va. 335, 50 S. E. 413, holding oral evidence admissible to show street used for twenty five years by the general public, on which railroad had during this time maintained signs of warning "Railroad crossing" was a public street.

Remote and proximate cause of injury.

Cited in note (12 L. R. A. 280) on contributory negligence as a defense must be proximate cause of injury.

Contributory negligence.

Cited in *Shriver v. Marion County Ct.* 66 W. Va. 693, 26 L.R.A.(N.S.) 381, 66 S. E. 1062, holding when a clear case of contributory negligence is disclosed by the evidence the court may take the case from the jury upon a proper motion.

11 L. R. A. 316, RAGSDALE v. RAGSDALE, 68 Miss. 92, 24 Am. St. Rep. 256, 8 So. 315.

Gifts burdened with trusts.

Cited in *Amherst College v. Ritch*, 10 Misc. 525, 31 N. Y. Supp. 885, impressing deed of gift of residuary estate with trust expressed in will and private memoranda; *Orth v. Orth*, 145 Ind. 197, 32 L. R. A. 306, 57 Am. St. Rep. 185, 42 N. E. 277, refusing to enforce parol promise by sole beneficiary under will to carry out wishes of testator as expressed in letter; *Ransdel v. Moore*, 153 Ind. 419, 53 L. R. A. 762, 53 N. E. 767, holding title of real estate, taken under promise to vest title in others, enforceable trust; *Gammel v. Fletcher*, 76 Kan. 593, 92 Pac. 713, holding a constructive trust raised, where husband to prevent wife's willing property during last illness, promises to make the conveyance according to wishes of wife; *Moore v. Crump*, 84 Miss. 619, 37 So. 109, to the point that where person obtains title to land intended for another by fraud trust will be raised in favor of such other; *Benbrook v. Yancy*, 96 Miss. 543, 51 So. 461, holding that one who induces testator to devise entire estate to her, by promising to convey to others a share thereof will be adjudged to hold property in trust.

Cited in notes (20 L. R. A. 468) on gifts by will as affected by promise made to testator and by secret trusts; (8 L.R.A.(N.S.) 699, 701) on constructive trust from fraud in frustrating decedent's intention to give property to third person; (106 Am. St. Rep. 97) on heir, devisee or legatee as trustee ex maleficio.

Distinguished in *Moore v. Campbell*, 102 Ala. 450, 14 So. 780, refusing to enforce parol trust in realty devised by will.

Parol evidence to show trust.

Cited in *Moore v. Crump*, 84 Miss. 619, 37 So. 109, holding where a grantee or devisee obtains possession and title to land intended for another by actual fraud, on proof of the fraud in favor of the latter a trust will be raised and it may be established by parol.

11 L. R. A. 317, MILLER v. ANDERSON, 1 S. D. 539, 47 N. W. 957.

Liens upon real and personal property.

Cited in *Wright v. Sherman*, 3 S. D. 297, 17 L. R. A. 794, 52 N. W. 1093, holding lien of chattel mortgage superior to subsequent agister's lien; *Iowa Land Co. v. Douglas County*, 8 S. D. 498, 67 N. W. 52, holding lien of personal taxes on real estate enforceable by sale of property; *McGillivray v. McGillivray*, 9 S. D. 190, 68 N. W. 316, holding payment good defense by county holding junior personal tax lien, to action to foreclose mortgage; *Buell v. Boylan*, 10 S. D. 181, 72 N. W. 406, holding mortgagee may redeem lands of mortgagor after tax sale, without paying subsequent personal tax lien; *Gifford v. Callaway*, 8 Colo. App. 366, 46 Pac. 626, holding that if lien on realty for personal taxes exists, it is inferior to prior encumbrance; *Bibbins v. Clark*, 90 Iowa, 237, 29 L. R. A. 284, 57 N. W. 884, and *Lobban v. State*, 9 Wyo. 382, 64 Pac. 82, holding personal tax lien on real estate inferior to earlier mortgage.

Cited in notes (29 L. R. A. 278) on priority of claims for taxes against assets of a debtor; (35 L. R. A. 373) on superiority of lien of local assessment over prior lien.

Distinguished in *Kirby v. Waterman*, 17 S. D. 317, 96 N. W. 129, holding a mortgage taken for money loaned on realty is subject to deeds executed by the city for the nonpayment of assessments for local improvements though improvements are made after mortgage is taken.

Disapproved in effect in *Minnesota v. Central Trust Co.* 36 C. C. A. 218, 94 Fed.

247, holding personal tax lien on personal property superior to every other private lien in such property.

11 L. R. A. 321, SCHUYLER v. HANNA, 31 Neb. 307, 47 N. W. 932.

Life estates.

Cited in Nebraska Loan & T. Co. v. Smassall, 38 Neb. 519, 57 N. W. 167, upholding validity of mortgage upon survivor's life interest in homestead estate; Brichacek v. Brichacek, 75 Neb. 419, 106 N. W. 473, holding upon death of wife husband became vested with the right to occupy homestead during his natural life, irrespective of any terms contained in the will; Re Robertson, 86 Neb. 493, 125 N. W. 1093, holding the homestead, upon husband's death, vested at once in surviving wife for life, and afterwards in his or her heirs forever, subject to power of disposition by will; Hobson v. Huxtable, 79 Neb. 342, 116 N. W. 278, holding the estate of the heir vests upon the death of the parent, subject to life estate of surviving spouse.

Cited in footnote to Starnes v. Hill, 22 L. R. A. 598, which holds indefeasible fee not vested in one to whom life estate given, with estate in fee to his "heirs."

Vested and contingent remainders.

Cited in Archer v. Jacobs, 125 Iowa, 475, 101 N. W. 195, holding it is the certainty of the right of future enjoyment which characterizes a vested remainder; Jonas v. Weires, 134 Iowa, 51, 111 N. W. 453, holding the uncertainty which characterizes a contingent, as distinguished from a vested, remainder, is uncertainty as to person or the event and not as to the time of enjoyment.

Cited in footnote to Bowen v. Hackney, 67 L.R.A. 441, which holds that no estate vests in children until widow's death under will giving life estate to widow and providing that at her death that given to her for life shall be equally divided between all the children, the representatives of those having died to stand in place of ancestors.

Cited in note (37 Am. St. Rep. 146) on vested and contingent remainders.

Construction of statutes.

Cited in Parker v. Nothomb, 65 Neb. 313, 60 L. R. A. 700, 91 N. W. 395, holding that word "unmarried" in bastardy statute refers to status of mother of illegitimate child at time it is begotten and born and not at time complaint is made; Joslin v. Williams, 3 Neb. (Unof.) 196, 93 N. W. 701, on obscurity of meaning of statute governing homestead rights.

"Heirs."

Followed in Fort v. Cook, 3 Neb. (Unof.) 13, 90 N. W. 634, holding words "his or her heirs" as used in statutes refers to heirs of decedent and not to those of survivor.

11 L. R. A. 323, EMMEL v. HAYES, 102 Mo. 186, 22 Am. St. Rep. 769, 14 S. W. 209.

Enforcement of land contract.

Cited in Taylor v. Von Schraeder, 107 Mo. 228, 16 S. W. 675, holding parol contract for sale of land not enforceable without delivery thereunder, and without permanent improvements on faith thereof; Johnson v. Hurley, 115 Mo. 519, 22 S. W. 492, upholding parol contract for purchase of land made with authorized agent, who forged deed and received purchase money, purchaser making valuable improvements; Hill v. Rich Hill Coal Min. Co. 119 Mo. 31, 24 S. W. 223, holding mere boring for coal by purchaser of land under prevalent custom, not such possession as to make specifically enforceable contract for purchase not otherwise enforceable; Rogers v. Wolfe, 104 Mo. 10, 14 S. W. 805, refusing to decree per-

formance of parol contract by wife to convey land to husband in consideration of promise of maintenance and support; *Cherbonnier v. Cherbonnier*, 108 Mo. 263, 18 S. W. 1083, refusing to decree specific performance of vague and indefinite oral contract to convey real estate; *Hays v. Kansas City, Ft. S. & G. R. Co.* 108 Mo. 550, 18 S. W. 1115, holding verbal contract to convey to railroad in consideration of certain improvements enforceable after performance by railroad; *Warren v. Castello*, 109 Mo. 342, 32 Am. St. Rep. 669, 19 S. W. 29, refusing to enforce agreement without consideration, to convey land to married woman; *Swafford v. Spratt*, 93 Mo. App. 635, 67 S. W. 701, holding question of sufficiency of delivery and part payment to take verbal sale out of statute of frauds, for jury; *Lewis v. North*, 62 Neb. 558, 87 N. W. 312, holding continued possession of tenant not sufficient part performance to take verbal contract to convey out of statute of frauds; *Rosenwald v. Middlebrook*, 188 Mo. 93, 86 S. W. 200, refusing specific performance of contract to will property for services which would have been done without contract.

Cited in note (6 Eng. Rul. Cas. 746) on right to specific performance of oral contract for land in case of part performance.

Testimony of transaction with deceased person.

Cited in *Goodin v. Goodin*, 172 Mo. 48, 72 S. W. 502, holding parol contract of deceased parent to convey land not established where evidence was contradictory and left facts in doubt; *Hickman v. Green*, 123 Mo. 187, 29 L. R. A. 49, 27 S. W. 440 (dissenting opinion), majority holding objection to competency of witness to testify in her own behalf as to transactions with deceased person, waived.

Rule as to possessor of land disputing title he holds under.

Cited in *Stewart v. Miles*, 166 Mo. 181, 65 S. W. 754, holding lessee cannot dispute title of landlord; *Kansas City v. Scarritt*, 169 Mo. 483, 69 S. W. 283, holding trustee of land for benefit of public cannot at same time hold it adversely.

Nature of part performance to satisfy statute of frauds.

Cited in *Logue v. Langan*, 81 C. C. A. 271, 151 Fed. 459, holding part performance or the making of valuable improvements to take case out of statute of frauds must be such as to indicate an acceptance of gift on the terms on which it is alleged to have been made; *Muir v. Chandler*, 16 N. D. 554, 113 N. W. 1038, holding possession must be actual, open and notorious to serve as an act of part performance; *Phillips v. Jones*, 79 Ark. 107, 95 S. W. 164, 9 A. & E. Ann. Cas. 131 (dissenting opinion), on possession necessary to part performance; *Jenning v. Miller*, 48 Or. 204, 85 Pac. 517, holding suit for specific performance of oral lease of land for more than one year will not lie though tenant on expiration of former lease took option on another building which he abandoned to accept lease.

Cited note (3 L.R.A.(N.S.) 810) on taking possession of realty as part performance to satisfy statute of frauds.

11 L. R. A. 327, *THIRD NAT. BANK v. HAUG*, 82 Mich. 607, 47 N. W. 33.

Bill to set aside conveyance as fraudulent in 95 Mich. 249, 54 N. W. 888.

Right to dividends as between secured and unsecured creditors.

Cited in *Williams v. Overholt*, 46 W. Va. 341, 33 S. E. 226; *New York Security & T. Co. v. Lombard Invest. Co.* 73 Fed. 554; *Chemical Nat. Bank v. Armstrong*, 28 L. R. A. 236, 8 C. C. A. 161, 16 U. S. App. 465, 59 Fed. 37; *Tod v. Kentucky Union Land Co.* 57 Fed. 65,—holding secured creditors entitled to dividend on whole amount of claims; *Merrill v. National Bank*, 173 U. S. 169, 43 L. ed. 654, 19 Sup. Ct. Rep. 360 (dissenting opinion), majority holding secured creditor entitled to dividend on full amount of claim at time of insolvency; *Ragsdale v. Winnsboro*

Bank, 45 S. C. 583, 23 S. E. 947, holding creditor entitled to dividend on assigned estates of sureties on full amount of claim, without deducting amount received from principal's estate; *High v. Fifth Nat. Bank*, 97 Mich. 511, 21 L. R. A. 826, 56 N. W. 927 (dissenting opinion), majority holding secured creditor receiving part payment from source outside security not obliged to deduct same from amount originally secured; *Re Scofield Buggy Co.* 89 Mich. 21, 50 N. W. 753, referring to, but not deciding, question as to rights to surplus, as between secured and unsecured creditors; *Re Burke*, 25 R. I. 302, 55 Atl. 825, holding that a secured creditor should be allowed dividend on the full amount of his debt though amount of security is less; *Re E. Bements Sons*, 150 Mich. 533, 114 N. W. 327, on rule of application of funds where one of two creditors has a right to resort to two funds.

Cited in footnotes to *Meyer's Assignment*, 11 L. R. A. 841, which holds right to dividend from estate of insolvent indorser on full amount of note not defeated by receiving dividend from maker's estate; *High v. American Wheel Co.* 21 L. R. A. 822, which holds secured creditor entitled to dividend on full claim.

Disapproved in *Sullivan v. Erle*, 8 Colo. App. 5, 44 Pac. 948; *Jamison v. Adler-Goldman Commission Co.* 59 Ark. 552, 28 S. W. 35; *Re Frasch*, 5 Wash. 347, 31 Pac. 755,—holding secured creditor only entitled to *pro rata* share of insolvent's estate after exhausting securities.

11 L. R. A. 332, *MAYNARD v. FIRST REPRESENTATIVE DISTRICT*, 84 Mich. 228, 47 N. W. 756.

Construction of Constitution.

Cited in footnote to *Johnston v. State*, 12 L. R. A. 235, which requires construction of constitutional provisions with reference to known usages.

Right to vote.

Cited in *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 495, 41 L. R. A. 629, 76 N. W. 175, holding act authorizing governor to appoint police and fire commissioners in metropolitan cities, void; *Chamberlain v. Wood*, 15 S. D. 229, 56 L. R. A. 191, 91 Am. St. Rep. 674, 88 N. W. 109 (dissenting opinion), majority upholding right to limit voting to candidates with names printed on official ballots.

Validity of election laws.

Cited in footnotes to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *Brewer v. McClelland*, 17 L. R. A. 845, which holds statute requiring notice of claim to be legal voter, from persons residing less than six months in county, void.

Cited in note (17 L. R. A. 842) on implied restrictions on power of legislature.

Mandamus to compel recanvass of votes.

Cited in *Belknap v. Board of Canvassers*, 94 Mich. 518, 54 N. W. 376, upholding right to mandamus to compel board of canvassers to reconvene and recanvass votes.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which authorizes mandamus to compel canvassing board to disregard illegal return; *Rosenthal v. State Canvassers*, 19 L. R. A. 158, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Cited in note (47 L. R. A. 514) on unconstitutionality of statute as defense against mandamus to compel its enforcement.

Distinguished in *May v. Board of Canvassers*, 94 Mich. 514, 54 N. W. 377, holding right to recount of vote of aggrieved party enforceable by mandamus.

Right to maintain mandamus.

Cited in *Miner v. Beurmann*, 165 Mich. 677, 131 N. W. 388, holding that title

to office cannot be tested in mandamus proceedings; *Payne v. Staunton*, 55 W. Va. 207, 46 S. E. 927, 2 A. & E. Ann. Cas. 74, denying mandamus to compel inspection of public records by a private individual for the sole purpose of learning, evidence for institution of criminal proceedings.

Questioning validity of statute by disregard thereof.

Cited in *State ex rel. Wiles v. Williams*, 232 Mo. 70, 34 L.R.A.(N.S.) 1066, 133 S. W. 11, holding that officer may raise question of constitutionality of statute in mandamus proceedings to compel him to perform ministerial duty, when so advised by attorney general.

Distinguished in *Com. ex rel. Atty. Gen. v. Mathus*, 210 Pa. 386, 59 Atl. 961, affirming 13 Pa. Dist. R. 238, 29 Pa. Co. Ct. 545, on right of state treasurer to call in question the validity of a statute relative to the salaries of the judiciary by refusing to pay warrants.

11 L. R. A. 340, *HOOSE v. PRESCOTT INS. CO.* 84 Mich. 309, 47 N. W. 587.

Ownership of insured property as affecting policy.

Cited in *Ahlbery v. German Ins. Co.* 94 Mich. 261, 53 N. W. 1102, upholding policy on building on leased ground issued under oral application when agent was fully notified of fact; *Hamilton v. Dwelling House Ins. Co.* 98 Mich. 539, 22 L. R. A. 529, 57 N. W. 735, holding vendor under land contract, vendee being in possession, has insurable interest; *Miotke v. Milwaukee Mechanics' Ins. Co.* 113 Mich. 169, 71 N. W. 463, holding condition as to ownership of property insured waived by leaving space for showing title blank; *Alamo F. Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 680, 28 S. W. 126, holding policy requiring sole ownership by insured of insured property not avoided by liens or encumbrances; *Quackenbush v. Citizens' Ins. Co.* 150 Mich. 558, 114 N. W. 388, holding vendor having legal title in property to have an insurable interest in the buildings thereon; *Glens Falls Ins. Co. v. Michael*; 167 Ind. 669, 8 L.R.A.(N.S.) 713, 74 N. E. 964, holding unconditional ownership clause waived where policy is issued to a life tenant without inquiry as to state of title and where no representation is made and premium is accepted.

Cited in notes (11 L. R. A. 293) on conditions in policy, and transfer and alienation of interest; (30 L. R. A. 636) on effect of riders or slips attached to policies; (20 L.R.A.(N.S.) 777) on vendee under land contract as owner within meaning of insurance policy.

Distinguished in *Rosenstock v. Mississippi Home Ins. Co.* 82 Miss. 636, 35 So. 309, holding vendor granting possession to vendee upon payment of large portion of purchase price not "sole and unconditional" owner; *Wyandotte Brewing Co. v. Hartford F. Ins. Co.* 144 Mich. 443, 6 L.R.A.(N.S.) 853, 115 Am. St. Rep. 458, 108 N. W. 393, holding that an insured cannot be relieved from a condition as to title in a policy by fact that he neglected to read condition; *Parsons v. Lane (Re Millers' & Mfrs.' Ins. Co.)* 97 Minn. 102, 4 L.R.A.(N.S.) 234, 106 N. W. 485, 7 A. & E. Ann. Cas. 1144, holding a provision as to an unconditional ownership to apply to existing conditions at time of contract not as to future conditions of title; *Parsons v. Lane (Re Miller's & Mfrs. Ins. Co.)* 97 Minn. 102, 4 L.R.A.(N.S.) 234, 106 N. W. 485, 7 Ann. Cas. 1144, holding that unknown existing breaches of condition are not waived.

Rules of construction of insurance contract.

Cited in *Brown v. Palatine Ins. Co.* 89 Tex. 594, 35 S. W. 1060, holding same rules of construction applicable to insurance as to other contracts; *McGannon v. Michigan Millers' Mut. F. Ins. Co.* 127 Mich. 651, 54 L. R. A. 746, 89 Am. St. Rep. 501, 87 N. W. 61 (dissenting opinion), majority upholding recovery on policy,

although watchman, agreed to be kept on premises, absented himself without knowledge of insured.

Cited in notes (22 Am. St. Rep. 330; 14 Eng. Rul. Cas. 16) on rules for construing insurance policies.

Acts and admissions of agent binding on insurance company.

Cited in footnotes to *Follett v. United States Mut. Acci. Asso.* 15 L. R. A. 668, which holds agent's knowledge of applicant's deafness imputable to insurance company; *Cole v. Union Cent. L. Ins. Co.* 47 L. R. A. 201, which holds credit for part of first premium extended by general agent binding on company; *Hall v. Union Cent. L. Ins. Co.* 51 L. R. A. 288, which holds admissions by insurance agent after death of insured, that all premiums paid, binding on company; *Koehler v. Supreme Council C. B. L.* 52 L. R. A. 861, which denies power of officers of benefit society to waive judgment of assessments for death benefits.

Conditions in policy affecting liability.

Cited in *Hall v. Niagara F. Ins. Co.* 93 Mich. 189, 18 L. R. A. 139, 32 Am. St. Rep. 497, 53 N. W. 727, holding conditions as to ownership, required to be indorsed on policy, related to changes subsequent to insurance.

Cited in note (13 L.R.A.(N.S.) 867) on effect of nonwaiver agreement on conditions existing at inception of policy.

Distinguished in *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 420, 64 N. W. 206, holding policy void because insured property was encumbered at time of issuance of policy, without knowledge or consent of insurer.

Erroneous direction of verdict.

Cited in *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 703, 64 N. W. 732, reversing judgment because of erroneous ruling and direction of verdict for defendant, although plaintiff's proofs were fatally defective; *Garn v. Lockard*, 108 Mich. 200, 65 N. W. 764, reversing judgment for erroneous direction of verdict, although record showed action to be barred by statute of limitations.

11 L. R. A. 347, *KINGMAN v. DENISON*, 84 Mich. 608, 22 Am. St. Rep. 711, 48 N. W. 26.

Stoppage in transitu.

Cited in *Weber v. Baessler*, 3 Colo. App. 465, 34 Pac. 261, upholding vendor's right of stoppage *in transitu* where goods were in hands of transfer company, with authority to deliver to vendee.

Cited in footnotes to *Jeffris v. Fitchburg R. Co.* 33 L. R. A. 351, which holds stoppage *in transitu* not defeated by delivery of part of consignment; *Johnson v. Eveleth*, 48 L. R. A. 50, which holds logs subject to stoppage *in transitu* while being driven down river by log-driving company; *Brewer Lumber Co. v. Boston & A. R. Co.* 54 L. R. A. 435, which holds right of stoppage *in transitu* not lost by carrier's storage for failure to unload in time, while freight charges unpaid.

Cited in note (23 Eng. Rul. Cas. 433) on termination of right of stoppage *in transitu*.

11 L. R. A. 350, *BOLANDER v. PETERSON*, 136 Ill. 215, 26 N. E. 603.

Names and trade-marks.

Cited in *Elgin Butter Co. v. Elgin Creamery Co.* 155 Ill. 136, 40 N. E. 616, Affirming 51 Ill. App. 233, holding corporation could not obtain exclusive right to trade-name of "Elgin butter" or "Creamery;" *William J. Moxley Co. v. Braun & F. Co.* 93 Ill. App. 187, upholding right to trade-mark "The Only High Grade;" *International Committee, Y. W. C. A. v. Young Women's Christian Asso.* 194 Ill. 202, 56 L. R. A. 892, 62 N. E. 551 (dissenting opinion), majority holding unau-

thorized use of name "International Committee of the Young Woman's Christian Association" enjoined; *Italian Swiss Colony v. Italian Vineyard Co.* 158 Cal. 258, 32 L.R.A. (N.S.) 446, 110 Pac. 913, holding that Italian word "Tipo" signifying type or kind, cannot be adopted as trademark in connection with other words designating type or kind; *Meldrum v. Shubert*, 2 Ill. C. C. 297, holding use of name "Garrick Theatre" was unfair as to an earlier user in a different section of same city.

Cited in footnote to *Schmidt v. Brieg*, 22 L. R. A. 790, which holds words "Sarsaparilla and Iron" not claimable as trade-mark.

Cited in notes (85 Am. St. Rep. 93, 115) on what words or phrases may constitute a valid trademark; (26 L.R.A. (N.S.) 89) on right to protection in use of geographical name; (32 L.R.A. (N.S.) 440) on descriptive word in foreign language as subject of trademark; (45 L. ed. U. S. 366) on trademark in geographical name.

11 L. R. A. 352, *WILLIAMS v. CHICAGO & A. R. CO.* 135 Ill. 491, 25 Am. St. Rep. 397, 26 N. E. 661.

Liability to persons to whom no duty is owed.

Cited in *City of Pekin v. McMahon*, 154 Ill. 148, 27 L. R. A. 209, 45 Am. St. Rep. 114, 39 N. E. 484, holding city liable for drowning of child in pit filled with water on premises owned by it; *Ziech v. Hebard*, 67 Ill. App. 99, holding plaintiff in negligence action must prove both duty and its neglect; *Pfeiffer v. Chicago, M. & St. P. R. Co.* 73 Ill. App. 426, holding defendant not liable for collision of engine with hand car; *West Chicago Street R. Co. v. Tuerk*, 193 Ill. 390, 61 N. E. 1087, holding proper, in action by passenger on street car for personal injuries from collision with wagon going in same direction, refusal to charge that failure to ring bell is immaterial; *Zimmerman v. Baur*, 11 Ind. App. 616, 39 N. E. 299, holding defendant not liable for injury to horse stepping into trench dug in violation of ordinance; *United States Exp. Co. v. Everest*, 72 Kan. 523, 83 Pac. 817, holding that dependent must owe duty to plaintiff; *North Chicago Street R. Co. v. Canfield*, 118 Ill. App. 357, holding gripman not bound to ring gong for protection of one alighting from car in middle of block; *Indiana & C. Coal Co. v. Neal*, 166 Ind. 463, 77 N. E. 850, 9 A. & E. Ann. Cas. 424, holding that one seeking to recover because of a failure to observe a statutory regulation must show statute was enacted for benefit of one in his circumstances.

Cited in notes (100 Am. St. Rep. 202) on right to recover for negligence in absence of privity; (69 L.R.A. 514) on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained; (9 L.R.A. (N.S.) 343, 345) on private action for violation of statute not expressly conferring it.

Signals at railway crossings.

Cited in *Louisville, E. & St. L. Consol. R. Co. v. Lee*, 47 Ill. App. 386, holding railroad not liable, in running at unlawful rate of speed without signals, for injury to horses on parallel highway; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 403, 26 L. R. A. 564, 44 Am. St. Rep. 145, 20 S. E. 550, holding defendant not liable for failure to observe statutory requirements, in case of injury to person upon trestle without license; *Cleveland, A. & C. R. Co. v. Workman*, 66 Ohio St. 542, 90 Am. St. Rep. 602, 64 N. E. 582, holding statutory requirement of railroads as to crossings not applicable to licensee on track using hand car; *Thompson v. Cleveland, C. C. & St. L. R. Co.* 123 Ill. App. 48, holding railroad company under no duty to ring bell as to a trespasser on right of way; *Ehrlich v. Chicago G. W. R. Co.* 160 Ill. App. 388, holding that failure to ring bell before reaching crossing does not confer right of action upon person who was on right of way

40 rods beyond crossing; *Thompson v. Cleveland*, C. C. & St. L. R. Co. 226 Ill. 545, 9 L.R.A.(N.S.) 673, 80 N. E. 1054, holding statutory duty to ring bell not to apply to one who had gone on track to rescue cattle; *Halbert v. Wabash R. Co.* 151 Ill. App. 355; *Morrow v. Southern R. Co.* 147 N. C. 627, 16 L.R.A.(N.S.) 644, 61 S. E. 621,—holding same as to one on tracks, not at point of crossing; *Everett v. Great Northern R. Co.* 100 Minn. 320, 9 L.R.A.(N.S.) 708, 111 N. W. 281, 10 A. & E. Ann. Cas. 294, holding same as to one driving along a street parallel to railroad; *New York, C. & St. L. R. Co. v. Martin*, 35 Ind. App. 676, 72 N. E. 654, holding same as to one using highway adjoining railroad track who is not intending to cross track.

Cited in notes (17 L. R. A. 255) on statutory signals at railway crossings; for whose benefit required; (11 L. R. A. 387) on duty of railroad employee to give warning on approaching road crossing.

Distinguished in *Chicago & A. R. Co. v. Anderson*, 166 Ill. 576, 46 N. E. 1125, Affirming 67 Ill. App. 390, upholding refusal to instruct that defendant owed no duty to deceased, no question as to statutory signals being involved; *Loneragan v. Illinois C. R. Co.* 87 Iowa, 763, 17 L. R. A. 258, 53 N. W. 236, holding company liable for failure to ring bell at crossing, frightening horse while owner was unloading corn on company's premises near crossing; *Chicago & N. W. R. Co. v. Thomson*, 128 Ill. App. 597, holding that a section hand had a right to expect that requirements of statute as to warnings and signals would be complied with.

11 L. R. A. 354, *SEAMAN v. BAUGHMAN*, 82 Iowa, 216, 47 N. W. 1091.

"Elections" within constitutional regulations thereof.

Cited in *Coggeshall v. Des Moines*, 138 Iowa, 739, 128 Am. St. Rep. 221, 117 N. W. 309, holding that since the qualifications of voters as prescribed by the constitution refer only to elections within the contemplation of the constitution for the choice of officers, a statute authorizing women to vote on the issuance of municipal bonds, is not contrary to the same.

Cited in note (14 L.R.A.(N.S.) 831) on applicability of provisions relating to general elections, to elections other than of officers.

Distinguished in *State v. State Board of Canvassers*, 78 S. C. 469, 14 L.R.A.(N.S.) 854, 59 S. E. 145, 13 Ann. Cas. 1133, holding that the term "all elections" as used in the state constitution applies to local option elections, as fixing the qualification of voters.

Method of voting at school meetings.

Cited in *Regan v. School Dist. No. 25*, 44 Wash. 525, 87 Pac. 828, holding that since voting at school meetings other than annual elections need not be by ballot a notice of meeting is not invalid for failure to specify the time polls will be open.

11 L. R. A. 355, *STATE v. SNOW*, 81 Iowa, 642, 47 N. W. 777.

Title of act.

Cited in *State v. Schlenker*, 112 Iowa, 651, 51 L. R. A. 351, 84 Am. St. Rep. 360, 84 N. W. 698, holding section of Code intended to prevent sale of adulterated milk not void because of insufficient title.

Cited in note (64 Am. St. Rep. 81) on sufficiency of title of statute.

Statutes regulating sale of food products.

Cited in footnotes to *Frost v. Chicago*, 49 L. R. A. 657, which holds void, ordinance prohibiting colored netting over package of fruit, etc.; *State v. Hanson*, 54 L. R. A. 468, which holds sale of unlabeled cottolene forbidden by statute against

selling unlabeled imitation of lard; *State v. Layton*, 62 L. R. A. 164, which upholds constitutionality of statute prohibiting manufacture or sale of baking powder containing alum; *State ex rel. Monnett v. Capital City Dairy Co.* 57 L.R.A. 181, which sustains statute forbidding sale of unmarked oleomargarine; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food, whereby damage or inferiority is concealed.

Cited in notes (21 L.R.A. 795) on constitutionality of statutes restricting contracts and business; (1 L.R.A.(N.S.) 186) on validity of police regulations as to branding or labeling articles of commerce.

11 L. R. A. 357, *COM. v. STEVENS*, 153 Mass. 421, 25 Am. St. Rep. 647, 26 N. E. 992.

Sales of forbidden articles by agents.

Cited in *Com. v. Joslin*, 158 Mass. 495, 21 L. R. A. 452, 33 N. E. 653, holding evidence that minor told druggist's clerk selling him liquor, that he was of age, properly excluded; *State v. McCance*, 110 Mo. 403, 19 S. W. 648, holding question of good faith of dramshop keeper's instructions to agent not to sell to minor, for jury; *State v. McKee*, 73 Conn. 32, 49 L. R. A. 548, 84 Am. St. Rep. 124, 46 Atl. 409, holding authority to make forbidden sale by agent during principal's absence may be inferred; *State v. Kittelle*, 110 N. C. 590, 15 L. R. A. 704, 28 Am. St. Rep. 698, 15 S. E. 103, majority holding principal criminally liable for sale of liquor to minor, though against his instructions; *Com. v. Johnston*, 2 Pa. Super. Ct. 335, holding druggist not liable criminally for illegal sales of liquor by his clerks in violation of orders; *People v. Longwell*, 120 Mich. 318, 79 N. W. 484 (dissenting opinion), majority holding fact that illegal sale of liquor was made by druggist's agent against instructions, no defense; *Walters v. State*, 174 Ind. 555, 92 N. E. 537 (dissenting opinion), on liability of principal for unlawful sale of liquor by agent; *Van Camp v. Michigan C. R. Co.* 137 Mich. 474, 100 N. W. 771 (dissenting opinion), an application of penal code to master for act of servant; *Ollre v. State*, 57 Tex. Crim. Rep. 540, 123 S. W. 1116 (dissenting opinion), on criminal liability of master for act of servant selling intoxicating liquor in violation of laws; *Com. v. Riley*, 196 Mass. 62, 10 L.R.A.(N.S.) 1123, 81 N. E. 881, holding master not liable on a penal statute where his employee failed to make certain notations in books as required.

Cited in notes (41 L. R. A. 651, 667) on criminal and penal liability for act of copartner, servant, or agent in violating liquor laws; (88 Am. St. Rep. 798) on criminal liability of principal for acts of agent against his orders.

Distinguished in *State v. Gilmore*, 80 Vt. 517, 16 L.R.A.(N.S.) 789, 68 Atl. 658, 13 A. & E. Ann. Cas. 321, holding master liable under a penal statute for act of his bartender in selling intoxicating liquor to a minor.

Disapproved in *Paducah v. Jones*, 126 Ky. 818, 104 S. W. 971, holding master criminally liable for acts of agent who within the scope of his employment sells liquor in violation of law.

Guilty knowledge.

Cited in *Com. v. Green*, 163 Mass. 104, 39 N. E. 775, holding guilty knowledge not an essential of offense of illegal sale of intoxicating liquor.

Cited in notes (54 Am. St. Rep. 93) on necessity of participation by master in agent's act to criminal liability therefor; (25 Eng. Rul. Cas. 143, 144) on necessity of guilty knowledge of master to liability for criminal acts of servant.

Number of registered sales.

Cited in *Com. v. Stevens*, 155 Mass. 292, 29 N. E. 508, holding it within discre-

tion of trial judge to admit evidence of number of registered sales of liquor by druggist.

Sales of liquor to minors.

Cited in *Com. v. Mixer*, 207 Mass. 143, 31 L.R.A.(N.S.) 468, 93 N. E. 249, 20 Ann. Cas. 1152, to the point that sale of liquor to minor, though made without reason to suppose he was under age, is violation of statute.

Cited in note (12 L. R. A. 433) on sale of liquor to minor.

Proof of age of minors.

Cited in *Com. v. Hollis*, 170 Mass. 435, 49 N. E. 632, holding jury might consider appearance of girl alleged to have been ravished, in determining her age.

11 L. R. A. 359, *McCREARY v. BOSTON & M. R. CO.* 153 Mass. 300, 26 N. E. 864.

Second appeal in 156 Mass. 316, 31 N. E. 126.

Establishment of public way by use.

Cited in *Sprow v. Boston & A. R. Co.* 163 Mass. 339, 39 N. E. 1024, holding evidence insufficient to establish public way across railroad tracks by prescription; *Randall v. Lowell*, 156 Mass. 256, 30 N. E. 1020, sustaining refusal to submit to jury question whether public had obtained a right of way at place of injury, where evidence does not show uninterrupted public use for necessary time; *Taft v. Com.* 158 Mass. 552, 33 N. E. 1046, holding instruction that if public travel bears insignificant proportion to private travel over road, no public way will be established by prescription, erroneous; *Hillyer v. Dickinson*, 154 Mass. 504, 28 N. E. 905, holding evidence merely raising a suspicion, surmise, or conjecture not sufficient for submission to jury; *Bigelow Carpet Co. v. Wiggan*, 209 Mass. 549, 95 N. E. 938, holding that from open and continuous user of way over land, knowledge of such user on part of owner can be inferred.

Cited in notes (35 L.R.A.(N.S.) 191) on acquisition of prescriptive right of way across railroad; (10 Eng. Rul. Cas. 93) on what is necessary to obtain easement by prescription.

Injury to person while on premises of railroad.

Cited in *Dillon v. Connecticut River R. Co.* 154 Mass. 479, 28 N. E. 899, holding carrier not liable for killing, by running of train off track, person in water closet wrongfully placed on defendant's premises; *Durbin v. New York, N. H. & H. R. Co.* 194 Mass. 182, 80 N. E. 219, holding where decedent was a trespasser that plaintiff could not recover unless wilful or reckless misconduct on part of defendant was shown.

Cited in note (11 L. R. A. 387) on duty of railroad employees to give warning on approaching road crossing.

Who are trespassers.

Distinguished in *O'Brien v. Hudner*, 182 Mass. 383, 65 N. E. 788, holding eight-year old child playing in street not a trespasser.

Delivery of personal property.

Cited in *People's Nat. Bank v. Freeman's Nat. Bank*, 169 Mass. 133, 61 Am. St. Rep. 279, 47 N. E. 588, holding delivery of package for inspection not delivery within meaning of instruction not to deliver except on payment of accompanying draft.

Death by wrongful act.

Criticised as obiter in *Hodson v. Lynn & B. R. Co.* 185 Mass. 518, 71 N. E. 66, holding that Massachusetts statute requires due care upon the part of the decedent as a prerequisite to recovery by next of kin and does not regard the rights which decedent would have had if he had survived.

11 L. R. A. 361, *FACTORS & T. INS. CO. v. WERLEIN*, 42 La. Ann. 1046, 8 So. 435.

Liability for maintenance of dangerous premises.

Cited in *Knoop v. Alter*, 47 La. Ann. 574, 17 So. 139, holding owner, as well as contractor, liable to third persons for fall of dangerous wall; *Alter v. Home Ins. Co.* 50 La. Ann. 1321, 24 So. 180, holding owner liable for collapse of wall, while insurance company was engaged in reconstructing building; *New Orleans Real Estate Mortg. & Securities Co. v. Teutonia Ins. Co.* 128 La. 68, 54 So. 466, to the point that owner of building is liable for damages caused by fall of wall if he neglects to properly brace it up.

Cited in footnotes to *Boyce v. Union P. R. Co.* 18 L. R. A. 509, which requires proprietor of bathing house to keep bottom free from substances which would injure bathers' feet; *Cork v. Blossom*, 26 L. R. A. 256, which holds one maintaining high chimney liable for fall on adjoining building; *Dettmering v. English*, 48 L. R. A. 106, which holds person constructing wall liable for failure to use due care to prevent its fall.

Cited in note (34 L. R. A. 563) on individual liability for falling walls or buildings.

Distinguished in *Beidler v. King*, 209 Ill. 313, 101 Am. St. Rep. 246, 70 N. E. 763, holding adjoining owner without right to touch party wall owned by another, to prevent same from falling.

Duty to keep down damages.

Cited in *Monnier v. Godbold*, 116 La. 167, 5 L.R.A. (N.S.) 464, 40 So. 604, 7 A. & E. Ann. Cas. 768, holding that injured person must use due care to minimize injury.

Cited in footnote to *Lawrence v. Porter*, 26 L. R. A. 167, which requires buyer, on seller's breach of contract to sell on credit, to accept latter's offer to sell for cash at reduced price.

Contributory negligence.

Cited in *McGuire v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1556, 16 So. 457 (dissenting opinion), majority holding defendant not relieved from liability because of contributory negligence of injured, where accident could have been avoided with reasonable care; *Bianchi v. Del Valle*, 117 La. 592, 42 So. 148, holding omission of husband to repair bars recovery by wife against landlord.

Quasi offenses under statute.

Cited in *State ex rel. Scarborough v. Circuit Ct. of Appeals Judges*, 43 La. Ann. 1167, 10 So. 253, holding act imposing fine on railroads for failure to erect time-tables at station, a civil statute, relating to quasi offenses.

11 L. R. A. 364, *LYMAN v. BOSTON & M. R. CO.* 66 N. H. 200, 20 Atl. 976.

Signals at crossings.

Cited in notes (11 L. R. A. 387, 388) on duty of railroad employees to give warning on approaching road crossing.

Presumption as to exercise of due care by person injured.

Cited in *Deschenes v. Concord & M. R. Co.* 69 N. H. 291, 46 Atl. 467, holding defendant's negligence not inferable from presumption of exercise of due care by plaintiff; *Stone v. Boston & M. R. Co.* 72 N. H. 209, 55 Atl. 359, holding evidence as to precautions taken by deceased on previous occasions admissible on question of care in crossing railroad; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 656, 95 N. W. 161 (dissenting opinion), majority holding presumption of exercise of due care from instinct of self-preservation not applicable where direct evidence shows contributory negligence; *Wright v. Boston & M. R. Co.* 74 N. H.

132, 8 L.R.A. (N.S.) 834, 124 Am. St. Rep. 949, 65 Atl. 687, holding instinct of self preservation not itself sufficient to establish due care; *Shumm v. Rutland R. Co.* 81 Vt. 206, 19 L.R.A. (N.S.) 982, 69 Atl. 945 (dissenting opinion), on presumption of self preservation as establishing due care on part of injured person; *Brown v. West Riverside Coal Co.* 143 Iowa, 673, 28 L.R.A. (N.S.) 1265, 120 N. W. 732, holding that in the utter absence of living witnesses the presumption is that injured person was using reasonable care for his safety; *Lunde v. Cudahy Packing Co.* 139 Iowa, 696, 117 N. W. 1063, holding that absence of contributory negligence on the part of the injured person must be shown; *Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 240, 71 N. E. 170, holding no presumption of contributory negligence to exist where one is struck by train where no alarm of approach is given; *Miller v. Boston & M. R. Co.* 73 N. H. 332, 61 Atl. 360, holding that due care on part of injured may be found from circumstances of the case; *Stevens v. United Gas & Electric Co.* 73 N. H. 173, 70 L.R.A. 126, 60 Atl. 848, holding that due care on part of injured person might be inferred from all the circumstances attending accident.

Cited in notes (16 L.R.A. 263) on presumption as to exercise of due care by person found to have been killed by alleged negligence of another; (11 L.R.A. (N.S.) 845) on presumption of due care by person whose death was unwitnessed, as preventing nonsuit; (116 Am. St. Rep. 125) on presumption of exercise of care.

Duty to look and listen before crossing railroad tracks.

Cited in *Davis v. Concord & M. R. Co.* 68 N. H. 252, 44 Atl. 388, holding mere failure to look and listen at railway crossing not conclusive as to want of due care; *Davis v. Concord & M. R. Co.* 68 N. H. 249, 44 Atl. 388, holding custom of deceased, while crossing tracks where killed, to stop and look, competent on question of care.

Cited in footnotes to *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds failure to look and listen on dark night not prevent recovery for injury by engine running backward; *Betts v. Lehigh Valley R. Co.* 45 L. R. A. 261, which sustains right of person approaching crossing where train is receiving or discharging passengers, to rely on rule requiring other train to stop; *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman absent not negligence *per se*; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look when within 30 feet of track not prevent recovery; *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow, in not looking and listening before crossing railroad track, for jury; *Passman v. West Jersey & S. R. Co.* 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution; *Colorado & Southern R. Co. v. Thomas*, 70 L.R.A. 681, which holds failure to look and listen before crossing track not excused by existence of building adjoining highway which would obstruct view of tracks and by noise created therein which would prevent hearing approaching train.

Proof of due care.

Cited in *Hutchins v. Macomber*, 68 N. H. 474, 44 Atl. 602, holding plaintiff in negligence action not bound to show affirmatively freedom from fault; *Gahagan v. Boston & M. R. Co.* 70 N. H. 444, 55 L. R. A. 435, 50 Atl. 146, holding plaintiff's freedom from fault in receiving injury must appear from affirmative proof, or be fairly inferable from circumstances; *Ayers v. Boston & M. R. Co.* 68 N. H. 208, 39 Atl. 102, holding question for jury whether plaintiff, hurt while loading milk cans on moving train, was negligent.

Cited in note (33 L.R.A.(N.S.) 1107, 1113, 1114, 1116, 1138) on burden of proof as to contributory negligence.

Rules as to speed of trains.

Cited in *Davis v. Concord & M. R. Co.* 68 N. H. 251, 44 Atl. 388, holding evidence that defendant's train was running at higher rate of speed than rules allowed, proper.

Cited in note (3 L.R.A.(N.S.) 780) on speed of train at country crossing as negligence.

When question of negligence for jury.

Cited in *Hardy v. Boston & M. R. Co.* 68 N. H. 536, 41 Atl. 179, holding denial of nonsuit proper where fair-minded men might arrive at opposite conclusions from evidence; *Whitcher v. Boston & M. R. Co.* 70 N. H. 248, 46 Atl. 740, holding it question for jury whether allowing ties to remain raised above surface of ground made safe place for plaintiff to work.

Rule as to taking useless steps and precautions.

Cited in *Colby v. Farwell*, 71 N. H. 84, 51 Atl. 254, holding holder of note may maintain suit against guarantor without first proceeding against insolvent maker.

Right to rely on observation of rules.

Cited in *Besecker v. Delaware L. & W. R. Co.* 220 Pa. 515, 123 Am. St. Rep. 714, 69 Atl. 1039, 14 A. & E. Ann. Cas. 21, holding that one has a right to assume that a railroad will observe its own rule.

Violation of rule as negligence.

Cited in *McCormick v. Columbia Electric Street R. Light & P. Co.* 85 S. C. 460, 67 S. E. 562, 21 Ann. Cas. 144, holding that rules of carrier of passengers for conduct of employees disobedience of which contributed to injury, is admissible in action for injury, whether injured person knew of rule or not; *St. Louis, S. F. & T. R. Co. v. Andrews*, 44 Tex. Civ. App. 427, 99 S. W. 971, holding that injured person could show a violation of a reasonable rule which had been adopted by defendant for its own employees.

Cited in note (8 L.R.A.(N.S.) 1063) on violation by railway servant of rule for protection of public, as evidence of negligence toward individual.

Previous conduct as evidence.

Cited in *Curtice v. Dixon*, 74 N. H. 304, 68 Atl. 587, holding evidence of prior exhibitions of unreasonable temper proper to corroborate testimony of relative as to his opinion of persons character such opinion being an issue.

11 L. R. A. 367, *FOSS v. BOSTON & M. R. CO.* 66 N. H. 256, 49 Am. St. Rep. 607, 21 Atl. 222.

Contributory negligence question for jury.

Cited in *Bass v. Concord Street R. Co.* 70 N. H. 173, 46 Atl. 1056, holding failure of passenger on street car to look before alighting not negligence, as matter of law; *Ayers v. Boston & M. R. Co.* 68 N. H. 208, 39 Atl. 102, holding question for jury whether plaintiff, hurt while loading milk cans on moving train, was negligent; *Topp v. United R. & Electric Co.* 99 Md. 643, 59 Atl. 52, 1 A. & E. Ann. Cas. 912, holding one not guilty of contributory negligence as a matter of law in getting off car though not at customary stopping place.

Assistance due to passengers in alighting from train.

Cited in *Mercer v. Cincinnati Northern R. Co.* 151 Mich. 568, 115 N. W. 733, holding railroad company bound to furnish needed assistance to infirm and feeble passengers; *Hanlon v. Central R. Co.* 187 N. Y. 76, 10 L.R.A.(N.S.) 413, 116 Am. St. Rep. 591, 79 N. E. 846, 10 A. & E. Ann. Cas. 366, holding carrier liable for

assistance negligently rendered by conductor assisting one from car to station platform; *Texas & N. O. R. Co. v. Harrington*, 44 Tex. Civ. App. 393, 98 S. W. 653, on duty of carrier to infirm passengers.

Cited in footnotes to *Croom v. Chicago, M. & St. P. R. Co.* 18 L.R.A. 602, which holds failure to render necessary assistance to feeble person accepted as passenger negligence; *Haley v. St. Louis Transit Co.* 64 L.R.A. 295, which holds carrying street car passenger beyond destination not proximate cause of his falling on slippery pavement.

Cited in notes (8 L.R.A.(N.S.) 301) on duty to assist infirm passenger; (10 L.R.A.(N.S.) 411) on liability of carrier for assistance negligently rendered passenger.

11 L. R. A. 370, *CARR v. STATE*, 127 Ind. 204, 22 Am. St. Rep. 624, 26 N. E. 778.

Contracts by state.

Cited in *Chapman v. State*, 104 Cal. 695, 43 Am. St. Rep. 158, 38 Pac. 457, holding state liable for loss of coal due to harbor commissioners' failure to repair state wharf; *Fristoe v. Blum*, 92 Tex. 80, 45 S. W. 998, holding, where state becomes vendor of land, same laws applicable to it as to contracts between individuals; *Boston Molasses Co. v. Com.* 193 Mass. 390, 79 N. E. 827, holding state bound by its covenant on a lease of commonwealth flats; *Union Trust Co. v. California*, 154 Cal. 728, 24 L.R.A.(N.S.) 1116, 99 Pac. 183, holding where state contracts with an individual it is liable for breach of contract.

Cited in footnote to *Cross v. Kentucky Board of Managers*, 43 L. R. A. 703 which sustains right to sue state board of managers of world's fair without consent of state.

Cited in note (101 Am. St. Rep. 162) on contracts by state.

Existing law or condition of things as part of contract.

Cited in *Farmers Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 264, 11 L. R. A. 746, 26 N. E. 784, holding mortgage on unbuilt railroad inferior to subsequent mechanic's lien for materials and labor used in construction.

Appropriation by state.

Cited in *Henderson v. State Soldiers & Sailors Monument Comrs.* 129 Ind. 101, 13 L. R. A. 173, 28 N. E. 127, holding sufficient, appropriation by act authorizing incurring of expenses and directing payment; *Beshoar v. Las Animas County*, 7 Colo. App. 450, 43 Pac. 912, holding appropriation "for ordinary county revenue" appropriation for general county purposes; *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 93, 61 Am. St. Rep. 538, 69 N. W. 373, holding act providing for payment of sugar bounties carries no appropriation for payment; *State ex rel. Henderson v. Burdick*, 4 Wyo. 280, 24 L. R. A. 268, footnote p. 266, 33 Pac. 125, holding continuing, appropriation of amounts of salary made by statute; *Cutting v. Taylor*, 3 S. D. 18, 15 L. R. A. 694, 51 N. W. 949, holding act directing issuance and payment of state warrants sufficient appropriation; *Meneff v. Askew*, 25 Okla. 626, 27 L.R.A.(N.S.) 539, 107 Pac. 159, holding that no particular form of appropriation for official salary necessary; *State ex rel. Davis v. Eggers*, 29 Nev. 483, 16 L.R.A.(N.S.) 640, 91 Pac. 819, holding further authorization not necessary if salary of public officer is fixed and the time of payment prescribed by law; *State ex rel. Ledwith v. Brian*, 84 Neb. 34, 120 N. W. 916, on construction of provisions for appropriations.

Distinguished in *State ex rel. Buchanan v. State Treasurer*, 68 S. C. 418, 47 S. E. 683, holding where constitution leaves amount of salary to be fixed by legislature no amount can be paid unless so fixed by legislature.

Disapproved in effect in *Shattuck v. Kincaid*, 31 Or. 389, 49 Pac. 758, holding

statute fixing salaries of state officers and prescribing manner and time of payment not an appropriation therefor; *Goodykoontz v. Acker*, 19 Colo. 363, 35 Pac. 911, holding act fixing amount of officer's salary and providing manner of payment not an appropriation.

Liability of state for interest.

Cited in *Sawyer v. Colgan*, 102 Cal. 293, 36 Pac. 580, holding state not liable for interest on matured indebtedness in absence of manifested consent; *Molineux v. State*, 109 Cal. 380, 50 Am. St. Rep. 49, 42 Pac. 34, holding state not liable to pay interest on matured Indian war bonds; *Davis v. State*, 121 Cal. 211, 53 Pac. 555, holding interest not recoverable against state on interest coupons to Indian war bonds; *Seton v. Hoyt*, 34 Or. 273, 43 L. R. A. 635, 75 Am. St. Rep. 641, 55 Pac. 967, holding county not liable for interest under general statute regulating subject; *Palmer v. District of Columbia*, 26 App. D. C. 42, 1 L.R.A.(N.S.) 883 (dissenting opinion), on general statutes as not binding state.

Distinguished in *Monteith v. Parker* 36 Or. 175, 78 Am. St. Rep. 767, 59 Pac. 192, holding municipality liable for interest on obligations under general statute regulating subject.

Implied repeal of laws.

Cited in *Ensley v. State*, 172 Ind. 209, 88 N. E. 62, holding that a void ordinance does not repeal a former ordinance.

Mandamus against public officer.

Cited in notes (1 Eng. Rul. Cas. 827; 16 Eng. Rul. Cas. 788) on right to mandamus against a public officer.

11 L. R. A. 376, *HAYS v. HAYS*, 126 Ind. 92, 25 N. E. 600.

Relief in case of mistake.

Cited in *Bigham v. Madison*, 103 Tenn. 363, 47 L. R. A. 269, 52 S. W. 1074, holding vendee of land entitled to rescission upon failure of title as to one half; *Equitable Trust Co. v. Milligan*, 31 Ind. App. 24, 65 N. E. 1044, holding vendor pointing out boundary lines liable to purchaser *pro rata* upon partial failure of title; *Equitable Trust Co. v. Milligan*, 31 Ind. App. 24, 65 N. E. 1044, holding that equity will relieve where money is paid under a mistake of fact induced by vendee; *Wolcott v. Frick*, 40 Ind. App. 238, 81 N. E. 731, sustaining right of vendee to recover for gross shortage in acreage where vendor led vendee to believe area was as represented.

11 L. R. A. 378, *SHUMAN v. FT. WAYNE*, 127 Ind. 109, 26 N. E. 560.

Unreasonable searches.

Cited in *Coöperative Bldg. & L. Asso. v. State*, 156 Ind. 468, 60 N. E. 146, upholding act authorizing tax officers to examine books and papers of taxpayers, to list and assess property for taxation.

Police powers of state.

Cited in *State ex rel. Duensing v. Roby*, 142 Ind. 192, 33 L. R. A. 221, 51 Am. St. Rep. 174, 41 N. E. 145, holding statute regulating horse-racing legitimate exercise of police power; *Re Snyder*, 10 Idaho, 697, 68 L.R.A. 714, 79 Pac. 819, holding city council to have no authority to prohibit farmers from selling meat in city; *Grossman v. Indianapolis*, 173 Ind. 165, 88 N. E. 945, holding that ordinance requiring junk dealers to keep record of purchases and description of persons from whom purchased is valid; *Cambridge v. Cambridge Water Co.* 99 Md. 503, 58 Atl. 442, 2 A. & E. Ann. Cas. 311, declaring the invalidity of a tax by a municipal corporation on fire plugs.

Cited in note (32 L. R. A. 117) on police power as exercised by municipalities over business of pawnbrokers, junk dealers and dealers in second-hand clothes.

Police power of local boards under delegated authority.

Cited in *Lowell v. Archambault*, 189 Mass. 74, 1 L.R.A.(N.S.) 460, 75 N. E. 65, holding that an unconditional license granted by the board of health under statutory authority for the erection of a stable cannot be revoked by board.

11 L. R. A. 381, *BROWN v. DOANE*, 86 Ga. 32, 12 S. E. 179.

Constructive trusts.

Cited in *Ransdel v. Moore*, 153 Ind. 419, 53 L. R. A. 762, 53 N. E. 767, holding title to real estate, taken under promise to vest title in others, enforceable trust; *Pavlovski v. Klassing*, 134 Ga. 710, 68 S. E. 511, holding an equitable estate to arise where wife of plaintiff by fraud induced plaintiff to have his brothers execute a deed to her; *Jones v. McElroy*, 134 Ga. 859, 68 S. E. 729, granting cancellation of a deed on ground of fraudulent promises to hold land for a certain purpose; *Wellner v. Eckstein*, 105 Minn. 464, 117 N. W. 830 (dissenting opinion), on creation of an implied trust by fraudulent conduct; *Crossman v. Keister*, 223 Ill. 87, 8 L.R.A.(N.S.) 708, 114 Am. St. Rep. 305, 79 N. E. 58, holding that a trust implied from fraud need not be shown by writing; *Cassels v. Finn*, 122 Ga. 35, 68 L.R.A. 82, 106 Am. St. Rep. 91, 49 S. E. 749, 2 A. & E. Ann. Cas. 554, on implied trusts based on fraud; *Williams v. Smith*, 128 Ga. 310, 57 S. E. 801, on creation of equitable estates.

Cited in footnotes to *Cassels v. Finn*, 68 L.R.A. 80, which holds that failure of sole heir to perform oral promise to dispose of decedent's estate as she desires does not make him a trustee *ex maleficio* as to the property inherited; *Stahl v. Stahl*, 68 L.R.A. 617, which holds constructive trust created where mother ill in bed at solicitation of children conveys property to one of them on his agreeing to hold it for benefit of all to avoid expense and his conveyance thereof to another child with notice.

Cited in notes (25 L.R.A. 571) on how far statutes will be disregarded as having abrogated maxim that one cannot profit by his own wrong; (39 L.R.A.(N.S.) 914) on grantee's oral promise to grantor as giving rise to constructive trust.

11 L. R. A. 383, *ST. LOUIS, A. & T. R. CO. v. HANKS*, 78 Tex. 300, 14 S. W. 691.

Liability for killing of dogs.

Cited in *Louisville & N. R. Co. v. Fitzpatrick*, 129 Ala. 325, 87 Am. St. Rep. 64, 29 So. 859; *Jones v. Illinois C. R. Co.* 75 Miss. 973, 23 So. 358; *St. Louis S. W. R. Co. v. Stanfield*, 63 Ark. 644, 37 L. R. A. 660, 40 S. W. 126,—holding railroad company liable for negligent killing of dog; *Central R. Co. v. Martin*, 150 Ala. 390, 43 So. 563, holding company liable for killing dog though owner knowingly permitted it to go upon track; *St. Louis, I. M. & S. R. Co. v. Rhoden*, 93 Ark. 34, 137 Am. St. Rep. 73, 123 S. W. 798, 20 Ann. Cas. 915, holding that dogs are personal property for negligent killing of which railway is liable; *Florida, C. & P. R. Co. v. Davis*, 45 Fla. 277, 34 So. 218, 3 A. & E. Ann. Cas. 274,—holding railroad company liable for negligent killing of a dog; *Harper v. St. Paul City R. Co.* 99 Minn. 255, 6 L.R.A.(N.S.) 914, 116 Am. St. Rep. 415, 109 N. W. 227, holding where motorman became aware of situation of a dog that he should have taken reasonable precaution to avoid injury; *Clement v. Adams Exp. Co.* 43 Pa. Super. Ct. 29, holding that driver of wagon on street is not liable for killing dog by running over it, where dog ran out barking at team.

Cited in notes (15 L. R. A. 252) on right to kill dogs; (37 L. R. A. 660) on liability of railroad for killing dogs; (6 L.R.A.(N.S.) 912) on duty of railroads or

street railways with respect to dogs on track; (67 Am. St. Rep. 292, 296) on property in dogs and remedies for its enforcement.

Torts not excused by contributory negligence.

Cited in *Gulf, C. & S. F. R. Co. v. Lankford*, 9 Tex. Civ. App. 596, 29 S. W. 933, holding railway liable for striking plaintiff's horses with car, when accident was preventable after discovery of danger; *Texas & P. R. Co. v. Robinson*, 4 Tex. Civ. App. 125, 23 S. W. 433, holding carrier liable for engineer's failure to check train after discovering danger of deceased on tracks; *Mitchell v. Western U. Teleg. Co.* 12 Tex. Civ. App. 279, 33 S. W. 1016, holding delay in delivering telegram, tardily sent, proximate cause of injury preventable had delivery been prompt.

11 L. R. A. 385, *SPICER v. CHESAPEAKE & O. R. CO.* 34 W. Va. 514, 12 S. E. 555.

Trespasser on railroad tracks.

Cited in *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 404, 14 S. E. 12, holding passenger bound to greater degree of care to passenger than to trespasser; *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 56, 24 L. R. A. 227, 19 S. E. 565, holding railroad not liable for killing trespasser after giving signals of approach of train; *Poling v. Ohio River R. Co.* 38 W. Va. 661, 24 L. R. A. 223, 18 S. E. 782, holding railroad owes spectator stationing himself on its premises no duty to keep mail crane in suitable and safe condition; *McVey v. Chesapeake & O. R. Co.* 46 W. Va. 114, 32 S. E. 1012, holding usage of tracks on right of way in town by public requires railroad to use ordinary care and diligence to prevent accident; *Huff v. Chesapeake & O. R. Co.* 48 W. Va. 47, 35 S. E. 866, holding railroad not liable for injury to trespasser on its tracks; *Egan v. Montana C. R. Co.* 24 Mont. 574, 63 Pac. 831, and *Ward v. Southern P. Co.* 25 Or. 440, 23 L. R. A. 718, 36 Pac. 166, holding railroad not bound to keep a lookout for trespassers on tracks; *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 359, 33 S. E. 240 (dissenting opinion), majority holding railroad liable for failure to keep proper lookout for helpless trespassers on its tracks; *Duncan v. St. Louis & S. F. R. Co.* 152 Ala. 125, 44 So. 418, holding a railroad company not negligent in failing to discover a trespasser on its tracks; *Adams v. St. Louis, I. M. & S. R. Co.* 83 Ark. 302, 103 S. W. 725, holding in such case it must be shown that trainmen actually discovered peril of injured person in time to avoid injury; *Connell v. New York C. & H. R. R. Co.* 144 App. Div. 669, 129 N. Y. Supp. 666, to the point that statute requiring railroad to give signal of approaching train was designed for protection of persons crossing tracks and not for those using tracks for footpath; *Dotta v. Northern P. R. Co.* 36 Wash. 514, 79 Pac. 32, holding in such cases railroad is liable only in cases of wanton negligence; *Palmer v. Oregon Short Line R. Co.* 34 Utah, 478, 98 Pac. 689, 16 A. & E. Ann. Cas. 229, holding same where a child was injured; *Bralley v. Norfolk & W. R. Co.* 66 W. Va. 467, 66 S. E. 653, holding that licensee, using railroad track as foot-path assumes all risks incident to such use and railroad owes him no greater duty than if he were trespasser.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 98, which denies duty towards trespassers on tracks before discovery; *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track caused by train running at excessive speed without ringing bell; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

Cited in note (30 Am. St. Rep. 54) on duty to trespassers on railroad track.

Distinguished in *Kelley v. Ohio River R. Co.* 58 W. Va. 217, 2 L.R.A.(N.S.)

900, 52 S. E. 520, holding that where trainmen see a person walking on track they are bound to give him an alarm signal.

Signals at crossings.

Cited in *Christy v. Chesapeake & O. R. Co.* 35 W. Va. 120, 12 S. E. 1111, holding railroad not required to give signal for benefit of section hand stepping directly in front of approaching train 300 feet from crossing; *Everett v. Great Northern R. Co.* 100 Minn. 319, 9 L.R.A.(N.S.) 708, 111 N. W. 281, 10 A. & E. Ann. Cas. 294; *New York, C. & St. L. R. Co. v. Martin*, 35 Ind. App. 676, 72 N. E. 654,—holding statutory duty to ring bell not for benefit of one using a highway parallel to tracks.

Cited in footnotes to *Lyman v. Boston & M. R. Co.* 11 L. R. A. 364, which holds company running engine rapidly through cut near crossing, without giving signals, liable for death of traveler at crossing; *Williams v. Chicago & A. R. Co.* 11 L. R. A. 352, which holds company not liable for failure to give crossing signal, to farmer whose horses frightened while plowing.

Cited in notes (15 L. R. A. 427) on giving of statutory signals as measure of trainman's duty at highway crossings; (17 L. R. A. 254) on statutory signals by approaching trains at railway crossings; for whose benefit required.

Contributory negligence.

Cited in footnotes to *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track negligence; *State use of Dyrenfurth v. Baltimore & O. R. Co.* 11 L. R. A. 442, which holds attempt to cross track within few feet of backing engine negligence.

Proximate and remote cause of injury.

Cited in footnotes to *Schumaker v. St Paul & D. R. Co.* 12 L. R. A. 257, which holds master's neglect to furnish transportation proximate cause of injury in walking to find shelter; *Schreiner v. Great Northern R. Co.* 58 L. R. A. 75, which holds failure to fence not proximate cause of injury to one pushed on track by cow.

Right acquired by use.

Cited in footnote to *McCreary v. Boston & M. R. Co.* 11 L. R. A. 359, which holds prescriptive right to use private farm crossing not shown by use.

11 L. R. A. 391, *NELSON v. GALVESTON, H. & S. A. R. CO.* 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. 1021.

Statutory rights of unborn child.

Cited in *Texas & P. R. Co. v. Robertson*, 82 Tex. 663, 27 Am. St. Rep. 929, 17 S. W. 1041, holding child unborn at time of killing of parent entitled to participate in benefit of judgment therefor; *State ex rel. Niece v. Soale*, 36 Ind. App. 79, 74 N. E. 1111, sustaining right of a posthumous child to maintain an action on a saloon keeper's bond for damages for loss of support by reason of death of father; *Kirk v. Middlebrook*, 201 Mo. 286, 100 S. W. 450, on right of child to recover for prenatal injuries to itself.

Cited in footnote to *Loring v. Hildreth*, 40 L. R. A. 127, which holds representation of unborn children by guardian *ad litem* sufficient in suit to remove cloud.

Cited in note (119 Am. St. Rep. 952) on children *en ventre sa mere*.

Distinguished in *Daubert v. Western Meat Co.* 139 Cal. 482, 96 Am. St. Rep. 154, 73 Pac. 244, holding judgment in favor of widow for death of husband bar to subsequent action by posthumous child for same death.

Actions by beneficiaries.

Cited in *Ft. Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 585, 24 S. W. L.R.A. Au. Vol. II.—41.

686, holding beneficiaries, not parties in action for damages for death, not precluded by judgment; *St. Louis, A. & T. R. Co. v. Taylor*, 5 Tex. Civ. App. 671, 24 S. W. 975, holding father of son killed by railroad not necessary party in action by widow and children for actual damages.

Cited in notes (34 L. R. A. 796, 798) on how many distinct causes of action arise from injuries resulting in death.

Statutory action for death.

Cited in *Yoakum v. Selph*, 83 Tex. 608, 19 S. W. 145, holding receiver not liable for death caused by operation of road during receivership.

Cited in note (70 Am. St. Rep. 674, 683, 687) on actions for death of human being.

11 L. R. A. 394, *BROWN v. WARNER*, 78 Tex. 543, 22 Am. St. Rep. 67, 14 S. W. 1032.

Liabilities arising during, or affected by, receivership of railroads.

Cited in *Texas & P. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 89, 20 S. W. 1135, holding railroad company not liable for negligence of receiver; *Diamond State Iron Co. v. San Antonio & A. P. R. Co.* 11 Tex. Civ. App. 594, 33 S. W. 987, holding insolvency and receivership of railroad not such breach of executory contract as will relieve other parties from performance.

Cited in note (16 L. R. A. 90) on receiver's obligation on contract of party whose property he holds.

Powers of receivers.

Cited in *Sullivan Timber Co. v. Black*, 159 Ala. 588, 48 So. 870, holding that a receiver cannot pay out money without being authorized thereto by order of the court general or special.

Cited in note (71 Am. St. Rep. 353) on relation of receivers to pre-existing liens and remedies for their enforcements.

11 L. R. A. 395, *TEXAS & P. R. CO. v. MILLER*, 79 Tex. 78, 23 Am. St. Rep. 308, 15 S. W. 264.

Care required of carrier of passengers.

Cited in *Denison & S. R. Co. v. Freeman*, 38 Tex. Civ. App. 154, 85 S. W. 55, holding that the high degree of care required of carrier of passengers extends to trolley pole and wire; *Missouri, K. & T. R. Co. v. Stanfield Bros.* 40 Tex. Civ. App. 384, 89 S. W. 778, holding that utmost care is required of carrier toward alighting passenger; *Northern Texas Traction Co. v. Danforth*, 53 Tex. Civ. App. 423, 116 S. W. 147, holding that degree of care required of carrier of passengers is highest known to law; *Clifton v. Charles*, 55 Tex. Civ. App. 449, 116 S. W. 120, holding that only ordinary care is required of railroad to person in depot awaiting departure of train on another road.

Cited in note (29 Am. St. Rep. 382) on degree of skill required of carrier of passengers.

Injury to passengers getting on and off trains.

Cited in *St. Louis, A. & T. R. Co. v. Finley*, 79 Tex. 88, 15 S. W. 266, holding carrier's duty to passenger not terminated until he has alighted; *Houston & T. C. R. Co. v. Dotson*, 15 Tex. Civ. App. 80, 38 S. W. 642, sustaining judgment against carrier for injury to passenger while alighting, due to jerking of train; *Chicago, R. I. & P. R. Co. v. Wimmer*, 72 Kan. 572, 4 L.R.A.(N.S.) 145, 84 Pac. 378, 7 A. & E. Ann. Cas 756, holding that duty of carrier does not terminate until passenger has reached destination and has left the train; *St. Louis S. W. R. Co. v. Harrison*, 32 Tex. Civ. App. 370, 73 S. W. 38; *Galveston, H. & N. R.*

Co. v. Morrison, 46 Tex. Civ. App. 188, 102 S. W. 143; Chicago, R. I. & T. R. Co. v. Armes, 32 Tex. Civ. App. 38, 74 S. W. 77,—holding that it is the duty of the railroad company to stop long enough to allow passengers to alight under usual and ordinary circumstances.

Cited in notes (21 L. R. A. 363) on injuries in getting on and off railroad trains; (13 L. R. A. 95) on duty of railway conductors in starting and stopping trains.

Assistance of passenger in alighting.

Cited in Chicago, R. I. & T. R. Co. v. Langston, 19 Tex. Civ. App. 580, 47 S. W. 1027, by Hunter, J., dissenting, who holds it question for jury whether it was negligence for carrier not to assist passengers in boarding train; Missouri, K. & T. R. Co. v. Buchanan, 31 Tex. Civ. App. 210, 72 S. W. 96, holding that railroad may be liable for injury resulting from failure to assist passenger to alight.

Submission of special issues.

Cited in Texas Loan Agency v. Fleming, 18 Tex. Civ. App. 671, 46 S. W. 63, holding objection to refusal to submit special issues not available on appeal, without exceptions reserved; Texas C. R. Co. v. Childress, 64 Tex. 349, holding statutory requirement as to submission of question to jury on special issues, on request, mandatory; Galveston, H. & S. A. R. Co. v. Jackson, 92 Tex. 641, 50 S. W. 1012, holding it duty of trial court under statute to submit a case upon special issues on request; Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 367, 58 N. W. 968, holding it discretionary with trial judge whether to submit special finding to jury.

Liability after discharge of receiver.

Cited in Missouri, K. & T. R. Co. v. Chilton, 7 Tex. Civ. App. 193, 27 S. W. 272, and Boggs v. Brown, 82 Tex. 43, 17 S. W. 830, holding railroad liable after discharge of receiver for negligence during receivership.

Cited in note (2 L.R.A.(N.S.) 1049) on priority of claims against property in hands of receiver over recorded liens.

Damages recoverable.

Cited in San Antonio Street R. Co. v. Muth, 7 Tex. Civ. App. 451, 27 S. W. 752, holding services of physician not legally qualified not recoverable as damages in action for injury to minor.

11 L. R. A. 398, MORRIS v. KASSLING, 79 Tex. 141, 15 S. W. 226.

Rewards for arrests.

Cited in Cornwell v. St. Louis Transit Co. 100 Mo. App. 262, 73 S. W. 305, holding deputy securing conviction of accused after former's discharge from official duty entitled to reward, although arrest made while claimant was officer; Cornwell v. St. Louis Transit Co. 100 Mo. App. 262, 73 S. W. 305, holding a deputy sheriff entitled to a reward where act performed was performed after he had been discharged from duty; Cornwell v. St. Louis Transit Co. 106 Mo. App. 140, 80 S. W. 744, holding where member of a posse did acts which he was under no obligation to perform that he was entitled to the reward.

Cited in footnotes to Lees v. Colgan, 40 L. R. A. 355, which denies right of police officer to reward for making arrest; Smitha v. Gentry, 42 L. R. A. 302, which denies right of constable to reward offered for arrest of fugitive in own county; People *ex rel.* Maynard v. Holly, 44 L. R. A. 677, which sustains city's power to offer reward for testimony to secure conviction of incendiaries; Hogan v. Stophlet, 44 L. R. A. 809, which denies sheriff's right to reward for making arrest within county for felony committed therein; Smith v. Vernon County,

70 L.R.A. 59, which sustains right of police officer to reward offered by authorities of another state for apprehension of perpetrator of crime committed there where he acts as private detective in making arrest.

Cited in notes (11 L.R.A.(N.S.) 1171) on right of officer to reward for arrest; (7 L.R.A.(N.S.) 216, on what necessary to earn reward for arrest.

Allegata et probata.

Cited in *Western U. Teleg. Co. v. Smith*, 88 Tex. 13, 30 S. W. 549, holding cause of action, proved but not alleged, not sufficient to support verdict; *Western U. Teleg. Co. v. Byrd*, 34 Tex. Civ. App. 596, 79 S. W. 40, holding where plaintiff proves a contract essentially different from one alleged that he cannot recover.

Arrests without warrants.

Cited in *Brown v. King*, 41 Tex. Civ. App. 593, 93 S. W. 1017, holding arrest improper for carrying and displaying a pistol where officers did not see offense committed; *Cortez v. State*, 47 Tex. Crim. Rep. 16, 83 S. W. 812, holding where officer has no warrant he must know felony has been committed and guilty party must be pointed out to him.

Cited in footnote to *McCullough v. Greenfield*, 62 L. R. A. 906, which holds arrest upon telephone request of out of town officer, holding warrant, not justified.

Cited in note (84 Am. St. Rep. 684) on right of policeman to make arrest.

Emancipated minor as sui juris.

Cited in *Pecos & N. T. R. Co. v. Blasengame*, 42 Tex. Civ. App. 67, 93 S. W. 187, holding where parent has emancipated child the child is owner of claim for personal injuries.

11 L. R. A. 402, *GRAND v. MICHIGAN C. R. CO.* 83 Mich. 564, 47 N. W. 837.

Injuries due to operation of railroads.

Cited in *Ragon v. Toledo, A. A. & N. M. R. Co.* 97 Mich. 274, 37 Am. St. Rep. 336, 56 N. W. 612, holding stepping between moving engine and car, without examining roadbed, negligence; *Eastman v. Lake Shore & M. S. R. Co.* 101 Mich. 603, 60 N. W. 309, upholding judgment against railroad for injury to car coupler caused by catching foot in unblocked switch; *Missouri, K. & T. R. Co. v. Thompson*, 11 Tex. Civ. App. 667, 33 S. W. 718, holding servant working two months in railroad yard with unblocked guard rails assumes risks thereof; *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 394, 26 Am. St. Rep. 48, 15 S. W. 895, holding that brakeman assumes risk of unblocked frogs; *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L. R. A. 76, 37 C. C. A. 503, 96 Fed. 303, holding, in absence of statute, servant assumed risks of unblocked switches and guard rails; *Secord v. Chicago & M. L. S. R. Co.* 107 Mich. 542, 65 N. W. 550, holding brakeman cannot recover for injury due to defective drawbar, danger being known to him; *Jones v. Flint & P. M. R. Co.* 127 Mich. 204, 86 N. W. 838 (dissenting opinion), majority sustaining recovery for death of brakeman, killed in unknown manner, close to switch frog; *Baltimore & O. & C. R. Co. v. Leathers*, 12 Ind. App. 565, 40 N. E. 1094 (dissenting opinion), majority holding question of assumed risk for jury when servant's attention is drawn from obvious danger by unusual circumstances.

Cited in notes (24 L. R. A. 658) on disobedience of master's rules as contributory negligence; (43 L. R. A. 364) on duties of master and servant as to rules promulgated for safe conduct of business; (48 L. R. A. 73) on liability of employers for injuries received by servants owing to want of blocking at switches.

Distinguished in *Martin v. Chicago*, R. I. & P. R. Co. 118 Iowa, 153, 59 L. R. A. 701, 96 Am. St. Rep. 371, 91 N. W. 1034, holding assumption of risk by employee as to speed of trains absolves company from liability for resulting injury.

— **Damages from fire.**

Cited in *Peter v. Chicago & W. M. R. Co.* 121 Mich. 333, 46 L. R. A. 227, 80 Am. St. Rep. 500, 80 N. W. 295 (dissenting opinion), majority holding defense of contributory negligence not available under statute fixing liability for causing fire from locomotive.

Contributory negligence.

Cited in *Krause v. Morgan*, 53 Ohio St. 41, 40 N. E. 886, holding employee failing to exercise due care cannot recover for injury due to master's negligence in keeping mine free from gas; *Schlemmer v. Buffalo*, R. & P. R. Co. 220 U. S. 597, 55 L. ed. 600, 31 Sup. Ct. Rep. 561, holding that under Safety Appliance Act, employee is not absolved from duty to use ordinary care for his own protection, because carrier failed to comply with law; *Keeley v. Cleveland*, C. C. & St. L. R. Co. 158 Ill. App. 243, holding that no damage can be recovered for death of servant who knowingly violates rule adopted to secure his safety; *Brannock v. St. Louis & S. F. R. Co.* 147 Mo. App. 316, 126 S. W. 552, holding that question of contributory negligence of brakeman in going between cars to make coupling was for jury.

Cited in note (25 Am. St. Rep. 58) on disobedience or violation of rules by servant as contributory negligence.

Assumption of risk and contributory negligence.

Cited in *Swick v. Aetna Portland Cement Co.* 147 Mich. 471, 111 N. W. 110, holding that rule that deprives employer of defense of assumption of risk, in cases where he omitted statutory duty, does not extend to defense of contributory negligence; *Langlois v. Dunn Worsted Mills*, 25 R. I. 651, 57 Atl. 910, holding that a 14-year-old child might assume risk which he appreciated; *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A.(N.S.) 995, 72 C. C. A. 365, 141 Fed. 258, 5 A. & E. Ann. Cas. 448, holding defense of assumption of risk available though duty is imposed on master by statute; *Schlemmer v. Buffalo*, R. & P. R. Co. 11 Pa. Dist. R. 679, holding same as to contributory negligence; *Hall v. West & S. Mill Co.* 39 Wash. 480, 81 Pac. 915, 4 A. & E. Ann. Cas. 587 (dissenting opinion), on doctrine of assumption of risk as affected by statute.

11 L. R. A. 407, *BREGGUGLIA v. LORD*, 53 N. J. L. 168, 20 Atl. 1082.

City ordinances.

Cited in footnotes to *Re Ah You*, 11 L. R. A. 408, which holds ordinance permitting \$1,000 fine for visiting disorderly house unreasonable; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 11 L. R. A. 410, which holds ordinance requiring other employee than driver, on every street car, reasonable; *Chicago v. McCoy*, 11 L. R. A. 413, which holds city ordinances, etc., cannot be published in foreign language at taxpayers' expense.

— **Penal ordinances.**

Cited in *St. Louis v. King*, 226 Mo. 346, 27 L.R.A.(N.S.) 612, 126 S. W. 495, holding city is without authority to penalize private conduct not amounting to a public offense.

11 L. R. A. 408, *Re AH YOU*, 88 Cal. 99, 22 Am. St. Rep. 280, 25 Pac. 974.

Reasonableness of municipal ordinances.

Cited in *Ex parte Solomon*, 91 Cal. 441, 27 Pac. 757, holding void an ordi-

nance making minimum penalty for having a lottery ticket in possession to be a fine of \$250.

Cited in footnotes to *Bregguglia v. Lord*, 11 L. R. A. 407, which holds borough council no power to pass ordinance making private trespass penal; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 11 L. R. A. 410, which holds ordinance requiring other employee than driver, on every street car, reasonable; *Chicago v. McCoy*, 11 L. R. A. 413, which holds city ordinances, etc., cannot be published in foreign language at taxpayers' expense; *Slaughter v. O'Berry*, 48 L. R. A. 442, which holds void, ordinance requiring city to provide materials and make sewer connections to within 3 feet of building.

Cited in note (78 Am. St. Rep. 272) on violation of municipal ordinance as crime.

Distinguished in *Denninger v. Recorder's Ct.* 145 Cal. 637, 79 Pac. 360, holding valid an ordinance fixing a fine of \$300 for violation of an ordinance fixing maximum rate for gas; *Kansas City v. Hallett*, 59 Mo. App. 166, holding fact that an ordinance provides a more definite fine or penalty than state statute not to affect its validity.

11 L. R. A. 410, *STATE, TRENTON HORSE R. CO., PROSECUTOR, v. TRENTON*, 53 N. J. L. 132, 20 Atl. 1076.

Validity of municipal ordinances.

Cited in *Allen v. Jersey City*, 53 N. J. L. 528, 22 Atl. 257, holding provision in ordinance prohibiting railroad company from digging up street without permission of aldermen void; *State, Consolidated Traction Co., Prosecutor, v. Elizabeth*, 58 N. J. L. 621, 32 L. R. A. 171, 34 Atl. 146, upholding ordinance prohibiting placing of salt on tracks, except at curves; *State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May*, 59 N. J. L. 396, 36 L. R. A. 656, 36 Atl. 679, upholding ordinance limiting rate of speed of electric cars in streets; *State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May*, 59 N. J. L. 400, 36 L. R. A. 654, 36 Atl. 696, upholding ordinance requiring fenders in front of electric cars; *State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May*, 59 N. J. L. 406, 36 L. R. A. 657, 36 Atl. 678, upholding ordinance requiring electric cars to stop before crossing intersecting streets; *State, Consolidated Traction Co., Prosecutor, v. East Orange Twp.* 61 N. J. L. 207, 38 Atl. 803, upholding ordinance forbidding trimming of trees in streets without permission of township committee; *Rowe v. New York & N. J. Teleph. Co.* 66 N. J. L. 21, 48 Atl. 523, holding telephone, as well as electric, company, liable for death caused by crossed wires falling to streets through absence of guards; *Sternberg v. State*, 36 Neb. 317, 19 L. R. A. 574, 54 N. W. 553, upholding ordinance requiring six street car tickets to be sold for 25 cents; *Morse v. West Port*, 110 Mo. 509, 19 S. W. 831, upholding reasonableness of paving ordinance on facts admitted on demurrer; *Zumault v. Kansas City & I. Air Line*, 71 Mo. App. 676, holding reasonableness of ordinance limiting speed of trains within city limits question for court; *Littlefield v. State*, 42 Neb. 228, 28 L. R. A. 590, 47 Am. St. Rep. 697, 60 N. W. 724, upholding ordinance prohibiting sale of milk without license; *Ex parte Wygant*, 39 Or. 434, 54 L. R. A. 639, 87 Am. St. Rep. 673, 64 Pac. 867, holding ordinance forbidding burials in places distant from inhabitants and thoroughfares unreasonable; *State, Kennelly, Prosecutor, v. Jersey City*, 57 N. J. L. 296, 26 L. R. A. 282, 30 Atl. 531, refusing to set aside ordinance authorizing laying of double tracks in street; *Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 306, 92 N. W. 79, holding that presumption as to exercise of legislative power is in favor of its reasonableness; *Combs v. Lakewood*, 68 N. J. L. 584, 53 Atl. 697, upholding township ordinance for licensing passenger ve-

hicles; *Ivins v. Trenton*, 68 N. J. L. 505, 53 Atl. 202, holding ordinance prohibiting stationary or swinging signs across sidewalks in business section reasonable; *Grand Trunk Western R. Co. v. South Bend*, 174 Ind. 228, 36 L.R.A.(N.S.) 860, 91 N. E. 809, holding that presumption is in favor of reasonableness of city council's action, unless contrary appears on face of ordinance; *Tacoma v. Boutelle*, 61 Wash. 442, 112 Pac. 661, holding that ordinance requiring ten and five minute street car service during certain hours is reasonable; *Chicago v. Gunning System*, 114 Ill. App. 388, holding that prima facie an ordinance is valid; *North Jersey Street R. Co. v. Jersey City*, 75 N. J. L. 351, 67 Atl. 1072, holding that burden of proving an ordinance unreasonable is on those who attack it; *Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.* 71 N. J. L. 78, 58 Atl. 343, holding that court has power to pass on the reasonableness of an ordinance; *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 417, 70 L.R.A. 862, 84 S. W. 648, holding that question as to reasonableness of a statute is for the court; *Hudson & M. R. Co. v. Hoboken*, 75 N. J. L. 304, 68 Atl. 60, holding where state statute authorized the doing of a certain act a city ordinance making the doing of that thing a penal offense unless a city license is obtained is void; *Harris v. Atlantic City*, 73 N. J. L. 252, 62 Atl. 995, sustaining an ordinance forbidding the hiring or the offering for hire, rolling chairs on boardwalks along ocean front.

Cited in footnotes to *Re Ah You*, 11 L. R. A. 408, which holds ordinance permitting \$1,000 fine for visiting disorderly house unreasonable; *Beiling v. Evansville*, 35 L. R. A. 272, which refuses to hold void, ordinance prohibiting maintenance of slaughterhouse within city, when authorized by statute; *Bregguglia v. Lord*, 11 L. R. A. 407, which holds borough council no power to pass ordinance making private trespass penal; *Chicago v. McCoy*, 11 L. R. A. 413, which holds city ordinances, etc., cannot be published in foreign language at taxpayers' expense; *People v. Detroit United R. Co.* 63 L.R.A. 746, which upholds ordinance requiring equipment of street cars with air brakes.

Cited in notes (15 L.R.A. 604) on validity of ordinance requiring conductors on street cars; (70 L.R.A. 853) on power of municipality to compel change of grade of railway in street; (104 Am. St. Rep. 650, 655) on municipal regulations of street railways for protection of public.

Distinguished in *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 361, 59 L. R. A. 463, 96 Am. St. Rep. 552, 53 Atl. 404, holding ordinance requiring street car company to pave between tracks not justifiable as exercise of police power.

Vested rights under charters.

Cited in *West Jersey Traction Co. v. Camden Horse R. Co.* 52 N. J. Eq. 482, 29 Atl. 333, holding, in repeal of traction charter, legislature cannot divest vested rights without compensation.

Police power over streets.

Cited in *Cook v. North Bergen Twp.* 72 N. J. L. 121, 59 Atl. 1035, sustaining power of a township to require persons desiring to excavate in the streets to obtain a permit and to deposit \$10 as security for restoration of street; *Unwen v. State*, 73 N. J. L. 532, 64 Atl. 163, sustaining an act requiring owners to register motor vehicles.

11 L. R. A. 413, *CHICAGO v. MCCOY*, 136 Ill. 344, 26 N. E. 363.

Construction of Constitution and statutes.

Cited in *Chicago General R. Co. v. Chicago City R. Co.* 62 Ill. App. 522, holding city ordinance a law within meaning of Constitution forbidding law making irrevocable grants of special privileges or immunities; *People ex rel. Akia v.*

Loeffler, 175 Ill. 602, 51 N. E. 785, holding Const. art. 12, § 24, as to appointment to office, applicable to state offices only; Rasmussen v. Baker, 7 Wyo. 148, 38 L. R. A. 782, 50 Pac. 819, holding right to vote not established by ability to read translation of Constitution; Rothschild v. New York L. Ins. Co. 97 Ill. App. 554, construing words "may" and "shall" in statute as used interchangeably, as best expressing intention; McGann v. People, 227 Ill. 570, 81 N. E. 702, holding that courts cannot disregard plain language of statute.

Municipal ordinances.

Cited in *Earlville v. Radley*, 237 Ill. 244, 86 N. E. 624, denying authority of a city council to impose a penalty on an alderman for failing to attend meeting.

Cited in footnotes to *Bregguglia v. Lord*, 11 L. R. A. 467, which holds borough council no power to pass ordinance making private trespass penal; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 11 L. R. A. 410, which holds ordinance requiring other employee than driver, on every street car, reasonable; *Re Ah You*, 11 L. R. A. 408, which holds ordinance permitting \$1,000 fine for visiting disorderly house unreasonable.

Publication in foreign language.

Cited in note (14 L. R. A. 64) on publication of official notices, etc., in foreign language.

Legal publications in English.

Cited in *Connors v. Lowell*, 209 Mass. 119, 95 N. E. 412, Ann Cas. 1912B, 627, holding that publication of advertisement of tax sale in English language in newspaper not printed in that language renders sale void; *Bennett v. Baltimore*, 106 Md. 493, 68 Atl. 14, 14 A. & E. Ann. Cas. 419, holding that a publication of an advertisement must be made in the English language in a newspaper printed in English; *Hyman v. Susemihl*, 137 Wis. 300, 118 N. W. 837, holding same as to a statutory publication of an official proceedings.

Injunction by taxpayer of unlawful municipal expenditures.

Cited in note (36 L.R.A.(N.S.) 22) on taxpayer's right to enjoin unlawful municipal expenditures.

11 L. R. A. 416, *JERNEE v. MONMOUTH COUNTY*, 52 N. J. L. 553, 21 Atl. 291.

Liability under bridge act of 1860.

Cited in *Morris County v. Hough*, 55 N. J. L. 635, 28 Atl. 86, holding county board of freeholders liable to person injured through defective bridge; *Murphy v. Mercer County*, 57 N. J. L. 248, 31 Atl. 229, holding action maintainable under statute for death of foot passenger falling into canal at night while bridge was drawn; *Mattlage v. Hudson County*, 63 N. J. L. 585, 44 Atl. 756, holding bridge act applicable in case of damage to vessel by running against draw of bridge; *Styles v. F. R. Long Co.* 70 N. J. L. 303, 57 Atl. 448, on liability of county for failure to erect or repair bridges; *Maguth v. Passaic County*, 72 N. J. L. 228, 62 Atl. 679, holding statute not to apply to damage done where by reason of smallness of culvert the water of a stream is backed up on private property; *Halm v. Hudson County*, 78 N. J. L. 714, 28 L.R.A.(N.S.) 948, 76 Atl. 1014, holding no duty to exist requiring lighting of a bridge by artificial light; *Keeler v. Burlington County*, 79 N. J. L. 437, 75 Atl. 432, to the point that town is not liable for injury by defective bridge, except where of right there is dependence on bridge for full and safe performance of its appropriate functions.

Cited in notes (39 L.R.A. 64) on liability of counties in actions for torts and

negligence; (21 L.R.A.(N.S.) 211) on liability of county for injuries to adjoining property by construction or maintenance of bridge.

Defective highways.

Cited in *Van Vane v. Centre Twp.* 67 N. J. L. 588, 52 Atl. 359, holding township, in absence of statutory imposition, not liable for damages through plunging of horse into unguarded ditch.

Liability of municipality for torts of officers.

Cited in footnote to *Wilson v. Mitchell*, 65 L.R.A. 158, which holds that municipality cannot ratify act of waterworks superintendent in wrongfully connecting well with city water mains so as to become liable for water taken from the well.

11 L. R. A. 418, *Ex parte LARKINS*, 1 Okla. 53, 25 Pac. 745.

Criminal jurisdiction.

Cited in *United States v. Pidgeon*, 153 U. S. 54, 38 L. ed. 633, 14 Sup. Ct. Rep. 746, holding United States without jurisdiction over horse stealing in Oklahoma on November 12, 1890; *Boyd v. Great Western Coal & Coke Co.* 189 Fed. 122; *Canary Oil Co. v. Standard Asphalt & Rubber Co.* 182 Fed. 666,—to the point that offense committed against criminal code Nebraska during term it was in force in Oklahoma, was an offense against laws of territory, triable in territorial courts, and not offense against general government.

Independent saving act.

Cited in *Seawell v. Hendricks*, 4 Okla. 441, 46 Pac. 557, upholding right to recovery of usurious interest arising under statute repealed before suit where other statute provides that repeal shall not extinguish any liability.

Ex post facto laws.

Cited in *Ex parte Buchannen*, 20 Okla. 835, 1 Okla. Crim. Rep. 138, 94 Pac. 943; *Higgins v. Brown*, 20 Okla. 418, 1 Okla. Crim. Rep. 93, 94 Pac. 703,—holding one indicted before admission of Oklahoma to statehood could be tried in state courts after admission.

Cited in footnotes to *People v. Hayes*, 23 L. R. A. 830, which holds change in statute authorizing slighter punishment not *ex post facto* law; *French v. Deane*, 24 L. R. A. 388, which holds void, act giving right to punitive damages as to existing cause of action; *People ex rel. Chandler v. McDonald*, 29 L. R. A. 834, which holds statute not *ex post facto* for abrogating provision for change of magistrate or of venue for prejudice.

Re-enactment of Nebraska laws in Oklahoma.

Cited in *State ex rel. Reardon v. Hooker*, 26 Okla. 463, 109 Pac. 527, to the point that first session of legislature of Oklahoma territory practically re-enacted the Nebraska laws.

11 L. R. A. 420, *STATE ex rel. GOODSILL v. WOODMANSE*, 1 N. D. 246, 46 N. W. 970.

Statutes relating to banking.

Cited in *Blaker v. Hood*, 53 Kan. 510, 24 L. R. A. 857, 36 Pac. 1115, holding act relating to organization and regulation of banks, within police power; *Re Surety Guarantee & T. Co.* 56 C. C. A. 655, 121 Fed. 74, holding that corporation cannot be private banker within meaning of bankruptcy act; *Noble State Bank v. Haskell*, 219 U. S. 113, 55 L. ed. 117, 32 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, holding that state statute subjecting banks to assessment for depositor's security fund is within police power of state; *First State Bank v. Shallenberger*, 172 Fed. 1004, sustaining act restricting

banking business to corporations and requiring a guaranty fund deposit; *Noble State Bank v. Haskell*, 22 Okla. 79, 97 Pac. 590, sustaining constitutionality of "Depositor's Guaranty Fund" act; *Weed v. Bergh*, 141 Wis. 575, 25 L.R.A. (N.S.) 1219, 124 N. W. 664, holding a statute requiring incorporation as a condition to doing a banking business to be constitutional; *State v. Richcreek*, 167 Ind. 221, 5 L.R.A. (N.S.) 878, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899, sustaining a bank regulation requiring the real estate, furniture and fixtures of a private banker to constitute not more than one third of entire capital of bank; *Bruner v. Citizens' Bank*, 134 Ky. 293, 120 S. W. 345, holding that a bank can exercise no functions which it is not strictly authorized to do; *Brady v. Mattern*, 125 Iowa, 163, 106 Am. St. Rep. 291, 100 N. W. 358, sustaining an act limiting building and loan association business to incorporated companies.

Cited in notes (15 L.R.A. 477) on constitutionality of statutes prohibiting private banking; (5 L.R.A. (N.S.) 875) on power to prohibit or impose conditions upon right of individuals to engage in banking; (135 Am. St. Rep. 62) on business of banking as a proper subject for legislative regulation; (55 L. ed. U. S. 130) on prohibiting or restricting private banking.

Disapproved in effect in *State v. Scougal*, 3 S. D. 76, 15 L. R. A. 487, 44 Am. St. Rep. 756, 51 N. W. 858, holding act, so far as prohibiting individual firms from engaging in business of banking, unconstitutional; *Marymont v. Nevada State Bldg. Board*, — Nev. —, 32 L.R.A. (N.S.) 481, 111 Pac. 295, holding that legislature cannot limit transaction of banking business to corporations.

Title of legislative act.

Cited in *Martin v. Tyler*, 4 N. D. 289, 25 L. R. A. 843, 60 N. W. 392, upholding drainage act as embracing but one subject, as expressed in title; *State ex rel. Standish v. Nomland*, 3 N. D. 431, 44 Am. St. Rep. 572, 57 N. W. 85, holding act creating board of state auditors void, because subject of act not expressed in title; *Richard v. Stark County*, 8 N. D. 393, 79 N. W. 863, holding boundary act unconstitutional, subject not being properly expressed in title; *State ex rel. Kol v. North Dakota Children's Home Soc.* 10 N. D. 498, 88 N. W. 273, upholding act relating to procurement of homes for orphans, as embracing but one subject, properly expressed in title; *State ex rel. Erickson v. Burr*, 16 N. D. 587, 113 N. W. 705, holding if subjects in the law are germane or reasonably connected with subject expressed in the title it is sufficient; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 27, 114 N. W. 482, holding following title not to embrace more than one subject:—An act requiring elevator companies to return certificates of inspection and weighmaster's certificates to local buyer; *Erickson v. Cass County*, 11 N. D. 501, 92 N. W. 841, holding title "An act to amend sec. 1466 of the Revised Codes relating to the establishment, construction and maintenance of drains" to embrace not more than one subject; *Powers Elevator Co. v. Pottner*, 16 N. D. 361, 113 N. W. 703, sustaining a materialmen and laborers lien law under title "An act regulating the filing and foreclosure of mechanic's liens upon lands held and occupied under a filing under laws of United States."

Cited in notes (64 Am. St. Rep. 77, 83) on sufficiency of title of statute; (79 Am. St. Rep. 468) as to when title of statute embraces only one subject, and what may be included thereunder.

11 L. R. A. 422, *RICKETTS v. LOUISVILLE*, ST. L. & T. R. CO. 91 Ky. 221, 34 Am. St. Rep. 176, 15 S. W. 182.

Revocation of a deed under power reserved.

Cited in *Stamper v. Venable*, 117 Tenn. 565, 97 S. W. 812, holding that grants

may be revoked by virtue of a power expressed in a deed; *Totten v. Pocahontas Coal & Coke Co.* 67 W. Va. 649, 68 S. E. 373, on power to revoke deed by virtue of reservation contained in deed itself.

Cited in note (95 Am. St. Rep. 219) on reservation of right to revoke deed.

Distinction between a deed and a will.

Cited in *Cribbs v. Walker*, 74 Ark. 117, 85 S. W. 244, holding an instrument in the form of a deed is a deed though it reserves the use of the land to grantor during life and a right to revoke trust if the grantor survives trustee.

Validity of conditions in deed.

Cited in notes (70 Am. St. Rep. 833) on impossibility of performance of conditions precedent or consequent in deeds; (95 Am. St. Rep. 215) on validity of conditions and restrictions in deed.

11 L. R. A. 424, *VAN RAALTE v. HARRINGTON*, 101 Mo. 602, 20 Am. St. Rep. 626, 14 S. W. 710.

Right of insolvent to make preferences.

Cited in *Glasgow Mill. Co. v. Burnes*, 144 Mo. 197, 45 S. W. 1074, and *Mansur-Tebbetts Implement Co. v. Ritchie*, 143 Mo. 605, 45 S. W. 634, holding kinship of preferred creditor may be considered as bearing upon question of fraud.

Cited in note (11 L. R. A. 470) on right of insolvent debtor to make preferences in assignment.

Knowledge of fraudulent intent.

Cited in *Batavia v. Wallace*, 42 C. C. A. 315, 102 Fed. 244; *Barrett v. Davis*, 104 Mo. 562, 16 S. W. 377; *Brown v. Hoffelmeyer*, 70 Mo. App. 390; *National Bank of Commerce v. Brunswick Tobacco Works Co.* 155 Mo. 607, 56 S. W. 283,—holding evidence from which actual knowledge of fraudulent intent may be inferred sufficient to put mortgagee on inquiry; *Sammons v. O'Neill*, 60 Mo. App. 537, holding knowledge sufficient to put prudent man on inquiry not alone enough to show actual knowledge of fraud; *Liggett v. Johnston*, 61 Mo. App. 203, holding court's instructions as to knowledge of fraudulent intent as affecting transfer sufficient; *Marion Distilling Co. v. Ellis*, 63 Mo. App. 21, holding fraudulent intent by creditor alone not sufficient to invalidate transfer of debtor's property to him; *Kurtz v. Lewis Voight & Sons Co.* 86 Mo. App. 655, holding vendee's knowledge of vendor's fraudulent intent renders sale fraudulent, notwithstanding sufficiency of consideration; *State use of Salomon v. Mason*, 112 Mo. 381, 34 Am. St. Rep. 390, 20 S. W. 629, holding vendee must have actual knowledge of fraudulent intent of vendor to avoid transfer; *Simon-Gregory Dry Goods Co. v. Schooley*, 66 Mo. App. 413, holding question of knowledge by purchaser for valuable consideration of vendor's fraudulent intent, for jury; *Alberger v. White*, 117 Mo. 366, 23 S. W. 92, holding agreement of creditor to pay back part of note secured by debtor's mortgage, to defeat other creditors, fraudulent as to them; *Farmers' Bank v. Worthington*, 145 Mo. 99, 46 S. W. 745, upholding deed made to defraud creditors, because of lack of knowledge of intent by grantee for valuable consideration; *Kurtz v. Troll*, 175 Mo. 513, 75 S. W. 386, holding that vendee for value, participating in fraud of vendor, takes subject to rights of vendor's creditors.

Cited in notes (32 L. R. A. 48, 53, 71) on participation by purchasers in fraud of vendor which will invalidate transfer for good consideration as against vendor's creditors; (22 Am. St. Rep. 80) on right of purchaser from fraudulent grantor; (34 Am. St. Rep. 399, 401) on vendee's knowledge as affecting validity of fraudulent conveyance.

Burden of proving fraud.

Cited in State *ex rel.* Grimm v. Manhattan Rubber Mfg. Co. 149 Mo. 214, 50 S. W. 321 (concurring opinion), majority holding preference of directors of corporation not invalid simply because it prefers directors over other creditors of corporation; Utley v. Hill, 155 Mo. 266, 49 L. R. A. 333, 78 Am. St. Rep. 569, 55 S. W. 1091, holding depositor cannot hold bank director liable for receiving deposits after insolvency, without proving wilful fraud; J. S. Merrill Drug Co. v. Knighton, 73 Mo. App. 575, and Mansur-Tebbetts Implement Co. v. Ritchie, 143 Mo. 612, 45 S. W. 634, holding burden of proof of fraud upon one charging it.

11 L. R. A. 426, PERKINS v. ST. LOUIS, I. M. & S. R. CO. 103 Mo. 52, 15 S. W. 320.

Constitutional law.

Cited in State v. Loomis, 115 Mo. 322, 21 L. R. A. 795, 22 S. W. 350, holding void, act prohibiting mining or manufacturing concerns from paying wages in scrip not redeemable at face value in money or supplies; Murnane v. St. Louis, 123 Mo. 493, 27 S. W. 711, holding act creating new class of cities within first of four classes, violation of Constitution limiting classes to four; Kingsbury v. Missouri, K. & T. R. Co. 156 Mo. 387, 57 S. W. 547, holding double damage act constitutional; Brown v. Missouri, K. & T. R. Co. 175 Mo. 189, 74 S. W. 973, holding constitutional question not properly raised at trial not available on appeal.

Cited in notes (25 Am. St. Rep. 878) on 14th amendment as to special privileges, burdens and restrictions; (62 Am. St. Rep. 173) on protection of corporations from special and hostile legislation.

Constitutionality of taxation of attorney's fees by successful plaintiff.

Cited in dissenting opinion in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 168, 41 L. ed. 672, 17 Sup. Ct. Rep. 255, Reversing 87 Tex. 22, 26 S. W. 985, majority holding act allowing successful plaintiff in claims against railroad company to tax attorney's fee unconstitutional; Farmers & M. Ins. Co. v. Dobney, 62 Neb. 222, 97 Am. St. Rep. 624, 86 N. W. 1070, and Lancashire Ins. Co. v. Bush, 60 Neb. 124, 82 N. W. 313, holding act permitting successful plaintiff to tax attorney's fees against insurer of real estate constitutional; Liquidating Comrs. v. Marrero, 106 La. 135, 30 So. 305, upholding act allowing commission of 10 per cent of amount of taxes collected, to attorney for collector, to be paid by one unsuccessfully resisting tax; Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 716, 55 L. R. A. 265, 86 Am. St. Rep. 393, 87 N. W. 714, upholding act permitting reasonable attorney's fees to landowner's in condemnation proceedings by railroads; Dell v. Marvin, 41 Fla. 228, 45 L. R. A. 203, 79 Am. St. Rep. 171, 26 So. 188, and Wortman v. Kleinschmidt, 12 Mont. 332, 30 Pac. 280, holding act permitting taxing of attorney's fee by plaintiff in foreclosure of mechanic's lien constitutional; Briggs v. St. Louis & S. F. R. Co. 111 Mo. 172, 20 S. W. 32, upholding constitutionality of act permitting taxing of attorney's fee in action for killing of stock by carrier; Terre Haute & L. R. Co. v. Salmon, 161 Ind. 133, 67 N. E. 918, upholding act imposing penalty in shape of attorney's fee for failure of railroad company to fence right of way; Thompson v. Wise Boy Min. & Mill. Co. 9 Idaho, 370, 74 Pac. 958, sustaining a statute allowing taxation of a reasonable attorney's fee for foreclosing a miner's lien; Engbretsen v. Gay, 158 Cal. 34, 28 L.R.A.(N.S.) 1068, 109 Pac. 880, sustaining an act allowing an attorney's fee against one whose delinquency makes necessary a proceeding to enforce a special assessment; Pyramid Land & Stock Co. v. Pierce, 30 Nev. 249, 95 Pac. 210, sustaining an act providing for attorney fees in favor of party recovering damages against one unlawfully grazing stock

on his land; *Knight v. Quiney*, O. & K. C. R. Co. 120 Mo. App. 320, 96 S. W. 716, sustaining statute allowing attorney fees to party prevailing in recovery of a statutory penalty; *Ilecker v. Illinois*, C. R. Co. 231 Ill. 579, 83 N. E. 456, on validity of statutes allowing attorney fees.

Cited in notes (14 L. R. A. 586) on constitutional equality of privileges, immunities, and protection as to attorney's fees; (21 L. R. A. 791) on constitutionality of statutes restricting contracts and business; (17 L.R.A.(N.S.) 910; (79 Am. St. Rep. 185) on constitutionality of statutes allowing attorney's fee; (47 L. ed. U. S. 822) on unconstitutional inequality or discrimination in statutes allowing attorney's fees.

Distinguished in *Davidson v. Jennings*, 27 Colo. 192, 48 L. R. A. 341, 83 Am. St. Rep. 49, 60 Pac. 354, holding act permitting plaintiff to tax attorney's fee in foreclosure of mechanic's lien unconstitutional.

Overruled in *Paddock v. Missouri P. R. Co.* 155 Mo. 537, 56 S. W. 453, holding statute permitting taxing of attorney's fee in favor of plaintiff void.

Injuries by railroads due to defective fences.

Cited in *Geiser v. St. Louis, I. M. & S. R. Co.* 61 Mo. App. 464, holding owner of cattle killed by coming on railroad from adjoining inclosed land must show their right to be upon such land before he can recover; *Yeager v. Chicago, B. & Q. R. Co.* 61 Mo. App. 596, holding failure to prove fright by locomotive fatal to recovery in action for killing animal on defendant's right of way; *Shaw v. St. Louis, M. & S. E. R. Co.* 110 Mo. App. 567, 85 S. W. 611, holding that to sustain a verdict for injury to a colt by being frightened and cut that it must be shown to have been frightened by train and that it ran into the fence; *Logan v. St. Louis, M. & S. E. R. Co.* 111 Mo. App. 678, 86 S. W. 565, holding evidence that animals were found a short distance from track not sufficient without showing train had recently passed or that animals were on track; *Reed v. Chicago & A. R. Co.* 112 Mo. App. 582, 87 S. W. 65, holding that a conjecture cannot be used to aid either party; *Hobbs v. St. Louis, M. & S. R. Co.* 113 Mo. App. 130, 87 S. W. 525, holding fact that animal is found dead in mire, that it was seen upon track and that train came soon after and that fence was defective to be sufficient; *Price v. St. Louis, K. C. & C. R. Co.* 133 Mo. App. 657, 113 S. W. 1136, on validity of railway fence regulations.

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L. R. A. 768, which holds company liable to brakeman for failure to maintain fences, causing derailment; *Gould v. Great Northern R. Co.* 30 L. R. A. 590, which requires railroad fences to be on outside margin of right of way.

Cited in notes (11 L.R.A. 461) on duty of railroad employees to keep lookout for stock on track; (9 L.R.A.(N.S.) 358) on duty of railroad to fence right of way; (31 L.R.A.(N.S.) 865) on constitutionality of statutes requiring railroad to fence tracks and build cattle guards; (37 L.R.A.(N.S.) 1185) on railroads; liability for injury to stock other than by trains, because of breach of statutory duty to fence.

Burden of proof of injury.

Cited in *Oglesby v. Missouri P. R. Co.* 150 Mo. 182, 51 S. W. 758, holding that burden of proving cause of injury is upon plaintiff.

11 L. R. A. 429, *SMITH v. DAVENPORT*, 45 Kan. 423, 23 Am. St. Rep. 737, 25 Pac. 851.

Liability for torts by infants.

Cited in *Swanson v. Crandall*, 39 W. N. C. 27, holding father not liable for injury to nurse shot with revolver taken from drawer by child; *Swanson v.*

Crandall, 2 Pa. Super. Ct. 91, holding parent not liable for injury where a five-year-old child discovered a loaded revolver in a drawer and discharged it causing injury; *Broadstreet v. Hall*, 168 Ind. 200, 10 L.R.A.(N.S.) 947, 120 Am. St. Rep. 356, 80 N. E. 145, holding that any liability of father for tort of child is based on relation of master and servant.

Cited in footnotes to *Evers v. Krouse*, 66 L.R.A. 593, which holds servant alone responsible for act by him while engaged in master's work but entirely disconnected therefrom; *Chastain v. Johns*, 66 L.R.A. 958, which holds father not liable for tort of minor child which he did not ratify and from which he received no benefit.

Cited in notes (57 L.R.A. 674) on liability of infant for torts; (74 Am. St. Rep. 801; 10 L.R.A.(N.S.) 933, 935, 939) on liability of parent for acts of children.

11 L. R. A. 430, *STATE ex rel. KELLOGG v. KANSAS MERCANTILE ASSO.*
45 Kan. 351, 23 Am. St. Rep. 727, 25 Pac. 984.

Lotteries.

Cited in *Re Smith*, 54 Kan. 707, 39 Pac. 707, holding lotteries cannot be chartered by legislature; *Davenport v. Ottawa*, 54 Kan. 718, 45 Am. St. Rep. 303, 39 Pac. 708, holding prize offered by merchant, dependent upon chance of drawing key to unlock box, a lottery; *Reilley v. United States*, 46 C. C. A. 34, 106 Fed. 905, holding game offering prize, dependent upon drawing numbers by chance from wheel, a lottery; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 616, 62 L.R.A. 124, footnote p. 93, 44 S. E. 320, holding determination by lot which, of a number of persons entitled to payment of fixed sums, shall be paid, not a lottery; *People v. McPhee*, 139 Mich. 690, 69 L.R.A. 507, 103 N. W. 174, 5 A. & E. Ann. Cas. 835, holding a scheme whereby each member of a club pays a certain amount per week and by lot one of the members receives a suit of clothes each week is lottery.

Cited in footnotes to *Martin v. Richardson*, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket, entitled to proceeds from one fraudulently obtaining it after prize is drawn; *Lynch v. Rosenthal*, 31 L. R. A. 835, which holds sale of lots to be drawn by lot, with one prize lot to be given to one of purchasers as result of chance, void; *Meyer v. State*, 51 L. R. A. 496, which holds giving customers chance to operate slot machine, and secure, in addition to purchase, article whose value determined by place where revolving wheel stops, a lottery; *State ex rel. Sheets v. Interstate Sav. Invest. Co.* 52 L. R. A. 530, which holds contracts of investment securities, etc., capable, by peculiar device, of redemption before accumulation in reserve fund of credit equal to stipulated endowment value, illegal; *State ex rel. Prout v. Nebraska Home Co.* 60 L. R. A. 448, which holds scheme by which common fund distributed among contributors, valuable preference in distribution depending on chance, a lottery; *Equitable Loan & S. Co. v. Waring*, 62 L.R.A. 93, which holds consideration, prize, and chance essential elements of lottery; *People ex rel. Ellison v. Lavin*, 66 L.R.A. 601, which holds distribution of prizes to those who shall make closest estimate of number of cigars on which tax is paid during specified month, a lottery; *People v. McPhee*, 69 L.R.A. 506, which holds a scheme by which a certain number of persons pay a small sum weekly and choose by lot each week one of the number to receive a suit of clothes worth much more than the weekly payment after which he ceases to be a member, a lottery, although each member is entitled to trade out the amount paid in whenever he chooses to withdraw.

Cited in notes (12 L.R.A. 89) on gift enterprise as lottery; (137 Am. St. Rep. 951) on lottery as unlawful calling.

11 L. R. A. 432, SOUTHERN KANSAS R. CO. v. SANFORD, 45 Kan. 372, 25 Pac. 891.

Carrier's liability to person carried.

Cited in Sewell v. Atchison, T. & S. F. R. Co. 78 Kan. 18, 96 Pac. 1007, holding railroad company liable for injury to an express messenger because of its negligence although express company and injured had agreed to assume all risk also citing annotation with special approval.

Cited in note (35 L. ed. U. S. 924) on negligence of railroad companies toward passengers.

— Trespassers on trains.

Cited in Hendryx v. Kansas City, Ft. S. & G. R. Co. 45 Kan. 379, 25 Pac. 893, refusing recovery for death of trespasser, though injury result of malice; Kansas City, Ft. S. & M. R. Co. v. Campbell, 6 Kan. App. 422, 49 Pac. 817, holding demurrer to plaintiff's evidence tending to prove gross negligence properly overruled.

Cited in footnote to Enright v. Pittsburgh Junction R. Co. 53 L. R. A. 330, which denies right to eject or frighten ten year old boy from rapidly moving train.

Cited in note (12 L. R. A. 338, 339) on carrier's liability for tortious acts of its agents.

Boarding or alighting from moving train.

Cited in Atchison, T. & S. F. R. Co. v. Holloway, 71 Kan. 7, 114 Am. St. Rep. 462, 80 Pac. 31, holding it not negligence as a matter of law to attempt to board a moving train which party had not had chance to board while standing; Walters v. Missouri P. R. Co. 82 Kan. 742, 28 L.R.A.(N.S.) 1060, 109 Pac. 173, holding question of contributory negligence one for jury where one alighted from a moving train as directed by conductor.

11 L. R. A. 434, EVISON v. CHICAGO, ST. P. M. & O. R. CO. 45 Minn. 370, 48 N. W. 6.

Reasonableness of municipal ordinances.

Cited in Schulz v. Chicago, M. & St. P. R. Co. 57 Minn. 274, 59 N. W. 192, holding ordinance limiting speed of trains to 4 miles an hour in sparsely settled district unreasonable; Burg v. Chicago, R. I. & P. R. Co. 90 Iowa, 111, 48 Am. St. Rep. 419, 57 N. W. 680, holding ordinance limiting speed of trains to 6 miles an hour unreasonable; Chicago & A. R. Co. v. Carlinville, 200 Ill. 322, 60 L.R.A. 394, 93 Am. St. Rep. 190, 65 N. E. 730, upholding ordinance limiting speed of passenger trains to 10 miles, and freight trains to 6 miles, an hour within city limits; Zumault v. Kansas City & I. Air Line, 71 Mo. App. 676, holding ordinance limiting speed of cars to 6 miles an hour in certain portions of city unreasonable; Plattsburg v. Hagenbush, 98 Mo. App. 671, 73 S. W. 725, holding ordinance limiting speed of trains to 6 miles an hour unreasonable as to outskirts of district; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 149, 53 L.R.A. 185, 83 N. W. 527, holding ordinance requiring telephone wires to be placed underground in sparsely settled districts unreasonable; Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 146 Ind. 423, 35 L. R. A. 685, 45 N. E. 587, holding municipality, under incidental powers, without authority to compel railroad to maintain gates and watchman at crossings; State ex rel. Young v. Standard Oil Co. 111 Minn. 102, 126 N. W. 527, holding that statute for-

bidding discrimination in prices charged for petroleum is valid police regulation; *St. Paul v. St. Paul City R. Co.* 114 Minn. 255, 36 L.R.A.(N.S.) 239, 130 N. W. 1108, Ann. Cas. 1912 B, 1136, holding that ordinance may be valid when applied to conditions existing in thickly settled part of city, but invalid with reference to suburban districts; *Neary v. Northern P. R. Co.* 41 Mont. 487, 110 Pac. 226, to the point that ordinance regulating rate of speed of railway trains within city is valid.

Cited in note (24 L.R.A.(N.S.) 933) on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope.

Presumptive validity of ordinances.

Cited in *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648; *Peterson v. State*, 79 Neb. 140, 14 L.R.A.(N.S.) 297, 126 Am. St. Rep. 651, 112 N. W. 306,—holding ordinances are presumptively valid and invalidity will not be declared unless unreasonableness or want of necessity clearly appears.

Powers of municipality.

Cited in *Reed v. Anoka*, 85 Minn. 301, 88 N. W. 981, upholding power of city officers to contract with private individuals to furnish light and water to city.

Negative evidence as to making of a noise or sound.

Cited in *Peterson v. Minneapolis Street R. Co.* 90 Minn. 60, 95 N. W. 751 (dissenting opinion), on testimony of witness that he did not hear a noise as of itself, no evidence as against positive testimony that noise was made.

11 L. R. A. 437, *NATIONAL BENEFIT CO. v. UNION HOSPITAL CO.* 45 Minn. 272, 47 N. W. 806.

Contracts in restraint of trade.

Cited in *Kronschabel-Smith Co. v. Kronschabel*, 87 Minn. 233, 91 N. W. 892, upholding contract not to engage in business in a small village; *Mapes v. Metcalf*, 10 N. D. 608, 88 N. W. 713, upholding contract for discontinuance of publication of newspaper in town for five years; *Cowan v. Fairbrother*, 118 N. C. 412, 32 L. R. A. 835, 54 Am. St. Rep. 733, 24 S. E. 212, upholding agreement to refrain from editing or being connected with newspaper or magazine in certain county; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 130, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 282, holding unlawful, combination of iron-pipe manufacturers to arbitrarily control prices; *Queen Ins. Co. v. State*, 86 Tex. 267, 22 L. R. A. 492, 24 S. W. 397, holding combination to fix insurance rates and commissions of agents not within prohibition of Texas trust act; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 350, 41 L. ed. 1031, 17 Sup. Ct. Rep. 540 (dissenting opinion), which holds that test of whether contract is in restraint of trade is whether, under all circumstances, it is reasonable; *State v. Duluth Bd. of Trade*, 107 Minn. 525, 23 L.R.A.(N.S.) 1270, 121 N. W. 395, holding that board of trade is not combination in restraint of trade; *Buck v. Walker*, 115 Minn. 244, 132 N. W. 205, holding that courts cannot declare contracts authorized by statute to be contrary to public policy.

Cited in footnotes to *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 12 L. R. A. 563, which holds agreement to prevent competition between corporations in manufacture of glue under patent valid; *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, which holds combination to fix prices of cotton seed and seed cotton void; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful; *Nester v. Continental Brewing Co.* 24 L. R. A. 247, which holds combination of brewers to stifle competition within specified place void; *Kramer v. Old*, 34 L. R. A. 389, which sus-

tains contract restricting seller from engaging in milling business in vicinity of certain city; *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement that lessor will not engage in business for five years; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone, to sell through common agent and maintain agreed prices; *John D. Park & Sons Co. v. National Wholesale Druggist Asso.* 62 L. R. A. 632, which holds valid, agreement between manufacturers and jobbers made to maintain fixed wholesale and retail prices; *Bancroft v. Union Embossing Co.* 64 L. R. A. 298, which holds valid, agreement of vendor not to engage in manufacture and sale of certain machines during life of contract; *Slaughter v. Thacker Coal & Coke Co.* 65 L.R.A. 342, which holds void contract by different coal mining companies giving exclusive right to sell entire output at uniform prices to corporation organized as their regular sales agent; *Eugene Dietzgen Co. v. Kokosky*, 66 L.R.A. 503, which sustains right to injunction against member of former partnership agreeing on sale of business not to engage directly or indirectly in competitive business within specified city for designated period from continuing in rival business into which he entered in violation of such agreement.

Criticised in *Southworth v. Davison*, 106 Minn. 121, 19 L.R.A.(N.S.) 771, 118 N. W. 363, holding contract if reasonable in other respects, is not void because unlimited as to time.

11 L. R. A. 440, *JOHNSON v. WATERHOUSE*, 152 Mass. 585, 23 Am. St. Rep. 858, 26 N. E. 234.

Actions for and against infants.

Cited in *Conto v. Silvia*, 170 Mass. 153, 49 N. E. 86, holding judgment against infant who has no guardian and for whom no guardian *ad litem* is appointed, erroneous; *Wise v. Schloesser*, 111 Iowa, 19, 82 N. W. 439, holding judgment against minor for breach of promise of marriage void, without defense by guardian; *Bernard v. Merrill*, 91 Me. 362, 40 Atl. 136, holding father, after suing as next friend for injuries to child, not estopped thereby from action for loss of services; *State v. Stark*, 149 Iowa, 752, 129 N. W. 331, holding that no judgment can be rendered against infant unless guardian is appointed and defense made; *McIsaac v. Adams*, 190 Mass. 119, 112 Am. St. Rep. 321, 76 N. E. 654, 5 A. & E. Ann. Cas. 729; *Schimpf v. Wayne Circuit Judge*, 129 Mich. 104, 88 N. W. 384,—holding a judgment against an infant merely voidable where no guardian *ad litem* was appointed.

Cited in note (29 Am. St. Rep. 644) on judgment against minors.

Question presented on writ of error.

Cited in *Perkins v. Bangs*, 206 Mass. 412, 92 N. E. 623, to the point that only question presented on writ of error is whether judgment should be reversed or affirmed.

11 L. R. A. 442, *STATE USE OF DYRENFURTH v. BALTIMORE & O. R. CO.* 73 Md. 374, 21 Atl. 62.

Negligence in crossing railroad tracks.

Cited in *Baltimore & O. R. Co. v. State*, 75 Md. 537, 24 Atl. 14, holding stepping directly before moving caboose without looking, contributory negligence; *Guthrie v. Missouri P. R. Co.* 51 Neb. 751, 71 N. W. 722, holding taking chance of driving across track 200 feet in front of rapidly approaching train, negligence; *McNab v. United R. & Electric Co.* 94 Md. 726, 51 Atl. 421, holding attempt to cross tracks 40 feet in front of rapidly approaching train, negligence barring recovery.

Cited in footnotes to *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look when within 30 feet of track does not prevent recovery; *Keenan v. United Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence.

Cited in notes (11 L. R. A. 388) on negligence in crossing railroad tracks; (3 L.R.A.(N.S.) 196), on stepping on track in front of train running in excess of speed prescribed by ordinance as negligence.

Distinguished in *Cooke v. Baltimore Traction Co.* 80 Md. 557, 31 Atl. 327, holding plaintiff, looking and listening, not negligent in failing to ascertain approach of street car coming around corner at full speed; *Jenkins v. Baltimore & O. R. Co.* 98 Md. 405, 56 Atl. 966, holding plaintiff not guilty of contributory negligence where he looked but could not see approaching engine because of darkness and shadows.

Right to go to jury.

Cited in *Florida C. & P. R. Co. v. Williams*, 37 Fla. 424, 20 So. 538, holding plaintiff in negligence action entitled to go to jury if there is evidence tending to prove issue.

11 L. R. A. 443, *THOMPSON v. THOMPSON*, 91 Ala. 591, 8 So. 419

Effect to be given foreign divorces.

Cited in *Dunham v. Dunham*, 162 Ill. 610, 35 L. R. A. 79, 44 N. E. 841, holding Dakota divorce decree in favor of wife no bar to husband's suit in Illinois.

Cited in footnotes to *Felt v. Felt*, 47 L. R. A. 546, which holds wife's suit for divorce barred by decree of divorce regularly obtained by husband in another state; *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Felt v. Felt*, 47 L. R. A. 546, which holds divorce on substituted service in other state, where complainant domiciled, entitled to recognition by interstate comity; *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds judgment for alimony, though subject to alteration, final as to enforcement in other state.

Cited in notes (19 L. R. A. 518) on validity of divorce decree granted by court of foreign country; (59 L. R. A. 155, 164, 167) on conflict of laws on subject of divorce.

Presumption as to validity.

Cited in footnote to *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds presumption of regularity of foreign divorce decree renders allegation of due service unnecessary.

11 L. R. A. 446, *PERRY v. SALT LAKE CITY*, 7 Utah, 143, 25 Pac. 739, 998.

Discretionary power to license sale of intoxicating liquors.

Cited in *State ex rel. Noble v. Cheyenne*, 7 Wyo. 437, 40 L. R. A. 716, 52 Pac. 975, upholding ordinance requiring permission of council for issuance of license to sell intoxicating liquors within certain district; *Berger v. De Loach*, 56 Tex. Civ. App. 536, 121 S. W. 591, holding that burden of proof is upon person refused license to show that granting power abused its discretion; *Smyth v. Butters*, 38 Utah, 158, 32 L.R.A.(N.S.) 396, 112 Pac. 809, holding that officers empowered to issue license to sell liquor, in their discretion may refuse an application for good cause; *Perkins v. Loux*, 14 Idaho, 613, 95 Pac. 694, holding that city council may refuse license to disreputable characters; *Harrison v. People*, 222 Ill. 153, 78 N. E. 52, Reversing 125 Ill. App. 183, holding refusal to grant license next to school grounds reasonable and within discretionary power of mayor; *Cooke v. Loper*, 151 Ala. 555, 44 So. 78, holding valid ordinance giving

council discretion to refuse license at location where it would be likely to disturb peace and good order.

Cited in notes (21 L. R. A. 582, 592) on discretion in granting of liquor license; (27 L.R.A.(N.S.) 1195), on right to control by mandamus decision of licensing officers as to fitness of applicant for liquor license.

Distinguished in *Ex parte Theisen*, 30 Fla. 540, 32 Am. St. Rep. 36, 11 So. 901, holding ordinance forbidding issuance of license for sale of liquors within certain distance of schools or churches, without consent of municipal body, void.

11 L. R. A. 450, *COM. v. LANNAN*, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858.

Larceny.

Cited in *Com. v. Flynn*, 167 Mass. 463, 57 Am. St. Rep. 472, 45 N. E. 924, holding defendant obtaining dollar bill for purpose of getting it changed, and appropriating it, guilty of larceny; *People v. Tomlinson*, 102 Cal. 23, 36 Pac. 506, Affirming conviction where defendant received money as security for complainant's faithful services as collector, with intent to convert such money to his own use; *Com. v. Rubin*, 165 Mass. 455, 43 N. E. 200, holding obtaining horse from boy on promise to deliver it to owner, but with intent to appropriate it, larceny; *People v. Shaughnessy*, 110 Cal. 602, 43 Pac. 2, holding obtaining of money from complainant by "bunco game," larceny; *Com. v. Dehle*, 42 Pa. Super. Ct. 306, holding that if by trick, owner of property is induced to part with possession only, still meaning to retain right of property, taking by such means is larceny; *State v. Loser*, 132 Iowa, 429, 104 N. W. 337, on fraudulent conversion of property delivered into possession for a temporary purpose as being larceny; *Com. v. King*, 202 Mass. 393, 88 N. E. 454, on scope of statute defining larceny.

Cited in notes (88 Am. St. Rep. 569, 570, 571, 583, 596) on larceny; (1 Brit. *Rul. Cas.* 1005) on larceny by taking greater quantity than paid for.

11 L. R. A. 452, *ST. LOUIS & S. F. R. CO. v. GILL*, 54 Ark. 101, 15 S. W. 18,

Affirmed in 156 U. S. 656, 39 L. ed. 569, 15 Sup. Ct. Rep. 484.

Statutes irregularly passed.

Cited in *Sweitzer v. Territory*, 5 Okla. 300, 47 Pac. 1094, refusing to declare act against gambling void on account of noncompliance by legislature with its rules in passing it.

Cited in note (40 L.R.A.(N.S.) 29) on conclusiveness of enrolled bill.

State regulation of rates and fares.

Cited in *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 248, 19 S. W. 839, holding act of April 4, 1887, regulating passenger rates, constitutional; *Indianapolis v. Navin*, 151 Ind. 143, 41 L. R. A. 340, 47 N. E. 525, upholding legislative power to regulate fares on street railways; *St. Louis & S. F. R. Co. v. Stevenson*, 54 Ark. 117, 15 S. W. 22, holding bridge toll of 40 cents, in addition to maximum charge for transportation, illegal; *Re Arkansas Rate Cases*, 187 Fed. 307, holding that rates made by commission on particular commodity so low as to be noncompensatory do not justify interference by courts unless they would reduce net earnings on entire business to such extent that they would be noncompensatory; *State ex rel. McCue v. Northern P. R. Co.* 19 N. D. 50, 25 L.R.A.(N.S.) 1008, 120 N. W. 869, holding that in determining whether rate is reasonable the question is whether total freight receipts under rate fixed will produce a fair profit; *Hammond Packing Co. v. State*, 81 Ark. 540, 126 Am. St. Rep. 1047, 100 S. W. 407, holding that state may compel foreign corporation

doing business within its borders to produce books, papers and documents under anti-trust act; *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* 137 N. C. 16, 115 Am. St. Rep. 636, 49 S. E. 191, holding that state may fix schedule time at which a train shall arrive at a certain station so as to connect with train on another line.

Cited in footnotes to *Chicago, B. & Q. R. Co. v. Jones*, 24 L.R.A. 141, which holds interstate commerce not affected by statute as to transportation within state; *Southern Exp. Co. v. Goldberg*, 62 L.R.A. 669, denying right of state to fix rates to be charged within state by interstate carrier.

Cited in notes (33 L. R. A. 179, 183) on legislative power to fix tolls, rates, and prices; (6 L.R.A.(N.S.) 835) on businesses affected with public interest subjecting them to regulation and control in respect to rates or prices; (15 L.R.A.(N.S.) 114), on consideration of entire local business in determining sufficiency of rates; (62 Am. St. Rep. 298), on regulation of rates; (44 L. ed. U. S. 418) on reasonableness of state limitation of railroad rates; (46 L. ed. U. S. 593) on contract exemptions from legislative power to fix tolls, rates, or prices.

Penalties recoverable against railroads.

Cited in *Missouri P. R. Co. v. Smith*, 60 Ark. 237, 5 Inters. Com. Rep. 349, 29 S. W. 752, holding action for penalty maintainable by person going on train for sole purpose of paying overcharge for transportation; *Kansas City, M. & B. R. Co. v. Spencer*, 72 Miss. 505, 17 So. 168, holding right to sue for penalty for failure to maintain cattle guards a continuing one.

Cited in note (12 L.R.A.(N.S.) 497) on motive of plaintiff as affecting right to recover statutory penalty from carrier.

11 L. R. A. 456, *PITTMAN v. PITTMAN*, 107 N. C. 159, 12 S. E. 61.

Parol trusts in land.

Cited in *Dover v. Rhea*, 108 N. C. 92, 13 S. E. 164, holding that trust results by transfer of land on parol agreement to pay debts which cannot be transferred by parol; *Blount v. Washington*, 108 N. C. 232, 12 S. E. 1008, holding vendee's oral declaration, after execution of absolute deed, insufficient to establish trust; *Blackburn v. Blackburn*, 109 N. C. 489, 13 S. E. 937, holding that by indorsement on back of deed at delivery, certifying life estate of third person in land, grantee takes title impressed with trust; *Cobb v. Edwards*, 117 N. C. 246, 23 S. E. 241, holding purchase at judicial sale on promise to convey to another, enforceable parol trust; *Sykes v. Boone*, 132 N. C. 202, 95 Am. St. Rep. 619, 43 S. E. 645, holding promise to reconvey as a condition upon which vendor passes title, not within statute of frauds; *Chappell v. White*, 146 N. C. 574, 60 S. E. 635, holding parol evidence inadmissible to show agreement between testator and his devisee by which the latter agreed to devise the property to a certain person; *Faust v. Faust*, 144 N. C. 386, 57 S. E. 22, holding parol promise by donee of land to pay a certain sum to a third party, insufficient to create a trust in the lands for its payment; *Gaylord v. Gaylord*, 150 N. C. 237, 63 S. E. 1028, on doctrine of parol trusts in lands.

Cited in footnote to *Cloud v. Malvin*, 45 L. R. A. 209, which denies right of grantees to have deed sustained against grantor's creditors, on claim that grantor originally took conveyance on secret trust for them.

Cited in notes (34 Am. St. Rep. 195) on voluntary trusts arising from declarations of trustor; (39 L.R.A.(N.S.) 909) on grantee's oral promise to grantor as giving rise to constructive trust; (115 Am. St. Rep. 784, 786) on creation of trusts in land by parol; (12 L.R.A.(N.S.) 548) on sufficiency of declaration to establish voluntary trust where title retained by settler.

Statute of frauds.

Cited in *Odom v. Clark*, 146 N. C. 551, 60 S. E. 513, holding that English Statute of Frauds is inapplicable in North Carolina except as re-enacted.

11 L. R. A. 460, *RANDALL v. RICHMOND & D. R. CO.* 107 N. C. 748, 12 S. E. 605.

Validity and construction of statutes.

Cited in *State ex rel. Harris v. Scarborough*, 110 N. C. 236, 14 S. E. 737, upholding constitutionality of act requiring registration before voting; *Kelly v. Fleming*, 113 N. C. 139, 18 S. E. 81, holding statute requiring privy examination of married woman with reference to chattel mortgages not applicable to absolute sales; *State v. Patterson*, 134 N. C. 614, 47 S. E. 808, holding that where language of statute is plain, title cannot be resorted to in construing it; *Coal & Coke R. Co. v. Conley*, 67 W. Va. 166, 67 S. E. 613, holding that it will be presumed that legislature did not intend to innovate upon or unsettle the common law.

Cited in note (30 Am. St. Rep. 265) on construction of statutes.

Liability of railroad company for injuring or killing cattle.

Cited in note (11 L. R. A. 426) on liability of railroad company for cattle killed or injured, under Missouri statute.

Presumption of negligence.

Cited in note (15 L. R. A. 40) on presumption of negligence from occurrence of accident.

Failure to whistle while approaching crossings and stations.

Cited in *Powell v. Southern R. Co.* 125 N. C. 374, 34 S. E. 530, holding failure to blow whistle while approaching crossings and stations, evidence of negligence.

Violation of letter of law.

Cited in *State v. Brown*, 109 N. C. 807, 13 S. E. 940, holding fact that road was impassable no excuse for driving loaded wagon on unpaved sidewalk in violation of ordinance.

11 L. R. A. 466, *HANCOCK BROS. v. WOOTEN*, 107 N. C. 9, 12 S. E. 199.

Fraudulent conveyances.

Cited in *Monroe Bros. v. Lewald*, 107 N. C. 656, 12 S. E. 287, holding supplementary proceedings should not be dismissed because of pendency of action in nature of judgment creditor's bill; *Smith v. Summerfield*, 108 N. C. 286, 12 S. E. 997, sustaining action in nature of judgment creditor's bill, brought by several creditors to set aside fraudulent conveyances; *Le Duc v. Brandt*, 110 N. C. 291, 14 S. E. 778, sustaining creditor's bill joining several causes of action, including recovery of indebtedness not reduced to judgment; *Wild v. Noblesville Bldg. Loan Fund & Sav. Inst.* 153 Ind. 6, 53 N. E. 944, holding mortgagees acquiring rights pending suit to set aside fraudulent conveyance bound by decree in such action; *Wild v. Noblesville Bldg. Loan Fund & Sav. Inst.* 153 Ind. 6, 53 N. E. 944, holding that mortgage obtained during pendency of action to set aside deed as fraudulent is taken subject to decree in such action.

Cited in footnote to *Manning v. Beck*, 14 L. R. A. 198, which holds bona fide transferee not affected by debtor's intention to make general assignment for creditors.

Distinguished in *Fisher v. Western Carolina Bank*, 132 N. C. 772, 44 S. E. 601, holding that commencement of action by creditor for himself and all other creditors to set aside conveyance as fraudulent, does not give such creditors any preference where assets were not increased thereby.

Parties.

Cited in *Daniels v. Baxter*, 120 N. C. 18, 26 S. E. 635, holding immaterial, in action by heirs and distributees attacking conveyance by ancestor, that personal representative is made party defendant; *Emry v. Parker*, 111 N. C. 264, 16 S. E. 236 (dissenting opinion), majority refusing to entertain appeal before judgment from order making a person party defendant; *Tarboro v. Pender*, 153 N. C. 430, 69 S. E. 425, holding that administrator is proper party to sell homestead of deceased for distribution; *Shober v. Wheeler*, 144 N. C. 410, 57 S. E. 152, holding that court has jurisdiction to subject lands of deceased to judgment in favor of creditor rendered prior to his death where administrator has been made a party and there are no other creditors.

Distinguished in *Goldberg v. Cohen*, 119 N. C. 71, 25 S. E. 714, denying right of plaintiffs, in action to set aside assignment as fraudulent to object that preferred creditor, made defendant with allegation that his claim was fraudulent should share equally with them when they withdrew all objections to his claim on his becoming party plaintiff; *Williams v. West Asheville & S. S. R. Co.* 126 N. C. 921, 36 S. E. 189, refusing to allow tort-judgment creditor to intervene in foreclosure action.

11 L. R. A. 472, *KELLER v. EUREKA BRICK MACH. MFG. CO.* 43 Mo. App. 84.

Certificates of stock in corporation.

Cited in *Withers v. Lafayette County Bank*, 67 Mo. App. 118, holding that fraudulent cancelation of corporation stock, and refusal to reissue certificates for same, constitute conversion; *Lacaff v. Dutch Miller Min. & Smelting Co.* 31 Wash. 571, 72 Pac. 112, holding that assignee of stock cannot compel corporation to issue certificate to him, until entered upon books of company; *Minnich v. Keystone Nat. Bank*, 20 Lanc. L. Rev. 237, holding that bank, upon receiving suitable indemnity bond, must issue certificate marked "duplicate" in place of lost original; *Landis v. Conestoga Nat. Bank*, 25 Lanc. L. Rev. 7, holding that stockholder can compel national bank to issue duplicate in place of lost certificate, on his giving bond; *Herrick v. Humphrey Hardware Co.* 73 Neb. 815, 119 Am. St. Rep. 917, 103 N. W. 685, 11 A. & E. Ann. Cas. 201, holding that corporation has no lien upon shares held by stockholders, for debts due the corporation, unless such lien be given by statute.

11 L. R. A. 480, *DECKER v. GARDNER*, 124 N. Y. 334, 26 N. E. 814.

Receiverships.

Cited in *United Glass Co. v. Vary*, 79 Hun, 107, 29 N. Y. Supp. 636, holding dissolution of corporation not shown by sequestration of its property by its receiver; *Bird v. Lanphear*, 92 Hun, 571, 36 N. Y. Supp. 1069, upholding right of court to impound moneys paid defendants by original landowners as commissions, fraud and misrepresentations being alleged; *Stokes v. Hoffman House*, 167 N. Y. 560, 53 L. R. A. 874, 60 N. E. 667, Affirming 46 App. Div. 133, 61 N. Y. Supp. 821, upholding right of receiver to recover money paid for rent pending receivership after purchaser on foreclosure was in possession; *Sigua Iron Co. v. Brown*, 171 N. Y. 494, 64 N. E. 194, upholding right of action for unpaid calls by corporation, during pendency of temporary receivership; *Ross v. Vernam*, 6 App. Div. 247, upholding appointment of receiver pending foreclosure, upon showing of precarious security; *Franklin Trust Co. v. Northern Adirondack R. Co.* 11 App. Div. 257, 42 N. Y. Supp. 211, holding foreclosure receiver of railroad corporation without power to dispose of corporate property of road; *Mutual Brewing Co. v. New York & C. P. Ferry Co.* 16 App. Div. 151, 45 N. Y. Supp. 101, upholding right of

corporation to sue for tort pending temporary receivership; Mercantile Trust Co. v. Kings County Elev. R. Co. 40 App. Div. 142, 57 N. Y. Supp. 892, holding persons furnishing supplies to elevated road before temporary receivership not entitled to preferential payment of claims out of receiver's assets; Pfeffer v. Kling, 58 App. Div. 186, 68 N. Y. Supp. 641, holding receiver paying out fund under directions of court not required to refund same; Davidson v. John Good Cordage & Mach. Co. 63 App. Div. 367, 71 N. Y. Supp. 565, holding court without power to restrain foreclosure of mortgage on corporation property not assumed by corporation, on appointment of receiver thereof; Platt v. New York & S. B. R. Co. 63 App. Div. 404, 71 N. Y. Supp. 913, holding order, so far as it related to appointment of mortgage foreclosure receiver of property not covered by lien, a nullity; Devlin v. New York, 4 Misc. 113, 24 N. Y. Supp. 116, holding action for moneys due under contract not prevented by temporary receivership; Forker v. Brown, 10 Misc. 166, 30 N. Y. Supp. 827, holding that without statutory provision, transfer of title does not follow appointment of receiver of corporation; Buckley v. Harrison, 10 Misc. 686, 31 N. Y. Supp. 999, holding ancillary receiver of foreign corporation without power to sue to disaffirm fraudulent transfer by corporation; Hall v. Holland House Co. 12 Misc. 57, 33 N. Y. Supp. 50, holding counterclaim arising during temporary receivership properly disallowed against receiver; Metropolitan L. Ins. Co. v. Sanborn, 34 Misc. 533, 69 N. Y. Supp. 1009, holding temporary receiver not liable personally for rent during receivership; Jackson v. McInnis, 33 Or. 531, 43 L. R. A. 129, 72 Am. St. Rep. 755, 54 Pac. 884, holding presentment and demand of payment on receiver *pendente lite*, and notice of nonpayment by such receiver, insufficient to bind indorser; Paddock v. Staley, 13 Colo. App. 379, 58 Pac. 363, holding creditors not barred from suing corporations by pendency of receivership proceedings; State *ex rel.* Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Court, 22 Mont. 239, 59 Pac. 219, holding appointment of receiver *pendente lite* does not mean dissolution of corporation; Flynn v. Furth, 25 Wash. 110, 64 Pac. 904, holding liability of partnership arising before appointment of receiver not enforceable against him alone; Northern P. R. Co. v. Heflin, 27 C. C. A. 462, 48 U. S. App. 562, 83 Fed. 94, holding receiver not proper party in action for tort committed by corporation prior to his appointment; McDermott v. Crook, 20 App. D. C. 467, holding action not maintainable against receiver for negligent act of corporation before his appointment; *Re* C. Moench & Sons Co. 123 Fed. 967, upholding right of directors of corporation in hands of receiver to adopt resolution declaring its willingness to be adjudged bankrupt; Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co. 231 Pa. 131, 80 Atl. 568, holding that receiver appointed to preserve property of corporation acquires no title to property but only right of possession; Emory v. Faith, 113 Md. 259, 77 Atl. 386, Ann. Cas. 1912 A 586, holding that no action can be maintained against receiver of partnership for damages for injury caused by negligence of partners before appointment of receiver; Harmon v. Perkins, 45 Ind. App. 86, 88 N. E. 961, holding that complaint against railroad and receiver alleging no negligence of receiver, does not state cause of action against receiver; Fountain v. Stickney, 145 Iowa, 169, 139 Am. St. Rep. 410, 123 N. W. 947, holding that action for personal injury sustained prior to receivership to preserve property of railroad will not lie against receiver; Bogert v. Turner, 135 App. Div. 532, 120 N. Y. Supp. 420, holding that receiver *pendente lite* of partnership property cannot be sued for a firm debt; Dow v. Nealis, 47 Misc. 154, 93 N. Y. Supp. 379, holding that receiver appointed *pendente lite* in mortgage foreclosure proceedings is not liable for failure to furnish tenant holding written lease, with cold storage facilities pursuant to an oral agreement with mortgagor; People v. New York City R. Co. 57 Misc. 123, 107 N. Y.

Supp. 247, holding that the state may maintain suit to have receiver appointed preliminary to dissolving insolvent corporation, though Federal court has appointed a receiver at the instance of creditors; *Cogan v. Conover Mfg. Co.* 69 N. J. Eq. 376, 60 Atl. 408, on powers of receiver of corporation appointed by court of equity under statute; *Prince v. Schlesinger*, 116 App. Div. 504, 101 N. Y. Supp. 1031, on analogy between rights and powers of a receiver of a corporation and those of an assignee of an insolvent debtor.

Cited in footnote to *Farmers' Loan & T. Co. v. Oregon P. R. Co.* 38 L. R. A. 424, which holds railroad mortgagee not liable for unpaid wages incurred by receiver appointed in foreclosure suit.

Cited in notes (20 L. R. A.) 211) on power of corporation to appoint receiver where no other relief is asked; (31 Am. St. Rep. 374) on actions against federal receivers; (71 Am. St. Rep. 357) on relation of receivers to pre-existing liens and remedies for their enforcements; (74 Am. St. Rep. 289, 291, 296), on action without leave of court against receiver or person for whom he is appointed; (118 Am. St. Rep. 200) as to when and at whose instance a receiver of a corporation may be appointed; (120 Am. St. Rep. 279) on enforcement against receiver of liabilities sounding in tort.

Distinguished in *Auburn Button Co. v. Sylvester*, 68 Hun, 402, 22 N. Y. Supp. 891, upholding right of corporation to appeal after entry of judgment of sequestration and appointment of permanent receiver; *Woodworth v. Brooklyn Elev. R. Co.* 29 App. Div. 5, 51 N. Y. Supp. 323, holding corporation and receiver under mortgage foreclosure properly made parties in abutting owners' actions for injunction and incidental damages; *Larsen v. United States Mortg. & T. Co.* 104 App. Div. 78, 93 N. Y. Supp. 610, holding that receiver continuing in possession of railroad after expiration of mortgage foreclosure action pending which he was appointed, may be sued individually for negligence of the railroad causing personal injury; *Brooklyn Improv. Co. v. Lewis*, 136 App. Div. 864, 122 N. Y. Supp. 111, holding receiver in bankruptcy personally liable for rent of premises leased to bankrupt where he remained in possession after order to vacate or give security for the rent.

Powers of equity over corporation.

Cited in *State ex rel. Donnell v. Foster*, 225 Mo. 196, 125 S. W. 184, holding that in the absence of statute, a court of equity has no power to dissolve a corporation; *Ashton v. Penfield*, 233 Mo. 446, 135 S. W. 938 (dissenting opinion), on power of court of equity to appoint receiver of corporation for purpose of dissolution.

Cited in note (39 L.R.A.(N.S.) 1038, 1041) on inherent equity jurisdiction to appoint receiver or wind up corporation because of mismanagement or fraud.

11 L. R. A. 483, *BREWER v. NEW YORK, L. E. & W. R. CO.* 124 N. Y. 59, 21 Am. St. Rep. 647, 26 N. E. 324.

Exemption from liability by contract.

Cited in *Fordyce v. Jackson*, 56 Ark. 597, 20 S. W. 528, sustaining right of express messenger, without express contract, to maintain action against carrier for negligence; *Lawton v. Waite*, 103 Wis. 254, 45 L. R. A. 619, 79 N. W. 321, holding subcontractor for carrying mail liable in tort for negligent injury to postal clerk carried in compliance with original contractor's contract assuming liability to persons aggrieved by his defaults; *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. 562, holding contract exempting carrier from liability to express messenger void; *Sager v. Northern P. R. Co.* 166 Fed. 534, holding that circus employee may recover from railroad for injury caused by its negligence, regardless of the contract of transportation with the circus the terms of which

were unknown to him; *Robinson v. St. Johnsbury & L. C. R. Co.* 80 Vt. 136, 9 L.R.A.(N.S.) 1252, 66 Atl. 814, 12 A. & E. Ann. Cas. 1060, holding express messenger not bound by contract of transportation between express company and carrier, the terms of which he did not know.

Cited in footnote to *Louisville, N. A. & C. R. Co. v. Keefer*, 38 L. R. A. 93, which holds contract by express company exempting railroad from liability to messenger authorizing contract, binding on latter.

Cited in notes (22 L. R. A. 796) on rights of person riding on pass or contract for free passage; (46 L. R. A. 54) on right of servant to recover damages from person other than his master for injuries received in performance of his duties; (47 L. R. A. 162) on *Volenti non fit injuria* as defense to actions by injured servants; (11 L.R.A.(N.S.) 434, 439) on contract exempting railroad from liability for negligent injury to sleeping car employees, or others sustaining similar relation; (130 Am. St. Rep. 48, 50) on liability of railroad company for injuries or losses due to operation of cars not owned by it.

Distinguished in *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 518, 44 L. ed. 569, 20 Sup. Ct. Rep. 385, holding messenger, agreeing with express company to assume risks, without right of action for injury in collision on carrier's train; *Clough v. Grand Trunk W. R. Co.* 11 L.R.A.(N.S.) 448, 85 C. C. A. 1, 155 Fed. 83, holding railroad not liable for injury to employee of circus having its own cars the motive power for which was furnished by the railroad company under contract exempting it from liability.

Disapproved in *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 201, 40 L. R. A. 104, 62 Am. St. Rep. 503, 46 N. E. 917, holding express messenger charged with notice of contract between express company and carrier exempting latter from liability; *Cleveland, C. C. & St. L. R. Co. v. Henry*, 170 Ind. 103, 83 N. E. 710, holding employee of show, being transported by railroad under contract as private carrier, bound by the provisions of the contract of transportation whether aware of its terms or not.

Construction of contracts limiting liability.

Cited in *Kenney v. New York C. & H. R. R. Co.* 125 N. Y. 425, 26 N. E. 626, construing contract guaranteeing contractor against liability for injury to its agents as one of indemnity, and not as limiting liability; *Bermel v. New York, N. H. & H. R. Co.* 62 App. Div. 396, 70 N. Y. Supp. 804, construing agreement by shipper and carrier limiting amount of loss, as applicable only to its common-law liability as insurer.

Cited in note (42 L. ed. U. S. 689, 690) on validity and construction of contracts exempting from liability for negligence.

Who are passengers.

Cited in *Davis v. Chesapeake & O. R. Co.* 122 Ky. 536, 5 L.R.A.(N.S.) 460, 121 Am. St. Rep. 481, 92 S. W. 339, 12 A. & E. Ann. Cas. 723, holding that express messenger is a passenger for hire; *Yarrington v. Delaware & H. Co.* 143 Fed. 567, holding that a mail clerk is a passenger; *Barker v. Chicago, P. & St. L. R. Co.* 243 Ill. 490, 26 L.R.A.(N.S.) 1062, 134 Am. St. Rep. 382, 90 N. E. 1057, holding that postal clerk may recover for injuries sustained through negligence of the railroad.

Cited in footnote to *Gulf, C. & S. F. R. Co. v. Wilson*, 11 L. R. A. 486, which holds United States agent performing duties on train, a passenger.

Cited in notes (61 Am. St. Rep. 99) on who are passengers and when they become such; (62 Am. St. Rep. 520, 521, 523, 524) on relation of express companies and their employees to other carriers; (44 L. ed. U. S. 561) on express messengers as passengers.

Violations of duty as basis of liability.

Cited in *Barry v. Port Jervis*, 64 App. Div. 272, 72 N. Y. Supp. 104, holding that liability of municipality for injury due to violation of duty cannot be taken away by law making right to maintain actions depend upon notice forty-eight hours after injury occurs; *Liekens v. Staten Island Midland R. Co.* 64 App. Div. 328, 72 N. Y. Supp. 162, holding carrier liable for negligent injury to person on its private highway, thrown open to use of public.

Assumption of risk by employee.

Cited in *Brennan v. Berlin Iron Bridge Co.* 74 Conn. 391, 50 Atl. 1030, holding that servant does not assume risk of negligence of servant of other master than his own; *Adolff v. Columbia Pretzel & Baking Co.* 100 Mo. App. 207, 73 S. W. 321, holding it question for jury whether inexperienced servant, ordered to operate dangerous machine, assumed risk.

11 L. R. A. 486, *GULF, C. & S. F. R. CO. v. WILSON*, 79 Tex. 371, 23 Am. St. Rep. 345, 15 S. W. 280.

Sufficiency of general allegations of negligence.

Cited in *Gulf, C. & S. F. R. Co. v. Brown*, 16 Tex. Civ. App. 100, 40 S. W. 608, holding negligence of carrier in allowing rear-end collision sufficiently alleged in complaint; *Galveston, H. & S. A. R. Co. v. Crawford*, 9 Tex. Civ. App. 248, 29 S. W. 958, holding general allegations as to defective railroad bed sufficient; *San Antonio & A. P. R. Co. v. Adams*, 6 Tex. Civ. App. 108, 24 S. W. 839, holding that facts of injury known to pleader should be alleged; *Galveston, H. & S. A. R. Co. v. Croskell*, 6 Tex. Civ. App. 171, 25 S. W. 486, holding allegations that defendant's train negligently struck cars of other company, sufficient without alleging how it was done; *San Antonio Street R. Co. v. Muth*, 7 Tex. Civ. App. 450, 27 S. W. 752; holding allegation with great particularity, of specific acts causing injury complained of, unnecessary; *International & G. N. R. Co. v. Bibolet*, 24 Tex. Civ. App. 7, 57 S. W. 974, holding on rehearing, evidence as to personal injury admitted under pleadings without objection not ground for reversal; *Schuyler v. Southern P. Co.* 37 Utah, 599, 109 Pac. 458, holding that under complaint alleging negligent killing of one in discharge of duties as mail clerk, on train, evidence is admissible showing that decedent was gratuitous passenger; *Galveston, H. & S. A. R. Co. v. Garcia*, 45 Tex. Civ. App. 230, 100 S. W. 198, holding allegation that plaintiff was a passenger and that the train was derailed sufficient; *St. Louis S. W. R. Co. v. Harkey*, 39 Tex. Civ. App. 529, 88 S. W. 506, holding that derailment of train raises presumption of negligence against the carrier.

Cited in note (59 L. R. A. 241) on sufficiency of general allegations of negligence.

Liability for injury to express messenger and postal clerks.

Cited in *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. 562 holding contract exempting carrier from liability to express messenger for negligence void; *Fordyce v. Jackson*, 56 Ark. 597, 20 S. W. 528, holding railway owes same duty to express messenger on train without express contract as it does to ordinary passenger; *Davis v. Chesapeake & O. R. Co.* 122 Ky. 536, 5 L.R.A.(N.S.) 460, 121 Am. St. Rep. 481, 92 S. W. 339, 12 A. & E. Ann. Cas. 723, holding that express messenger is a "passenger;" *Wabash R. Co. v. Jellison*, 124 Ill. App. 662; *Barker v. Chicago, P. & St. L. R. Co.* 243 Ill. 489, 26 L.R.A. (N. S.) 1062, 134 Am. St. Rep. 382, 90 N. E. 1057; *Malott v. Central Trust Co.* 168 Ind. 434, 79 N. E. 369, 11 A. & E. Ann. Cas. 879; *Heskins v. Northern P. R. Co.* 39 Mont. 400, 102 Pac. 988,—holding that postal clerks are "passengers" and railroad is

liable to them as such; *Texas & P. R. Co. v. Fenwick*, 34 Tex. Civ. App. 226, 78 S. W. 548, holding that railroad cannot exempt itself from liability for negligent injury to newsboy by contract with news company.

Cited in notes (11 L. R. A. 483) on express agent as passenger; (19 L. R. A. 340) on liability of railroad companies for injuries received by postal clerks on their trains; (61 Am. St. Rep. 86, 99) on who are passengers and when they become such; (62 Am. St. Rep. 520, 523) on relation of express companies and their employees to other carriers.

Distinguished in *Yarrington v. Delaware & H. Co.* 143 Fed. 567, holding railroad not liable for injury to postal clerk as "passenger" under Pennsylvania statute.

Collision with animal by reason of defective fence.

Cited in *Dickson v. Omaha & St. L. R. Co.* 124 Mo. 148, 25 L. R. A. 324, 46 Am. St. Rep. 429, 27 S. W. 476, holding railroad liable for death of engineer caused by collision with bull, owing to defective fence; *International & G. N. R. Co. v. Richmond*, 28 Tex. Civ. App. 516, 67 S. W. 1029, holding railroad liable to third person for killing of stock because of opening in fence left by agreement with abutting landowner; *International & G. N. R. Co. v. Thompson*, 34 Tex. Civ. App. 70, 77 S. W. 439, holding that where railroad company has right to fence its track, the fact that a derailment was caused by an animal on the track does not of itself negative negligence.

Sufficiency of proof of negligence.

Cited in *Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 710, 44 S. W. 595, holding evidence sufficient to sustain verdict of carrier's negligence in not preventing loss of cotton by fire.

Loss of mail.

Cited in *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 118 Iowa, 434, 59 L. R. A. 801, 92 N. W. 88, holding railroad company not liable to individual for loss of mail carried under government contract.

Instructions as to duty of carrier to passengers.

Cited in note (3 L.R.A.(N.S.) 96) on use of emphatic words like "great care," "utmost care," or "highest care" in instructing jury as to duty of carrier to passengers.

11 L. R. A. 488, *HAYES v. WESTCOTT*, 91 Ala. 143, 24 Am. St. Rep. 875, 8 So. 337.

Fraudulent conveyances.

Cited in *Thornton v. Cook*, 97 Ala. 632, 12 So. 403, holding chattel mortgage given by solvent merchant not invalidated by reservation of possession of goods; *Howell v. Carden*, 99 Ala. 112, 10 So. 640, holding deed of trust will not be set aside as fraudulent, where grantee for value does not participate in fraud; *Troy Fertilizer Co. v. Norman*, 107 Ala. 681, 18 So. 201, and *Goetter v. Norman Bros.* 107 Ala. 595, 19 So. 56, holding partnership sale to secure creditor not invalidated because additional consideration given was individual indebtedness.

Cited in note (18 L. R. A. 610, 613) on effect on validity of mortgage of merchandise, of provision or agreement giving mortgagor possession with power of sale.

Conveyance fraudulent in part.

Cited in *Rogers v. Munnerlyn*, 36 Fla. 598, 18 So. 669, holding mortgage covering real and personal property, though constructively void as to personality, valid as to realty; *Rocheleau v. Boyle*, 11 Mont. 472, 28 Pac. 872, holding bona fide mortgage, though void as to part of property, valid as to rest; *Greely v.*

Winson, 1 S. D. 625, 48 N. W. 214, holding mortgage presumably fraudulent as to part of property covered, presumably fraudulent as to whole; Eastman v. Parkinson, 133 Wis. 388, 13 L.R.A.(N.S.) 931, 113, N. W. 649, holding that chattel mortgage covering two distinct classes of property and void for constructive fraud as to one of them, is nevertheless valid as to the other.

Cited in note (13 L.R.A.(N.S.) 922) on validity of chattel mortgage fraudulent as to portion of property.

11 L. R. A. 491, LANKFORD v. SOMERSET COUNTY, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412.

Governor's signature to bill after passage.

Cited in Detroit v. Chapin, 108 Mich. 138, 37 L. R. A. 394, 66 N. W. 587, holding bill signed by governor within ten days after its passage, though after adjournment of legislature, becomes law.

Cited in note (37 L. R. A. 394) on right of executive to sign bill after adjournment of legislative bodies.

Mode of passing statutes.

Cited in notes in (11 L.R.A. 452) holding statute not invalidated by nonobservance of joint rules of General Assembly regulating passages of statutes; (40 L.R.A.(N.S.) 31) on conclusiveness of enrolled bill.

Distinguished in State ex rel. Gregg v. Erickson, 39 Mont. 282, 102, Pac. 336, holding that enrolled bill properly signed by presiding officers and governor cannot be impeached by any evidence except the journals in regard to vote on its final passage.

Local and special legislation.

Cited in footnotes to Milwaukee County v. Isenring, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; Hamilton County v. Rasche Bros. 19 L. R. A. 584, which holds statute as to taxes, not applying to all parts of state, unconstitutional.

Title of act.

Cited in Garrison v. Hill, 81 Md. 555, 32 Atl. 191, holding title of act stating purpose to add additional section to certain article of Code sufficient; Com v. Brown, 91 Va. 775, 28 L. R. A. 114, 21 S. E. 357, holding reference in title of Code amendment act, to number and section of chapter and subject of chapter amended, sufficient; Cook v. Marshall County, 119 Iowa, 401, 93 N. W. 372, holding act providing tax against persons dealing in cigarettes germane to subject "Crimes and Their Punishment;" Worcester County v. School Comrs. 113 Md. 309, 77 Atl. 605, holding that title of act is sufficient which describes the act by reference to article of Code in which it is to be incorporated; Binion v. Oklahoma Gas & Electric Co. 28 Okla. 358, 114 Pac. 1096, to the point that title of act is sufficient which describes act by reference to article of Code in which it is to be incorporated; Bertram v. Com. 108 Va. 905, 62 S. E. 969, holding that where statutes have been incorporated in a code, the general title to the code is sufficient and subsequent amendments may be made by reference to code chapter and section.

Distinguished in State v. German Sav. Bank, 103 Md. 201, 63 Atl. 481, holding title insufficient where the sections of the statutes which it proposed to supplement did not exist.

11 L. R. A. 498, KNEELAND v. SCHMIDT, 78 Wis. 345, 47 N. W. 438.

Surrender of leased premises.

Cited in Hutchins v. Da Costa, 88 Wis. 376, 60 N. W. 427, holding returning

contract for purchase of land and consent to stoppage of payment on check in part payment surrender of all purchaser's interest; *O'Donnell v. Brand*, 85 Wis. 101, 55 N. W. 154, holding mere declaration by vendee of intention not to carry out land contract, not acted on by vendor for two years, not surrender; *Burnham v. O'Grady*, 90 Wis. 464, 63 N. W. 1049, holding that no surrender takes place by operation of law, where tenant retains possession of material portion of premises; *Goldsmith v. Darling*, 92 Wis. 365, 66 N. W. 397, holding parol agreement to surrender lease does not of itself effect cancelation and surrender; *Lovejoy v. McCarty*, 94 Wis. 344, 68 N. W. 1003, holding lessee not relieved by surrender of premises to sublessee under agreement with lessor's agent; *Maxon v. Gates*, 112 Wis. 201, 88 N. W. 54, holding surrender by operation of law must be by acts inconsistent with continuance of contract accepted and acted on by both parties; *Carson v. Arvantes*, 10 Colo. App. 387, 50 Pac. 1080, holding execution of agreement by tenant to abandon leased premises to landlord, a surrender; *Hays v. Goldman*, 71 Ark. 254, 72 S. W. 563, holding it question for jury whether re-entry by landlord was acceptance of abandonment by tenant, as surrender of lease; *Armour Packing Co. v. Des Moines Pork Co.* 116 Iowa, 725, 93 Am. St. Rep. 268, 89 N. W. 196, holding re-entry by landlord after abandonment by tenant, acceptance of same as surrender of lease; *Commercial Hotel Co. v. Brill*, 123 Wis. 642, 101 N. W. 1101, holding lease terminated where lessee surrendered the premises at the direction of the lessor, to parties who had leased the premises from him; *West Concord Mill Co. v. Hosmer*, 129 Wis. 13, 107 N. W. 12, holding lease terminates where lessee surrendered the premises and lessor took full and complete possession.

Cited in footnote to *Gray v. Kaufman Dairy & Ice Cream Co.* 49 L. R. A. 580, which denies right to recover rent, of landlord reletting after tenant's abandonment, notwithstanding unanswered letter that premises will be leased at tenant's risk.

Cited in notes (114 Am. St. Rep. 718) on rights of landlord on abandonment of premises by tenant; (35 L.R.A.(N.S.) 1135) on caring for and repair of, premises by landlord as acceptance of surrender; (15 Eng. Rul. Cas. 524) on what constitutes a surrender of a lease.

11 L. R. A. 500, *ATTY. GEN. v. ALGONQUIN CLUB*, 153 Mass. 447, 27 N. E. 2. **Objectionable structures.**

Cited in *Atty. Gen. v. Williams*, 174 Mass. 483, 47 L. R. A. 318, 55 N. E. 77, upholding action by attorney general to restrain erection and maintenance of building above statutory height; *Providence, S. F. River & N. S. B. Co. v. Fall River*, 183 Mass. 543, 67 N. E. 647, enjoining occupation of abutting owner's land by structures used while changing grade of street; *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 394, 74 S. W. 474, holding maintenance of smokestack projecting into alley in violation of covenant enjoinable; *Lawrence v. Smith*, 201 Mass. 215, 87 N. E. 623, on attorney general as having power to institute proceedings to compel the removal of structure over street.

Cited in footnotes to *Summers v. Beeler*, 48 L. R. A. 54, which holds restriction in deed as to building line, not available to prior grantee of other lot; *State v. Kean*, 48 L. R. A. 102, which holds indictable nuisance created by bay window extending over street.

— Laches.

Cited in *Harrington v. McCarthy*, 169 Mass. 494, 48 N. E. 278, holding no laches shown where owner called attention to fact that defendant was building beyond his land; *Bacon v. Sandberg*, 179 Mass. 399, 60 N. E. 936, holding no

laches where mayor was promptly petitioned to prevent objectionable structure, defendants notified, and bill filed two days after completion of work; *Daly v. Foss*, 199 Mass. 107, 85 N. E. 94, holding right to relief not barred by laches where parties awaited result of action upon same state of facts by another plaintiff, before commencing suit; *Codman v. Bradley*, 201 Mass. 369, 87 N. E. 591, holding right to enforce building restriction not lost by laches where high board wall prevented discovery until building was erected and action was begun immediately thereafter.

Mandatory injunction.

Cited in *Jackson v. Stevenson*, 156 Mass. 502, 32 Am. St. Rep. 476, 31 N. E. 691, refusing to enjoin infringement of restriction in deed, when character of neighborhood had so changed as to make it inequitable; *Boland v. St. John's Schools*, 163 Mass. 239, 39 N. E. 1035, upholding right of plaintiff to mandatory perpetual injunction requiring defendant to remove fence obstructing private way; *Lynch v. Union Inst. for Sav.* 159 Mass. 308, 20 L. R. A. 843, 34 N. E. 364, holding substantial restoration to tenant evicted from part of premises sufficient under facts in case; *Brande v. Grace*, 154 Mass. 213, 31 N. E. 633, holding sublessee confined to damages where it would be inequitable to require restoration of structure to original condition; *Robbins v. Archer*, 147 Iowa, 746, 126 N. W. 936, holding that mandatory injunction lies to protect easement over land of another; *Bristol v. Palmer*, 83 Vt. 63, 31 L.R.A.(N.S.) 893, 74 Atl. 332, to the point that mandatory injunction lies to protect easement over another's land; *Frost v. Jacobs*, 204 Mass. 8, 90 N. E. 357, granting mandatory injunction for removal of structure over passage way erected secretly in the nighttime after notice of plaintiff's right to unobstructed passage; *Curtis Mfg. Co. v. Spencer Wire Co.* 203 Mass. 451, 133 Am. St. Rep. 307, 89 N. E. 534, granting mandatory injunction for removal of foundation wall extending over line, erected after notice and objection.

Construction of written instrument.

Cited in *Nash v. Webber*, 204 Mass. 424, 90 N. E. 872, holding evidence of practical construction of lease by the parties thereto admissible, where the language was uncertain.

Validity of building restrictions.

Cited in note (95 Am. St. Rep. 220) on validity of building restrictions in deed.

11 L. R. A. 503, *WESTERN WOODEN WARE ASSO. v. STARKEY*, 84 Mich. 76, 22 Am. St. Rep. 686, 47 N. W. 604.

Contracts in restraint of trade.

Cited in *Clark v. Needham*, 125 Mich. 88, 51 L. R. A. 787, 84 Am. St. Rep. 559, 83 N. W. 1027, holding agreement to cease manufacturing certain articles for one year, with privilege of four years' renewal, void; *Gamewell Fire Alarm Teleg. Co. v. Crane*, 160 Miss. 56, 22 L. R. A. 676, 39 Am. St. Rep. 458, 35 N. E. 98, holding agreement not to engage in certain business for ten years, by vendor, void; *Anchor Electric Co. v. Hawkes*, 171 Mass. 106, 41 L. R. A. 192, 68 Am. St. Rep. 403, 50 N. E. 509, upholding agreement by vendor corporation not to engage in certain business for five years; *Hitchcock v. Anthony*, 28 C. C. A. 82, 54 U. S. App. 439, 83 Fed. 781, upholding agreement not to engage in coal and fish business on certain premises for term of years; *Swigert v. Tilden*, 121 Iowa, 655, 63 L. R. A. 611, 100 Am. St. Rep. 374, 97 N. W. 82, upholding contract not to engage in manufacture of shirts within 100 miles of certain place, or in their sale in certain states for ten years; *Keene Syndicate v. Wichita Gas, Electric*

Light & P. Co. 69 Kan. 288, 67 L.R.A. 64, 105 Am. St. Rep. 164, 76 Pac. 834, 2 A. & E. Ann. Cas. 949, holding void lease of electric light plant, where lessor agreed not to engage in the business during the existence of the lease, nor to sell any of the machinery or appliances retained by it, for such purpose; **Anderson v. Shawnee Compress Co.** 17 Okla. 243, 15 L.R.A.(N.S.) 854, 87 Pac. 315, holding lease of cotton compressing plant void in whole, where lessee was a company seeking a monopoly of the business and lessor agreed not to engage in the business within 50 miles of any plant owned by lessee, and also agreed to discourage competition; **Detroit Salt Co. v. National Salt Co.** 134 Mich. 128, 96 N. W. 1 (dissenting opinion), on validity of contract in partial restraint of trade.

Cited in footnotes to **Trenton Potteries Co. v. Oliphant**, 46 L. R. A. 255, which sustains vendor's agreement not to engage in competitive business for fifty years within United States, except in specified states and territories; **Tuscaloosa Ice Mfg. Co. v. Williams**, 50 L. R. A. 175, which holds void, contract by owner of ice machine to abandon manufacture of ice in certain town for five years, giving other party monopoly of business; **Steichen v. Fehleisen**, 51 L. R. A. 412, which holds individual partners not bound by firm agreement not to re-engage in certain business for specified period; **Pohlman v. Dawson**, 54 L. R. A. 913, which holds agreement on sale of business, not to engage in barber business in any manner, violated by working as employee in other shop; **Swigert v. Tilden**, 63 L.R.A. 608, which upholds contract by seller of goodwill of business not to compete with purchaser for a reasonable designated time; **Keene Syndicate v. Wichita Gas, E. L. & P. Co.** 67 L.R.A. 61, which holds void lease by corporation generating electricity to rival company with agreement not to engage in business for ten years.

Cited in notes (24 L.R.A.(N.S.) 924) on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope; (6 Eng. Rul. Cas. 452) on invalidity of contracts in restraint of trade.

Distinguished in **O. & W. Thum Co. v. Tloczynski**, 114 Mich. 160, 38 L. R. A. 205, 68 Am. St. Rep. 469, 72 N. W. 140, upholding validity of agreement by employee not to disclose trade secrets.

11 L. R. A. 506, **MARVIN v. CHICAGO, M. & ST. P. R. CO.** 79 Wis. 140, 47 N. W. 1123.

Proximate cause of injury.

Cited in **Megou v. Chicago, M. & St. P. R. Co.** 86 Wis. 469, 56 N. W. 1099, sustaining nonsuit in action for damages by fire to cranberry marsh 12 miles distant from railroad; **Jackson v. Wisconsin Teleph. Co.** 88 Wis. 250, 26 L. R. A. 105, 60 N. W. 430, holding telephone company liable for fire caused by lightning transmitted to building along one of its wires; **O'Connor v. Chicago & N. W. R. Co.** 92 Wis. 615, 66 N. W. 795, holding amendment allowing insertion of claim for damage from same cause by fire mile distant from original fire improperly allowed; **Union P. R. Co. v. McCollum**, 2 Kan. App. 327, 43 Pac. 97, upholding judgment for damages to buildings 4 miles from original seat of prairie fire set by defendant, and spread by wind; **Yankton F. Ins. Co. v. Fremont, F. & M. Valley R. Co.** 7 S. D. 438, 64 N. W. 514, sustaining verdict for damages for fire 8½ miles distant from original seat of fire set by locomotive; **Duncan v. Western U. Teleg. Co.** 87 Wis. 177, 58 N. W. 75, sustaining nonsuit in action to recover for death of horse through mistake in transmitting telegram, causing delay in procuring veterinary; **Stephenson v. Pennsylvania R. Co.** 20 Pa. Super. Ct. 168, holding it question for jury whether railroad company was negligent in permitting spread of fire through rubbish on its premises.

Cited in footnote to *Hoffman v. King*, 46 L. R. A. 672, which denies liability of one negligently starting fire, for damage to lands of remote proprietors to which fire spreads.

Cited in notes (36 Am. St. Rep. 824, 827) on proximate and remote cause; (20 L.R.A.(N.S.) 92, 95) on weather conditions as independent, intervening, efficient cause.

Distinguished in *Florida East Coast R. Co. v. Welch*, 53 Fla. 167, 44 So. 250, 12 A. & E. Ann. Cas. 210, holding the setting of the fire by the railroad to be the proximate cause, though the changing of the wind after the fire was set caused the injury which would not otherwise have occurred.

Care required in dry season.

Cited in *Norfolk & W. R. Co. v. Fritts*, 103 Va. 692, 68 L.R.A. 866, footnote p. 864, 106 Am. St. Rep. 911, 49 S. E. 971, holding that greater caution is required of railroads to avoid setting fires, when on account of dryness of the season, and nearness of buildings, the danger is greater.

11 L. R. A. 510, *MILLER v. WADDINGHAM* (Cal.) 25 Pac. 688.

Fixtures.

Cited in footnotes to *Beeler v. C. C. Mercantile Co.* 60 L. R. A. 283, which holds hotel building affixed to, and conveyed with, land cannot afterward become a chattel by mere agreement of parties; *Peaks v. Hutchinson*, 59 L. R. A. 279, which holds building on stone posts, erected under parol agreement that it shall remain builder's, does not pass to bona fide purchaser of land.

11 L. R. A. 513, *REED v. REED*, 91 Ky. 267, 15 S. W. 525.

Probate of will.

Cited in *Newcomb v. Newcomb*, 108 Ky. 599, 51 L. R. A. 424, 57 S. W. 2, holding legally probated foreign will cannot be subject of adjudication in courts of another country, where testator was domiciled at death; *Kentucky Land & Immigration Co. v. Crabtree*, 113 Ky. 945, 70 S. W. 31, holding judgment of competent court admitting will to probate not open to collateral attack.

Distinguished in *Lischy v. Schrader*, 104 Ky. 665, 47 S. W. 611, holding judgment by consent, dismissing appeal from order probating will, binding only upon parties before the court.

Purchase pendente lite.

-Cited in note (10 L.R.A.(N.S.) 447) as to whether purchase of land pendente lite when made after decree and before any steps taken to review.

11 L. R. A. 515, *LOUIS SNIDER'S SONS CO. v. TROY*, 91 Ala. 224, 24 Am. St. Rep. 887, 8 So. 658.

Corporations de facto.

Cited in *Owensboro Wagon Co. v. Bliss*, 132 Ala. 256, 90 Am. St. Rep. 907, 31 So. 81; *Bibb v. Hall*, 101 Ala. 97, 14 So. 98; *Cory v. Lee*, 93 Ala. 470, 8 So. 694,—holding person dealing with corporation *de facto* in corporate capacity estopped from denying its corporate character; *Hoyt v. McCallum*, 102 Ill. App. 291, holding stockholders in corporation not liable as partners; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 13, 46 L. ed. 780, 22 Sup. Ct. Rep. 531, holding *de facto* corporation cannot deny corporate existence for purpose of avoiding payment on its bonds; *Georgia Southern & F. R. Co. v. Mercantile Trust & Deposit Co.* 94 Ga. 316, 32 L. R. A. 211, 47 Am. St. Rep. 153, 21 S. E. 701, holding corporation which might be corporation *de jure* may be corporation *de facto*; *Lamming v. Galusha*, 81 Hun, 254, 30 N. Y. Supp. 767, holding colorable compliance with re-

quirements of statute renders railroad organization corporation *de facto*; *Bergeron v. Hobbs*, 96 Wis. 657, 65 Am. St. Rep. 85, 71 N. W. 1056 (dissenting opinion), majority holding organizers of society not properly filing certificate not relieved from individual liability for debts of society; *State ex rel. Standeven v. Armstrong*, 27 Okla. 814, 117 Pac. 332, to the point that *de facto* corporation exists when there is an organization with color of law and exercise of corporate rights and franchises; *Board of Education v. Berry*, 62 W. Va. 441, 125 Am. St. Rep. 975, 59 S. E. 169, holding that corporate existence of public corporation cannot be questioned by private party, where bona fide attempt to organize according to law has been made, and corporate rights have been exercised.

Cited in notes (17 L.R.A. 551) on partnership liability of stockholders in case of defective or illegal incorporation; (35 L.R.A.(N.S.) 454) on liability of directors for permitting business before capital stock all subscribed; (29 Am. St. Rep. 601) on personal liability of persons acting without authority as corporation; (33 Am. St. Rep. 182, 183, 185, 186) on defective formation of corporations; (48 Am. St. Rep. 915) on personal liability of corporate officers to third persons; (94 Am. St. Rep. 594) on transactions in name of supposed but non-existing corporation; (118 Am. St. Rep. 253, 259) on what constitutes a corporation *de facto*.

Distinguished in *Duke v. Taylor*, 37 Fla. 76, 31 L. R. A. 488, 53 Am. St. Rep. 232, 19 So. 172, holding participants in illegal attempt to organize corporation liable as partners; *Harrill v. Davis*, 22 L.R.A.(N.S.) 1157, 94 C. C. A. 47, 168 Fed. 191, holding members liable as partners where they have assumed a corporate name but have failed to file any articles, have no charter nor color of legal incorporation.

Estoppel.

Cited in *Brown v. First Nat. Bank*, 103 Ala. 129, 15 So. 435, holding maker estopped from denying existence of place named in note as place of payment thereof; *Johnson v. Mason Lodge No. 33*, I. O. O. F. 106 Ky. 846, 51 S. W. 620, holding person executing note for borrowed money to corporation estopped from denying legality; *Citizens Bank v. Jones*, 117 Wis. 454, 94 N. W. 329, holding mortgagors estopped from denying corporate existence of mortgagee at time of execution of mortgage; *Western Invest. Co. v. Davis*, 7 Ind. Terr. 172, 104 S. W. 573, 15 A. & E. Ann. Cas. 1134; *American Radiator Co. v. Kinnear*, 56 Wash. 213, 35 L.R.A.(N.S.) 456, 105 Pac. 630,—holding person dealing with *de facto* corporation estopped to deny its corporate existence.

11 L. R. A. 518, *HOLLOWAY v. HOLLOWAY*, 86 Ga. 576, 22 Am. St. Rep. 484, 12 S. E. 943.

Head of family and dependents.

Cited in *Cross v. Benson*, 68 Kan. 511, 64 L.R.A. 567, footnote p. 560, 75 Pac. 558, holding minor residing with grandparents and dependent upon them for support, member of their family within homestead law; *Re Wardlaw*, 192 Fed. 451, to the point that widow is head of family and entitled to homestead during her life as against creditors; *Adams v. Clark*, 48 Fla. 211, 37 So. 734, holding grandfather to be head of a family within meaning of homestead law, where granddaughter lived with him and had been wholly supported by him from childhood.

Cited in footnote to *Ecker v. Lindskog*, 48 L. R. A. 155, which authorizes wife of incompetent person to select exempt property allowed head of family.

Cited in notes (4 L.R.A.(N.S.) 392) on what constitutes a "family" under homestead and exemption laws; (4 L.R.A.(N.S.) 787) on homestead right in

widow and minor children; (70 Am. St. Rep. 112) on who is head of family within homestead law.

Distinguished in *Marshall v. Macon Sash, Door & Lumber Co.* 103 Ga. 727, 41 L. R. A. 211, 68 Am. St. Rep. 140, 30 S. E. 571, holding that children have no right of action for negligence causing death of stepfather.

11 L. R. A. 520, *MT. PLEASANT v. BALTIMORE & O. R. CO.* 138 Pa. 365, 20 Atl. 1052.

Exemption from local improvement burdens.

Cited in *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 382, 21 Atl. 763, holding roadbed of railroad not liable to assessment for improvement of parallel street; *Philadelphia v. Philadelphia & R. R. Co.* 1 Pa. Super. Ct. 247, 38 W. N. C. 20, holding terminal yard of railroad assessable for local improvement; *Philadelphia v. North Pennsylvania R. Co.* 1 Pa. Super. Ct. 260, 38 W. N. C. 24, holding lots used for freight depot and storage yard of railroad liable for sewer improvement; *Nevada use of Gilfillan v. Eddy*, 123 Mo. 563, 27 S. W. 471, holding railroad land used for depot and yard purposes not exempt from special taxes for street improvement; *McCutecheon v. Pacific R. Co.* 72 Mo. App. 277, holding side tracks of railroad on right of way not subject to municipal lien for improvement; *Pettibone v. Smith*, 150 Pa. 128, 17 L. R. A. 425, 30 W. N. C. 327, 24 Atl. 693, holding lessee with covenant to pay all taxes not bound to pay assessment for local improvement; *Mt. Joy v. Harrisburg, P. Mt. J. & L. R. Co.* 19 Lanc. L. Rev. 218, 8 Northampton Co. Rep. 250, upholding power of municipality to compel railroad company to lay, or pay for laying, sidewalk in front of its premises; *Meanor v. Goldsmith*, 216 Pa. St. 493, 10 L.R.A.(N.S.) 348, 65 Atl. 1084, on requirement to lay pavement being a police regulation and not a tax nor a municipal assessment.

Cited in footnote to *Storrie v. Houston City Street R. Co.* 44 L. R. A. 716, which holds street railway company required to pave between rails and 6 inches each side.

Cited in notes (28 L. R. A. 250) on liability of railroad right of way to assessment for local improvements; (35 L. R. A. 40) on liability to local assessments for benefits, of property exempt from general taxation.

Distinguished in *Shreveport v. Kansas City, S. & G. R. Co.* 125 La. 584, — L.R.A.(N.S.) —, 51 So. 648, holding that railway company may be compelled to relay its tracks in and adjoining a street so as to conform to repaving; *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 186, 12 L.R.A.(N.S.) 120, 121 Am. St. Rep. 649, 104 S. W. 67, 12 A. & E. Ann. Cas. 630; *Northern P. R. Co. v. Seattle*, 46 Wash. 679, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244,—holding that railroad right of way may be assessed for local improvement adjoining it under statute authorizing assessment of abutting property in proportion to frontage.

Amendment of municipal lien.

Cited in *Philadelphia v. Second Reformed Presby. Congregation*, 16 Pa. Super. Ct. 69, allowing amendment of municipal lien after time for filing lien had expired.

Distinguished in *Matthew's License*, 30 Pa. Co. Ct. 522, 35 Pittsb. L. J. N. S. 357, holding that petition for liquor license cannot be amended by adding names of sureties which had been omitted.

Necessity of demand on property owner.

Cited in *Meanor v. Goldsmith*, 216 Pa. 497, 10 L.R.A.(N.S.) 350, 65 Atl. 1084, holding that lien for paving sidewalk cannot be enforced in absence of previous demand upon the owner to pave and his refusal to do so.

11 L. R. A. 522, *COM. v. LEWIS*, 140 Pa. 261, 21 Atl. 396.

Cruelty to animals.

Cited in *Waters v. People*, 23 Colo. 36, 33 L. R. A. 838, footnote p. 836, 58 Am. St. Rep. 215, 46 Pac. 112, holding shooting at doves released from trap, cruelty to animals; *Horton v. State*, 124 Ala. 82, 27 So. 468, holding mere killing of dog not forbidden by statute against cruelty to animals.

Cited in footnotes to *Wilcox v. State*, 39 L.R.A. 709, which holds dogs domestic animals within statute against cruelty; *Bland v. People*, 65 L.R.A. 424, which holds prohibition of use of horses with docked tails within police power.

Cited in note (3 Eng. Rul. Cas. 150) on liability for cruelty to animals.

11 L. R. A. 524, *PUTNAM NAIL CO. v. DULANEY*, 140 Pa. 205, 23 Am. St. Rep. 228, 21 Atl. 391.

Infringement of trade-mark, trade name, and labels.

Cited in *Hoyt v. Hoyt*, 143 Pa. 639, 13 L. R. A. 345, footnote p. 343, 24 Am. St. Rep. 575, 22 Atl. 755, which holds no trade-mark obtainable in shape of bottle or box for extracts; *Brown v. Seidel*, 153 Pa. 74, 31 W. N. C. 522, 25 Atl. 1064, refusing injunction for slight imitation of trade-mark, and label not likely to deceive; *Sapp v. New York Dental Parlors*, 4 Lack. Legal News, 118, restraining use of name "New York Dental Parlors;" *Clark & S. Co. v. Scott*, 4 Lack. Legal News, 164, restraining use of package of tobacco so closely resembling plaintiff's in general appearance, as to be likely to deceive; *Shepp v. Jones*, 3 Pa. Dist. R. 542, 35 W. N. C. 30, 15 Pa. Co. Ct. 63, restraining publication and sale of book so closely resembling plaintiff's as to deceive purchasers; *E. T. Fraim Lock Co. v. Shiner*, 43 Pa. Super. Ct. 230, 12 North Co. Rep. 10, holding that design of keystone slightly raised over keyhole of padlock may be adopted as valid technical trademark; *Warren Bros. Co. v. Barber Asphalt Paving Co.* 145 Mich. 83, 12 L.R.A.(N.S.) 339, 108 N. W. 652, holding that copyrighting a trade name, and advertising and selling a certain article under that name does not give any exclusive right to make or sell the article; *Diamond Match Co. v. Saginaw Match Co.* 74 C. C. A. 61, 142 Fed. 729, holding that particular colors for heads and tips of matches cannot be monopolized as trade marks by one first using them; *Re American Circular Loom Co.* 28 App. D. C. 449, holding that trademark of which color is the distinctive feature cannot be registered.

Cited in notes (17 L. R. A. 129) on completion in business; use of trade-mark; (19 L.R.A.) 56) on invalidity of deceptive trade-mark; (85 Am. St. Rep. 120) on what words or phrases may constitute a valid trademark.

Distinguished in *Capewell Horse Nail Co. v. Mooney*, 167 Fed. 589, sustaining adoption of check figure formed of intersecting lines surrounding check marks as trade mark for horseshoe nails.

11 L. R. A. 526, *WHITING v. GRAY*, 27 Fla. 482, 8 So. 726.

Time as essence of contract.

Cited in *Weitzel v. Leyson*, 23 S. D. 375, 121 N. W. 868, holding that reasonable time to procure title will be given, where parties contract for sale and purchase of land known to both parties to be owned by third person and no time for transfer is fixed.

Cited in note (12 L. R. A. 241) as to when time of essence of contract.

11 L. R. A. 528, *FONNER v. SMITH*, 31 Neb. 107, 28 Am. St. Rep. 510, 47 N. W. 632.

Right to maintain action.

Cited in *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 807, 77 N. W. 346,

upholding right of holder of check to sue bank on refusal to pay; *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 318, 83 N. W. 69, holding check drawn upon particular fund, appropriation of so much of fund as necessary to pay same; *Donohoe-Kelly Bkg. Co. v. Southern P. Co.* 138 Cal. 186, 94 Am. St. Rep. 28. 71 Pac. 93, holding that check on fund in bank does not operate as assignment *pro tanto* before presentation; *May v. Jones*, 87 Iowa, 198, 54 N. W. 231, holding gift of check with intent to transfer present interest in fund in bank entitles holder to payment after donor's death; *Union P. R. Co. v. Metcalf*, 50 Neb. 461, 69 N. W. 961, holding action maintainable against carrier by consignor without averment of ownership, liability, or special damage; *Tecumseh Nat. Bank v. Best*, 50 Neb. 520, 70 N. W. 41, holding action maintainable by creditor against bank succeeding to another bank and assuming its obligations; *Falls City State Bank v. Wehrli*, 68 Neb. 76, 93 N. W. 994; *Turner v. Hot Springs Nat. Bank*, 18 S. D. 504, 112 Am. St. Rep. 804, 101 N. W. 348, 5 A. & E. Ann. Cas. 937,—holding that holder of check presented to bank for payment and refused may maintain action against the bank for its payment where drawer has funds in the bank to pay it.

Cited in footnotes to *Raesser v. National Exch. Bank*, 56 L.R.A. 174, which holds bank's authority to pay check working assignment *pro tanto* of fund not revoked by depositor's death; *Love v. Ardmore Stock Exchange*, 67 L.R.A. 617, which holds check on open bank account not an assignment of the fund or superior to subsequent attachment levied on such fund before presentation of check for payment.

Cited in notes (17 L.R.A.) 580) on deposit tickets given by banks; (2 L.R.A. (N.S.) 84) on bank draft or check as assignment of funds drawn upon; (80 Am. St. Rep. 872, 873) on liability of bank for refusing to honor checks; (3 Eng. Rul. Cas. 761) on check as equitable assignment and duty of bank to pay same; (10 Eng. Rul. Cas. 425) on what constitutes an equitable assignment.

Distinguished in *Henderson v. United States Nat. Bank*, 59 Neb. 282, 80 N. W. 898, holding that check for larger amount than deposit does not operate as transfer or assignment of the lesser amount.

Disapproved in effect in *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 68, 31 L. R. A. 655, 56 Am. St. Rep. 700, 42 N. E. 700, holding action against bank not maintainable by holder of check unless accepted.

11 L. R. A. 530, *COM. USE OF ALLEGHENY COUNTY v. WEISS*, 139 Pa. 247, 21 Am. St. Rep. 182, 21 Atl. 10.

Statutory offenses.

Cited in *Com. use of Allegheny County v. Hendley*, 7 Pa. Super. Ct. 359, 28 Pittsb. L. J. N. S. 401, holding public caterer furnishing oleomargarine to guests for gain subject to statutory penalty; *Hatcher v. Dunn*, 102 Iowa, 416, 36 L. R. A. 692, 71 N. W. 343, holding intent an element of offense of falsely branding oil by inspector; *People v. O'Brien*, 96 Cal. 177, 31 Pac. 45, holding fraudulent intent not element of offense of altering public record; *State v. Engle*, 156 Ind. 342, 58 N. E. 698, holding intent to defraud not element of offense of violation of inn-keepers' act by removal of baggage; *Furley v. Chicago, M. & St. P. R. Co.* 90 Iowa, 158, 23 L. R. A. 78, 57 N. W. 719 (dissenting opinion), majority holding liability under statute for importing cattle infected with Texas fever not absolute; *State ex rel. Rowe v. District Ct.* 44 Mont. 326, 119 Pac. 1103, holding that guilty intent in person violating statute need not be shown where statute plainly forbids an act to be done, unless from language purpose to require existence of such intent is discoverable; *Re Black Horse Hotel License*, 10 Del. Co. Rep. 458, holding that license will not be revoked, where sale to minor was not knowing-

ly or negligently made; *Com. v. Weiserth*, 47 Pa. Super. Ct. 597, holding that inspector of election may be convicted under act of July 2, 1839, of having "unlawfully, willingly and knowingly" rejected vote of qualified voter, because imposter had previously voted under such voter's name; *People v. Nylin*, 236 Ill. 27, 86 N. E. 156, holding knowledge that package contained less than five gallons immaterial in prosecution under statute forbidding sale of liquor in package of less than five gallons; *Groff v. State*, 171 Ind. 549, 85 N. E. 769, 17 A. & E. Ann. Cas. 133, holding knowledge of misbranding or adulteration immaterial in prosecution for violation of pure food law; *Com. v. La Bar*, 32 Pa. Super. Ct. 234, holding intent immaterial in prosecution for illegal cutting of timber on state lands.

Cited in notes (11 L.R.A.) 309) on intent as element of crime: (32 L.R.A. (N.S.) 746) on ignorance that article furnished as butter is oleomargarine as defense; (55 Am. St. Rep. 514) on ignorance of law and innocence of intent to violate it as excuse; (78 Am. St. Rep. 239, 240) on acts which legislature may declare criminal; (8 Eng. Rul. Cas. 47) on criminal intent as essential to commission of crime.

Distinguished in *State v. Audette*, 81 Vt. 401, 18 L.R.A. (N.S.) 529, 130 Am. St. Rep. 1061, 70 Atl. 833, holding one not guilty of adultery where he had connection after marriage with woman whom he believed to be single but who in fact had a husband in another state: *United States v. Ninety-Nine Diamonds*, 2 L.R.A. (N.S.) 192, 72 C. C. A. 9, 139 Fed. 968, holding that "false" and "falsity" in United States customs law means knowingly untrue.

Regulation of business.

Cited in *State v. Heinemann*, 80 Wis. 257, 27 Am. St. Rep. 34, 49 N. W. 818, upholding validity of act requiring pharmacists to be licensed; *Kentucky Bd. of Pharmacy v. Cassidy*, 115 Ky. 703, 74 S. W. 730, holding that state has power to regulate the sale of drugs.

Cited in footnotes to *State v. Myers*, 35 L. R. A. 844, which sustains statute requiring oleomargarine and artificial butter to be colored pink; *State ex rel. Monnett v. Capital City Dairy Co.* 57 L. R. A. 181, which sustains statute forbidding sale of unmarked oleomargarine; *Frost v. Chicago*, 49 L. R. A. 657, which holds void, ordinance prohibiting colored netting over package of fruit, etc.; *State v. Hanson*, 54 L. R. A. 468, which holds sale of unlabeled cottolene, forbidden by statute against selling unlabeled imitation of lard; *State v. Layton*, 62 L.R.A. 164, which upholds statutory prohibition of manufacture or sale of baking powder containing alum; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food whereby damage or inferiority is concealed.

Sufficiency of indictment.

Cited in footnotes to *State v. Howard*, 34 L. R. A. 178, which holds indictment insufficient to show knowledge that person to whom bribe offered was juror, or that money offered had value; *Haughn v. State*, 59 L. R. A. 789, which holds it insufficient to follow statutory language in indictment for bunco steering.

11 L. R. A. 534, *ADSIT v. SECRETARY OF STATE*, 84 Mich. 420, 48 N. W. 31.

Defects in formalities of elections.

Cited in *Lindstrom v. Board of Canvassers*, 94 Mich. 470, 19 L. R. A. 172, 54 N. W. 280, refusing to exclude from count ballots having an unauthorized vignette upon them; *People ex rel. Hartwick v. Avery*, 102 Mich. 574, 61 N. W. 4, holding election not invalidated by irregularity of notice; *State ex rel. Little v. Langlie*, 5 N. D. 599, 32 L. R. A. 727, 67 N. W. 958, holding defective notice would not invalidate election for relocation of county seat if voters were not deceived by it;

Jones v. State, 153 Ind. 451, 55 N. E. 229, refusing to invalidate election because of defective ballots and acts of election officers; State *ex rel.* Sammon v. Chatterton, 11 Wyo. 16, 70 Pac. 466, refusing to compel filing of independent nomination, where, through neglect to proclaim office to be voted for at certain election, regular parties had failed to nominate; Grove v. Haskell, 24 Okla. 712, 104 Pac. 56, holding that notice of election not fully in conformity with law will not be deemed to affect result of election where it is not shown that electors of county did not participate therein on account of insufficient notice; State *ex rel.* Sammon v. Chatterton, 12 Wyo. 172, 73 Pac. 961, holding rule that "absence of notice required by statute does not invalidate the election" applicable only where the election has been held and the great body of voters had, in fact, notice that a vacancy was to be filled; Rodwell v. Rowland, 137 N. C. 634, 50 S. E. 319, holding that actual knowledge by the electors and an opportunity to vote, takes the place of the notice required by statute.

Cited in notes (16 L.R.A. 755) on acquiescence in irregularities in Australian ballot; (90 Am. St. Rep. 62, 70, 71) on irregularities avoiding elections; (120 Am. St. Rep. 794, 795) on necessity of notice or proclamation of election.

Distinguished in *People v. Palmer*, 91 Mich. 288, 51 N. W. 999, holding time and place of special election can only be fixed by authorities designated by statute; *People ex rel. Dix v. Kerwin*, 10 Colo. App. 477, 51 Pac. 530, declaring election illegal for want of notice required by statute; *McNees v. School Twp.* 133 Iowa, 122, 110 N. W. 325, holding notice of issues to be submitted to voters of school district essential to validity of vote thereon.

Effect of unconstitutional statute.

Cited in *Michigan Sugar Co. v. Auditor General*, 124 Mich. 682, 56 L. R. A. 333, 83 Am. St. Rep. 354, 83 N. W. 625, holding that beet sugar claimants could secure no rights against state by reason of unconstitutional statute; *Minnesota Sugar Co. v. Iverson*, 91 Minn. 40, 97 N. W. 454, holding state under no moral obligation to pay beet sugar bounties under unconstitutional statute.

11 L. R. A. 542, *HOLDERMAN v. POND*, 45 Kan. 410, 23 Am. St. Rep. 734, 25 Pac. 872.

Jurisdiction of action concerning foreign realty.

Cited in note (26 L.R.A.(N.S.) 936, 940) on jurisdiction of action for damages for breach of contract, or for tort concerning realty in another state or country.

11 L. R. A. 543, *LUCO v. TORO*, 88 Cal. 26, 25 Pac. 983.

Affirmance by divided court.

Cited in *Frankel v. Deidesheimer*, 93 Cal. 74, 28 Pac. 794; *Santa Rose C. R. Co. v. Central Street R. Co.* 112 Cal. 437, 44 Pac. 733,—holding that where justices of appellate court are equally divided and there is no immediate probability of change in the personnel the lower court must be affirmed; *State ex rel. Hampton v. McClung*, 47 Fla. 227, 37 So. 51, holding that where appellate court is equally divided and there is no immediate prospect of change in the personnel it is the duty of the members favoring reversal, to vote for affirmance.

11 L. R. A. 545, *CHAMBERS v. BALDWIN*, 91 Ky. 121, 34 Am. St. Rep. 165, 15 S. W. 57.

Liability for causing breach or termination of contract.

Cited in *Bourlier Bros. v. Macauley*, 91 Ky. 137, 11 L. R. A. 551, 34 Am. St. Rep. 171, 15 S. W. 60, holding action not maintainable against rival theater manager for inducing breach of contract for theatrical performance; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.* 138 Mo. 446, 36 L. R. A. 806,

60 Am. St. Rep. 560, 40 S. W. 93, holding one giving notice not to remove gravel not liable for thereby causing breach of contract for same; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 617, 56 L. R. A. 808, 88 Am. St. Rep. 895, 40 S. E. 591, holding wanton and malicious inducement of another to violate contract with third person actionable; *Boyson v. Thorn*, 98 Cal. 386, 21 L. R. A. 241, 33 Pac. 492, holding maliciously inducing breach of contract, without deception, violence, threats, or benefit, not actionable; *Guethler v. Altman*, 26 Ind. App. 590, 84 Am. St. Rep. 313, 60 N. E. 355, holding action not maintainable against teacher for inducing pupils not to patronize plaintiff's store; *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1176, 55 L. R. A. 273, 64 S. W. 913, holding action not maintainable for terminating contract of indefinite employment, by reason of conspiracy not to employ; *London Guarantee & Acci. Co. v. Horn*, 206 Ill. 499, 99 Am. St. Rep. 185, 69 N. E. 526, holding employers' liability insurance company liable for securing discharge of injured employee of policy holder, who refused to settle his claim for small amount; *Swain v. Johnson*, 151 N. C. 94, 28 L.R.A.(N.S.) 618, 65 S. E. 619, holding that action will not lie for inducing a third party to break his contract for sale of timber lands to plaintiff.

Cited in footnotes to *Lucke v. Clothing Cutters' & T. Assembly*, No. 7507, K. of L. 19 L. R. A. 408, which holds incorporated labor union liable for causing discharge of nonunion man; *Flaccus v. Smith*, 54 L. R. A. 640, which authorizes injunction against representative of labor union enticing apprentices to break contract not to join union; *Wolf v. New Orleans Tailor-Made Pants Co.* 67 L.R.A. 65, which holds one employing person in ignorance of latter's agreement to work for another not liable to latter for failure to discharge servant on latter's expressing determination not to return to former employer.

Cited in notes (21 L.R.A. 235, 237) on liability of third person in damages for inducing party to break contract; (16 L.R.A.(N.S.) 750; 97 Am. St. Rep. 927; 1 Eng. Rul. Cas. 728; 17 Eng. Rul. Cas. 353) on same point.

Distinguished in *Carter v. Oster*, 134 Mo. App. 155, 112 S. W. 995, holding members of trade union liable in civil action for inducing employers, by unlawful means, to break their contracts to employ plaintiff; *Standard Oil Co. v. Doyle*, 118 Ky. 668, 111 Am. St. Rep. 331, 82 S. W. 271, holding that action will lie for interference with a person's employment in an unlawful manner.

Disapproved in *Joyce v. Great Northern R. Co.* 100 Minn. 229, 8 L.R.A.(N.S.) 759, 110 N. W. 975, holding employer preventing a third person from obtaining employment from another employer, maliciously and without justification, liable in action for damages under statute.

Malice as element of cause of action.

Cited in *Chambers v. Probst*, 145 Ky. 382, 36 L.R.A.(N.S.) 1207, 140 S. W. 572, holding that action lies for damages caused by discharge of servant caused by false and malicious statements made by defendant to employer; *Arnold v. Moffit*, 30 R. I. 319, 75 Atl. 502, holding that civil action will not lie for an act lawful in itself though prompted by a malicious motive; *Whitesell v. Study*, 37 Ind. App. 434, 76 N. E. 1010, holding malicious motive immaterial where a person uses legal process to enforce his legal or equitable rights; *Meffert v. Brown*, 132 Ky. 204, 116 S. W. 779, on motive of council in annexing territory to city as not affecting the validity thereof.

Cited in notes (40 L. R. A. 177) on liability for malicious erection of fence; (62 L. R. A. 682, 683) on effect of bad motive to make actionable what otherwise would not be; (36 Am. St. Rep. 843) on intervention of wilful torts.

Distinguished in *Louisville Gas Co. v. Kentucky Heating Co.* 117 Ky. 77, 70 L.R.A. 561, 111 Am. St. Rep. 225, 77 S. W. 368, 4 A. & E. Ann. Cas. 355, holding

that lessee of gas land has no right to draw off and waste the gas to the detriment of adjoining lessees.

Cause of action on case.

Cited in footnote to Royce v. Oakes, 39 L. R. A. 845, which holds action on case does not lie for failure to pay over on demand, money collected for principal.

11 L. R. A. 550, *BOURLIER BROS. v. MACAULEY*, 91 Ky. 135, 34 Am. St. Rep. 171, 15 S. W. 60.

Tort in inducing breach or termination of contract.

Cited in *Guethler v. Altman*, 26 Ind. App. 590, 84 Am. St. Rep. 313, 60 N. E. 355, holding school teacher not liable for maliciously inducing pupils not to patronize plaintiff's store; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.* 138 Mo. 446, 36 L. R. A. 806, 60 Am. St. Rep. 560, 40 S. W. 93, holding third person giving notice not to remove gravel not liable for breach of contract caused thereby; *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1176, 55 L. R. A. 272, 64 S. W. 913, holding action for conspiracy in terminating contract of employment for indefinite time not maintainable against employer; *Boyson v. Thorn*, 98 Cal. 586, 21 L. R. A. 241, 33 Pac. 492, holding maliciously inducing breach of contract, without deception, violence, threats, or benefit, not actionable; *Kline v. Eubanks*, 109 La. 246, 33 So. 211, holding action not maintainable against one for enticing laborer from plantation, malice or fraud not being shown.

Cited in footnote to *Lucke v. Clothing Cutters' & T. Assembly No. 7507 K. of L.* 19 L. R. A. 408, which holds incorporated labor union liable for causing discharge of nonunion man.

Cited in notes (11 L.R.A. 549) on limitation of province of municipal law as to enforcement of obligations; (21 L. R. A. 238) on liability of third person in damages for inducing party to break contract; (62 L. R. A. 682, 715) on effect of bad motive to make actionable what otherwise would not be; (5 L.R.A.(N.S.) 1099) on civil liability for enticing servant to quit; (97 Am. St. Rep. 927; 1 Eng. Rul. Cas. 728) on right of action against one intentionally inducing another person to break his contract; (17 Eng. Rul. Cas. 353) on liability for inducing breach of contract of service.

Distinguished in *Standard Oil Co. v. Doyle*, 118 Ky. 668, 111 Am. St. Rep. 331, 82 S. W. 271, holding that action will lie for interference with another's employment by unlawful means.

Disapproved in *Heath v. American Book Co.* 97 Fed. 536, holding action maintainable against third person for knowingly inducing breach of contract for purchase of school books; *Raymond v. Yarrington*, 96 Tex. 450, 62 L. R. A. 967, 97 Am. St. Rep. 914, 72 S. W. 580, holding third parties inducing breach of contract liable for resulting injuries.

Motive as affecting liability.

Cited in *Chambers v. Probst*, 145 Ky. 383, 36 L.R.A.(N.S.) 1207, 140 S. W. 572; *Arnold v. Moffitt*, 30 R. I. 319, 75 Atl. 502,—holding that act lawful in itself is not converted by malicious motives into unlawful act so as to make doer of act liable to civil action; *Barger v. Barringer*, 151 N. C. 442, 25 L.R.A.(N.S.) 837, 66 S. E. 439 (dissenting opinion) on motive as affecting liability for erecting "spite" fence shutting off light and air from adjoining owner; *Whitesell v. Study*, 37 Ind. App. 434, 76 N. E. 1010, holding malicious motive immaterial where a person employs legal process to enforce a legal or equitable right.

Cited in note (36 Am. St. Rep. 844) on intervention of wilful torts.

11 L. R. A. 553, *LINDSAY v. GUNNING*, 59 Conn. 296, 22 Atl. 310.

Mechanic's lien.

Cited in *Balch v. Chaffee*, 73 Conn. 320, 84 Am. St. Rep. 155, 47 Atl. 327, upholding mechanic's lien for artesian well dug as adjunct to house, but not connected with it; *Progress Press Brick & Mach. Co. v. Gratiot Brick & Quarry Co.* 151 Mo. 519, 74 Am. St. Rep. 557, 52 S. W. 401, holding lien for bricks and machinery for kiln on separate lots, connected by roof and intended for one complete plant, valid; *Willamette Mills Co. v. Shea*, 24 Or. 47, 32 Pac. 759, sustaining lien on several houses on adjoining lot owned by one person; *Crane Co. v. Erie Heating Co.* 57 Or. 415, 112 Pac. 430, holding that mechanic's lien must be established by claimant connecting himself by contract with owner of property; *Filston Farm Co. v. Henderson*, 106 Md. 374, 67 Atl. 228, on liberal construction of mechanic's lien statute citing annotation also on this point.

Distinguished in *Wilcox v. Woodruff*, 61 Conn. 580, 17 L. R. A. 318, 29 Am. St. Rep. 222, 24 Atl. 521, holding mechanic's lien covering lot of three quarters of an acre, upon which three houses were built, not valid.

11 L. R. A. 557, *ARTHUR v. INGELS*, 34 W. Va. 639, 12 S. E. 872.

11 L. R. A. 559, *IRON CITY NAT. BANK v. McCORD*, 139 Pa. 52, 23 Am. St. Rep. 166, 21 Atl. 143.

Negotiability of commercial paper.

Cited in *Benney v. Dunn*, 2 Lack. Legal News, 137, 26 Pittsb. L. J. N. S. 383, holding note with statement that it is secured by stock, with power to sell same before maturity, with attorney's fee, not negotiable; *Weaver v. Paul*, 4 Dauphin Co. Rep. 307, 16 Pa. Co. Ct. 473, holding note containing warrant of attorney not negotiable; *Post v. Kinzua Hemlock R. Co.* 171 Pa. 620, 37 W. N. C. 307, 33 Atl. 362, holding note payable upon contingency of execution of contract by one of parties thereto not negotiable; *Flagg v. School Dist. No. 70*, 4 N. D. 40, 25 L. R. A. 368, 58 N. W. 499, holding note providing for payment of exchange at place other than place of payment not negotiable; *White v. Cushing*, 88 Me. 344, 32 L. R. A. 592, footnote p. 590, 51 Am. St. Rep. 402, 34 Atl. 164, which holds negotiability of savings bank order destroyed by statement that pass book must accompany order; *Lincoln Nat. Bank v. Perry*, 14 C. C. A. 278, 32 U. S. App. 15, 66 Fed. 892, holding note containing agreement that collateral security may be added to or sold on notice not negotiable.

Cited in notes (125 Am. St. Rep. 194) on agreements and conditions destroying negotiability; (127 Am. St. Rep. 437, 437) on effect of indorsements of memoranda on negotiable instruments at time of execution; (4 Eng. Rul. Cas. 192) on negotiability of note or bill of exchange.

Distinguished in *Valley Nat. Bank v. Crowell*, 148 Pa. 286, 33 Am. St. Rep. 824, 23 Atl. 1068, holding clause in note stating it is accompanied by collateral security does not destroy negotiability.

11 L. R. A. 561, *COM. v. BIDDLE*, 139 Pa. 605, 21 Atl. 134.

Forbidden insurance in foreign companies.

Followed in *Western Mass. Mut. Ins. Co. v. Girard Point Storage Co.* 6 Pa. Super. Ct. 291, 41 W. N. C. 474, holding issuance and delivery of policies in foreign state makes contract foreign and enforceable if valid there though prohibited in Pennsylvania; *Commonwealth Mut. F. Co. v. Sharpless Bros.* 12 Pa. Super. Ct. 338, holding judgment of foreign court for forbidden insurance not enforceable.

Cited in *State v. Allgeyer*, 48 La. Ann. 107, 18 So. 904, holding defendants

liable for penalty for insuring with foreign corporation not complying with laws of defendant's state; *Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.* 149 Mo. 179, 50 S. W. 281, holding foreign contract of insurance enforceable in state where property is situated, although plaintiff had not complied with laws of state of forum; *Com. v. Hammer*, 11 Pa. Super. Ct. 144, holding person representing himself as adjuster of unauthorized foreign insurance company not guilty of misdemeanor under act of 1893; *Adler-Weinberger S. S. Co. v. Rothschild*, 123 Fed. 146, holding statute making agent of foreign insurance company personally liable for unauthorized contracts applicable to insurance of out of state property; *Swing v. Brister*, 87 Miss. 529, 40 So. 146, 6 A. & E. Ann. Cas. 740, holding insurance policy on property within the state valid though insurer had not complied with the state statute where insurer was a foreign corporation and contract wholly entered into in another state; *Swing v. Cameron*, 145 Mich. 188, 9 L.R.A.(N.S.) 425, 108 N. W. 506, 9 A. & E. Ann. Cas. 332 (dissenting opinion), on same point; *Bartlett v. Rothschild*, 214 Pa. 428, 63 Atl. 1030; *East Stroudsburg State Normal School v. Yetter*, 33 Pa. Super. Ct. 559 (opinion of lower court),—on right of state in its exercise of police power to declare acts done within the state unlawful or criminal.

Cited in footnote to *Fort v. State*, 23 L. R. A. 86, which holds it no offense for agents to assist accident Lloyds in transacting business without license.

Cited in note (20 L. R. A. 409) on effect of insurance where statutes regulating business of foreign insurance companies have not been complied with.

Distinguished in *Swing v. Munson*, 191 Pa. 589, 58 L. R. A. 226, 71 Am. St. Rep. 772, 43 Atl. 342, holding valid foreign contract prohibited in state of forum not enforceable there; *Western Massachusetts Mut. F. Ins. Co. v. Girard Point Storage Co.* 6 Pa. Dist. R. 57, holding foreign corporation not complying with statutes of state of forum cannot enforce contract there.

11 L. R. A. 563, *COM. v. WALDMAN*, 140 Pa. 89, 21 Atl. 248.

Acts forbidden by laws against Sunday labor.

Cited in *Com. v. Diffenbaugh*, 26 Pa. Co. Ct. 69, 19 Lanc. L. Rev. 22, holding sale of meal on Sunday forbidden; *State v. Sopher*, 25 Utah, 326, 60 L. R. A. 471, footnote p. 468, 95 Am. St. Rep. 845, 71 Pac. 482, and *Breyer v. State*, 102 Tenn. 109, 50 S. W. 769, holding business of barber not a work of charity or necessity; *Petit v. Minnesota*, 177 U. S. 167, 44 L. ed. 719, 20 Sup. Ct. Rep. 666, upholding power of legislature to declare Sunday barbering not work of necessity or charity; *State v. Wellott*, 54 Mo. App. 315, and *Ex parte Kennedy*, 42 Tex. Crim. Rep. 149, 51 L. R. A. 271, 58 S. W. 129, holding work of barber not work of necessity within meaning of statute prohibiting Sunday labor; *State v. Nesbit*, 8 Kan. App. 109, 54 Pac. 326, holding shaving of person by barber on Sunday, prohibited "labor"; *Armstrong v. State*, 170 Ind. 190, 15 L.R.A.(N.S.) 650, 84 N. E. 3; *State v. Schatt*, 128 Mo. App. 631, 107 S. W. 10,—holding that barber conducting business in his shop on Sunday is "laboring" within meaning of Sunday law.

Cited in footnotes to *Arnheiter v. State*, 58 L. R. A. 392, which holds sale of meat by butcher to customers on Sunday not work of necessity or charity; *State v. McBee*, 60 L. R. A. 638, which holds pumping oil well on Sunday work of necessity, if permanent, material loss and injury would otherwise result; *First M. E. Church v. Donnell*, 46 L. R. A. 858, which sustains subscription to church indebtedness made on Sunday; *State v. Collett*, 64 L.R.A. 204, which holds re-pairing of belt in factory on Sunday so as to prevent two hundred hands from losing work on the following day.

Cited in note (14 L. R. A. 194) on Sunday labor.

Trial by jury.

Cited in *Com. v. Wetherill*, 5 Lack. Legal News, 363, 7 Northampton Co. Rep. 102, 8 Pa. Dist. R. 563, 30 Pittsb. L. J. N. S. 232, 23 Pa. Co. Ct. 59, holding question of violation of statute against use of nets in fishing, for court; *Com. v. Clark*, 14 Lanc. L. Rev. 42, holding, in quashing indictment, defendant not entitled to jury trial for violation of borough health ordinance; *Com. v. Hammer*, 9 Pa. Dist. R. 252, holding trial by jury on appeal from convictions for non-attendance at school, proper; *Com. v. Forrest*, 3 Pa. Dist. R. 800, holding defendant not entitled to trial by jury on appeal from summary conviction for riding bicycle on sidewalk; *Com. v. Fasnacht*, 20 Lanc. L. Rev. 44, holding that appeal from conviction for swearing, under act of 1794, lies to court of quarter sessions, without jury; *Com. v. Layton*, 45 Pa. Super. Ct. 585, to the point that statute granting right of appeal from summary convictions by magistrate does not give right to trial by jury; *Easton v. Cericola*, 18 Pa. Dist. R. 199, 11 North. Co. Rep. 258, holding that trial by jury is not a right guaranteed under the constitution as to offenses created by statute or ordinance, which did not exist at common law.

Appeal from summary conviction.

Cited in *Com. v. Edsall*, 13 Pa. Dist. R. 509, on appeal from summary conviction; *Luckey's Appeal*, 32 Pa. Co. Ct. 20, 10 North. Co. Rep. 189, 10 Del. Co. Rep. 51, 15 Pa. Dist. R. 381, holding valid act giving right of appeal by defendant in cases of summary conviction before magistrate; *Com. v. Kulp*, 34 Pa. Co. Ct. 654, 11 North. Co. Rep. 181, 17 Pa. Dist. R. 863, on trial of appeal being heard by the court.

11 L. R. A. 564, *HUMPHREYS v. NATIONAL BEN. ASSO.* 139 Pa. 264, 20 Atl. 1047.

Interpretation of insurance contract.

Cited in *Bole v. New Hampshire F. Ins. Co.* 159 Pa. 57, 34 W. N. C. 27, 28 Atl. 205, holding manufacturing building in hands of assignee, with foreman in charge, in operation within meaning of policy; *Spicer v. Commercial Mut. Acci. Ins. Co.* 4 Dauphin Co. Rep. 289, 16 Pa. Co. Ct. 169, 4 Pa. Dist. R. 275, holding foreman with badly sprained knee not "immediately, wholly, and continuously disabled" from transacting business; *Hendel v. Reverting Fund Assur. Asso.* 2 Pa. Dist. R. 118, holding insurance contract should be construed most favorably to insured; *Maynard v. Locomotive Engineer's Mut. L. & Acci. Asso.* 16 Utah, 150, 67 Am. St. Rep. 602, 51 Pac. 259, holding ambiguous by-laws of mutual benefit association should be construed most favorably to members; *Primrose v. Casualty Co.* 232 Pa. 213, 37 L.R.A.(N.S.) 622, 81 Atl. 212, holding that words used in policy of insurance should be construed most favorably to insured; *Farner v. Massachusetts Mut. Acci. Asso.* 219 Pa. 73, 123 Am. St. Rep. 621, 67 Atl. 927, holding that a bite of a dog is an accident, and though infection results, is covered by the accident clause of the policy; *Frick v. United Firemen's Ins. Co.* 218 Pa. 417, 67 Atl. 743; *Yost v. Anchor F. Ins. Co.* 38 Pa. Super. Ct. 601; *McGinnis v. St. Paul F. & M. Ins. Co.* 38 Pa. Super. Ct. 395,—holding that where policy admits of two constructions, that will be adopted which favors the insured; *St. Paul F. & M. Ins. Co. v. Penman*, 81 C. C. A. 151, 151 Fed. 977 (dissenting opinion), on same point.

Cited in footnotes to *Lord v. American Mut. Acci. Asso.* 26 L. R. A. 742, which holds it question for jury whether entire loss of hand caused by injury, without amputation above wrist; *Mogé v. Société De Bienfaisance St. Jean Baptiste*, 35 L. R. A. 736, which holds total blindness resulting from accident covered by

policy; *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 48 L. R. A. 86, which denies right to whole amount of insurance for amputation of "limb" (whole hand or foot) on amputation of part of foot; *Peterson v. Modern Brotherhood of America*, 67 L.R.A. 631, which holds a Pott's fracture not covered by policy providing indemnity in case of breaking of shafts of both bones between knee and ankle joints.

Cited in notes (13 L. R. A. 263) on interpretation of insurance contract; (38 L.R.A. 535) on what constitutes total disability of insured; (14 Eng. Rul. Cas. 23) on rules for construing insurance policies.

Knowledge of agent.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

Cited in notes (24 Am. St. Rep. 228) on notice to agent as notice to principal; (16 L.R.A.(N.S.) 1182) on parol-evidence rule as to varying or contradicting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

11 L. R. A. 565, *GHORMLEY v. SMITH*, 139 Pa. 584, 23 Am. St. Rep. 215, 21 Atl. 135.

Trusts to defeat claims of creditors.

Cited in *J. S. Menken Co. v. Brinkley*, 94 Tenn. 732, 31 S. W. 92; *Brown v. MacGill*, 87 Md. 168, 39 L. R. A. 809, 67 Am. St. Rep. 334, 39 Atl. 613; *Patrick v. Smith*, 2 Pa. Super. Ct. 118, 39 W. N. C. 6,—holding that one cannot create trust for his own benefit to exclusion of his own creditors; *Catherwood's Estate*, 29 W. N. C. 344, holding conveyance by grantor of estate in trust for his own benefit for life, free from debts, with power of appointment, void; *Reiff v. Mack*, 160 Pa. 266, 40 Am. St. Rep. 720, 28 Atl. 699, holding attachment execution will not lie against proceeds of pension check on deposit in bank; *Philadelphia v. Meredith*, 20 Pa. Dist. R. 24; *Petty v. Moores Brook Sanitarium*, 110 Va. 819, 27 L.R.A.(N.S.) 802, 67 S. E. 355, 19 Ann. Cas. 271,—holding that owner of property cannot convey it to trustee for his sole benefit for life, with power to dispose of it at death and also exempt such property from debts; *Nolan v. Nolan*, 218 Pa. 140, 12 L.R.A.(N.S.) 374, 67 Atl. 52, holding that a person cannot as against creditors, present or future, settle his property by irrevocable deed in trust for his own use for life with power of disposition by will; *Hackley v. Littell*, 150 Mich. 114, 113 N. W. 787 (dissenting opinion); *Ward v. Marie*, 73 N. J. Eq. 523, 68 Atl. 1084,—on trust for the benefit of grantor in trust deed.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Requa v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest, accepted by husband, not trust beyond reach of creditors; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Cited in notes (13 L.R.A. 212) on right of creator of estate to qualify its enjoyment by annexing conditions and limitations; (24 Am. St. Rep. 696) on spendthrift trusts.

11 L. R. A. 567, *BRODHEAD v. SHOEMAKER*, 44 Fed. 518.

Federal jurisdiction of contested wills.

Cited in *Richardson v. Green*, 9 C. C. A. 571, 15 U. S. App. 488, 61 Fed. 429,

upholding jurisdiction of Federal courts in proceeding to contest validity of will after probate; *Williams v. Crabb*, 59 L. R. A. 431, 54 C. C. A. 220, 117 Fed. 200, holding Federal court in proper case has concurrent jurisdiction with state court of equity to contest validity of probated will; *Sawyer v. White*, 58 C. C. A. 591, 122 Fed. 227, upholding jurisdiction of Federal courts in controversy over validity of will between citizens of different states.

Removal of causes to Federal courts.

Cited in *Walcott v. Watson*, 46 Fed. 531, holding proof by affidavit sufficient to justify court in ordering removal of cause to Federal court; *Reeves v. Corning*, 51 Fed. 778, upholding removal to Federal court on account of "prejudice and local influence" on *ex parte* hearing; *Bonner v. Meikle*, 77 Fed. 488, ordering removal to Federal court on petition on ground of prejudice and local influence; *Wahl v. Franz*, 49 L. R. A. 66, 40 C. C. A. 642, 100 Fed. 684, Reversing 81 Fed. 10, holding proceeding for probate of will under Arkansas statutes not removable to Federal court.

11 L. R. A. 573, *COOK v. PATRICK*, 135 Ill. 499, 26 N. E. 658.

Resulting or implied trusts.

Cited in *Telford v. Patton*, 144 Ill. 622, 33 N. E. 1119, Reversing 43 Ill. App. 156, holding title to money deposited in bank for another does not pass without delivery of certificate of deposit by donor; *Re Davis*, 112 Fed. 133, holding trust results in favor of purchaser of property conveyed to another in trust for third persons, on failure of latter trust.

Cited in footnotes to *Edwards v. Culbertson*, 18 L.R.A. 204, which holds woman purchasing land with money fraudulently obtained by promise to marry, trustee on refusal to do so; *Monahan v. Monahan*, 70 L.R.A. 935, which holds that equity may declare trust in securities purchased in name of son for purpose of avoiding taxation taken in name of son without his knowledge where he afterwards surreptitiously took possession of and refused to surrender them.

Delivery of deed.

Cited in *Fitzgerald v. Allen*, 240 Ill. 95, 88 N. E. 240, holding delivery to third party even when deed is made without grantee's knowledge, good when afterward ratified by grantee.

Cited in footnotes to *Martin v. Flaharty*, 19 L. R. A. 243, which holds manual delivery of deed not essential; *Parrot v. Avery*, 22 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery; *Daggett v. Simonds*, 46 L. R. A. 332, which sustains right of one to whom note delivered in escrow to be delivered on payee's death, to deliver same on happening of condition.

Cited in notes (54 L. R. A. 867, 868) on delivery of deed to third person, or record, or delivery for record, by grantor; (53 Am. St. Rep. 553) on what is a delivery of a deed.

Voluntary trusts, gifts.

Cited in *Re Richardson*, 138 Iowa, 671, 100 N. W. 797, holding acts and declarations of person deceased who made loans sufficient to establish title of notes in parties to whom the notes were payable; *Fowler v. Fowler*, 141 Mo. App. 612, 125 S. W. 1171, holding where party paid for lot and gave deed to another saying, "I want * * * to give it to you" gift of lot effected.

11 L. R. A. 577, *WALKER v. PRITCHARD*, 135 Ill. 103, 25 N. E. 573.

Damages on dissolution of injunction.

Cited in *Brackebush v. Dorsett*, 138 Ill. 172, 27 N. E. 934, holding surety on

injunction bond not relieved by partial dissolution of injunction; *Crate v. Kohl-saat*, 44 Ill. App. 276, holding full amount of damages should have been awarded defendant upon dissolving injunction, although exceeding amount of bond.

Attorney's fees as damages.

Cited in *Lambert v. Alcorn*, 144 Ill. 328, 21 L. R. A. 616, 33 N. E. 53; *Anderson v. Anderson*, 55 Mo. App. 276; *Chicago Veneered Door Co. v. Parks*, 79 Ill. App. 190; *Keith v. Henkleman*, 173 Ill. 146, 50 N. E. 692, — holding only attorney's fees necessarily incurred in dissolving injunction allowable as damages; *Landis v. Wolf*, 206 Ill. 401, 69 N. E. 103, holding counsel fees incurred in defending suit generally, not assessable as damages for wrongful injunction; *Dempster v. Lansingh*, 234 Ill. 390, 84 N. E. 1032, reversing 128 Ill. App. 402, holding where injunction ancillary to principal relief is sought, fees for defending suit generally are not assessable as damages on dissolution of injunction.

Cited in note (16 L.R.A.(N.S.) 64, 66, 71) on recovery on injunction bond of attorney's fees necessarily expended in dissolving injunction.

Conditions of injunction bond.

Cited in *Terre Haute & I. R. Co. v. Peoria & P. Union R. Co.* 81 Ill. App. 450, holding court has power to fix conditions of injunction bond, except in case of enjoining collection of judgment.

11 L. R. A. 580, *STEGER v. ARCTIC REFRIGERATING CO.* 89 Tenn. 453, 14 S. W. 1087.

Construction of mechanic's lien laws.

Cited in *Nanz v. Cumberland Gap Park Co.* 103 Tenn. 301, 47 L. R. A. 273, 76 Am. St. Rep. 650, 52 S. W. 999, holding florist not entitled to mechanic's lien upon hotel and grounds, for adorning, grading, and graveling; *Luttrell v. Knoxville, L. & J. R. Co.* 119 Tenn. 508, 123 Am. St. Rep. 737, 105 S. W. 565, holding lien upon property of railroad company enforceable without attachment.

Lien on pipe lines and fixtures.

Cited in *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 51, holding entire waterworks plant, including piping in streets, subject to material man's lien for furnishing pipes; *Hughes v. Lambertville Electric Light, H. & P. Co.* 53 N. J. Eq. 437, 32 Atl. 69, holding wires and insulators forming part of plant for supplying electricity to customers, fixtures within mechanic's lien law; *Wells v. Christian*, 165 Ind. 666, 76 N. E. 518, holding under statute person employed to haul earth from trench in street for laying steam pipes and to haul sand to be used in filling trench and replacing brick on street may enforce lien for such labor against lot upon which heating plant is located.

Cited in footnote to *Clements v. Philadelphia Co.* 39 L. R. A. 532, which sustains gas company's right to enter to remove gas pipes on abandoning useless line.

Distinguished in *Blue v. Gunn*, 114 Tenn. 423, 69 L.R.A. 899, 108 Am. St. Rep. 912, 87 S. W. 408, 4 A. & E. Ann. Cas. 1157, where question was whether title to certain finishing materials, doors, mantels, casings, columns, corner beads, etc. ordered for use in house but not attached to it passed to purchaser under mortgage sale of premises.

Entire property subject to lien.

Cited in *Connor v. Tennessee C. R. Co.* 54 L. R. A. 694, 48 C. C. A. 738, 109 Fed. 939, holding that part of right of way and roadbed of railroad cannot be sold under decree of court separate from franchises to enforce mechanic's lien; *Park City Meat Co. v. Comstock Silver King Min. Co.* 36 Utah, 154, 103 Pac.

254, holding that easements and improvements connected with mine are covered by mechanic's lien.

Cited in notes in (65 Am. St. Rep. 169) on including property in mechanic's lien in addition to that on which work was performed or materials furnished; (26 L.R.A.(N.S.) 838) on extent of land to which mechanics' lien will attach.

11 L. R. A. 582, *BRADSHAW v. LANKFORD*, 73 Md. 428, 25 Am. St. Rep. 602, 21 Atl. 66.

Delegation of power by legislature.

Cited in *Hamilton v. Carroll*, 82 Md. 337, 33 Atl. 648, upholding act permitting question as to location of county seat to be submitted to the people.

Cited in footnote to *State ex rel. Howe v. Des Moines*, 39 L. R. A. 285, which denies right of legislature to delegate power to fix amount of tax for public library to be levied by common council.

Cited in note (23 L. R. A. 114) on power of legislature to make statute contingent on approval by vote of people.

Rights in water beds.

Cited in *State v. Applegarth*, 81 Md. 299, 28 L. R. A. 814, 31 Atl. 961, upholding legislative power to regulate taking of oysters; *Hughes v. State*, 87 Md. 301, 39 Atl. 747, upholding power of state to regulate fishing in tide-water rivers.

Cited in footnotes to *Mott v. Underwood*, 32 L. R. A. 270, which denies right of tenant in common of oyster bed to deprive cotenant of right to take oysters; *Tyler v. State*, 52 L. R. A. 100, which holds oysters taken from waters outside of state not within statutory prohibition of possession of.

Cited in note (3 L.R.A.(N.S.) 206) on injunction against trespass upon, or interference with, oyster beds.

11 L. R. A. 585, *SMITH v. BORDEN*, 17 R. I. 220, 33 Am. St. Rep. 867, 21 Atl. 351.

Validity of judgments against married women.

Cited in note (134 Am. St. Rep. 929, 937) on validity of judgments against married woman.

Former judgment.

Cited in *H. F. Watson Co. v. Citizen's Concrete Co.* 28 R. I. 474, 125 Am. St. Rep. 749, 68 Atl. 310, holding propriety of directing verdict will not be considered in subsequent action where record shows verdict returned by jury and judgment entered thereon, and no proceedings ever taken to question correctness of either.

11 L. R. A. 587, *STATE v. BITTICK*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325.

Effect of noncompliance with marriage statutes.

Cited in *State v. Cooper*, 103 Mo. 273, 15 S. W. 327, reversing conviction for bigamy because of court's failure to define nature of common-law marriage; *Banks v. Galbraith*, 149 Mo. 536, 51 S. W. 105, holding that purchase of Indian woman, and subsequent cohabitation, not common-law marriage; *Adair v. Mette*, 156 Mo. 511, 57 S. W. 551, holding burden of proving common-law marriage is upon one seeking to establish it; *People v. Beevers*, 99 Cal. 289, 33 Pac. 844, holding consent to marriage, followed by mutual assumption of marital rights and obligations, sufficient to support prosecution for bigamy for subsequent marriage; *Ingersol v. McWillie*, 9 Tex. Civ. App. 555, 30 S. W. 56, upholding validity of common-law marriage by consent and cohabitation on settlement of husband's estate; *Re Campbell*, 12 Cal. App. 716, 108 Pac. 669, on definition of marriage

and validity of common law marriage notwithstanding statutes regulating marriage ceremony; *Topper v. Perry*, 197 Mo. 546, 114 Am. St. Rep. 777, 95 S. W. 203, holding present assumption of the marriage status necessary when consent to marry is manifested by words *de praesenti*; *Collard v. Burch*, 138 Mo. App. 98, 119 S. W. 1009; *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 231, 86 S. W. 263,—holding that since marriage is a civil contract in Missouri a woman is not competent to testify as to an alleged common law marriage with one since deceased.

Cited in footnotes to *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence; *University of Michigan v. McGuckin*, 57 L. R. A. 917, which holds lawful marriage shown between persons whose cohabitation was originally meretricious, by continued cohabitation after disability removed, and birth of children baptized as legitimate; *Hilton v. Roylance*, 58 L. R. A. 723, which sustains sealing for time and eternity under Mormon marriage ceremony.

Cited in notes (2 L.R.A.(N.S.) 353) on effect on common-law marriage of statute regulating marriage; (79 Am. St. Rep. 361, 362, 363, 375) on what marriages are void; (124 Am. St. Rep. 105, 121) on common law marriages; (17 Eng. Rul. Cas. 172, 174) on what constitutes a valid marriage.

Disapproved in *Western U. Teleg. Co. v. Procter*, 6 Tex. Civ. App. 303, 25 S. W. 811, holding common-law marriage without statutory license, void.

Prohibited marriages.

Cited in *Trammell v. Vaughan*, 158 Mo. 222, 51 L. R. A. 856, 81 Am. St. Rep. 302, 59 S. W. 79, holding venereal disease, under certain circumstances, legal justification for postponement of marriage; *Keen v. Keen*, 184 Mo. 373, 83 S. W. 526, holding slave negro woman and white man could not enter into civil contract of marriage from 1850 to 1865 under laws of Missouri, and common-law marriage thereafter is not presumed from their relations; *Grover v. Zook*, 44 Wash. 500, 7 L.R.A.(N.S.) 591, 120 Am. St. Rep. 1012, 12 A. & E. Ann. Cas. 192, holding man under legal and moral duty to decline to carry out promise to marry woman, where woman is consumptive and man has hereditary taint of consumption.

Cited in note (22 L.R.A.(N.S.) 1206) on marriage of persons of nonage.

11 L. R. A. 589, *PENNINGTON v. TODD*, 47 N. J. Eq. 569, 24 Am. St. Rep. 419, 21 Atl. 297.

Illegal partnerships.

Cited in footnote to *Chateau v. Single*, 33 L. R. A. 750, which denies relief to either party for settlement of partnership to carry on unlawful business.

Cited in note (23 L.R.A.(N.S.) 486) on accounting between members of illegal or void partnership or one engaged in illegal business.

What constitutes partnership.

Cited in note (18 L.R.A.(N.S.) 967) on effect of agreement to share profits to create partnership.

Action based on illegal transaction.

Cited in *Illingworth v. Bloemecke*, 67 N. J. Eq. 489, 58 Atl. 566, refusing to compel accounting for profits derived from Sunday bicycle racing; *Van Tine v. Hilands*, 131 Fed. 128, holding partner ignorant of any wrong-doing entitled to share of profits realized from conduct of sale of stock, wherein commission was taken from both buyer and seller.

Review of decree entered on remittitur.

Cited in *Powell v. Yearance*, 73 N. J. Eq. 123, 67 Atl. 892, holding an inter-

locutory decree entered on remittitur is, after final decree, subject to review to determine whether it follows the direction of the appellate court.

11 L. R. A. 591, *RICE v. RICE*, 47 N. J. Eq. 559, 21 Atl. 286.

Identification of accused.

Cited in *People v. Gardner*, 144 N. Y. 128, 28 L. R. A. 706, 43 Am. St. Rep. 741, 38 N. E. 1003, holding compelling defendant to stand up at trial for identification not error.

Cited in note (28 L. R. A. 699) on right to compel accused to exhibit himself for identification.

11 L. R. A. 593, *BARDEN v. MONTANA CLUB*, 10 Mont. 330, 24 Am. St. Rep. 27, 25 Pac. 1042.

Sales or distribution of liquors by social clubs.

Cited in *People v. Adelphi Club*, 149 N. Y. 13, 31 L. R. A. 513, footnote, p. 510, 52 Am. St. Rep. 700, 43 N. E. 410, holding distribution of liquor by social club members not illegal sale; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 15, 28 Am. St. Rep. 826, 14 S. E. 290, holding distribution of liquor by club among members for pay for purpose of replenishing supply only, not illegal; *Manassas Club v. Mobile*, 121 Ala. 564, 25 So. 628, holding license not required of social club not selling liquor for profit; *State ex rel. Bell v. St. Louis Club*, 125 Mo. 327, 26 L. R. A. 580, footnote, p. 573, 28 S. W. 604, holding valid distribution of liquor among members by social club; *Koenig v. State*, 33 Tex. Crim. Rep. 378, 47 Am. St. Rep. 35, 26 S. W. 835, holding private social corporation, furnishing liquors to members or guests without profit, not "house for retailing spirituous liquors" nor "public house;" *Cuzner v. California Club*, 155 Cal. 312, 20 L.R.A. (N. S.) 1110, 100 Pac. 868, holding transactions of bona fide social club not liquor selling within meaning of ordinance imposing tax upon such business; *Com. v. Tierney*, 1 Pa. Dist. R. 20, 29 W. N. C. 196, on furnishing members of social club with liquors; *Moriarty v. State*, 122 Tenn. 444, 25 L.R.A. (N.S.) 1253, 124 S. W. 1016, holding steward of association for social, benevolent, and fraternal purposes, in connection with which furnishing of refreshments, including intoxicating liquors was purely incidental, not guilty of selling or aiding in sale of intoxicating liquors.

Annotation cited in *Manning v. Canon City*, 45 Colo. 574, 23 L.R.A. (N.S.) 194, 101 Pac. 978, holding furnishing of liquor by social club to members violation of ordinance prohibiting selling, disposing of, or giving away liquors; *State v. Kline*, 50 Or. 435, 93 Pac. 237, holding distribution of liquors by club to members violation of local option law forbidding sale, exchange or giving away of liquors.

Cited in footnotes to *State v. Boston Club*, 20 L. R. A. 185, which holds that incorporated institutions selling liquor to members owe license; *State ex rel. Stevenson v. Law & Order Club*, 62 L. R. A. 885, which holds that incorporated social club cannot, without license, dispense liquor to members.

Cited in notes (12 L. R. A. 413) on sale of liquor by social club; (12 L. R. A. (N.S.) 519) on applicability of liquor laws to social club; (28 Am. St. Rep. 832) on distribution of liquor by social club.

Distinguished in *State ex rel. Young v. Minnesota Club*, 106 Minn. 521, 20 L.R.A. (N.S.) 1101, 119 N. W. 494, holding distribution of liquors by social club to be a sale within meaning of statute making it misdemeanor for any person to sell any intoxicating liquors in quantities less than five gallons, or in any quantity to be drunk on premises, except as provided.

Constitutionality of license laws.

Cited in *State v. Camp Sing*, 18 Mont. 151, 32 L. R. A. 642, 56 Am. St. Rep. 551, 44 Pac. 516, upholding constitutionality of laundry license tax law.

Appellate jurisdiction of supreme court.

Cited in *State ex rel. Whiteside v. First Judicial Dist. Court*, 24 Mont. 558, 63 Pac. 305, holding supreme court in its appellate jurisdiction without power to try questions of fact.

11 L. R. A. 596, *CAMPBELL v. AMERICAN ZYLONITE CO.* 122 N. Y. 455, 25 N. E. 853.

Rights and liabilities of corporation stockholders and transferees.

Cited in *Ernst v. Elmira Municipal Improv. Co.* 24 Misc. 587, 54 N. Y. Supp. 116, upholding action by transferee of stock to record transfer and to enjoin it from proposed illegal issue of preferred stock; *Elyea v. Lehigh Salt Min. Co.* 169 N. Y. 33, 61 N. E. 992, Affirming 45 App. Div. 237, 60 N. Y. Supp. 1050, refusing to set aside transfer of corporate property at suit of pledgee of stock; *Marklove v. Utica, C. & B. R. Co.* 48 Misc. 272, 96 N. Y. Supp. 795, holding where railroad issued stock to city with guaranty of certain dividend, purchaser from city entitled to have indorsement made or something else done so that stock could be identified as paying such a dividend; *Cohen v. Big Stone Gap Iron Co.* 111 Va. 473, 69 S. E. 359, Ann. Cas. 1912, A 203, to the point that holder of unregistered stock is not bound by contract between corporation and assignor which is not within power of corporation.

Cited in footnote to *Earle v. Carson*, 60 L. R. A. 266, which denies liability of national bank stockholder selling stock to insolvent without knowledge of bank's insolvency, though bank declared insolvent before transfer made on books of bank.

Cited in notes (27 L. R. A. 138) on preferred, guaranteed, and interest-bearing stock; (133 Am. St. Rep. 730) on compelling issue of stock.

Distinguished in *Martin v. Remington-Martin Co.* 95 App. Div. 21, 88 N. Y. Supp. 573, holding stockholder cannot restrain increase of capital stock; *Hinckley v. Schwarzschild & S. Co.* 107 App. Div. 481, 95 N. Y. Supp. 357, holding statute permitting corporations to issue preferred stock, with consent of two-thirds instead of all stockholders, valid exercise of legislative power and applicable to corporations existing at time of its passage.

11 L. R. A. 598, *WAINER v. MILFORD MUT. F. INS. CO.* 153 Mass. 335, 26 N. E. 877.

Disputed liability on policy.

Cited in *Hayes v. Milford Mut. F. Ins. Co.* 170 Mass. 497, 49 N. E. 754, holding provision as to arbitration waived where amount was undisputed for more than sixty days after statement of loss; *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* 171 Mass. 436, 50 N. E. 943, holding that question of waiver of arbitration should have been submitted to jury under evidence; *Stephens v. Union Assur. Soc.* 16 Utah, 28, 67 Am. St. Rep. 595, 50 Pac. 626, holding insurance company denying liability cannot demand appraisal after plaintiff sues to recover loss; *Hill v. Middlesex Mut. Assur. Co.* 174 Mass. 545, 55 N. E. 319, holding that breach of conditions, although past and not contributing to loss, avoided policy; *Smith v. California Ins. Co.* 85 Me. 348, 27 Atl. 191, setting aside verdict for plaintiff on policy as against weight of evidence; *Hickerson v. German-American Ins. Co.* 96 Tenn. 200, 32 L. R. A. 175, 33 S. W. 1041, holding that insurer denying all liability cannot demand appraisal; *Mascott v. First National F. Ins. Co.* 69 Vt. 120, 37 Atl. 255, holding policy not avoided by failure of ownership, where combined interests of parties insured amounted to fee.

Cited in footnotes to *Brook v. Dwelling House Ins. Co.* 26 L. R. A. 623, which denies right of insurer uniting in appointment of appraisers to claim appointment premature; *Grand Rapids F. Ins. Co. v. Finn*, 50 L. R. A. 555, which holds appraisal of loss not required by policy unless demand made by insurer.

Cited in note (15 L.R.A.(N.S.) 1074) on arbitration as condition precedent to action on insurance policy.

Distinguished in *Union Institution for Savings v. Phoenix Ins. Co.* 196 Mass. 237, 14 L.R.A.(N.S.) 464, 81 N. E. 994, 13 A. & E. Ann. Cas. 433, holding no part of defense waived by insurance company where its attitude was that of standing upon all its legal rights.

Oral agreements for insurance.

Cited in *Cunningham v. Connecticut F. Ins. Co.* 200 Mass. 337, 86 N. E. 787, holding where parties merely contemplate a contract springing into existence upon delivery of policies and payment of premiums, company is not bound by oral agreement.

Cited in footnote to *Hicks v. British America Assur. Co.* 48 L. R. A. 424, which holds rights of one whose property destroyed after oral contract to insure it, but before policy issued, subject to provisions of standard policy prescribed by law.

Cited in note (22 L. R. A. 769) on validity of oral insurance contract.

Representations as to ownership.

Cited in *McCoy v. Iowa State Ins. Co.* 107 Iowa, 84, 77 N. W. 529, holding entire beneficial interest sufficient compliance with policy requiring absolute interest; *Liverpool & L. & G. Ins. Co. v. Ricker*, 10 Tex. Civ. App. 268, 31 S. W. 248, holding failure of insured to disclose fact that he had unpaid purchase money notes outstanding not fatal to recovery; *Phenix Ins. Co. v. Kerr*, 129 Fed. 727, and *Milwaukee Mechanics' Ins. Co. v. Rhea*, 60 C. C. A. 105, 123 Fed. 11, holding vendee under unconditional contract to buy upon definite terms, sole owner within meaning of policy; *Modlin v. Atlantic F. Ins. Co.* 151 N. C. 40, 65 S. E. 605, holding one entitled, under parol trust, to entire beneficial interest is sole and absolute owner of property affected by trust.

Cited in footnote to *Loventhal v. Home Ins. Co.* 33 L. R. A. 258, which holds vendee of land under executory contract, unconditional and sole owner.

Cited in note (20 L.R.A.(N.S.) 777) on vendee under land contract as owner within meaning of insurance policy.

Distinguished in *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 727, holding owner of property who has given irrevocable option to purchase to one who has not agreed to accept or to buy or pay for property, still has unconditional ownership within meaning of policy.

Insurable interest.

Cited in *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 482, 48 N. E. 620, holding vendee of goods has insurable interest; *Doyle v. American F. Ins. Co.* 181 Mass. 143, 63 N. E. 394, upholding right of tenant by curtesy to recover in his own name on policy; *Tabbut v. American Ins. Co.* 185 Mass. 420, 102 Am. St. Rep. 353, 70 N. E. 430, holding purchaser of piano under conditional sale contract has insurable interest therein, though not title holder, and that such interest is covered by policy in common form.

Cited in footnote to *Home Ins. Co. v. Mendenhall*, 36 L. R. A. 374, which holds insurable interest given by title such that owner would suffer loss by destruction of premises.

Cited in note (13 Eng. Rul. Cas. 334) on necessity of specifying in policy the interest of the assured.

When insurance contract is complete.

Cited in footnote to *Summers v. Mutual Life Ins. Co.* 66 L.R.A. 812, which holds contract for present insurance not made by applicant giving note for first premium in consideration that a policy shall be issued where his examination is to be made in future and he expressly stipulates that note shall not be negotiated until policy has been delivered and accepted.

Cited in notes (69 Am. Rep. 149) as to when insurance contract is complete; (138 Am. St. Rep. 33, 48) on delivery and acceptance of insurance policies.

Vacancy of insured premises.

Cited in note (10 L.R.A.(N.S.) 740) on effect of temporary vacancy ceasing before loss, under general provision against increase of risk, or specific provision against certain conditions.

Doubted in *Harris v. North American Ins. Co.* 190 Mass. 371, 4 L.R.A.(N.S.) 1141, 77 N. E. 493, holding house never occupied did not become vacant or unoccupied within meaning of clause of policy providing policy void if house became vacant.

11 L. R. A. 602, *COM. v. ZELT*, 138 Pa. 615, 21 Atl. 7.

Followed without discussion in *Com. v. Silverman*, 21 Pittsb. L. J. N. S. 247.

Intent as element of criminal offense.

Cited in *Com. ex rel. Allegheny County v. Weiss*, 139 Pa. 253, 11 L. R. A. 533, 21 Am. St. Rep. 182, 21 Atl. 10, holding absence of guilty intent not an excuse for unlawful sale of oleomargarin; *United States v. Stofello*, 8 Ariz. 463, 76 Pac. 611, holding statute making it crime to furnish intoxicating liquor to Indians, creates an offense in which knowledge or intent is not an essential ingredient; *Com. v. New York C. & H. R. R. Co.* 202 Mass. 397, 23 L.R.A.(N.S.) 351, 132 Am. St. Rep. 507, 88 N. E. 764, holding railroad cannot defend itself against charge of obstructing street with train for more than five minutes by showing delay caused by acts of other persons.

Distinguished in *Com. v. Johnston*, 2 Pa. Super. Ct. 333, holding druggist not liable criminally for act of assistant in selling liquor illegally in violation of orders.

Seller's knowledge of facts making sale illegal.

Cited in *Com. v. Silverman*, 138 Pa. 645, 21 Atl. 13, sustaining conviction for sale of liquor to person of known intemperate habit; *Garey's License*, 9 Lanc. L. Rev. 271, 11 Pa. Co. Ct. 470, 1 Pa. Dist. R. 617, revoking license for sale of liquor to minor and persons of known intemperate habits although not known to be such by accused.

Police powers as affected by right to ship in original packages.

Followed in *Com. v. Swihart*, 138 Pa. 633, 21 Atl. 11, holding defendant not entitled to complain of failure of court to instruct as to what constituted original package, such instruction not being asked for.

Applied in *Com. use of Philadelphia County v. Schollenberger*, 156 Pa. 214, 22 L. R. A. 160, 4 Inters. Com. Rep. 493, 32 W. N. C. 409, 36 Am. St. Rep. 32, 27 Atl. 30, Reversing 12 Pa. Co. Ct. 536, 2 Dist. R. 245, holding defendant liable to penalty, for sale of oleomargarine in original packages, merely to evade state laws.

Cited in *Com. v. Paul*, 170 Pa. 291, 30 L. R. A. 398, 5 Inters. Com. Rep. 511, 37 W. N. C. 140, 50 Am. St. Rep. 776, 33 Atl. 82, holding 10-pound tubs of oleomargarine not original packages; *McGregor v. Cone*, 104 Iowa, 473, 39 L. R. A. 487, 65 Am. St. Rep. 522, 73 N. W. 1041, holding small packages of cigarettes

taken from wooden box in which shipped not original packages; *Austin v. Tennessee*, 179 U. S. 356, 45 L. ed. 231, 21 Sup. Ct. Rep. 132, holding paper packages containing ten cigarettes each not original packages.

Cited in footnotes to *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages, act requiring marking on package of year in which seed grown; *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

Agents of foreign importers.

Cited in *Com. v. Pendergast*, 138 Pa. 638, 21 Atl. 12, holding it proper to comment on defendant's failure to offer other proof of agency for foreign principal to sell liquor in original packages than his own testimony; *Com. v. Bishman*, 138 Pa. 642, 21 Atl. 12, holding good faith of agency for foreign principal, alleged in defense of illegal sale of liquor, properly submitted to jury; *State v. Sapienza*, 84 Ohio St. 71, 34 L.R.A.(N.S.) 1120, 95 N. E. 381, Ann. Cas. 1912 B, 1109, to the point that one charged with illegally selling liquor was acting as agent for foreign importer is matter of defense to be established by competent evidence sufficient to throw reasonable doubt on case of prosecution; *Adams Exp. Co. v. Com.* No. 1835, 124 Ky. 169, 5 L.R.A.(N.S.) 633, 92 S. W. 932, holding express company charged with violating prohibition law has burden of proving its acts were in pursuance of contract of interstate commerce.

Right of sale under liquor license.

Cited in *Meenan's Appeal*, 11 Pa. Super. Ct. 589, holding license to sell liquor up to specified quantity does not justify sales in greater quantities.

What constitutes intemperance.

Cited in *Shettler's License*, 13 Pa. Dist. R. 651, as to when person is of intemperate habits.

Place of imprisonment.

Cited in *Com. v. Sarver*, 44 Pa. Super. Ct. 443, holding that person convicted of assault before justice of peace in Washington county may be imprisoned in Alleghany county workhouse.

Validity of liquor laws.

Cited in notes (27 Am. St. Rep. 568; 15 L.R.A.(N.S.) 926) on constitutional right to prohibit sale of intoxicants.

Burden of proof of want of license.

Cited in note (36 L.R.A.(N.S.) 100) on burden of proof as to license or permit in prosecution for unlawful sale of liquor.

11 L. R. A. 604, *SAN DIEGO LAND & TOWN CO. v. NEALE*, 88 Cal. 50, 25 Pac. 977.

Measure of damages.

Followed in *Hollister v. State*, 9 Idaho, 16, 71 Pac. 541, holding certain instructions to jury correct on measure of damages.

Cited in *Kishlar v. Southern P. R. Co.* 134 Cal. 639, 66 Pac. 848, holding instruction that measure of damages to leasehold was fair market value of lease, proper; *Alameda v. Cohen*, 133 Cal. 7, 65 Pac. 127, holding damages for improvements must be alleged and proved to be awarded in condemnation proceedings; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224, holding peculiar fitness of land for particular purposes is element in estimating its value which may be shown; *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 533, 28 Pac. 681, holding if land sought to be condemned is valuable for reservoir purposes evidence is admissible to show such value; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 620, 42 Am. St. Rep. 149, 37 Pac. 750, holding market value of lot is

not determined by its value for any particular use, but from consideration of all uses for which it is adapted, and to which it may be applied; *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 410, 104 Pac. 979, holding value of land for specific purpose in terms of money not admissible as element in determining market value; *Central P. R. Co. v. Feldman*, 152 Cal. 310, 92 Pac. 849, holding witness who has testified as expert as to value of land may be cross-examined, to test his knowledge, on matters of land valuation not otherwise admissible.

Cited in notes (22 Am. St. Rep. 50, 51) on damages in eminent domain; (11 L.R.A.(N.S.) 996) on special value of property for purpose as element of compensation or condemnation.

Distinguished in *Coats v. Atchison*, T. & S. F. R. Co. 1 Cal. App. 446, 82 Pac. 640, holding deterioration in market value of land not measure of damages in case of nuisance.

Costs in condemnation proceedings.

Cited in *Alameda County v. Crocker*, 125 Cal. 106, 57 Pac. 766, refusing to reverse condemnation judgment, where no costs were awarded defendant; *Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 722, 55 L. R. A. 267, 86 Am. St. Rep. 393, 87 N. W. 714, upholding act requiring railroad company to pay attorney's fee to landowner on successful appeal from award.

Cited in note (36 L.R.A.(N.S.) 626, on liability for costs on appeal from award in condemnation.

11 L. R. A. 610, *HALL v. PALMER*, 87 Va. 354, 24 Am. St. Rep. 653, 12 S. E. 618.

Extent of interest bequeathed.

Cited in *Farish v. Wayman*, 91 Va. 435, 21 S. E. 810, holding devisee of life estate with unrestrained power of disposition, takes fee; *Bowen v. Bowen*, 87 Va. 440, 24 Am. St. Rep. 664, 12 S. E. 885, holding devise for life to wife with power to sell all property bequeathed, an absolute estate; *Lee v. Law*, 1 Va. Dec. 815, 19 S. E. 255, holding remainder to children after life estate subject to be defeated by power of disposition in trustee for benefit of life tenant vested in children on death of life tenant; *Mulvane v. Rude*, 146 Ind. 482, 45 N. E. 659, holding absolute devise not limited by repugnant gift over of portion which might remain undisposed of at owner's death; *Meacham v. Graham*, 98 Tenn. 206, 39 S. W. 12, holding, where expression in will is doubtful, construction should favor absolute estate; *Brown v. Strother*, 102 Va. 147, 47 S. E. 236, holding where donees under will took estate in all testator possessed with full power to consume same for their support, limitations over to others were void for repugnancy and uncertainty; *Morgan v. Morgan*, 60 W. Va. 334, 55 S. E. 389, 9 A. & E. Ann. Cas. 943, holding limitation over after equitable estate in fee void for uncertainty and repugnancy; *Hawley v. Watkins*, 109 Va. 128, 63 S. E. 560, holding where donee was given property absolutely in one clause of will and provision for trustee of such property made in another clause, funds to be advanced as beneficiary might need them, remainder to another, limitation over was void.

Cited in footnote to *Roth v. Rauschenbusch*, 61 L. R. A. 455, which holds fee simple by devise to one absolutely and forever not cut down by subsequent provision as to disposition of any remainder on devisee's death.

Cited in notes (5 L.R.A.(N.S.) 325) on gift over after absolute devise; (25 Eng. Rul. Cas. 624) on invalidity of condition in will inconsistent with, and repugnant to, previous gift.

Distinguished in *Newman v. Newman*, 60 W. Va. 373, 7 L.R.A.(N.S.) 373, 55

S. E. 377, where testator intended to give widow support out of estate, but did not intend she should consume whole for her own purposes, but intended to vest property in her for benefit of children.

11 L. R. A. 613, CHAMBERS v. STATE, 127 Ind. 365, 26 N. E. 893.

Eligibility to office.

Cited in *State ex rel. Broatch v. Moores*, 52 Neb. 780, 73 N. W. 299, holding salaried office of mayor of metropolitan city, office of profit and trust under laws as to holding other office; *Opinion of the Justices*, 95 Me. 586, 51 Atl. 224, expressing opinion that (minority opinion) offices of fish and game commissioner and trustee of state institution, are state offices, and, where compensation fixed, "offices of profit," preventing incumbent while retaining same from having seat in legislature; *Wood v. State*, 130 Ind. 366, 30 N. E. 309, holding postmaster cannot at same time hold office of school trustee and president of school board; *Seiler v. State*, 160 Ind. 636, 66 N. E. 946 (dissenting opinion), majority holding county auditor entitled to per diem allowance as member of county board of review; *Atty. Gen. ex rel. Moreland v. Detroit*, 112 Mich. 163, 37 L. R. A. 218, footnote, p. 211, 70 N. W. 450, holding office of governor incompatible with that of mayor of city.

Cited in footnotes to *State ex rel. Childs v. Sutton*, 30 L. R. A. 630, which holds disability of member of legislature to hold other office during term not affected by resignation; *State ex rel. Walker v. Bus*, 33 L. R. A. 616, which holds deputy sheriff not state officer within prohibition against holding county or municipal office; *Bishop v. State*, 39 L. R. A. 278, which holds postmaster of local postoffice a "deputy postmaster" within provision as to right to hold other office.

Pleading.

Cited in *Bishop v. State*, 149 Ind. 234, 39 L. R. A. 281, 63 Am. St. Rep. 279, 48 N. E. 1038, holding information to oust defendant from second lucrative office insufficient for failure to negative exception.

"Lucrative office."

Cited in *State ex rel. Little v. Slagle*, 115 Tenn. 340, 89 S. W. 326, holding office of deputy sheriff in Tennessee lucrative one, whether contract for compensation made between himself and high sheriff or not.

11 L. R. A. 615, BLYTHE v. DENVER & R. G. R. CO. 15 Colo. 333, 22 Am. St. Rep. 403, 25 Pac. 702.

Remote and proximate cause of injury.

Cited in *Denver, F. & G. R. Co. v. Robbins*, 2 Colo. App. 317, 30 Pac. 261, holding proximate cause question for jury; *Grand Valley Irrig. Co. v. Pitzer*, 14 Colo. App. 127, 59 Pac. 420, holding irrigating ditch owner not liable for overflow caused by unprecedented storm; *Denver & R. G. R. Co. v. Andrews*, 11 Colo. App. 208, 53 Pac. 518, holding railroad company not liable for injuries caused by snow slide; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 119, 88 N. E. 1073, holding that proximate cause of injury is decisive cause thereof and what constitutes such cause is usually question for jury; *Lyons v. Watt*, 43 Colo. 241, 18 L.R.A.(N.S.) 1140, 95 Pac. 930, on definition of proximate cause.

Cited in footnotes to *Smith v. Western R. Co.* 11 L. R. A. 619, which holds unprecedented flood, act of God relieving carrier from liability for injury to goods; *Long v. Pennsylvania R. Co.* 14 L. R. A. 741, which holds carrier not liable for loss of baggage by unprecedented flood; *Wald v. Pittsburg, C. C. & St. L. R. Co.* 35 L. R. A. 356, which holds carrier liable for baggage lost by unprecedented

flood where loss due to negligent delay; *Libby v. Maine* C. R. Co. 20 L. R. A. 812, which holds unprecedented flood causing washout of railroad culvert, act of God; *Terre Haute & I. R. Co. v. Fowler*, 48 L. R. A. 531, which holds railroad liable for injury to employee by breaking of trestle by flood and drift; *Lang v. Pennsylvania R. Co.* 20 L. R. A. 360, which holds theft or destruction of whiskey after train wrecked by flood not due to inevitable accident; *Faucher v. Wilson*, 39 L. R. A. 431, which denies carrier's liability for bursting of hoghead of molasses from fermentation.

Cited in notes (53 L.R.A. 678) on what constitutes damages "by the elements" within meaning of contract with stipulations referring thereto; (36 Am. St. Rep. 838, 851) on proximate and remote cause; (20 L.R.A.(N.S.) 96) on weather conditions as independent, intervening, efficient cause; (31 L.R.A.(N.S.) 1133) on delaying run of logs as proximate cause of loss from high water, wind, or other similar cause; (39 L.R.A.(N.S.) 645) on duty of carrier to take precaution to prevent loss threatened without its antecedent fault.

Distinguished in *Denver v. Johnson*, 8 Colo. App. 389, 46 Pac. 621, holding open ditch in street into which plaintiff was thrown, through fright of horses and collision with street car, proximate cause of injury.

Act of God and inevitable accident.

Cited in *Cormack v. New York, N. H. & H. R. Co.* 196 N. Y. 447, 24 L.R.A. (N.S.) 1211, 90 N. E. 56, 17 A. & E. Ann. Cas. 949, as to existence of legal distinction between inevitable accident and act of God.

Cited in footnotes to *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* 69 L.R.A. 509, which holds carrier negligently delaying shipment liable for loss by unanticipated act of God which would not have caused the damage but for the delay; *Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S. Co.* 70 L.R.A. 562, which holds that carrier must prove that fire was purely accidental and impossible to prevent to escape liability where cotton on railroad platform in course of delivery is damaged by fire.

Cited in notes (29 L.R.A.(N.S.) 671) on duty of carrier where act of God has occurred or is threatened; (1 Eng. Rul. Cas. 233) on act of God or inevitable accident excusing carrier from liability.

11 L. R. A. 619, *SMITH v. WESTERN R. CO.* 91 Ala. 455, 24 Am. St. Rep. 929, 8 So. 754.

Act of God.

Cited in *Willson v. Boise City*, 20 Idaho, 139, 36 L.R.A.(N.S.) 1162, 117 Pac. 115, holding that cloudburst which has irregularly occurred a number of times in particular locality, causing freshets, is thing that can reasonably be expected to occur again and cannot be classed as act of God.

Cited in footnotes to *Terre Haute & I. R. Co. v. Fowler*, 48 L. R. A. 531, which holds railroad liable for injury to employee by breaking of trestle by flood and drift reasonably to be expected; *Smith v. North American Transp. & Trading Co.* 44 L. R. A. 557, which holds steamer company compelled to abandon trip to Dawson because of low water, required to bring passenger back without charge.

Cited in notes (11 L.R.A. 616) on act of God as excuse for loss by carrier must be proximate cause of loss; (29 L.R.A.(N.S.) 671, 672) on duty of carrier where act of God has occurred or is threatened; (39 L.R.A.(N.S.) 646) on duty of carrier to take precaution to prevent loss threatened without its antecedent fault; (1 Eng. Rul. Cas. 233, 234) on act of God or inevitable accident excusing carrier from liability.

11 L. R. A. 620, *SHEAR v. BOX*, 92 Ala. 596, 8 So. 792.

Second action in ejectment.

Cited in *Hamilton v. Maxwell*, 119 Ala. 26, 24 So. 769, and *Ex parte McAnulty*, 117 Ala. 238, 23 So. 680, holding second suit in ejectment between same parties should be stayed until payment of cost of first; *Southern R. Co. v. Raney*, 117 Ala. 272, 23 So. 29, holding rule as to staying second action applies only when both suits are founded upon substantially same cause of action; *Ponder v. Cheeves*, 104 Ala. 313, 16 So. 145, holding admission of complaint in former ejectment suit proper, in connection with pleas in such suit.

Annotation cited in *Brinsfield v. Howeth*, 107 Md. 294, 24 L.R.A. (N.S.) 602, 68 Atl. 566, holding whether proceedings are to be stayed until costs in former suit are paid is within discretion of court.

Distinguished in *Ex parte Matthews*, 145 Ala. 508, 40 So. 78, holding where judgment against defendant is reversed on appeal, and costs of appeal are not paid by plaintiff, new trial will not be stayed on motion of defendant.

11 L. R. A. 621, *ARKANSAS MIDLAND R. CO. v. WHITLEY*, 54 Ark. 199, 15 S. W. 465.

Statute of frauds.

Cited in *Warner v. Texas & P. R. Co.* 164 U. S. 429, 41 L. ed. 502, 17 Sup. Ct. Rep. 147, and *Sweet v. Desha Lumber Co.* 56 Ark. 632, 20 S. W. 514, holding contract to build and maintain switch at will not within statute of frauds; *Wynn v. Followill*, 98 Mo. App. 465, 72 S. W. 140, holding oral contract for care of infant not within statute of frauds; *Hampton v. Caldwell*, 95 Ark. 388, 129 S. W. 816, holding that oral contract not to engage in business of barber at certain place is not within statute of frauds, as one not to be performed within year; *Degnan v. Nowlin*, 5 Ind. Terr. 321, 82 S. W. 758, holding contract to open up coal mine, capable of performance within year, not within statute; *Valley Planting Co. v. Wise*, 93 Ark. 3, 26 L.R.A. (N.S.) 404, 123 S. W. 768, holding contract to superintend making and gathering of cotton crop for stated compensation not within the statute; *Stitt v. Rat Portage Lumber Co.* 98 Minn. 57, 107 N. W. 824, holding contract of partnership at will and for no definite time not within statute.

Cited in footnotes to *Weatherford, M. W. & N. W. R. Co. v. Wood*, 28 L. R. A. 526, which holds not within statute of frauds, contract to give pass to man and his family annually for ten years; *Hand v. Osgood*, 30 L. R. A. 379, which holds oral lease of land for one year, with privilege of three, within statute of frauds; *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds.

Cited in notes (138 Am. St. Rep. 591, 592) on agreements not to be performed within a year; (15 L.R.A. (N.S.) 315) on effect of statute of frauds upon parol contracts for services performable within a year, though not so intended; (6 Eng. Rul. Cas. 305) on validity of agreement to be performed on a contingency which may take place within a year.

11 L. R. A. 623, *HARTFORD F. INS. CO. v. BONNER MERCANTILE CO.* 44 Fed. 151.

Affirmed in 5 C. C. A. 524, 15 U. S. App. 134, 56 Fed. 378.

Submission to arbitrators.

Cited in *Stemmer v. Scottish Ins. Co.* 33 Or. 82, 53 Pac. 498, holding that jurisdiction to set aside award does not attach except for misconduct of arbitrators or mistake; *Levin v. Northwestern Nat. Ins. Co.* 146 Fed. 78, holding direct proceedings in equity required to set aside award of arbitrators; *Cook v. Foley*, 81 C. C. A. 237, 152 Fed. 51, holding final estimates of engineers in pur-

suance of contract making such estimates final and conclusive are final and conclusive in absence of fraud or such gross mistakes as imply bad faith or failure to exercise honest judgment; and that attack on such estimates must be made by proceedings in equity.

Cited in footnote to *Hewitt v. Reed City*, 50 L. R. A. 128, which holds award avoided by submission of authorities to arbitrators after close of testimony, where it was agreed that neither party should be represented by counsel.

Cited in notes (17 L.R.A. 211) on promise to give full satisfaction subject to judgment of promisee; (18 L.R.A.(N.S.) 1247) on right of arbitrators to rehear, or of a party to withdraw, where award not coextensive with submission.

Distinguished in *Home Ins. Co. v. M. Schiffs' Sons*, 103 Md. 657, 64 Atl. 63, where appraisers agreed upon loss on all but certain number of insured articles, so umpire had power to act only as to such articles.

Federal equity jurisdiction.

Cited in note (18 L. R. A. 269) on adoption by Federal courts of remedies created by state statutes.

Multifariousness.

Cited in *Day v. National Mut. Bldg. & L. Asso.* 53 W. Va. 553, 44 S. E. 779, holding that person cannot repudiate stock subscription, and charge fraudulent mismanagement of corporation affairs, in one bill; *Gill v. Lake Charles*, 119 La. 24, 43 So. 897, holding citizens and taxpayers of city, owners of property abutting on lake, and of riparian rights pertaining thereto, may unite in action to secure annulment of ordinance granting railway company right to construct and operate railroad along lake front.

11 L. R. A. 628, *TILLMAN v. HELLER*, 78 Tex. 597, 22 Am. St. Rep. 77, 14 S. W. 700.

Fraudulent transfers.

Cited in *Cleveland v. Butts Bros.* 13 Tex. Civ. App. 274, 35 S. W. 804, holding bona fide purchaser for value protected only as to amount actually paid; *Houston & T. C. R. Co. v. Shirley*, 89 Tex. 99, 31 S. W. 291, holding instruction that sale should be avoided if vendee "might have known" of vendor's fraudulent intent by "ordinary diligence" erroneous; *Watkins v. Sproull*, 8 Tex. Civ. App. 431, 28 S. W. 356, holding negotiable note payment for value; *Mixon v. Symonds*, 2 Tex. Civ. App. 630, 21 S. W. 772, holding transferee's participation in fraudulent intent will avoid conveyance to secure bona fide debt; *McFadyen v. Masters*, 11 Okla. 23, 66 Pac. 284, holding vendee will be protected only to extent of money paid before notice of fraudulent intent of vendor; *Barnhart v. Anderson*, 22 S. D. 404, 118 N. W. 31, holding that upon proof by plaintiff that deed sought to be set aside was made with fraudulent intent, he is entitled to judgment in absence of proof that purchase was made without notice and for value; *Sparks v. Taylor*, 99 Tex. 427, 6 L.R.A.(N.S.) 390, 90 S. W. 485, holding purchaser of land is protected as to purchase money paid before receiving notice of equity of another, but bound to account to holder of equity as to purchase money paid after notice.

Cited in note (34 Am. St. Rep. 402) on vendee's knowledge as affecting validity of fraudulent conveyance.

Burden of proof.

Cited in *Sanger Bros. v. Colbert*, 84 Tex. 673, 19 S. W. 863, and *Martin Brown Co. v. Cooper*, 82 Tex. 244, 17 S. W. 1051, holding burden of proving vendee's notice of vendor's fraudulent intent on plaintiff; *Prouty v. Musquiz*, 94 Tex. 91, 58 S. W. 721, holding, under facts in case, burden upon maker of promissory note

to show assignee's knowledge of defense of fraud; *J. S. Merrill Drug Co. v. Knighton*, 73 Mo. App. 575, holding burden upon plaintiff assuming affirmative defense on inter plea to prove fraudulent sale; *Le Page v. Slade*, 79 Tex. 478, 15 S. W. 496, holding purchaser depending upon promissory note as valuable consideration must show its negotiability.

Cited in note (32 L. R. A. 64, 72) on participation by purchaser in fraud of vendor which will invalidate transfer for good consideration as against vendor's creditors.

11 L. R. A. 630, *CHINN v. STATE*, 47 Ohio St. 575, 26 N. E. 986.

Who are related by affinity.

Annotation cited in *Tagert v. State*, 143 Ala. 92, 111 Am. St. Rep. 17, 39 So. 293, on continuance of affinity between husband and blood relations of wife, after death of wife, by living issue of the marriage.

Cited in note (79 Am. St. Rep. 200, 201) on who are related by affinity.

Incest between persons related by affinity.

Cited in notes (111 Am. St. Rep. 22) on crime of incest between persons related by affinity; (31 L.R.A.(N.S.) 773) on incest between persons related by marriage.

Disqualification by relationship by marriage.

Cited in *Tegarden v. Phillips*, 14 Ind. App. 36, 42 N. E. 549, holding juror not disqualified where mother of wife of one of parties and juror's wife were first cousins; *Smith v. Supreme Tent*, K. M. W. 127 Iowa, 117, 69 L.R.A. 175, 102 N. W. 830, holding there is no relationship by affinity between son of father by second wife and niece of first wife of father; such niece cannot be beneficiary of certificate in fraternal association taken by such son under statute requiring beneficiary to be relative of member.

Distinguished in *State ex rel. Perez v. Wall*, 41 Fla. 467, 49 L. R. A. 550, 79 Am. St. Rep. 195, 26 So. 1020, holding judge disqualified when husband of wife's niece is one of the parties.

Effect of repeal of statute.

Cited in *State v. Lawrence*, 74 Ohio St. 46, 77 N. E. 266, 6 A. & E. Ann. Cas. 888, holding repeal of criminal statute does not deprive state of right to prosecute thereafter for cause of prosecution existing at time of repeal; *Bevitt v. Diehl*, 12 Ohio S. & C. P. Dec. 323, holding that a change in the statute of limitations does not affect accrued causes of actions; *State v. Bell*, 6 Ohio N. P. N. S. 486, 16 Ohio S. & C. P. Dec. 611, holding that it is not necessary that an indictment allege that the prosecution is brought under a statute since repealed where the date alleged showed the crime was committed prior to the change in the law.

11 L. R. A. 632, *WILKINSON v. MERRILL*, 87 Va. 513, 12 S. E. 1015 .

Effect of loss of family on homestead exemption.

Cited in *Fullerton v. Sherrill*, 114 Iowa, 514, 87 N. W. 419, holding homestead exemption cannot be claimed by widow, after her family moves away from house; *Holmes v. Holmes*, 27 Okla. 150, 30 L.R.A.(N.S.) 926, 111 Pac. 220, holding that widow is entitled to occupy homestead although there are no children, so long as she preserves its homestead character; *Weaver v. First Nat. Bank*, 76 Kan. 548, 16 L.R.A.(N.S.) 118, 123 Am. St. Rep. 155, 94 Pac. 273, holding homestead of husband and wife exempt, although husband was dead and children moved away, leaving wife sole occupant.

Cited in notes (13 L.R.A. 743) on how far homestead defeated by loss of family; (4 L.R.A.(N.S.) 383) on what constitutes a "family" under home-

stead and exemption laws; (16 L.R.A. (N.S.) 112) on continuance of family as condition of continuance of homestead where a condition of inception.

11 L. R. A. 634, *ABENDROTH v. MANHATTAN R. CO.* 122 N. Y. 1, 19 Am. St. Rep. 461, 25 N. E. 496.

Followed without comment in *Duyckinck v. New York Elev. R. Co.* 125 N. Y. 711, 26 N. E. 755.

Right to compensation for private property taken.

Cited in *Sperb v. Metropolitan Elev. R. Co.* 61 Hun, 542, 16 N. Y. Supp. 392, holding injury by smoke, cinders, and obnoxious gases, erroneously allowed in compensation for obstruction of light and air; *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 112, 14 L. R. A. 383, 29 N. E. 95, holding lot owner entitled to compensation for construction of abutment in front of premises; *Woodruff v. Paddock*, 130 N. Y. 625, 29 N. E. 1021, holding abutting owner's private rights in alley lost by exclusion and adverse possession; *Stroub v. Manhattan R. Co.* 27 Jones & S. 508, 14 N. Y. Supp. 774, enjoining railroad company from constructing switch in front of owner's premises until company obtains right to enter upon premises; *Blashfield v. Empire State Teleph. & Teleg. Co.* 18 N. Y. Supp. 254, upholding right of abutting owners to damages for erection of telegraph poles in highway; *Maitland v. Manhattan R. Co.* 9 Misc. 618, 30 N. Y. Supp. 428, holding abutting owner may restrain construction of third elevated track, without proof of more than nominal damages; *Mattlage v. New York Elev. R. Co.* 14 Misc. 296, 35 N. Y. Supp. 704, holding construction and operation of elevated railway additional burden upon fee of street owned by abutting land owner; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 522, 27 L. R. A. 243, 29 S. W. 104, holding electric railroad company destroying telephone company's ground circuit by operation of road liable for cost of return wires as substitute; *Stevens v. New York Elev. R. Co.* 25 Jones & S. 417, 8 N. Y. Supp. 313, and *Mortimer v. New York Elev. R. Co.* 25 Jones & S. 270, 6 N. Y. Supp. 898, holding abutting owner, whether having fee to street or not, cannot be deprived of easements of light and air without compensation; *Eisenbach v. Hatfield*, 2 Wash. 269, 12 L. R. A. 647, 26 Pac. 539 (dissenting opinion), majority holding building by state or grantees of wharves on shores of navigable rivers not "taking" of private property; *Carvalho v. Brooklyn & J. B. Turnp. Co.* 56 App. Div. 524, 67 N. Y. Supp. 539, holding detention of tide fifteen minutes by construction of turnpike road across bay not sufficient to establish actionable special damages to adjoining owner; *Nelson v. New Jersey Short Line R. Co.* 73 N. J. Eq. 189, 67 Atl. 1032, to the point that railroad may be restrained from taking property without first making compensation where it is guilty of wilful aggression; *Re Rutland*, 70 Misc. 87, 128 N. Y. Supp. 94, holding that abutting owners cannot be deprived of rights in highway about to be discontinued without compensation.

Cited in footnotes to *Pappenheim v. Metropolitan Elev. R. Co.* 13 L. R. A. 401, which holds right to damages from construction of elevated railroad passes with transfer of abutting property; *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders from railroad; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, which holds use of elevated railroad in street enjoined by abutting owner until payment of compensation; *Hellen v. Medford*, 69 L.R.A.

314, which holds that statutory right to have damages for land fee of which is taken for public use assessed and paid in money cannot be impaired by statute authorizing reduction of damages because of provision for revesting of land on its abandonment.

Cited in notes (20 L.R.A. 756) on damages in lieu of injunction; (25 L.R.A. (N.S.) 1271) on right of abutter to damages for special injuries where street railway not considered additional burden; (36 L.R.A. (N.S.) 738, 739, 833) on abutter's right to compensation for railroads in streets; (37 L. ed. U. S. 156) on damages to abutting owners in exercise of right of eminent domain.

Distinguished in *Selden v. Jacksonville*, 28 Fla. 581, 14 L. R. A. 377, 29 Am. St. Rep. 278, 10 So. 457, holding erection of viaduct by municipality for purpose of changing street grade not "taking" of private property.

Easements of abutting owners in highway.

Cited in *Holloway v. Delano*, 64 Hun, 39, 18 N. Y. Supp. 704, holding abutting owner acquired easement in half of highway, independent of right of public; *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 111, 14 L. R. A. 383, 29 N. E. 95, Reversing 70 App. Div. 422, 75 N. Y. Supp. 476, holding railroad liable for cutting off access to abutting premises and damaging light and air incident thereto, by erection of embankment; *Long v. Wilson*, 119 Iowa, 270, 60 L. R. A. 721, 97 Am. St. Rep. 315, 93 N. W. 282, holding abutting owner not bound by decree changing boundaries of street in suit to which he was not a party; *George Sweet Mfg. Co. v. Van Der Hoof*, 137 App. Div. 494, 121 N. Y. Supp. 842, holding that easement of abutting owner in street is private property; *Ridgway v. Osceola*, 139 Iowa, 595, 117 N. W. 974, holding street or alley may become so appurtenant to abutting property that it cannot be vacated without paying compensation to owner of property; *Donahue v. Keystone Gas Co.* 181 N. Y. 316, 70 L.R.A. 762, 106 Am. St. Rep. 549, 73 N. E. 1108, holding abutting owner entitled to damages for killing of trees in street in front but not on his premises by gas escaping from pipes; *South Bound R. Co. v. Burton*, 67 S. C. 522, 46 S. E. 340, holding construction of railroad through street is such curtailment of usual street privileges as entitles owner of abutting lots to compensation for depreciation in value of his property arising from railroad use; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 592, 30 L.R.A. (N.S.) 237, 95 Pac. 224, holding abutting owner's means of access to his property cannot be cut off by building railroad in street, without compensation; *Hindley v. Manhattan R. Co.* 103 App. Div. 509, 93 N. Y. Supp. 53, on invasion of private right by use of street for elevated railway; *Potter v. Interborough Rapid Transit Co.* 54 Misc. 430, 105 N. Y. Supp. 1071, holding use of street for sub-surface or tunnel railroad proper; *Close v. Whitbeck*, 126 App. Div. 546, 110 N. Y. Supp. 717, holding no substantial damage suffered by abutting owner by reason of projecting show window on same side of street where easements of light, air, view and access not interfered with.

Annotation cited in *Little Rock & Ft. S. R. Co. v. Greer*, 77 Ark. 396, 96 S. W. 129, holding building of railroad embankment along street opposite person's premises productive of special injury to him.

Cited in footnotes to *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, which holds one erecting building acquires easement in street for light, air, and access; *Block v. Salt Lake Rapid Transit Co.* 24 L. R. A. 610, which holds abutters' rights to access, air, and light same whether fee owned by them or by city.

Cited in notes (14 L. R. A. 381) on injury to abutters' easements by railroad in street; (15 L. R. A. 377) on right to construct elevated railroad in street; (22 L.R.A. 543) on American law as to easements of light, air, and prospect; (15 L.R.A. (N.S.) 54) on cutting off access to highway as a taking; (31 Am. St.

Rep. 733) on occupation of city streets by railroads; (106 Am. St. Rep. 238, 247) on what are additional servitudes in highways.

11 L. R. A. 640, KANE v. NEW YORK ELEV. R. CO. 125 N. Y. 164, 26 N. E. 278.

Injury to abutting property by unusual use of highway.

Cited in Pappenheim v. Metropolitan Elev. R. Co. 128 N. Y. 445, 13 L. R. A. 404, 26 Am. St. Rep. 486, 28 N. E. 518, holding right to damages from construction of elevated road passes with transfer of abutting property; Bohm v. Metropolitan Elev. R. Co. 129 N. Y. 588, 14 L. R. A. 349, 29 N. E. 802, holding value of private easements taken should be measured by injury inflicted on land to which they are appurtenant; Hughes v. Metropolitan Elev. R. Co. 130 N. Y. 26, 28 N. E. 765, holding right of abutting owner to light, air, and access an appurtenance of his lot; Egerer v. New York C. & H. R. R. Co. 130 N. Y. 110, 14 L. R. A. 383, 29 N. E. 95, Reversing 70 App. Div. 422, 75 N. Y. Supp. 476, holding lot owner entitled to compensation for construction of abutment in front of premises; Buffalo v. Pratt, 131 N. Y. 299, 15 L. R. A. 416, 30 N. E. 233, sustaining award of substantial damages for taking of abutting owner's fee in street; White v. Manhattan R. Co. 139 N. Y. 23, 34 N. E. 887, holding easements in street may be extinguished by full consent of abutting owner to construction of elevated road; Eels v. American Teleph. & Teleg. Co. 143 N. Y. 140, 25 L. R. A. 644, 38 N. E. 202, holding erection of telegraph and telephone wires and poles in rural highway, burden not included in public easement; Holloway v. Delano, 64 Hun, 39, 18 N. Y. Supp. 704, holding abutting owner has easement in highway distinct from right of public to use road; Case v. Cayuga County, 88 Hun, 61, 34 N. Y. Supp. 595, holding action not maintainable by abutting owner for damages to highway, by its use by steam surface railroad; *Re One Hundred & Sixteenth Street*, 1 App. Div. 439, 37 N. Y. Supp. 508, holding city in proceeding for opening of street acquired fee in trust for use as public street; Emigrant Mission Committee v. Brooklyn Elev. R. Co. 20 App. Div. 598, 47 N. Y. Supp. 344, holding abutting owner only entitled to injunction for invasion of easements of light, air, and access; Kornder v. Kings County Elev. R. Co. 41 App. Div. 359, 58 N. Y. Supp. 518, holding abutting owner's equitable rights not barred by consent to construction of elevated road, all rights being therein expressly reserved; Sauer v. New York, 44 App. Div. 307, 60 N. Y. Supp. 648, holding municipality liable to abutting owner for erection of viaduct in street; Maitland v. Manhattan R. Co. 9 Misc. 618, 62 N. Y. S. R. 82, 30 N. Y. Supp. 428, holding abutting owner may restrain construction of third elevated track, without proof of more than nominal damages; Krumwiede v. Manhattan R. Co. 9 Misc. 553, 30 N. Y. Supp. 400, holding fee damage by construction of elevated road ascertainable by effect on rental values; Sherlock v. Kansas City Belt R. Co. 142 Mo. 182, 64 Am. St. Rep. 551, 43 S. W. 629, sustaining injunction against operation of steam railroad branch in alley, when operation would monopolize alley; Willamette Iron Works v. Oregon R. & Nav. Co. 26 Or. 229, 29 L. R. A. 91, 46 Am. St. Rep. 620, 37 Pac. 1016, holding approach 30 feet wide to toll bridge additional servitude on abutting property; Newton v. New York, N. H. & H. R. Co. 72 Conn. 427, 44 Atl. 813, holding action not maintainable by abutting owner for change in course of highway not immediately in front of his premises; Chicago G. W. R. Co. v. First M. E. Church, 50 L. R. A. 492, 42 C. C. A. 184, 102 Fed. 91, holding action maintainable by abutting property owner specially injured by unreasonable use of street by railroad company; Thompson v. Manhattan R. Co. 16 Daly, 66, 8 N. Y. Supp. 641, reversing judgment as to Metropolitan Elevated Railroad Company, enjoined from operation of road not owned by it; Knickerbocker Ice Co. v. Forty-second

Street & G. Street Ferry R. Co. 39 Misc. 36, 78 N. Y. Supp. 838, and Knickerbocker Ice Co. v. Forty-second Street & G. Street Ferry R. Co. 176 N. Y. 417, 68 N. E. 864, Affirming 85 App. Div. 540, 83 N. Y. Supp. 469, holding city without power to convey fee to part of public street for pier; Matlage v. New York Elev. R. Co. 14 Misc. 296, 35 N. Y. Supp. 704, holding abutting owner entitled to injunctive relief against maintenance and operation of elevated railroad in street; People *ex rel.* Dilzer v. Calder, 89 App. Div. 505, 85 N. Y. Supp. 1015, holding act prohibiting structures within 30 feet from sides of street unconstitutional as taking private property without compensation; De Geofroy v. Merchants' Bridge Terminal R. Co. 179 Mo. 705, 64 L. R. A. 962, footnote, p. 959, 101 Am. St. Rep. 524, 79 S. W. 386, holding use by elevated railroad of street enjoined by abutting owner until payment of compensation; Donahue v. Keystone Gas Co. 181 N. Y. 316, 70 L.R.A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108, holding abutting owner has such property in trees in street in front of but not on his property, that he can maintain action for the killing of them by gas permitted to escape from pipes in street; Sautter v. Utica City Nat. Bank, 119 App. Div. 902, 104 N. Y. Supp. 1139 (dissenting opinion), on rights of owners of premises abutting on city streets.

Cited in footnote to Aldrich v. Metropolitan West Side Elev. R. Co. 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away.

Cited in notes (14 L. R. A. 370) on injury to abutter's easements of light, air, and access by vacating street, changing grade, etc.; (14 L. R. A. 381, 383) on injury to abutters' easements by railroad in street; (22 L. R. A. 543) on American law as to easements of light, air, and prospect; (15 L.R.A.(N.S.) 54) on cutting off access to highway as a taking; (106 Am. St. Rep. 247) on what are additional servitudes in highways; (37 L. ed. U. S. 156) on damages to abutting owners in exercise of right of eminent domain.

Distinguished in Witmark v. New York Elev. R. Co. 149 N. Y. 399, 44 N. E. 78, holding evidence as to depreciation in value of other property in vicinity by operation of elevated road improper on question of damages in action by abutting owner; Baker v. Boston Elev. R. Co. 183 Mass. 184, 66 N. E. 711, upholding recovery by abutting owner for operation of elevated railroad, including noise as element of damage.

— **By operation of street railroad.**

Cited in American Bank Note Co. v. New York Elev. R. Co. 129 N. Y. 269, 29 N. E. 302, holding noise from operation of elevated road not proper element of fee damages; Messenger v. Manhattan R. Co. 129 N. Y. 504, 29 N. E. 955, holding evidence of annoyance from noise, and invasion of privacy, competent on question of rental value; Moore v. New York Elev. R. Co. 130 N. Y. 527, 14 L. R. A. 732, 29 N. E. 997, holding defendant liable for invasion of privacy, reducing rental value of property; Smith v. New York Elev. R. Co. 44 N. Y. S. R. 876, 18 N. Y. Supp. 132, and Sperb v. Metropolitan Elev. R. Co. 137 N. Y. 160, 20 L. R. A. 758, 32 N. E. 1050, Reversing 61 Hun, 542, 16 N. Y. Supp. 392, holding discharge of smoke, cinders, and gases by operation of elevated railroad proper items of damage to easements of abutting owners; Flood v. Brooklyn Elev. R. Co. 75 Hun, 603, 27 N. Y. Supp. 662, holding noise from operation of elevated road proper element of past damages to real estate; Golden v. Metropolitan Elev. R. Co. 1 Misc. 144, 48 N. Y. S. R. 726, 20 N. Y. Supp. 630, holding that record did not show that noise was made element of fee damage; Church of Holy Apostles v. New York Elev. R. Co. 21 App. Div. 48, 47 N. Y. Supp. 418, holding elevated railroad company liable to plaintiff for noise caused by running trains; American Bank Note Co. v. New York Elev. R. Co. 27 Jones & S. 184, 13 N. Y. 626, holding

right of abutting owner to equitable relief extends to operation of road; *Carswell v. Hudson Valley R. Co.* 68 Misc. 396, 125 N. Y. Supp. 24, holding that one who owns to center of street in village has no right of action in consequence of construction of street railway under proper authority; *Lentell v. Boston & W. Street R. Co.* 202 Mass. 120, 88 N. E. 765, holding trestle in street to carry street railway over tracks of railroad private nuisance to abutting owner; *Duncan v. Nassau Electric R. Co.* 127 App. Div. 254, 111 N. Y. Supp. 210, holding every resulting injury to property of abutting owner from trespass in using street for street railway considered in awarding damages in condemnation proceedings; *Potter v. Interborough Rapid Transit Co.* 54 Misc. 430, 105 N. Y. Supp. 1071, holding use of street for sub-surface or tunnel railroad proper; *Re Board of Rapid Transit R. Comrs.* 197 N. Y. 103, 36 L.R.A.(N.S.) 657, 90 N. E. 456, modifying 128 App. Div. 103, 112 N. Y. Supp. 619, holding real ground upon which abutting owner entitled to damages for physical impairment of his property by subway is fact land abuts on street and not ownership of fee in street.

Cited in footnotes to *Austin v. Augusta Terminal R. Co.* 47 L.R.A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders of railroad; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L.R.A. 959, which sustains right of abutting owner to compensation for construction of elevated railroad track in a public street.

Cited in notes (1 L.R.A.(N.S.) 119) on injury to abutter by elevated railroad; (36 L.R.A.(N.S.) 707, 737, 738, 781) on abutter's right to compensation for railroads in streets.

Distinguished in *Sauer v. New York*, 206 U. S. 551, 51 L. ed. 1183, 27 Sup. Ct. Rep. 686, distinguishing between elevated railroad of private corporation and elevated iron viaduct for purposes of public travel, as respects rights of owner of property abutting on street.

Rights of riparian owners.

Approved in *Mobile Transp. Co. v. Mobile*, 153 Ala. 419, 13 L.R.A.(N.S.) 355, 127 Am. St. Rep. 34, 44 So. 976, holding city recovering legal title to shore in ejectment as trustee cannot oust riparian owner from riparian rights by writ of possession.

Cited in *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 86, 15 L. R. A. 621, 28 Am. St. Rep. 600, 30 N. E. 654, holding riparian owner entitled to damages for exclusion from access to navigable waters by construction of railroad embankment; *Shively v. Bowlby*, 152 U. S. 21, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding donation land claim on navigable water under act of Congress, while Oregon was territory, passes no title to lands below high-water mark as against subsequent grant of state of Oregon; *Brookhaven v. Smith*, 188 N. Y. 81, 9 L.R.A.(N.S.) 328, 80 N. E. 665, 11 A. & E. Ann. Cas. 1, holding owner of upland entitled to build pier out over land under water, title to which is in town under royal grant.

Cited in notes (40 L.R.A. 600) on right of owner of upland to access to navigable water; (23 Eng. Rul. Cas. 162) on riparian owner's right of access.

Damages resulting from authorized act.

Cited in *Louisville & N. Terminal Co. v. Lelleyett*, 114 Tenn. 396, 1 L.R.A.(N.S.) 84, 85 S. W. 881, holding legislative authority to build and operate railroad, terminal yards, roundhouses, etc., does not carry with it authority to damage property not taken for such purposes; *Nelson v. New Jersey Short Line R. Co.* 73 N. J. Eq. 189, 67 Atl. 1032, holding that railroad taking land without first making compensation will not be enjoined from using land, where it did not intentionally violate law.

11 L. R. A. 646, MYGATT v. COE, 124 N. Y. 212, 26 N. E. 611.

Second appeal in 142 N. Y. 82, 24 L. R. A. 852, 36 N. E. 870.

Third appeal in 147 N. Y. 460, 42 N. E. 17, Reversing 64 N. Y. S. R. 877, 31 N. Y. Supp. 1130.

Fourth appeal in 152 N. Y. 461, 57 Am. St. Rep. 521, 46 N. E. 949.

Privity in estate.

Cited in *Van Nostrand v. Hubbard*, 35 App. Div. 202, 54 N. Y. Supp. 739, holding, on married woman entering upon land under executory contract, legal presumption is that it is her, and not her husband's possession; *Farmers' & M. Irrig. Co. v. Hill*, 90 Neb. 855, 39 L.R.A.(N.S.) 802, 134 N. W. 929, to the point that grantee is not liable on covenants unless he and plaintiff in case are privies in estate; *Deason v. Findley*, 145 Ala. 408, 40 So. 220, holding in order to recover on covenant of warranty of remote vendor, one must show he holds title by privity with immediate covenantor of such remote vendor.

Distinguished in *Mygatt v. Coe*, 142 N. Y. 82, 24 L. R. A. 852, 36 N. E. 870, holding possession, without other actual title, sufficient estate to which covenant attaches.

Covenants running with the land.

Cited in *Wright v. Phipps*, 90 Fed. 567, holding covenants of seisin and of good right to convey do not run with land; *Geiszler v. De Graaf*, 166 N. Y. 341, 82 Am. St. Rep. 659, 59 N. E. 993, holding covenant against encumbrances runs with the land.

Cited in footnotes to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land, agreement for party wall expressly declared to run with land; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land; *Doty v. Chattanooga Union R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad; *Wallace v. Pereles*, 53 L. R. A. 644, which holds conveyance by married woman of land deeded her by husband without consideration does not carry covenants in deed to husband; *Wiggins v. Pender*, 61 L. R. A. 772, which holds assignee entitled to benefit of covenant of warranty not naming him, if assigns named in habendum clause of deed.

Cited in notes (66 L.R.A. 676) on enforcement of obligation to contribute to cost of party walls, by or against grantees or successors in title; (14 L.R.A. (N.S.) 517) on right of remote grantee to sue for breach of covenant when covenantor had neither title nor possession; (53 Am. St. Rep. 118) on covenant for quiet enjoyment as running with land; (82 Am. St. Rep. 665, 670, 685, 686, 689) on what covenants run with the land; (125 Am. St. Rep. 450) on rule that on breach of covenant of seisin it becomes nonassignable chose; (126 Am. St. Rep. 371, 374) or liability of grantee on covenants and conditions in deed; (15 Eng. Rul. Cas. 251) on right of assignee to sue covenantor.

Criticized in *Clarke v. Priest*, 21 App. Div. 177, 47 N. Y. Supp. 489, Affirming 18 Misc. 502, 42 N. Y. Supp. 766, holding covenant against encumbrances passes to subsequent grantees.

Breach of covenant of seisin.

Cited in *Werner v. Wheeler*, 142 App. Div. 366, 127 N. Y. Supp. 158, holding that covenant of seisin, is broken if good title and right of possession are not in grantor at time of delivery of conveyance.

11 L. R. A. 656, *MANN v. STATE*, 47 Ohio St. 556, 26 N. E. 226.

Sufficiency of indictment.

Followed in *Smith v. State*, 1 Ohio C. C. N. S. 498, 25 Ohio C. C. 27, holding that an indictment for threatening to accuse another of crime is not sufficient where it is not alleged that the threatened charges constitute a crime.

Cited in *Whiting v. State*, 48 Ohio St. 234, 27 N. E. 96, holding count in indictment charging defendant with receiving specified stolen property, knowing it to have been stolen, sufficient; *Cohen v. State*, 37 Tex. Crim. Rep. 119, 38 S. W. 1005, holding indictment for attempted extortion must aver specific criminal offense threatened to be charged; *Du Brul v. State*, 80 Ohio St. 61, 87 N. E. 837, holding indictment charging presentation of and securing payment on false and fraudulent claim against county, defective in failing to state wherein claim was false or fraudulent or to give facts affording inference of falsity or fraudulency; *State v. Ice Delivery Co.* 5 Ohio N. P. N. S. 109, 17 Ohio S. & C. P. Dec. 531, holding that an indictment for monopolies contrary to statute, need not allege knowledge on the part of the persons engaged or aiding in such monopoly, but knowledge is essential as against an agent of the monopoly.

Extortion.

Cited in *Re Burke*, 17 Ohio C. C. 327, holding demanding and receiving money from woman by threat of exposure of illicit relations with another woman's husband, extortion; *Disbarment Proceedings v. Burke*, 17 Ohio C. C. 327, 9 Ohio D. 358, holding that where the threat of criminal prosecution is made with the intent to extort money or property not due, the knowledge of the truth or falsity of the charge made, is immaterial as to the liability of the accuser.

Cited in notes (18 L.R.A.(N.S.) 78) on efforts to collect debt as extortion; (116 Am. St. Rep. 458, 466, 467, 474) on what constitutes extortion; (40 L.R.A.(N.S.) 802) on extortion or robbery as affected by belief in right to property.

Evidence of guilt of person threatened.

Cited in *State v. Waite*, 101 Iowa, 381, 70 N. W. 596, holding evidence of guilt of person threatened with prosecution sometimes admissible on question of motive.

11 L. R. A. 661, *RANKIN v. COAR*, 46 N. J. Eq. 566, 22 Atl. 177.

Notice of title by possession.

Cited in *Marden v. Dorthy*, 12 App. Div. 198, 42 N. Y. Supp. 827, holding possession of land by woman claiming that deed was fraudulently obtained from her, consistent with apparent title in record owner where latter was her daughter and both lived together as one household; *Kirby v. Tallmadge*, 160 U. S. 387, 40 L. ed. 467, 16 Sup. Ct. Rep. 349, holding possession of land as a home by husband and wife sufficient to put purchaser upon inquiry as to their title; *Schumacher v. Truman*, 134 Cal. 432, 66 Pac. 591, holding possession of tenant of husband after divorce decree presumed to be possession of divorced wife as well as of husband where they owned the land as tenants in common; *Atlanta Nat. Bldg. & L. Asso. v. Gilmer*, 128 Fed. 297, holding occupancy by mother, of room in house with daughters, not notice to mortgagee of her equity in premises; *Geyer v. Geyer*, 75 N. J. Eq. 127, 78 Atl. 449, holding that possession by life tenant with other members of family is sufficient notice to mortgagee of premises under mortgage executed by son of life tenant who was also remainderman.

Cited in footnotes to *Rock Island & P. R. Co. v. Dimick*, 19 L.R.A. 105, which holds open and exclusive possession of passageway through railroad embankment notice of rights to purchaser of railroad; *Gibson v. Thomas*, 70 L.R.A. 768,

which holds unrecorded release of portion of property covered by mortgage by holder to mortgagor not binding on subsequent assignee of mortgage without notice.

Cited in notes (13 L.R.A.(N.S.) 78, 88, 131) on possession of land as notice of title; (104 Am. St. Rep. 352) on effect of possession of real property as notice.

Subrogation.

Cited in footnote to *Walters v. Charleston Mills*, 48 L. R. A. 503, which holds purchaser on foreclosure, voluntarily paying claim for taxes before sale affirmed, subrogated to claim for valid part of taxes.

11 L. R. A. 664, *STATE, DUKE, PROSECUTOR, v. CENTRAL NEW JERSEY TELEPH. CO.* 53 N. J. L. 341, 21 Atl. 460.

Rights of telephone companies under "telegraph" acts.

Cited in *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 32, 86 N. W. 657, and *Bradford City v. Pennsylvania & N. Y. Teleg. & Teleph. Co.* 26 Pa. Co. Ct. 340, holding telephone corporation may organize and operate under act to incorporate and regulate telegraph companies; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* 93 Tex. 319, 49 L. R. A. 460, footnote, p. 459, 77 Am. St. Rep. 884, 55 S. W. 117, holding telephone company entitled to exercise power of eminent domain as "magnetic telegraph line;" *Southern Bell Teleph. & Teleg. Co. v. Richmond*, 78 Fed. 860, holding telegraph and telephone companies entitled to post-roads rights under act of Congress; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 773, 43 L. ed. 1167, 19 Sup. Ct. Rep. 864, Reversing 28 C. C. A. 664, 42 U. S. App. 686, 85 Fed. 19, holding telephone companies not entitled to post-roads rights under act of July 24, 1866; *Central New York Teleph. & Teleg. Co. v. Averill*, 199 N. Y. 135, 32 L.R.A.(N.S.) 497, 139 Am. St. Rep. 878, 92 N. E. 206, to the point that corporation organized under statute regulating telegraph companies may condemn lands for construction of telephone lines; *Wichita v. Missouri & K. Teleph. Co.* 70 Kan. 451, 78 Pac. 886, holding telegraph and telephone companies same in character; both included under statute where only telegraph companies are specifically mentioned; *Muskogee Nat. Teleph. Co. v. Hall*, 4 Ind. Terr. 23, 64 S. W. 600, holding same principles applicable to telephone as to telegraph companies in deciding whether grant of exclusive right to construct telephone line violates interstate commerce clause of Federal constitution.

Right to erect poles and wires for electric current.

Cited in *Nicoll v. New York & N. J. Teleph. Co.* 62 N. J. L. 736, 72 Am. St. Rep. 666, 42 Atl. 583, holding right to erect telephone poles in public highway, with fee in abutting owner, only acquirable by consent or condemnation; *Old Colony Trust Co. v. Wichita*, 123 Fed. 775, questioning whether statute conferring power upon cities to grant right of way to telephone companies along street and alleys withdrew powers under prior general law; *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 534, 58 Atl. 46, holding use of land for erection and maintenance of wires by electric light and power company, public; *Western U. Teleg. Co. v. Polhemus*, 167 Fed. 232, denying right of telegraph company in New Jersey to erect additional poles to strengthen its line along highway, without consent of adjoining owners.

11 L. R. A. 667, *LOVELL v. SEEBACK*, 45 Minn. 465, 48 N. W. 23.

Constitutionality of poor laws.

Cited in footnote to *Church v. South Kingstown*, 53 L. R. A. 739, which holds

void, statutory provision for charging town with maintenance of pauper on report of unsworn committee.

11 L. R. A. 670, FOWLER v. BLACK, 136 Ill. 363, 26 N. E. 596.

Extent of interest devised.

Cited in *Wolfer v. Hemmer*, 144 Ill. 559, 33 N. E. 751, holding devise to wife, "her heirs and assigns," passes fee; *Davis v. Sturgeon*, 198 Ill. 522, 64 N. E. 1016, and *Ewing v. Barnes*, 156 Ill. 68, 40 N. E. 325, holding devise to person named and heirs passes fee under rule in *Shelley's Case*; *Silva v. Hopkinson*, 158 Ill. 388, 41 N. E. 1013, holding devise of lands to two daughters and their lawful heirs passes fee; *Palmer v. Cook*, 159 Ill. 303, 50 Am. St. Rep. 165, 42 N. E. 796, holding clause in deed "in case either of grantees die without an heir, her interest to revert to the survivor," inoperative; *Winter v. Dibble*, 251 Ill. 224, 95 N. E. 1093, to the point that declaration in deed that it was intent and meaning of instrument that grantee should hold only during his natural life and upon his death, premises should be held in fee by heirs, did not make word "heirs" word of purchase; *Ward v. Butler* (*Ward v. Todd*) 239 Ill. 467, 29 L.R.A.(N.S.) 943, 88 N. E. 189, holding intention of testator often defeated by rule in *Shelley's case*; *Kepler v. Larson*, 131 Iowa, 441, 7 L.R.A.(N.S.) 1113, 108 N. W. 1033, holding rule that where grantor retains no reversionary interest provision in restraint of alienation is void is especially true in case of conveyances within rule of *Shelley's case*.

Cited in footnotes to *Starnes v. Hill*, 22 L. R. A. 598, which holds indefeasible fee not vested in one to whom life estate given with estate in fee to his "heirs;" *Glover v. Condell*, 35 L. R. A. 360, which holds ownership of fund subject to limitation given over, by bequest to son, and over in case of death without living heirs; *Grainger v. Grainger*, 36 L. R. A. 186, which holds rule in *Shelley's Case* not applicable to devise to one for life, and after his death to heirs of his body, if any survive him, with devise over otherwise; *Wool v. Fleetwood*, 67 L.R.A. 444, which holds fee simple vested in children under provision in will that five years after life tenant's death they shall procure the property to be divided between them; *Doyle v. Andis*, 69 L.R.A. 953, which holds fee simple vested in first taker by conveyance to one "during his natural life and then to his heirs."

Cited in notes (29 L.R.A.(N.S.) 1042, 1057, 1161) on rule in *Shelley's case*; (10 Eng. Rul. Cas. 758) on creation of estate tail by gift to "heirs of the body" following gift of same subject to the *praepositus*.

Interpretation of deed or written contract.

Cited in *Dinwiddie v. Self*, 145 Ill. 304, 33 N. E. 892, holding deed conveying to woman "and her bodily heirs" should be reformed where intention was to pass fee; *Atherton v. Roche*, 192 Ill. 258, 55 L. R. A. 593, 61 N. E. 357, refusing reformation of deed for mistake in law as to heirs included in deed to husband and wife and "their bodily heirs;" *Seymour v. Bowles*, 172 Ill. 524, 50 N. E. 122, holding allegation that word "heirs" was by mistake used for "children" insufficient for reformation; *Kyner v. Boll*, 182 Ill. 184, 54 N. E. 925, holding deed may be corrected for mistake of law on part of scrivener; *Heath & M. Mfg. Co. v. National Linseed Oil Co.* 99 Ill. App. 96, holding money paid under mistake of law not recoverable; *Illinois Glass Co. v. Three States Lumber Co.* 90 Ill. App. 603; *Ballance v. Peoria*, 180 Ill. 38, 54 N. E. 428; *Wolsey v. Neeley*, 46 Ill. App. 395, — holding unambiguous written contract cannot be varied by parol testimony; *Fletcher v. Shepherd*, 174 Ill. 270, 51 N. E. 212, holding title to property passes on delivery of deed, notwithstanding verbal agreement that it is to take effect on certain conditions; *Butterfield v. Sawyer*, 187 Ill. 602, 52 L. R. A. 77,

79 Am. St. Rep. 246, 58 N. E. 602, holding deed not warranting construction that grantor using words "heirs generally" meant collateral heirs; *Deemer v. Kessinger*, 206 Ill. 62, 69 N. E. 28, holding that devise of use, benefit, and control of land to one during lifetime only, and at death to lawful heirs, passed fee; *Cameron v. Sexton*, 110 Ill. App. 386, construing deed of land, subject to "claims of any and every description," to mean claims against the land only; *Tilton v. Fairmount Lodge No. 590*, A. F. & A. M. 244 Ill. 622, 91 N. E. 644, holding that relief and no reformation of contract can be had where terms of instrument were used deliberately and knowingly by parties, even though under misapprehension of their legal effect; *Morton v. Babb*, 251 Ill. 491, 96 N. E. 279, holding that if there is no ambiguity in language of deed, which has settled legal meaning, it cannot be changed, explained or added to by oral evidence; *Fraser v. Fraser*, 128 Ill. App. 75, on denial of relief in equity against consequences of mistake of law; *Gage v. Cameron*, 212 Ill. 163, 72 N. E. 204, holding parol testimony to show intention of parties to written instrument not permissible.

Cited in footnotes to *Atherton v. Roche*, 55 L. R. A. 591, which denies power to reform deed to daughter and husband and "their" heirs, so as to include all heirs of her body; *Bigham v. Madison*, 47 L. R. A. 267, which authorizes rescission for mutual mistake as to location of boundary lines pointed out by vendor.

Cited in notes (28 L.R.A.(N.S.) 800, 809, 819) on relief from mistake of law as to effect of instrument; (55 Am. St. Rep. 515) on ignorance of one's rights as ground of relief; (65 Am. St. Rep. 487, 488; 37 L ed. U. S. 455) on reformation of contract in equity.

Disapproved in *Ryder v. Ryder*, 19 R. I. 189, 32 Atl. 919, holding mutual mistake in law as to property covered by mortgage correctable in equity.

11 L. R. A. 674, *LOUISVILLE & N. R. CO. v. WEBB*, 90 Ala. 185, 8 So. 518.

Contributory negligence at railway crossings.

Cited in *Louisville & N. R. Co. v. Richards*, 100 Ala. 366, 13 So. 944; *Glass v. Memphis & C. R. Co.* 94 Ala. 587, 10 So. 215; *East Tennessee, V. & G. R. Co. v. Kornegay*, 92 Ala. 230, 9 So. 557, — holding failure to stop, look, and listen before crossing railroad negligence; *Highland Ave. & Belt R. Co. v. Sampson*, 91 Ala. 564, 8 So. 778, holding person driving across railroad crossing without stopping to look and listen guilty of contributory negligence; *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 302, 12 So. 236, holding deceased guilty of contributory negligence in passing between cars close together at crossing; *Alabama G. S. R. Co. v. Anderson*, 109 Ala. 304, 19 So. 516, holding signal by flagman to cross relieves traveler from duty of stopping to look and listen; *Louisville & N. R. Co. v. Webb*, 97 Ala. 313, 12 So. 374, holding recovery may be had for reckless, wanton, or wilful negligence of railroad, although evidence may show contributory negligence; *Chewning v. Ensley R. Co.* 100 Ala. 495, 14 So. 204, holding involuntarily stepping backward in front of slowly approaching engine contributory negligence; *Louisville & N. R. Co. v. Stewart*, 128 Ala. 330, 29 So. 562, holding question whether plaintiff was justified in crossing on watchman's signal without looking for train, for jury; *Georgia P. R. Co. v. Lee*, 92 Ala. 267, 9 So. 230, holding question of contributory negligence for jury where person injured failed to get out of buggy and go to point where he could see track was clear, before crossing; *La Barge v. Pere Marquette R. Co.* 134 Mich. 146, 95 N. W. 1073, holding person injured by cars impelled across street with no one in control cannot recover if guilty of negligence after discovering his danger.

Cited in footnotes to *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds that failure to look and listen on dark night does not prevent recovery

for injury by engine running backward; *Betts v. Lehigh Valley R. Co.* 45 L. R. A. 261, which sustains right of person approaching crossing where train is receiving or discharging passengers to rely on rule requiring other train to stop; *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman is absent not negligence *per se*; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds that failure to look when within 30 feet of track does not prevent recovery; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence.

Cited in note (3 L.R.A.(N.S.) 196) on stepping on track in front of train running in excess of speed prescribed by ordinance as negligence.

Distinguished in *Gratiot v. Missouri P. R. Co.* 116 Mo. 464, 21 S. W. 1094, holding that one observing approaching engine has right to assume, in crossing tracks, that it is running at lawful speed.

Limited in *Central R. Co. v. Hyatt*, 151 Ala. 363, 43 So. 867, holding failure to stop, look and listen will not defeat right of recovery of injured party unless it proximately contributes to injury.

Disapproved in *Union P. R. Co. v. Rosewater*, 15 L.R.A.(N.S.) 808, 84 C. C. A. 616, 157 Fed. 172, 13 A. & E. Ann. Cas. 851, holding traveler on highway not relieved of duty to look and listen by signal of flagman or open gates.

Duty towards persons on railroad track.

Cited in *Louisville & N. R. Co. v. Hairston*, 97 Ala. 353, 12 So. 299, holding engineer not bound to be on lookout for trespassers on tracks.

Violation of ordinance as ground for private action.

Cited in note (5 L.R.A.(N.S.) 194, 201, 219, 220) on violation of police ordinance as ground for private action.

11 L. R. A. 681, *SHAW v. SMITH*, 45 Kan. 334, 25 Pac. 886.

Followed without comment on same question of law and fact in 45 Kan. 339, 25 Pac. 887.

Breach of warranty.

Cited in *Johnson v. Sproull*, 50 Mo. App. 124, sustaining judgment for defendant on note given for worthless flaxseed bought for planting; *Coyle v. Baum*, 3 Okla. 715, 41 Pac. 389, holding, on sale of oats to liveryman to feed to horses, there is implied warranty of fitness; *Diebold Safe & Lock Co. v. Huston*, 55 Kan. 110, 28 L. R. A. 56, 39 Pac. 1035, holding warranty of quality of safe not implied on sale of "fire-proof" safe; *Edgar v. Breck & Sons Corp.* 172 Mass. 583, 52 N. E. 1083, holding words of description in executory contract for sale of bulbs may be construed as warranty after sale is completed; *Queen City Glass Co. v. Pittsburg Clay Pot Co.* 97 Md. 441, 55 Atl. 447, holding warranty that clay pots would withstand heat of glass furnace implied, where sold for use in glass making; *Jones Cotton Co. v. Snead*, 169 Ala. 570, 53 So. 988, holding that contract of sale of article is not void for uncertainty, because price is not stated therein where price to be paid may be shown by competent proof; *Oil Well Supply Co. v. Watson*, 168 Ind. 611, 15 L.R.A.(N.S.) 875, 80 N. E. 157, holding cable sold for well drilling purposes, is impliedly warranted to be merchantable for such purposes, where no opportunity is afforded for inspection.

Cited in footnote to *Gardner v. Winter*, 63 L.R.A. 647, which holds one filling order for particular brand of seed by supplying kind ordered does not impliedly warrant its fitness.

Cited in notes (4 L.R.A.(N.S.) 1169) on right of buyer to retain goods and defeat action for price on discovering they do not comply with contract requirements; (37 L.R.A.(N.S.) 81, 87) on liability of vendor of seeds; (102

Am. St. Rep. 623) on implied warranty of quality; (23 Eng. Rul. Cas. 492) on implied warranty of fitness for purpose for which goods are sold.

Distinguished in *Kinkel v. Winne*, 67 Kan. 103, 62 L. R. A. 597, 72 Pac. 548, holding sale of fire-insurance expiration register does not contain warranty as to exclusiveness of information contained therein; *Ehrsam v. Brown*, 76 Kan. 217, 15 L.R.A.(N.S.) 882, 91 Pac. 179, where goods were sold and delivered on an executed contract.

Damages.

Cited in *Kent v. Halliday Bros.* 23 R. I. 187, 49 Atl. 700, holding damages recoverable from vendor where loss of crop of potatoes due to failure of quality of paris green sold.

Cited in footnotes to *Reiger v. Worth Co.* 52 L. R. A. 362, as to measure of damage from failure of seed rice to grow; *Herring v. Armwood*, 57 L. R. A. 958, which holds damage from diminution of yield from breach of contract to furnish fertilizers not too remote for recovery.

Cited in notes (18 L. R. A. 386) on measure of damages for breach of implied warranty; (22 L. R. A. 189) on implied warranty of fitness of property bought for special purpose; (52 L. R. A. 236) on loss of profits of sale or purchase as damages; (6 Eng. Rul. Cas. 626) on damages recoverable for breach of contract.

Distinguished in *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 721, 48 So. 410, where seed produced crop, but it was of inferior quality and of less value than would have been produced had warranty been complied with.

11 L. R. A. 684, *RIDDEN v. THRALL*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627.

Appeal from confirmation of appraiser's tax assessment in *Re Edwards*, 85 Hun, 437, 32 N. Y. Supp. 901.

Gifts inter vivos and causa mortis.

Cited in *Re Cornell*, 66 App. Div. 169, 73 N. Y. Supp. 32, holding gift of securities to donees, donor merely retaining income for life passes title at once to donee, so that they are not subject to transfer tax; *Bliss v. Fosdick*, 86 Hun, 173, 33 N. Y. Supp. 317, holding gift *causa mortis* revocable; *Langworthy v. Crissey*, 10 Misc. 452, 31 N. Y. Supp. 85, holding gift not made under apprehension of death from present disease of impending evil not gift *causa mortis*; *Kirk v. McCusker*, 3 Misc. 277, 22 N. Y. Supp. 780, holding drawing of money from bank by donor after delivery of books defeats gift *causa mortis*; *Rix v. Hunt*, 16 App. Div. 551, 44 N. Y. Supp. 988, upholding gift of notes *inter vivos*, delivery not being made at time of expression of intention to give, note being in possession of donee at donor's death; *Dinley v. McCullagh*, 92 Hun, 456, 36 N. Y. Supp. 1007, holding delivery of check and savings bank book not sufficient to establish gift *inter vivos*; *Wetherow v. Lord*, 41 App. Div. 414, 58 N. Y. Supp. 778, upholding gift where check for less amount than was on deposit was delivered to donee, together with bank book; *Re Spaulding*, 49 App. Div. 548, 63 N. Y. Supp. 694, holding absolute gift of securities by father in failing health, to children not taxable as gift *causa mortis*; *Snyder v. Harris*, 61 N. J. Eq. 486, 48 Atl. 329; *Tilford v. Bank for Savings*, 31 App. Div. 572, 52 N. Y. Supp. 142; *Re Taber*, 30 Misc. 182, 63 N. Y. Supp. 728; *Farian v. Wiegel*, 76 Hun, 463, 28 N. Y. Supp. 95, — holding evidence of gift not sufficiently clear and convincing; *Snook v. Sullivan*, 53 App. Div. 606, 66 Supp. 24, holding evidence of assignee, partly corroborated by his father and brother, not sufficient to establish assignment of bank stock to business agent, disclosed after assignor's death; *Re Reichert*, 38 Misc. 230, 77 N. Y. Supp. 654, holding testimony of third wife to donor as to

gift to child, together with holographic instrument making same disposition of property, sufficient to establish gift; *Rix v. Hunt*, 16 App. Div. 556, 44 N. Y. Supp. 988 (dissenting opinion), majority holding gift to niece by aged bachelor uncle, shown by evidence; *Re Manhardt*, 17 App. Div. 10, 78 N. Y. S. R. 842, 44 N. Y. Supp. 836, holding that gift *inter vivos*, asserted after donor's death, must be established by clear and convincing proof; *Loucks v. Johnson*, 70 Hun, 567, 24 N. Y. Supp. 267, upholding gift *causa mortis*, where bank book was delivered to, and accepted by, donee; *Callanan v. Clement*, 18 Misc. 625, 42 N. Y. Supp. 514, holding delivery of bank book to donee and declaration of donor that it belongs to donee, gift *causa mortis*; *Guinan's Appeal*, 70 Conn. 347, 39 Atl. 482, holding delivery of bank book with intent that donee take title, valid gift; *Whalen v. Milholland*, 89 Md. 207, 44 L. R. A. 211, 43 Atl. 45, and *Polley v. Hicks*, 58 Ohio St. 225, 41 L. R. A. 860, 50 N. E. 809, holding gift of savings bank book with words showing intent to give, valid gift of deposit; *Watson v. Watson*, 69 Vt. 245, 39 Atl. 201, holding written assignment not necessary to valid gift of savings bank book; *Larrabee v. Hascall*, 88 Me. 519, 51 Am. St. Rep. 440, 34 Atl. 408, sustaining gift where order for definite amount was made on savings bank and delivered, together with book, to donee; *Gescheidt v. Drier*, 47 N. Y. S. R. 411, 20 N. Y. Supp. 11, holding taking bank book out of wardrobe by donee at direction of donor on day of death, replacing it and putting keys under donor's pillow, not sufficient delivery; *Re Swade*, 65 App. Div. 594, 72 N. Y. Supp. 1030, holding delivery of package of valuable papers, with appropriate words of gift, a gift *causa mortis*; *Telford v. Patton*, 144 Ill. 620, 33 N. E. 1119, holding title to money deposited in bank in name of another person, depositor retaining certificate and making no declaration of trust, remains in depositor; *Crook v. First Nat. Bank*, 83 Wis. 38, 35 Am. St. Rep. 17, 52 N. W. 1131, holding certificate of deposit indorsed to donee and delivered to him with intention to give, valid gift of fund on deposit; *Leyson v. Davis*, 17 Mont. 274, 31 L. R. A. 446, 42 Pac. 775, upholding gift *causa mortis* made before going on journey for health, although donor returned and lived some time thereafter; *Reynolds v. Reynolds*, 20 Misc. 257, 45 N. Y. Supp. 338, holding gift of keys to trunk and box containing bank book, with declaration of intent to give, valid gift *causa mortis*; *Keepers v. Fidelity Title & D. Co.* 56 N. J. L. 308, 23 L. R. A. 186, 44 Am. St. Rep. 397, 28 Atl. 585, holding delivery of key to box, with declaration of intent to give contents, not sufficient delivery to constitute gift *causa mortis*; *Gilkinson v. Third Ave. R. Co.* 47 App. Div. 476, 63 N. Y. Supp. 792, holding rental of deposit box in name of donor and donee, giving to donee of one key to box, declaration of gift of securities deposited therein, donor's own securities being kept in another box, gift *inter vivos*; *Liebe v. Battmann*, 33 Or. 244, 72 Am. St. Rep. 705, 54 Pac. 179, holding indorsement of note, placing it in envelope and addressing it to another, not sufficient delivery to constitute gift; *Zeller v. Jordan*, 105 Cal. 147, 38 Pac. 640, holding check by wife to husband, with understanding it was to be paid after death, unaccompanied by delivery of pass book or order, not valid gift; *Matthews v. Hoagland*, 48 N. J. Eq. 487, 21 Atl. 1054, holding that delivery of certificate of stock without actual transfer or written assignment does not constitute gift *inter vivos*; *Blazo v. Cochrane*, 71 N. H. 587, 53 Atl. 1026, holding evidence that donor died from swallowing nitric acid sufficient to support finding that gift after previous unsuccessful attempt at suicide on same day was not valid as a gift *causa mortis*; *Deneff v. Helms*, 42 Or. 165, 70 Pac. 390, holding delivery to donee by third parties at direction of donor on day before death, of property intended as gift, valid gift *causa mortis*; *O'Neil v. O'Neil*, 43 Mont. 512, 117 Pac. 889, Ann. Cas. 1912 C, 268; *Foley v. Harrison*, 233 Mo. 561, 136 S. W. 354,—holding that gift *causa mortis* is disposition by owner who apprehending

death to be near, delivers personally to another to keep it in case of donor's decease; *Carlton v. Ryan*, 73 Misc. 605, 133 N. Y. Supp. 629, to the point that gift must be established by evidence which is plain and satisfactory; *McCoy v. McCoy*, 126 Ky. 787, 104 S. W. 1031, holding gift of money on deposit may be made by delivery of pass book whether money in savings or ordinary deposit bank; *Varley v. Sims*, 100 Minn. 338, 8 L.R.A.(N.S.) 831, 117 Am. St. Rep. 694, 111 N. W. 269, 10 A. & E. Ann. Cas. 473, holding valid gift *causa mortis* made where donor drew check in favor of donee for full amount of bank deposit and delivered same to third party for donee; *Van Wagenen v. Bonnot*, 72 N. J. Eq. 154, 65 Atl. 239, holding savings bank books are proper subjects of gifts *causa mortis* by delivery; *Augsbury v. Shurtliff*, 180 N. Y. 146, 72 N. E. 927, on nonexistence of apprehension of death from existing disease as tending to show absence of intention to make gift *causa mortis*; *O'Brien v. Elmira Sav. Bank*, 99 App. Div. 79, 91 N. Y. Supp. 364, holding valid gift *causa mortis* made where deceased ill with typhoid fever drew instrument changing savings bank account so that he or donee could draw money, delivered pass book and instrument to donee and declared if anything happened to him he wanted donee to have the money; *McGuire v. Murphy*, 107 App. Div. 106, 94 N. Y. Supp. 1005, holding fund in savings bank irrevocably transferred by symbolic delivery of deposit evidenced by pass book with order for full amount payable on production of book; *Tompkins v. Leary*, 134 App. Div. 122, 118 N. Y. Supp. 810, holding proof not sufficiently clear, convincing and cogent to establish gift of securities *inter vivos*; *Re Van Derzee*, 66 Misc. 403, 121 N. Y. Supp. 662, holding evidence of gift of mortgage sufficient where donor indorsed same with statement it was given to donee, and handed papers to third party as requested by donee; *Hill v. Escort*, 38 Tex. Civ. App. 490, 86 S. W. 367, holding delivery of savings bank pass book with order for payment of whole deposit for purpose of transferring money to donee is valid gift, though book and order not presented at bank till after donor's death; *Williams's Estate*, 11 Pa. Dist. R. 638, sustaining gift of deposit in savings bank by father to son where father delivered bank book to son with words showing intent to give and directed bank to make funds subject to son's order in case of death or accident to father; *Phinney v. State*, 36 Wash. 251, 68 L.R.A. 125, 78 Pac. 927, holding valid gift *causa mortis* of decedent's estate made where decedent had check drawn in favor of donee for nearly all of his estate, and check was handed to donee with statement by decedent that he wanted donee to have his money if he did not get over his illness; *McDonald v. McDonald*, 33 Can. S. C. 171 (dissenting opinion), on laws regulating gifts *causa mortis* and range of such gifts.

Cited in footnotes to *Hatcher v. Buford*, 27 L. R. A. 507, which holds gift *causa mortis* does not take away wife's right to distributive interest; *Peck v. Rees*, 13 L. R. A. 714, which holds delivery of deed by donor to own agent insufficient.

Cited in notes (18 L. R. A. 171) on sufficiency of constructive delivery to sustain gift *causa mortis*; (19 L. R. A. 700) on delivery of bank book to sustain gift of money in bank; (99 Am. St. Rep. 903, 907, 917) on gifts *causa mortis*; (9 Eng. Rul. Cas. 863, 864, 865) on requisites of *donatio causa mortis*.

Transfer of funds in savings bank.

Cited in *Drefahl v. Rabe*, 132 Iowa, 572, 107 N. W. 179, on transfer of funds in savings bank by delivery of deposit books.

Cited in note (105 Am. St. Rep. 744) on duties of savings banks toward depositors.

11 L. R. A. 689, SPOKANE TRUCK & DRAY CO. v. HOEFER, 2 Wash. 45, 26 Am. St. Rep. 842, 25 Pac. 1072.

Measure of damages.

Cited in Willson v. Northern P. R. Co. 5 Wash. 624, 32 Pac. 468, holding injury to feelings for wrongful expulsion from car, element of compensatory damages.

Cited in note (17 L. R. A. 72, 73) on measure of recovery for death caused by negligence.

— Exemplary damages.

Cited in Atrops v. Costello, 8 Wash. 152, 35 Pac. 620, holding exemplary damages not recoverable in action by parent for death of child, under Code, § 139; Donovan v. Manhattan R. Co. 1 Misc. 370, 21 N. Y. Supp. 457, holding master not liable in punitive damages for wilful tort of servant, unauthorized and unratified; Levy v. Fleischner, 12 Wash. 17, 40 Pac. 384, holding exemplary damages not recoverable in action on attachment bond; Atchison, T. & S. F. R. Co. v. Townsend, 71 Kan. 531, 81 Pac. 205, 6 A. & E. Ann. Cas. 191, holding exemplary damages not recoverable in action for wrongfully causing death, unless allowed by statute; Woodhouse v. Powles, 43 Wash. 622, 8 L.R.A.(N.S.) 787, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 A. & E. Ann. Cas. 54, holding punitive or exemplary damages not recoverable in Washington unless provided for by statute; McGill v. Fuller, 45 Wash. 618, 88 Pac. 1038, holding instruction allowing recovery of punitive damages in action for wrongfully suing out writ of attachment, erroneous.

Cited in notes (29 L.R.A.(N.S.) 282) on exemplary damages in action for malicious prosecution or abuse of process in suing out attachment for collection of debt only; (59 Am. St. Rep. 590) on exemplary damages against corporations; (8 Eng. Rul. Cas. 376) on right to punitive damages.

Distinguished in Seattle Crochery Co. v. Haley, 6 Wash. 313, 36 Am. St. Rep. 156, 33 Pac. 650, and Sloan v. Langert, 6 Wash. 29, 32 Pac. 1015, holding exemplary damages recoverable for malicious attachment; Woldson v. Larson, 90 C. C. A. 422, 164 Fed. 549, holding exemplary damages recoverable in action for alienating wife's affections, where question of their recovery is controlled by principles of general jurisprudence; Ott v. Press Pub. Co. 40 Wash. 312, 82 Pac. 403, holding evidence of surrounding circumstances in mitigation of damages caused by libel, admissible under statute, where damages for mental suffering and injury to business is claimed by plaintiff.

Liability for personal injuries.

Cited in Hannan v. Gross, 5 Wash. 703, 32 Pac. 787, holding nonsuit improper where plaintiff in action for assault and battery was struck, choked, and kicked black and blue.

11 L. R. A. 693, FRONT STREET CABLE R. CO. v. JOHNSON, 2 Wash. 112, 25 Pac. 1084.

Right to mechanic's lien.

Cited in Vincent v. Snoqualmie Mill Co. 7 Wash. 575, 35 Pac. 396, holding lien notice defective in not alleging that defendant had any interest in the land covered; Massillon Bridge Co. v. Cambria Iron Co. 59 Ohio St. 187, 52 N. E. 192, holding mechanic's lien statute relating to railroads not applicable to street railroads; Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. 55, 59 U. S. App. 403, 88 Fed. 597, holding Montana mechanic's lien statute applying to "any railway corporation" does not include street railroads; Pacific Rolling Mills Co. v. James Street Constr. Co. 16 C. C. A. 71, 29 U. S. App. 698, 68 Fed. 968, holding, under

Washington statute, material man cannot acquire lien upon street railway structure in streets.

Cited in note (62 L. R. A. 371) on mechanics' liens upon buildings distinct from the land.

Street railway as railroad.

Cited in *Bammel v. Kirby*, 19 Tex. Civ. App. 200, 47 S. W. 392, holding that words "any railroad" in statutes giving right of action for death through negligence include street railroads; *Railroad Comrs. v. Market Street R. Co.* 132 Cal. 683, 64 Pac. 1065, holding railroad commissioners without jurisdiction over street railways in municipality; *Savannah T. & I. of H. R. Co. v. Williams*, 117 Ga. 416, 61 L.R.A. 250, footnote p. 249, 43 S. E. 751, holding chartered street railroad a railroad company within statute as to liability for negligence of fellow servant; *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 621, 23 L.R.A.(N.S.) 715, 85 N. E. 954, as to application to street railroads of statute making every railroad corporation liable for damages for personal injury suffered by any employee while in its service; *State ex rel. Greffet v. Williams*, 227 Mo. 52, 127 S. W. 52 (dissenting opinion), on difference between railroad and street railroad in both technical and popular sense; *Omaha & C. B. St. R. Co. v. Interstate Commerce Commission*, 179 Fed. 244, holding Interstate Commerce Commission has no power to regulate rates of street car companies operating across state lines, under act of Congress to regulate commerce and amendments thereto.

Cited in footnote to *Diebold v. Kentucky Traction Co.* 63 L.R.A. 637, which holds an electric railway for carrying of passengers and freight between cities in different states a trunk railway within exception of such railways from constitutional prohibition against granting franchises to other than the highest bidder.

Nature of railroad as realty or personalty.

Cited in note (66 L.R.A. 36) on nature of railroad as realty or personalty.

11 L. R. A. 694, *BION'S APPEAL*, 59 Conn. 372, 20 Atl. 662.

Habeas corpus and certiorari.

Cited in *State ex rel. Jackson v. Kennie*, 24 Mont. 53, 60 Pac. 589, holding order dismissing writ of certiorari, applied for at same time as writ of habeas corpus, appealable; *Scott v. Spiegel*, 67 Conn. 358, 35 Atl. 262, holding regular rules of pleading, so far as applicable, apply where mittimus signed by justice of peace is made part of return to habeas corpus writ; *Young v. Fain*, 121 Ga. 740, 49 S. E. 731, holding court hearing writ of habeas corpus cannot go behind judgment of magistrate either to correct error in rulings during trial of peace warrant proceedings or to ascertain from evidence if probable cause existed for requiring bond to keep peace.

Cited in footnotes to *Turner v. Conkey*, 17 L. R. A. 509, which denies habeas corpus to release one committed on preliminary examination by justice erroneously denying motion for change; *Stoutenburgh v. Frazier*, 48 L. R. A. 220, which authorizes discharge on habeas corpus from sentence under unconstitutional or indefinite act of Congress; *Ex parte Miskimins*, 49 L. R. A. 831, which authorizes release by habeas corpus of witness punished for refusal to answer incriminating questions.

Cited in note (23 Am. St. Rep. 109) on collateral attack upon judgment by habeas corpus.

Disqualification of justice of peace.

Cited in *Yudkin v. Gates*, 60 Conn. 429, 22 Atl. 776, holding justice of peace,

who was attorney and bondsman in action against defendant, disqualified from signing mittimus committing defendant to jail.

11 L. R. A. 700, KUHN v. BROWNFIELD, 34 W. Va. 252, 12 S. E. 519.

Care and skill required of physician or surgeon.

Cited in *Lawson v. Conaway*, 37 W. Va. 163, 18 L. R. A. 629, 38 Am. St. Rep. 17, 16 S. E. 564, holding surgeon not bound to use highest degree of skill, nor negligent because cure not effected; *Tompkins v. Pacific Mut. L. Ins. Co.* 53 W. Va. 491, 62 L. R. A. 495, 97 Am. St. Rep. 1006, 44 S. E. 439, holding insurance company liable for injury resulting from negligent examination of foot of policy holder by its physician; *Dye v. Corbin*, 59 W. Va. 270, 53 S. E. 147, holding evidence insufficient to sustain verdict for plaintiff in action to recover damages for negligence in treating injured ankle, physician not being an insurer of success of treatment under the general rule requiring exercise of the same skill and diligence as is ordinarily possessed by other practitioners in good standing, in same general line of practice.

Cited in notes (37 L.R.A. 832) on degree of care and skill which physician or surgeon must exercise; (93 Am. St. Rep. 658) on liability of physicians and surgeons for negligence and malpractice.

Rule as to amendments.

Cited in *Goodman v. Henry*, 42 W. Va. 532, 35 L. R. A. 849, 26 S. E. 528, as to whether amendment to affidavit of attachment can be made to prejudice of second lien; *Clarke v. Ohio River R. Co.* 39 W. Va. 739, 20 S. E. 696, holding declaration for failure to build fences and guards amendable by adding other places than those specified; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 743, 23 S. E. 584, holding amendment claiming larger damages or on additional property in action on insurance policy, proper; *Cleavenger v. Franklin F. Ins. Co.* 47 W. Va. 607, 35 S. E. 998, holding amended bill alleging that no application was made for insurance policy, as averred in original bill, properly allowed; *Bird v. Stout*, 40 W. Va. 48, 20 S. E. 852, sustaining amendment as to parties and prayer for relief, not a departure from original cause; *National Bank v. Lynch*, 69 W. Va. 334, 71 S. E. 389, holding that declaration may be amended, in form, or in substance so long as identity of cause of action is preserved; *Wise v. Ottrim*, 139 Iowa, 198, 130 Am. St. Rep. 301, 117 N. W. 264, holding amendment changing claim from one upon implied to one upon express contract does not set up such new claim or cause of action as would permit intervention of statute of limitations where period has expired since filing of original claim; *Staats v. Georgia Home Ins. Co.* 57 W. Va. 575, 50 S. E. 815, 4 A. & E. Ann. Cas. 541, holding new case not made by allowing amendment of one copy of insurance policy to conform to another; *Ritchie County Bank v. Bee*, 62 W. Va. 462, 59 S. E. 181, holding plaintiff suing on renewal note may amend and set up original note, when plea of non est factum is filed by defendant; *Hanson v. Blake*, 63 W. Va. 564, 60 S. E. 589, holding a declaration against an administrator wherein allegations were directly against defendant amendable to show claim upon decedent's estate.

Cited in footnote to *Love v. Southern R. Co.* 55 L. R. A. 471, which sustains right to file new declaration after limitation period has elapsed, naming statutory beneficiaries in action for death.

Cited in note (39 L. ed. U. S. 984) on amendment of pleading as affecting statute of limitations.

Computation of time.

Cited in footnotes to *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for ap-

pearance; *McGinn v. State*, 30 L. R. A. 450, which defines calendar month as period terminating with day of succeeding month corresponding to day of beginning, less one.

11 L. R. A. 705, *BLOSE v. BEAR*, 87 Va. 177, 12 S. E. 294.

Homestead exemptions.

Cited in note (34 Am. St. Rep. 497) on judgment liens on homesteads.

Distinguished in *Wilkinson v. Merrill*, 87 Va. 520, 11 L. R. A. 634, 12 S. E. 1015, holding homestead exemption does not cease on subsequent death of family.

11 L. R. A. 706, *HAUK v. ALLEN*, 126 Ind. 568, 25 N. E. 897.

Proof of misconduct of jury.

Cited in *Reed v. State*, 147 Ind. 49, 46 N. E. 135, holding that jurors cannot impeach their own verdict; *Treschman v. Treschman*, 28 Ind. App. 221, 61 N. E. 961, and *Hutchins v. State*, 151 Ind. 674, 52 N. E. 403, holding affidavit of misconduct of jury, on information and belief, without statement of source, insufficient; *Oster v. Broe*, 161 Ind. 123, 64 N. E. 918, holding testimony of jurors inadmissible to show matters taken into consideration by them on trial of action; *Weil v. Stone*, 33 Ind. App. 119, 104 Am. St. Rep. 243, 69 N. E. 698, holding affidavits of jurors showing their own misconduct will not avail in support of motion for new trial.

Annotation cited in *Southern Nevada Gold & S. Min. Co. v. Holmes Min. Co.* 27 Nev. 150, 103 Am. St. Rep. 759, 73 Pac. 759, on rule that affidavits of jurors are not receivable to impeach their verdicts.

Cited in note (31 L. R. A. 489) on right of jurors to act on their own knowledge of facts in, or relevant to, issue.

Cited as overruled in *Indianapolis Traction & Terminal Co. v. Miller*, 43 Ind. App. 723, 88 N. E. 526, holding attorney's affidavit of misconduct of jury in arriving at average or quotient verdict insufficient to support motion for new trial, if source or manner of acquisition of affiant's knowledge is not stated.

Compromise verdicts.

Cited in *Southern Ins. Co. v. White*, 58 Ark. 283, 24 S. W. 425, and *Richardson v. Coleman*, 131 Ind. 213, 31 Am. St. Rep. 429, 29 N. E. 909, holding instruction permitting compromise verdict erroneous; *Chicago & I. Coal R. Co. v. McDaniel*, 134 Ind. 173, 32 N. E. 728, holding quotient verdict illegal.

Prejudicial error.

Cited in *Morningstar v. Musser*, 129 Ind. 471, 28 N. E. 1119, holding that prejudicial error must be affirmatively shown for reversal for admission of incompetent evidence not in record.

11 L. R. A. 708, *METROPOLITAN L. INS. CO. v. MCCOY*, 124 N. Y. 47, 26 N. E. 345.

Estoppel to deny sufficiency of seals or validity of bonds.

Cited in *Beattys v. Solon*, 64 Hun, 123, 19 N. Y. Supp. 37, upholding validity of bonds, although not issued with seals in conformity to requirements of statute; *Lyman v. Brucker*, 26 Misc. 597, 56 N. Y. Supp. 767, holding that obligors to liquor bond may be estopped from questioning its validity; *Rusling v. Union Pipe & Constr. Co.* 5 App. Div. 449, 39 N. Y. Supp. 216, holding instrument reciting that it is under seal, sufficient, though sealed by only one of the parties; *McClure v. Supreme Lodge, K. of H.* 41 App. Div. 139, 59 N. Y. Supp. 764, holding that court must conclude seal was attached to benefit certificate, where copy of certificate recites that it was affixed; *Ivy Courts Realty Co. v. Barker*, 71 Misc. 461, 128 N. Y. Supp. 715, to the point that recital in instrument that it is sealed

and acceptance of instrument in good faith estops obligor from denying that instrument is sealed.

11 L. R. A. 710, *JAFFRAY v. DAVIS*, 124 N. Y. 164, 26 N. E. 351.

Accord and satisfaction.

Cited in *Jackson v. Volkening*, 81 App. Div. 43, 80 N. Y. Supp. 1102, and *Nasoiy v. Tomlinson*, 148 N. Y. 329, 51 Am. St. Rep. 695, 42 N. E. 715, holding acceptance of check given by debtor in full of disputed account, accord and satisfaction; *Fuller v. Kemp*, 40 N. Y. S. R. 674, 16 N. Y. Supp. 158, holding mere use of proceeds of check sent by debtor with letter stating that it is in full settlement of claim, not accord and satisfaction; *Blackwell v. Bainbridge*, 47 N. Y. S. R. 135, 19 N. Y. Supp. 681, holding sureties on bond for costs released by accord and satisfaction of judgment against principal; *Stuber v. McEntee*, 47 N. Y. S. R. 299, 19 N. Y. Supp. 900, holding payment of all expenses of death of intestate to persons afterwards appointed administrators, accord and satisfaction; *Freiberg v. Moffett*, 91 Hun, 20, 36 N. Y. Supp. 95, holding retaining proceeds of draft sent by debtor, with statement that it is given in full settlement of disputed account, accord and satisfaction; *Re Corbett*, 90 Hun, 185, 35 N. Y. Supp. 945, holding defects in answer setting up accord and satisfaction of debt against estate waived by failure of creditors to object in surrogate's court; *Re Hodgman*, 11 App. Div. 352, 42 N. Y. Supp. 1004, holding receipts for certain sums of money, signed by residuary legatees in full for all claims against estate, accord and satisfaction; *Lee v. Timkin*, 23 App. Div. 350, 48 N. Y. Supp. 251, holding acceptance of \$4,000 in cash, accord and satisfaction of agreement to pay off \$10,000 mortgage on acceptor's house; *Strauss v. Trotter*, 6 Misc. 79, 26 N. Y. Supp. 20, holding acceptance of indorsed note in satisfaction of debtor's existing indebtedness, accord and satisfaction; *Schmidt v. Livingston*, 16 Misc. 556, 38 N. Y. Supp. 746, holding part payment by payee of note to holder, and giving of note for balance, original note not being surrendered, not accord and satisfaction as to maker; *Nathan v. Smith*, 24 Misc. 375, 53 N. Y. Supp. 265, holding settlement of pending action and right of action by payment of costs and giving of note, accord and satisfaction; *West v. Banigan*, 51 App. Div. 332, 64 N. Y. Supp. 884, holding settlement of action on notes by acceptance of new notes with indorsement, accord and satisfaction; *Shanley v. Koehler*, 80 App. Div. 570, 80 N. Y. Supp. 679, holding acceptance by creditor in full satisfaction of judgment, of lesser sum than amount thereof, not accord and satisfaction; *Simons v. Supreme Council*, A. L. of H. 82 App. Div. 619, 81 N. Y. Supp. 1014, holding acceptance of lesser amount than face of benefit certificate by beneficiary, to which there was no defense, not accord and satisfaction; *Stacy v. Cook*, 62 Kan. 55, 61 Pac. 399, holding right of set-off waived by acceptance of mortgage securing the larger indebtedness with promise to pay mortgagor's claim in cash; *Slade v. Mutrie*, 156 Mass. 21, 30 N. E. 168, holding delivery of promissory note by holder to maker, with intention of transferring title, extinguishment of debt; *Winter v. Kansas City Cable R. Co.* 73 Mo. App. 191 (dissenting opinion), Affirmed in 160 Mo. 180, 61 S. W. 606, majority holding liquidated debt not discharged by part payment made in full satisfaction, but without consideration; *Henson v. Stever*, 69 Mo. App. 140, holding compromise of other differences and release of damages for trespass, sufficient consideration to support accord and satisfaction; *Chicago, M. & St. P. R. Co. v. Clark*, 35 C. C. A. 126, 92 Fed. 979, holding payment by debtor of liquidated amount due not sufficient consideration for release of other unliquidated claims; *Providence Albertype Co. v. Kent & S. Co.* 19 R. I. 564, 35 Atl. 152, holding that agreement to accept compromise settlement may be withdrawn before acceptance; *Shelton v. Jackson*, 20 Tex. Civ. App. 446, 49 S. W. 415, holding insolvency of principal and surety

of bond sufficient consideration to support part payment in full satisfaction; *Kerr v. Topping*, 109 Iowa, 155, 80 N. W. 321, holding securing debt sufficient consideration for agreement of creditor to accept lesser amount in satisfaction; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 366, 44 L. ed. 1106, 20 Sup. Ct. Rep. 924, holding that receipt of sum by contractor in full settlement of disputed claim against railroad barred action to recover anything thereon; *Carpenter v. Chicago, M. & St. P. R. Co.* 7 S. D. 587, 64 N. W. 1120, holding executed agreement and acceptance of specified consideration must be shown to establish plea of accord and satisfaction; *Lincoln Sav. Bank & S. D. Co. v. Allen*, 27 C. C. A. 90, 49 U. S. App. 498, 82 Fed. 151, holding agreement of creditor to accept specified sums and part of collateral notes, amounting in all to less than debt, enforceable; *Continental Nat. Bank v. McGeoch*, 92 Wis. 314, 66 N. W. 606, holding agreement between insolvent firm and creditors, "in consideration of prompt settlement and to avoid litigation," to accept lesser amount than face of claims in settlement, accord and satisfaction; *Herman v. Schlesinger*, 114 Wis. 401, 91 Am. St. Rep. 922, 90 N. W. 460, holding conveyance of title to collateral, or waiver of benefit under bankruptcy laws, sufficient consideration to support settlement of indebtedness by part payment; *Williams v. Blumenthal*, 27 Wash. 27, 67 Pac. 393, holding acceptance of lesser amount than face of judgment, right of appeal being waived, valid accord and satisfaction; *Rothschild v. Mosbacher*, 26 App. Div. 170, 49 N. Y. Supp. 698 (concurring opinion), holding acceptance of check, debtor stating he would pay no more, creditor saying he would take it in part payment and sue, not accord and satisfaction; *Morrill v. Baggott*, 157 Ill. 244, 41 N. E. 639 (dissenting opinion), majority holding acceptance of less than fixed amount of indebtedness, paid in labor and materials, not accord and satisfaction; *Lewis v. Donohue*, 27 Misc. 516, 58 N. Y. Supp. 319, holding agreement to accept lesser sum than due, on surrender of lease and abandonment of defense, binding; *Meeker v. Requa*, 94 App. Div. 302, 87 N. Y. Supp. 959, holding judgment satisfied by payment of portion of amount thereof with exempt moneys, under agreement to take same in full settlement; *Schwartzman v. Post*, 94 App. Div. 477, 87 N. Y. Supp. 872, holding owner surrendering note to maker upon part payment, with promise to pay balance, precluded from maintaining action thereon; *Re Freeman*, 117 Fed. 686, holding acceptance of part of judgment debt in full settlement to prevent appeal, good accord and satisfaction; *Dreyfus v. Roberts*, 75 Ark. 360, 69 L.R.A. 825, 112 Am. St. Rep. 67, 87 S. W. 641, 5 A. & E. Ann. Cas. 521, holding satisfaction of judgment of more than \$1600 for \$200, evidenced by written receipts, binding; *Dalby v. Lauritzen*, 98 Minn. 77, 107 N. W. 826, on sufficiency of benefit or legal possibility of benefit to creditor thrown in to support satisfaction of larger debt by smaller sum; *Tucker v. Dolan*, 109 Mo. App. 452, 84 S. W. 1126, holding that while debt is not discharged by taking of less for greater sum slight consideration would be sufficient to support an agreement to that effect; *First Nat. Bank v. Gridley*, 112 App. Div. 403, 98 N. Y. Supp. 445, holding at common law in absence of fraud or mistake alleged and proven, cancelation and surrender of obligation by obligee operates as release of liability thereon.

Annotation cited in *Knights Templars & M. Life Indemnity Co. v. Crayton*, 209 Ill. 558, 70 N. E. 1066, affirming 110 Ill. App. 656, holding where insurance policy provided in case assured should die from cause other than suicide, insurer would pay certain sum and assessments, payment to guardian of amount of assessments and release by him did not discharge insurer from liability for the other sum.

Cited in footnote to *Dreyfus v. Roberts*, 69 L.R.A. 823, which holds debt discharged by payment of less than is due on full execution of agreement to that effect evidenced by written receipt in full satisfaction.

Cited in notes (20 L.R.A. 791) on accord and satisfaction by part payment; (1 Eng. Rul. Cas. 391) on part payment as accord and satisfaction.

Distinguished in *McKenzie v. Harrison*, 120 N. Y. 265, 8 L. R. A. 258, 17 Am. St. Rep. 638, 24 N. E. 458, holding parol agreement, without consideration, reducing rent provided by lease, valid so far as executed, invalid so far as unexecuted; *Bandman v. Finn*, 185 N. Y. 512, 12 L.R.A.(N.S.) 1136, 78 N. E. 175, where creditor holding unmatured and contingent obligation agreed with debtor for its surrender.

Disapproved in *Frey v. Hubbell*, 74 N. H. 366, 17 L.R.A.(N.S.) 1202, 68 Atl. 325, holding ruling that payment and acceptance of sum less than amount due in full satisfaction and discharge of debt is no defense to collection of balance, erroneous.

11 L. R. A. 715, *FOSDICK v. HEMPSTEAD*, 125 N. Y. 581, 26 N. E. 801.

Motion for reargument denied in 126 N. Y. 651, 27 N. E. 382.

Trusts for charitable uses.

Cited in *Pratt v. Roman Catholic Orphan Asylum*, 20 App. Div. 354, 46 N. Y. Supp. 1035, holding bequest of \$1,000 to poor of incorporated church invalid for indefiniteness; *Allen v. Stevens*, 161 N. Y. 140, 55 N. E. 568, Reversing 33 App. Div. 499, 54 N. Y. Supp. 8, Which Reversed 22 Misc. 165, 49 N. Y. Supp. 431, holding trust attempted to be created by will invalid for indefiniteness, validated by statute of 1893; *Re Botsford*, 23 Misc. 391, 52 N. Y. Supp. 238, holding bequest for support and relief of widows and fatherless and orphan children of town void for indefiniteness; *Bird v. Merkle*, 144 N. Y. 551, 27 L. R. A. 425, footnote p. 423, 39 N. E. 645, Reversing 75 Hun, 78, 26 N. Y. Supp. 1021, holding bequest to churches to buy coal for poor, direct gift to churches; *Hope v. Brewer*, 136 N. Y. 136, 18 L. R. A. 462, 48 N. Y. S. R. 838, 32 N. E. 558, upholding trust valid in Scotland where gift was to take effect, though void for indefiniteness in New York; *Fairchild v. Edson*, 154 N. Y. 212, 61 Am. St. Rep. 609, 48 N. E. 541, and *People v. Powers*, 147 N. Y. 109, 35 L. R. A. 504, 41 N. E. 432, Reversing 83 Hun, 455, 29 N. Y. Supp. 950, Which Affirmed 8 Misc. 633, 29 N. Y. Supp. 950, holding trust for benefit of benevolent institutions of city unenforceable for indefiniteness; *Wilcox v. Gilchrist*, 85 Hun, 12, 32 N. Y. Supp. 608, holding trust without certain beneficiary void; *Beecher v. Yale*, 79 N. Y. S. R. 623, 45 N. Y. Supp. 622, holding trust for erection of monument, without provision as to how or by whom to be carried out, void; *Simmons v. Burrell*, 8 Misc. 395, 28 N. Y. Supp. 625, holding trust for purchase of materials for garments for poor children void; *Re Sturges*, 28 Misc. 111, 59 N. Y. Supp. 783, holding trust, invalid under New York laws, but valid in Massachusetts where it was to take effect, not enforceable in New York; *Re Griffin*, 167 N. Y. 79, 60 N. E. 284, construing provision in will apparently creating trust, as absolute gift to beneficiary within intent of testator; *Congregational Unitarian Soc. v. Hale*, 29 App. Div. 401, 51 N. Y. Supp. 704, holding that bequest to legatee, with directions as to investment and application, does not create trust; *Re Crane*, 12 App. Div. 275, 42 N. Y. Supp. 904, upholding bequest to city of New York to erect drinking fountain; *Re Williams*, 1 Misc. 443, 1 Power, 417, 23 N. Y. Supp. 150, holding trust without limitation of suspension of absolute ownership of testator's property, except on certain contingencies, void; *Brennan v. Winkler*, 37 S. C. 463, 16 S. E. 190, holding trust for education of young men to priesthood, or to educate individual orphan boys or orphan girls, void; *McHugh v. McCole*, 97 Wis. 178, 40 L. R. A. 728, 72 N. W. 631, holding trusts for benefit of Roman Catholic Church and for masses void; *Atwater v. Russell*, 49 Minn. 83, 51 N. W. 629, upholding gift to hospital for support of charity patients therein; *Cone v. Wold*, 85 Minn. 309, 88 N. W. 977, holding, on failure

of resulting trust, funds given reverted to donor; *Danforth v. Oshkosh*, 119 Wis. 278, 97 N. W. 258, holding that devise of land to city absolutely, to be used perpetually as site for public library, passed fee; *Re Botsford*, 2 Gibbons Sur. Rep. 431, holding that bequest to supervisor of town and successors to use income for support of widows and orphan children in town, as supervision shall deem proper, is void for indefiniteness; *Re Compton*, 72 Misc. 293, 131 N. Y. Supp. 183, holding that bequest to individual to be used "in Lord's work" does not sufficiently indicate charitable purpose to which testator desired to apply gift; *Robb v. Washington & J. College*, 103 App. Div. 352, 93 N. Y. Supp. 92, holding charitable corporation cannot act as trustee in matter in which it has no interest, but where it has interest in principal or income, it may act as trustee for another or others having interest in whole or part of income for life; *Johnston v. Hughes*, 112 App. Div. 527, 98 N. Y. Supp. 525, holding gift for use of Blessed Virgin Mary Purgatorial Fund of hospital not within purposes of corporation for gratuitous care of sick, aged, infirm and poor; *Re Seymour*, 67 Misc. 350, 124 N. Y. Supp. 637, holding bequest to person to be used in the Master's work ineffectual to create trust; *Hubbard v. Worcester Art Museum*, 194 Mass. 289, 9 L.R.A. (N.S.) 694, 80 N. E. 490, 10 A. & E. Ann. Cas. 1025, on unfavorableness of policy of state of New York in regard to charities.

Cited in footnote to *Thompson v. Brown*, 62 L. R. A. 398, which upholds devise of fund to be distributed by executor "to the poor," in his discretion.

Cited in notes (13 L. R. A. 217) on right of municipal corporation to take and administer property in trust for charitable uses; (14 L. R. A. 70) on municipal corporation as trustee of charity; (64 Am. St. Rep. 761, 769) on certainty and unity required in charitable trusts; (14 L.R.A. (N.S.) 112, 119, 126) on enforcement of general bequest for charity or religion; (5 Eng. Rul. Cas. 578) on invalidity of charitable bequests for indebtedness.

Distinguished in *Loch v. Mayer*, 50 Misc. 445, 100 N. Y. Supp. 837, holding donations for relief of suffering incident to excursion steamer disaster within rule as to definiteness of beneficiaries, statute controlling application of doctrine of cy pres being applicable to such gift.

Other trusts.

Cited in *Holmes v. Walter*, 118 Wis. 421, 62 L. R. A. 991, 95 N. W. 380, holding valid trust created by devise to wife in trust for herself and children.

Cited in note (82 Am. St. Rep. 513) on effect of writings in favor of "trustee" without indicating beneficiary or terms of trust.

11 L. R. A. 720, *BURBANK v. ILLINOIS C. R. CO.* 42 La. Ann. 1156, 8 So. 580.

Dangerous platforms, wharves, and bridges.

Cited in *De Gruy v. Aiken*, 43 La. Ann. 804, 9 So. 747, holding lessee of public wharf not liable for injury to person through defect not known to him; *Lawson v. Shreveport Waterworks Co.* 111 La. 85, 35 So. 390 (dissenting opinion), majority holding that one inviting public to use defective highway bridge liable for resulting injury.

Cited in note (20 L. R. A. 529) as to whom railroad owes duty of keeping station platforms safe.

Distinguished in *Atchison, T. & S. F. R. Co. v. Cogswell*, 23 Okla. 184, 20 L.R.A. (N.S.) 839, 99 Pac. 923, holding railroad liable to person injured by falling into hole in station platform, having gone to station to meet incoming passenger on business.

Assumed risks of dangerous way.

Cited in *Settoon v. Texas & P. R. Co.* 48 La. Ann. 810, 19 So. 759, holding traveler assumes risk of taking more dangerous of two routes open to him

Definition of "passenger."

Cited in footnote to *Woolsey v. Chicago, B. & Q. R. Co.* 25 L. R. A. 79, which holds person riding on freight locomotive without conductor's consent not a passenger.

Wilful, wanton negligence.

Cited in *McGuire v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1556, 16 So. 457 (dissenting opinion), majority holding defendant liable for negligent injury notwithstanding contributory negligence of person injured; *Peterson v. South Western R. Co.* 143 N. C. 265, 8 L.R.A. (N.S.) 1244, 118 Am. St. Rep. 799, 55 S. E. 618, holding railroad not liable to person entering car to buy lemons, and injured by being thrown to ground by jerking of train in starting, where not guilty of wanton injury.

Responsibility for unsafe condition or negligent use of premises.

Cited in *Monroe v. Atlantic Coast Line R. Co.* 151 N. C. 376, 27 L.R.A. (N.S.) 194, 66 S. E. 315, holding owner of vacant lot not liable to person who fell into pit thereon while passing through lot at night.

— Carrier's premises cars etc.

Cited in *Chicago & W. I. R. Co. v. Gardanier*, 116 Ill. App. 623, holding declaration in action for damages for injury caused by bucket falling upon plaintiff from one of defendant railway company's buildings occupied by lessee, in which no averment made that plaintiff was rightfully where she was, does not state cause of action; *Watson v. Manitou & P. P. R. Co.* 41 Colo. 142, 17 L.R.A. (N.S.) 921, 92 Pac. 17, holding railroad company owning buildings on top of Pike's Peak, not liable to person who climbed to top of peak uninvited by railroad company, and was injured by falling off retaining wall at night; *McCarty v. St. Louis & S. R. Co.* 105 Mo. App. 604, 80 S. W. 7, holding street railway company under obligation, as to person boarding car at place where passengers not usually received, to have handrail sound and secure.

Trespassing persons or animals.

Cited in *Mongogna v. Illinois C. R. Co.* 115 La. 599, 39 So. 699, on duty of railroad company to persons or animals trespassing on its line; *Davis v. Arkansas Southern R. Co.* 117 La. 325, 41 So. 587, on relationship of trespasser to proprietor in operation of dangerous instrumentalities on his premises.

11 L. R. A. 722, *HARRISON v. RAY*, 108 N. C. 215, 23 Am. St. Rep. 57, 12 S. E. 993.

Estates passed by deeds.

Cited in *Fort v. Allen*, 110 N. C. 192, 14 S. E. 685, holding *feme covert* accepting benefits of deed in partition bound by its conditions; *Carson v. Carson*, 122 N. C. 648, 30 S. E. 4, holding partition deed to land by heirs to husband, not joined in by wife, who was also an heir, did not convey her title, although she joined in deed to other heirs; *Whitsett v. Wamack*, 159 Mo. 21, 81 Am. St. Rep. 339, 59 S. W. 961; *Propes v. Propes*, 171 Mo. 417, 71 S. W. 685; *Snyder v. Elliott*, 171 Mo. 371, 71 S. W. 826; *Harrington v. Rawls*, 131 N. C. 40, 42 S. E. 461, holding that quitclaim deed to coparcener and her husband for purpose of partitioning land, conveys no title to the husband; *Smith v. McClain*, 146 Ind. 84, 45 N. E. 41, holding that quitclaim deed by children to widow vested fee of children's interest in her; *Bruce v. Nicholson*, 109 N. C. 204, 26 Am. St. Rep. 562, 13 S. E. 790, holding conveyance of land to husband and wife passes estate by entirety; *Ray v. Long*, 132 N. C. 896, 44 S. E. 652, holding that land purchased jointly by husband and wife cannot be sold under execution against husband; *Jones v. Myatt*, 153 N. C. 230, 69 S. E. 135; *Shaffer v. Shaffer*, 69 W. Va. 167, 71 S. E. 111; *Martin v.*

Martin, 98 Ark. 100, 135 S. W. 348,—to the point that new estate is not created by division of estate by tenants in common; *Foster v. Hobson*, 131 Iowa, 62, 107 N. W. 1101, holding title of tenant in common to share set apart to him by decree in partition proceedings, or through mutual conveyances by the several tenants, is same as that by which he held undivided interest in the entire estate; *Harrington v. Rawls*, 136 N. C. 66, 48 S. E. 571, holding deed of partition, by mutual deeds, wherein part of tract in which wife is tenant in common is conveyed in severalty to husband and wife carries no title, but simply severs unity of possession; *Sprinkle v. Spainhour*, 149 N. C. 224, 25 L.R.A.(N.S.) 168, 62 S. E. 910, holding deeds executed by heirs at law to each other to effect partition of land, not intended to change character of estate of heirs in lands inherited; *Shehy v. Cunningham*, 81 Ohio St. 300, 25 L.R.A.(N.S.) 1206, 90 N. E. 805, on effect of partition deeds, in connection with parol explanation of consideration of deed.

Cited in notes (30 L. R. A. 312, 315, 325) on tenancy by entireties; (57 L. R. A. 332, 333) on effect of deed in partition as distinguished from ordinary deeds; (25 L.R.A.(N.S.) 167) on character of estate under conveyance to both spouses as affected by one's already having estate in land.

Conclusiveness of judgments.

Cited in *Buchanan v. Harrington*, 152 N. C. 335, 67 S. E. 747, holding cotenant seeking reformation of deed to correct quantity of interest conveyed estopped by former judgment in partition proceedings between same parties concerning same land.

Distinguished in *Carter v. White*, 134 N. C. 474, 101 Am. St. Rep. 853, 46 S. E. 983, holding judgment in partition binding upon parties as against after-acquired title.

11 L. R. A. 724, *MERRITT v. MORA*, 44 Fed. 369.

Computing time.

Cited in *Grant v. Paddock*, 30 Or. 319, 47 Pac. 712, holding that day upon which cause of action arises should be excluded in computing time of running of statute of limitation; *Brown v. Knop*, 137 Mich. 238, 100 N. W. 466, on difficulty of reconciling American decisions on legal computation of time.

Cited in footnotes to *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for appearance; *McGinn v. State*, 30 L. R. A. 450, which defines calendar month as period terminating with day of succeeding month corresponding to day of beginning, less one.

Cited in notes (13 L. R. A. 40) on excluding Sunday in computation of time; (49 L.R.A. 206) on rule as to first and last days in computation of time; (78 Am. St. Rep. 375) on computation of time.

11 L. R. A. 725, *CONROY v. PITTSBURGH TIMES*, 139 Pa. 334, 21 Am. St. Rep. 188, 21 Atl. 154.

Libelous publications.

Cited in *Bryant v. Pittsburg Times*, 192 Pa. 587, 44 W. N. C. 527, 44 Atl. 251, holding case for jury where probable cause for libelous charge of abortion against physician not established by competent evidence; *Collins v. Morning News Co.* 15 Lanc. L. Rev. 158, 6 Pa. Super. Ct. 336, 41 W. N. C. 428, holding belief in truth of libelous publication must be based upon reasonable and probable cause, to relieve publisher from liability; *Shelly v. Dampman*, 1 Pa. Super. Ct. 123, 38 W. N. C. 315, *Reversing* 1 Lack. Legal News, 78, 4 Pa. Dist. R. 497, holding wrongful

charge against plaintiff of keeping bawdy house not privileged; *Com. v. Brown*, 1 Pa. Dist. R. 567, 30 W. N. C. 323, holding publication of charge imputing bribery against private citizen not privileged; *McGaw v. Hamilton*, 184 Pa. 114, 63 Am. St. Rep. 786, 39 Atl. 4, holding accusation of plaintiff of perjury, by councilman, when no motion was pending, and not in course of debate, not privileged as matter of law; *Com. v. Swallow*, 8 Pa. Super. Ct. 604, holding libelous publication to be privileged must have been made without malice or negligence; *Wallace v. Jameson*, 179 Pa. 116, 39 W. N. C. 392, 36 Atl. 142, holding privilege of discussion of character of candidate for office lost by improper comments; *Wood v. Boyle*, 177 Pa. 631, 39 W. N. C. 131, 52 Am. St. Rep. 747, 35 Atl. 853, holding libelous publication impeaching official in his private capacity not privileged; *Moore v. Leader* Pub. Co. 8 Pa. Super. Ct. 157, 42 W. N. C. 572, holding libelous charge of assault and battery not privileged; *Coates v. Wallace*, 4 Pa. Super. Ct. 257, 40 W. N. C. 236, holding published charge that candidate for office had violated law, not founded on reasonable ground for belief, not privileged; *Arnold v. Sayings Co.* 76 Mo. App. 182, holding postal-card communication to chief of police not justification for libelous publication by newspaper; *Knapp v. Campbell*, 14 Tex. Civ. App. 203, 36 S. W. 765, holding publication charging indictable offense libelous *per se*; *Com. v. Costello*, 1 Pa. Dist. R. 749, holding question of malice in libelous publication for jury; *Com. v. Scouton*, 20 Pa. Super. Ct. 521, holding that privilege may be lost by manner of publication; *Montgomery v. New Era Printing Co.* 229 Pa. 167, 78 Atl. 85, Ann. Cas. 1912A, 375, 27 Lane. L. Rev. 301, Reversing 26 Lanc. L. Rev. 105, holding that to make communication privileged, it must be shown to have been made on proper occasions, from proper motives, and based on reasonable or probable cause; *Com. v. Reilly*, 22 Lanc. L. Rev. 284, holding that facts which witness had not communicated to defendant and with which prosecutor was not connected are not admissible to show probable cause; *Myers v. Hodges*, 53 Fla. 220, 44 So. 357, holding question of malice should be left to jury on intrinsic evidence afforded by libelous charge itself, where there is no extrinsic evidence of malice; *Prewitt v. Wilson*, 128 Iowa, 206, 103 N. W. 365, holding question whether alleged privilege was exceeded and publication made with actual malice is for jury; *Mulderig v. Wilkes-Barre Times*, 215 Pa. 473, 114 Am. St. Rep. 967, 64 Atl. 636, holding party relying on privilege must prove all facts necessary and bring himself within it, evidence of malice may be intrinsic, from style and tone of article; *Sunley v. Metropolitan L. Ins. Co.* 132 Iowa, 127, 12 L.R.A.(N.S.) 93, 109 N. W. 463, holding inference that accusation of defalcation was malicious might be drawn by jury from uncertainty of defendant as to amount and from other conduct; *Sheibley v. Nelson*, 84 Neb. 396, 121 N. W. 458, holding on failure of proof on part of defendant justifying publication of charge that plaintiff was black mailer and circulated slanders, damage of plaintiff and malice of defendant presumed; *Com. v. Pascoe*, 39 Pa. Super. Ct. 170, holding newspaper publication charging person with being traitor to ward and community and that he is distrusted and detested by all parties and factions, not privileged; *Com. v. Di Silvestro*, 31 Pa. Super. Ct. 554, holding whether communication privileged question of law for court where facts clearly established by testimony of defendants; *Com. v. Cochran*, 16 Pa. Dist. R. 314, 23 Lanc. L. Rev. 268, holding words charging graft and looting of city by filtration company evidence of malice; such matter is proper subject for public information.

Cited in notes (3 L.R.A.(N.S.) 697) on privileged occasion; burden of showing good faith and probable cause; (12 L.R.A.(N.S.) 92) on inference from publication alone, of malice which will preclude qualified privilege; (104 Am. St. Rep. 112, 119) on what libelous statements are privileged; (116 Am. St. Rep. 813) on

what words are libelous per se; (123 Am. St. Rep. 641) on liability for libel or slander in course of judicial proceedings.

Denied in *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 439, 3 L.R.A. (N.S.) 700, 114 Am. St. Rep. 171, 83 Pac. 131, 7 A. & E. Ann. Cas. 840, holding when occasion is shown to have been privileged burden of showing defendant has lost his privilege is on plaintiff.

Presumption of innocence.

Cited in *Thomas v. Bowen*, 29 Or. 266, 45 Pac. 768, holding, in action for libel in publishing charge of crime, that presumption of innocence of accused requires defendant to allege and prove truth of charge; *Washington Post Co. v. Wells*, 27 App. D. C. 498, holding that it is necessary for plaintiff alleged in libel to be proprietor of gambling resort, to show he was not such proprietor where publication of alleged libel is proved.

Pleading.

Cited in *Mengel v. Lehigh Coal & Nav. Co.* 24 Pa. Co. Ct. 160, holding that to be entitled to an exception as to multifariousness one must bring himself within it by his averments and proofs.

Bringing case within exception.

Cited in *Bare v. Wenrich*, 17 Pa. Dist. R. 280, holding one who relies upon exception must prove all facts necessary to bring himself within it, thus owner of cattle in possession of tenant must show cattle not subject to distress for rent.

11 L. R. A. 726, *BURNS v. BRADFORD*, 137 Pa. 361, 20 Atl. 997.

Actions arising out of defects in walks and highways.

Cited in *Brendlinger v. New Hanover Twp.* 148 Pa. 95, 23 Atl. 1105, holding knowledge of defect in highway, sufficient to have enabled one injured to avoid it, fatal to recovery; *Lohr v. Philipsburg*, 156 Pa. 249, 32 W. N. C. 526, 27 Atl. 133, holding municipality not required to seek defects in sidewalk; *Cole v. Scranton*, 4 Lack. Legal News, 287, holding municipal authorities not bound to notice and remedy defect in walk not easily observable; *Carvin v. St. Louis*, 151 Mo. 346, 52 S. W. 210, holding municipality not liable for injury due to falling through meter hole in walk by slipping of cover; *Keen v. Havre De Grace*, 93 Md. 39, 48 Atl. 444, holding express notice to municipality must be shown where defect in walk is not readily observable; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 375, holding municipality always entitled to notice, direct or implied, of defects in streets; *Honickson v. Philadelphia*, 28 Pa. Co. Ct. 507, holding evidence of defect in sidewalk insufficient to show constructive notice of fact to municipality; *Garland v. Wilkes-Barre*, 212 Pa. 153, 61 Atl. 820, holding city not liable to person injured by fall on ice and snow at crossing, where facts were insufficient to charge city with notice of defect, and defect was not such as city was bound to notice; *Hopkins v. Williamsport*, 25 Pa. Super. Ct. 503, holding to entitle plaintiff to recover for injury sustained by fall on sidewalk, there must not only be cause of action but sufficient proof to convict municipality of negligence in not maintaining safe and sufficient sidewalk, after notice, actual or implied, of defect; *Honickson v. Philadelphia*, 12 Pa. Dist. R. 280, holding no recovery can be had against city for injury caused by fall on sidewalk where city without actual or constructive notice of defect; *Portsmouth v. Houseman*, 109 Va. 559, 65 S. E. 11, holding evidence insufficient to support verdict for plaintiff, injured by falling through open man-hole in street, where only one of thousand or more persons passing place of accident saw opening and city had no actual notice of defect; *Taylor v. Manson*, 9 Cal. App. 394, 99 Pac. 410, holding where only defect was depression of few inches between cement sidewalk and earth

sidewalk jury should have been instructed that defendants were not liable if sidewalk was reasonably safe for those using due care; *Miller v. United R. & Electric Co.* 108 Md. 95, 17 L.R.A.(N.S.) 980, 69 Atl. 636, holding street railway company not liable to person injured through being thrown out of buggy wheel of which fell into cable slot of track, negligence not being imputed to company under such circumstances; *Brader v. Lehman Twp.* 34 Pa. Super. Ct. 127, holding township in mountainous district not liable for injury to person thrown out of two wheeled road cart by cart catching on flat stone imbedded in road; *New Castle v. Kurtz*, 210 Pa. 188, 69 L.R.A. 492, 105 Am. St. Rep. 798, 69 Atl. 989, 18 A. & E. Ann. Cas. 943, holding municipality mulcted in damages for injury of person who sustained fall because of ridge of ice on sidewalk cannot recover from adjoining property owner who had no notice, as city had, of such defect; *Lindstrom v. Pennsylvania Co.* 212 Pa. 393, 61 Atl. 940, holding owner of abutting property not occupied by him, but in exclusive possession of tenant, not liable for injury resulting from hole in pavement, where owner has no notice of defect.

Cited in footnotes to *Teagar v. Flemingsburg*, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians; *Watertown v. Greaves*, 56 L. R. A. 865, which holds question of defect in difference of 3 inches in height of concrete sidewalk and adjoining gravel one, for jury; *Harden v. Jackson*, 66 L.R.A. 986, which holds plank sidewalk not so unsafe as to render city liable to one falling thereon because his cane goes through, although the edges of planks have become so decayed as not to withstand pressure of cane.

Cited in notes (2 L.R.A.(N.S.) 161) on municipal liability for latent defects in streets; (20 L.R.A.(N.S.) 520, 577, 581, 640, 712) on liability of municipality for defects or obstructions in streets.

11 L. R. A. 727, *READ v. CHURCH OF ST. AMBROSE*, 137 Pa. 320, 20 Atl. 1002.
Right to erect church building.

Cited in *St. Matthew's Church v. Schaffer*, 17 Montg. Co. L. Rep. 131, 25 Pa. Co. Ct. 121, holding members of Sunday school, by occupying room assigned in church building, acquired no right by adverse possession to erect separate Sunday school building upon church grounds.

11 L. R. A. 729, *STATE ex rel. ATTY. GEN. v. TOLEDO*, 48 Ohio St. 112, 26 N. E. 1061.

Property of municipality devoted to public use.

Cited in *Toledo v. Yeager*, 8 Ohio C. C. 320, and *Toledo v. Hosler*, 54 Ohio St. 421, 43 N. E. 583, holding municipal gas wells, pipe lines, pumping stations, and machinery exempt from taxation; *Toledo v. Hosler*, 10 Ohio C. C. 259, holding act, so far as exempting municipal gas plant from taxation, unconstitutional; *Mitchell v. Negaunee*, 113 Mich. 367, 38 L. R. A. 160, 67 Am. St. Rep. 468, 71 N. W. 646, holding that municipalities may be authorized by legislature to own lighting plants; *Mayo v. Washington*, 122 N. C. 25, 40 L. R. A. 169, 29 S. E. 343 (dissenting opinion), majority holding municipality, without legislative authority, powerless to issue bonds for erection of electric light plant; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 670, 44 S. E. 410, holding gas pipes and connections used in supplying city with gas, property devoted to public use; *Bellaire Goblet Co. v. Findlay*, 5 Ohio C. C. 427, 3 Ohio C. D. 210, holding special contract fixing price of gas to one customer entered into by gas trustees of city owning gas plant acquired by uniform taxation of all citizens was void as discriminatory and unauthorized; *Holton v. Camilla*, 134 Ga. 566, 31 L.R.A.(N.S.) 124, 68 S. E.

472, 20 Ann. Cas. 199, holding it not illegal for city to operate ice plant in connection with its waterworks system; Toledo Consol. Street Ry. v. Toledo Electric Street R. Co. 6 Ohio C. C. 379, 3 Ohio C. D. 501, holding act which authorizes street railway company to appropriate existing street railway tracks is general in nature, and is valid.

Cited in footnote to *Fawcett v. Mt. Airy*, 63 L.R.A. 870, which upholds power of municipality to procure a plant for lighting its streets.

Public nature of gas supply.

Cited in *Akron v. East Ohio Gas Co.* 7 Ohio N. P. N. S. 562, 19 Ohio S. & C. P. Dec. 226, holding gas company furnishing gas to several cities may be enjoined from ceasing to furnish gas to particular city.

Classification as affecting legislation.

Cited in *Kenton v. State*, 52 Ohio St. 61, 38 N. E. 885, holding act to redistrict certain cities of the fourth grade of the second class unconstitutional; *State ex rel. Monnett v. Baker*, 55 Ohio St. 10, 44 N. E. 516, upholding act relating to government of cities, based on classification by population; *Merrill v. Toledo*, 6 Ohio C. C. 436, upholding act relating to construction of natural gas plant, limited to cities of third grade of first class; *Herrmann v. Cincinnati*, 9 Ohio C. C. 362, holding city cannot pass from one class to another without taking statutory steps therefor; *Seifert v. Weidner*, 12 Ohio C. C. 5, upholding constitutionality of crematory act, applicable to all cities of second grade of second class; *State ex rel. Reemelin v. Smith*, 48 Ohio St. 218, 26 N. E. 1069, holding act applicable to only a particular city in class to which it belongs, special legislation; *State v. Jones*, 22 Ohio C. C. 696, 11 Ohio C. D. 505, holding law valid, though applying to a class which embraces but one city in the state.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which not having, race course; *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census, without respect to actual population, void; *Longview v. Crawfordsville*, 68 L.R.A. 623, which holds void classification of cities for purpose of legislation so as to make particular law conferring power to annex territory applicable to those having population between six and seven thousand.

What is public use.

Cited in *Webster v. Susquehanna Pole Line Co.* 112 Md. 429, 76 Atl. 254, holding supplying public with electric power is public use.

Distinguished in *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 450, 5 L.R.A.(N.S.) 648, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182, holding supplying of electrical energy is public enterprise but supplying of water power from wheels is not.

11 L. R. A. 740, *FARMERS LOAN & T. CO. v. CANADA & ST. L. R. CO.* 127 Ind. 250, 26 N. E. 784.

Waiver as to pleadings and judgment.

Cited in *Havens v. Gard*, 131 Ind. 523, 31 N. E. 354, holding doubtful whether answers in attachment are not waived by submission to trial; *Schnull v. McPheeters*, 12 Ind. App. 511, 40 N. E. 758, holding proceeding to trial without filing answer in attachment, waiver of same; *Indianapolis, D. & W. R. Co. v. Sands*, 133 Ind. 442, 32 N. E. 722, holding decree agreed upon by parties to action binding upon them.

Contractors, subcontractors, and material men.

Cited in *Caulfield v. Polk*, 17 Ind. App. 436, 46 N. E. 932, holding corporation furnishing engines and boilers to mills and factories not a contractor; *Erath v. Allen*, 55 Mo. App. 115, holding that statute requiring taking of bond for benefit of laborers and mechanics did not include subcontractors; *Pere Marquette R. Co. v. Baertz*, 36 Ind. App. 418, 74 N. E. 51, holding right to lien given by statute to laborers employed by railroad subcontractor; *Krotz v. A. R. Beck Lumber Co.* 34 Ind. App. 587, 73 N. E. 273, holding holder of title founded on validity of statutory mechanic's liens, and proceedings which followed thereon, has burden of showing they were within statutory requirements.

Cited in footnote to *Hunt v. Darling*, 69 L.R.A. 497, which sustains subcontractor's right to simultaneously bring proceeding to enforce mechanic's lien against property and an action against the contractor.

Cited in note (20 L. R. A. 565) on payment to contractors or subcontractors as affecting liens of subordinate claimants.

Distinguished in *Spengler v. Stiles-Tull Lumber Co.* 94 Miss. 812, 48 So. 966, holding where no lien is given materialmen by statute right of assignee of contractor to unpaid balance of money due on building contract is superior to that of materialmen.

Medium of payment.

Cited in *Reed v. Fleming*, 102 Ill. App. 674, holding that on failure to pay at maturity of note, right provided therein to pay in bonds forfeited; *Combs v. Bays*, 19 Ind. App. 265, 49 N. E. 358, holding obligation to pay money only dischargeable by payment of money, there being no valid agreement to contrary; *Goshorn v. People's Nat. Bank*, 32 Ind. App. 430, 102 Am. St. Rep. 248, 69 N. E. 185, holding it is duty of bank to whom depositor gives his receipt for money on deposit to pay amount named in money.

Cited in footnote to *Johnson v. Dooley*, 40 L. R. A. 74, which holds note payable in bonds not payable in money on failure to tender bonds when due.

Liens upon railroads.

Cited in *Adams v. Grand Island & W. C. R. Co.* 12 S. D. 426, 81 N. W. 960, holding notice of lien, describing portion upon which subcontractor filing same was employed, sufficient; *Lake Erie & W. R. Co. v. Bowker*, 9 Ind. App. 436, 36 N. E. 864 (dissenting opinion), majority upholding right to personal judgment in action foreclosing sewer lien on right of way and depot lot of railroad; *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 156, 84 N. W. 802, holding liens on separate railroad properties not extended to whole property after consolidation, so as to affect priorities; *Indiana, I. & I. R. Co. v. Larrew*, 130 Ind. 369, 30 N. E. 517, holding laborer's lien against railroad, acquired by notice given in due time, not defeated by payment to contractor; *McKay v. Ripley & M. C. Valley R. Co.* 42 W. Va. 26, 24 S. E. 685, holding railroad must be sold, if at all, in its entirety.

Rights of railroad as to property held for public way.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Stickley*, 155 Ind. 315, 58 N. E. 192, holding lands acquirable against railroad company by adverse possession.

Priority of liens.

Cited in *Deming-Colborn Lumber Co. v. Union Nat. Sav. & L. Asso.* 151 Ind. 467, 51 N. E. 936, referring to rule, but not deciding that mechanic's lien may be superior to prior mortgage; *Bell v. Hiner*, 16 Ind. App. 186, 44 N. E. 576, holding laborer's lien superior to prior chattel mortgage; *Bragg v. Lamport*, 38 C. C. A. 472, 96 Fed. 630, holding grantee taking title subject to, but before acceptance of, mortgage does not thereby defeat lien; *Heckman v. Tammen*, 84 Ill. App. 549, holding laborer's lien superior to prior chattel mortgage; *Kilpatrick v. Kansas*

City & B. R. Co. 38 Neb. 635, 41 Am. St. Rep. 741, 57 N. W. 664, holding mechanics' liens superior over prior mortgage of corporation advancing money for construction of railroad; Hubbard v. Security Trust Co. 38 Ind. App. 160, 78 N. E. 79, holding claim of surety on delivery bond, compelled to pay, has priority over other claims against receiver of execution debtor.

Cited in footnotes to Green v. Williams, 19 L. R. A. 478, which holds purchaser takes premises subject to lien subsequently filed within time allowed; Brown v. Markham, 30 L. R. A. 84, which holds valid, statute authorizing logger's lien without notice to owner, but giving subsequent opportunity to intervene.

Cited in note (13 L. R. A. 704) on legislative intent in New York mechanics' lien law of 1885.

Distinguished in McDaniel v. Osborn, 166 Ind. 5, 2 L.R.A.(N.S.) 618, 117 Am. St. Rep. 354, 75 N. E. 647, holding under statute giving claim for debt due for manual or mechanical labor preference when property of debtor is in hands of assignee or receiver, such claim is not preferred to prior mortgage.

Bona fide holder for value.

Cited in State Nat. Bank v. Bennett, 8 Ind. App. 683, 36 N. E. 551, and Bunting v. Mick. 5 Ind. App. 296, 31 N. E. 378, holding burden upon holder of note to allege and prove bona fides, lack of notice, and payment of valuable consideration; National Exch. Bank v. Berry, 21 Ind. App. 262, 52 N. E. 104, holding one taking notes governed by law merchant as collateral security, holder for value; Shull v. Fontanet Co-Operative Min. Asso. 128 Ind. 335, 26 N. E. 790, holding that laborer working for assignee had right to foreclose lien for wages against purchaser without knowledge of claim.

Fraud.

Cited in John H. Hibben Dry Goods Co. v. Hicks, 26 Ind. App. 650, 59 N. E. 938, holding, in replevin action based on fraud, fraud must be found as a fact; Johnson v. Bedwell, 15 Ind. App. 257, 43 N. E. 246; Sickman v. Wilhelm, 130 Ind. 481, 29 N. E. 908; Hutchinson v. First Nat. Bank, 133 Ind. 283, 36 Am. St. Rep. 537, 30 N. E. 952; Bruner v. Brown, 139 Ind. 610, 38 N. E. 318; Morgan v. Worden, 145 Ind. 603, 32 N. E. 783; Levi v. Bray, 12 Ind. App. 16, 39 N. E. 754,—holding fraud a question of fact, to be found as such; State Bank v. Backus, 160 Ind. 695, 67 N. E. 512, holding mortgage, in absence of fraud, not void as to creditors of mortgagor, because of failure to record.

Laborers and employees within lien laws.

Cited in Farmer v. St. Croix Power Co. 117 Wis. 87, 98 Am. St. Rep. 914, 93 N. W. 830, holding one employing teams and men in performance of work for subcontractor not himself an employee of subcontractor, but a subcontractor under him; Young Men's Christian Asso. v. Gibson, 58 Wash. 313, 108 Pac. 766, holding that under mechanic's lien law, "subcontractor" does not include laborers or materialmen.

11 L. R. A. 748, FIRST NAT. BANK v. SKEEN, 101 Mo. 683, 14 S. W. 732.

Provisions affecting negotiability of written instruments.

Cited in Fogg v. School District, 75 Mo. App. 171, holding twenty-year bonds, redeemable after five years, negotiable; Union Loan & T. Co. v. Southern California Motor Road Co. 51 Fed. 849, holding bonds redeemable before maturity at option of obligor negotiable; Lewiston Sav. Bank v. Lawson, 87 Mo. App. 45, holding, on inspection of note, words "or bearer" not erased before note was signed; Maze v. Baird, 89 Mo. App. 353, holding instrument promising to pay definite sum after death, promissory note; City Nat. Bank v. Goodloe-McClelland Commission Co. 93 Mo. App. 133, holding negotiable, note with provision: Makers

and indorsers agree to all extensions and partial payments before or after maturity, without prejudice to holder; *Roads v. Webb*, 91 Me. 411, 64 Am. St. Rep. 246, 40 Atl. 128, holding note for payment of certain sum "and attorney's fees" not negotiable.

Cited in footnote to *National Bank of Commerce v. Feeney*, 46 L. R. A. 732, which holds note rendered non-negotiable by stipulation for discount at 12 per cent, if paid before maturity.

Cited in notes (35 L.R.A.(N.S.) 390) on bills and notes: provision accelerating maturity as affecting negotiability; (23 Am. St. Rep. 169) on conditions affecting negotiability; (125 Am. St. Rep. 200) on agreements and conditions destroying negotiability.

Construction of statutes.

Cited in *Keene v. Wyatt*, 160 Mo. 16, 63 S. W. 116, dissenting opinion, by Marshall, J., who holds statutes should be construed with reference to objects and subject-matter.

Negligence in purchase of negotiable instrument.

Cited in *First State Bank v. Hammond*, 104 Mo. App. 410, 79 S. W. 493, holding knowledge of facts which would put prudent man on inquiry not sufficient to affect title of indorsee of negotiable instrument purchased before maturity.

Date of payment of note.

Cited in *State ex rel. Bithulitic & Contracting Co. v. Murphy*, 20 N. D. 430, 128 N. W. 303, holding that note payable on or before certain date is regarded as payable on date named.

11 L. R. A. 750, *DAVIS v. HAMPSHIRE COUNTY*, 153 Mass. 218, 26 N. E. 848.

Injunction to restrain city from defraying any part of expense of crossing improvement refused in *Parsons v. Northampton*, 154 Mass. 411, 28 N. E. 350.

Injuries suffered in common with community.

Cited in *Hammond v. Worcester County*, 154 Mass. 511, 28 N. E. 902, holding one whose land abuts on highway on both sides of railway, without remedy for injury caused by closing of crossing; *Stanwood v. Malden*, 157 Mass. 18, 16 L. R. A. 592, 31 N. E. 702, holding that discontinuance of part of street gives land-owner on another street no right of action for damages for diversion of travel; *Cunningham v. Railroad Comrs.* 158 Mass. 109, 32 N. E. 959, dismissing petition by residents of town, who owned real estate, for certiorari to quash proceedings of commissioners on relocation of railroad stations; *Shaw v. Boston & A. R. Co.* 159 Mass. 599, 35 N. E. 92, holding action not maintainable for negligent repair of highway bridge, depriving plaintiff of use of highway for unreasonable time; *Nichols v. Richmond*, 162 Mass. 172, 38 N. E. 501, holding damages not recoverable for inconvenience of being compelled to use more circuitous route by reason of discontinuance of crossing; *Re Westborough*, 169 Mass. 497, 48 N. E. 763, sustaining act of commissioners in proceeding for change of grade, although requiring relocation of considerable extent of track; *Natick Gaslight Co. v. Natick*, 175 Mass. 250, 56 N. E. 292, holding action not maintainable by gas company against town for cost of removing pipe laid in highway necessitated by its abandonment, unless value of land was diminished thereby; *Putnam v. Boston & P. R. Corp.* 182 Mass. 353, 65 N. E. 790, holding action for damages not maintainable by abutting owner because change of grade of street was very near his land; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 428, 44 Atl. 813; *Re Melon Street*, 38 L. R. A. 278, 1 Pa. Super. Ct. 79; *Cram v. Laconia*, 71 N. H. 44, 57 L. R. A. 284, 51 Atl. 635, — holding

action not maintainable by abutting owner for discontinuance of highway at point not in front of his premises, not cutting off access; *Putnam v. Boston & P. R. Corp.* 182 Mass. 353, 65 N. E. 790, holding action maintainable for damages where abutting owner's land is entirely cut off from access to streets by change of grade; *Brown v. San Francisco*, 124 Cal. 281, 57 Pac. 82, holding that abutting owners not entitled to damages for narrowing street cannot question by certiorari validity of order directing it; *Rand v. Boston*, 164 Mass. 363, 41 N. E. 484 (dissenting opinion), majority holding damages not recoverable by abutting owner for injury due to building of embankment and bridge on land on opposite side of street; *Prince v. Crocker*, 166 Mass. 362, 32 L. R. A. 612, 44 N. E. 446, holding statute not assailable as unconstitutional because allowing taking or injury of property of another person without compensation; *Chicago v. Bureky*, 158 Ill. 108, 29 L. R. A. 570, 48 Am. St. Rep. 142, 42 N. E. 178, holding abutting owner entitled to damages for cutting off of access by viaduct in front of premises; *State ex rel. Lamb v. Gillilan*, 83 Vt. 328, 75 Atl. 711, holding that persons having no peculiar interest in fact that license commissioners issued liquor license, cannot sue out writ of certiorari on ground that issuing of license was violation of law; *Highbarger v. Milford*, 71 Kan. 343, 80 Pac. 633 (dissenting opinion), as to when injury suffered by property owner from discontinuance of street is in common with that suffered by public; *Hyde v. Fall River*, 189 Mass. 440, 2 L.R.A.(N.S.) 271, 75 N. E. 953, holding no recovery can be had for damages suffered by discontinuance of highway if they are same in kind as those suffered by public; *Enders v. Friday*, 78 Neb. 515, 111 N. W. 140, 15 A. & E. Ann. Cas. 685, holding owner of property not abutting on part of street to be vacated not entitled to damages or to restrain proposed vacation; *Lee v. McCook*, 82 Neb. 29, 116 N. W. 955, holding owners whose property does not abut upon and is not adjacent to roadway sought to be vacated, cannot restrain vacation thereof; *Scrutchfield v. Choctaw, O. & W. R. Co.* 18 Okla. 316, 9 L.R.A.(N.S.) 500, 88 Pac. 1048, holding property owner cannot recover damages in case of construction of railroad in street, where his only grievance is not having free access to his premises on one particular street in one direction; *Adams v. Oklahoma City*, 20 Okla. 527, 95 Pac. 975, holding city first establishing grade not liable for obstructing flow of surface water, in absence of negligence; *Peabody v. Boston Elev. R. Co.* 191 Mass. 519, 78 N. E. 392, discussing analogy between special damage sustained by discontinuance of way for which compensation is allowed and special benefit from improvement which may be set-off against damage; *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.* 202 Mass. 600, 89 N. E. 118, holding railroad liable for entire damages caused by discontinuance of private way in abolition of railroad crossing and not merely for damages suffered within its right of way.

Cited in notes (26 L.R.A. 664) on effect of abandonment of highway; (109 Am. St. Rep. 912) on what constitutes "damage" to property within provision that property shall not be taken or damaged for public use without compensation.

Distinguished in *Cutter v. Boston*, 200 Mass. 402, 86 N. E. 798, holding damages allowable for injury of property by taking or obstructing of private way by abolition of grade crossing.

Disapproved in *Piscataqua Nav. Co. v. New York, N. H. & H. R. Co.* 80 Fed. 365, holding action maintainable by vessel owner for damages for detention by negligent falling of draw in defendant's bridge.

Right of authorities to close highways.

Cited in *Norwood v. New York & N. E. R. Co.* 161 Mass. 263, 37 N. E. 199, holding change in place of crossing authorized under petition for alteration;

Albes v. Southern R. Co. 164 Ala. 363, 51 So. 327, to the point that abutting owners have right to compensation where injured by vacation of street; Butt v. Ifert, 171 Ind. 556, 86 N. E. 961, on vacation of highways.

Cited in notes (26 L.R.A. 831) on discontinuance or vacation of highway by acts of public authorities; (2 L.R.A.(N.S.) 270) on right of property owner whose access from one direction is shut off or interfered with by closing of street.

Powers of highway authorities.

Cited in Holliston v. New York C. & H. R. R. Co. 195 Mass. 304, 81 N. E. 204, holding board of county commissioners authorized to inquire whether way is obstructed by railroad and to order its restoration in a particular manner.

Construction of statutes.

Cited in Re Waltham, 206 Mass. 212, 92 N. E. 477, to the point that statute is to be construed in manner which will promote ends which it was intended to accomplish.

11 L. R. A. 753, MOORE v. MANUFACTURERS NAT. BANK, 123 N. Y. 420, 25 N. E. 1048.

Second appeal in 136 N. Y. 666, 33 N. E. 335.

Privileged communications.

Cited in Beggs v. McCrea, 62 App. Div. 41, 70 N. Y. Supp. 864, holding affidavit by bank director, made to be used on application for removal of testamentary trustee, privileged; Hemmens v. Nelson, 138 N. Y. 523, 20 L. R. A. 443, footnote p. 441, 34 N. E. 342, holding statement by principal of deaf mute institute to executive committee as to improper acts of department superintendent privileged; McLaughlin v. Charles, 60 Hun, 241, 14 N. Y. Supp. 608, holding testimony given on investigation by common council of bribery charge against city officer privileged; Hart v. Sun Printing & Pub. Asso. 79 Hun, 361, 29 N. Y. Supp. 434, holding impertinent imputations, made in connection with report of judicial proceeding, not privileged; Link v. Moore, 84 Hun, 119, 32 N. Y. Supp. 461, holding allegations of adultery in complaint in action for divorce privileged; Coloney v. Farrow, 5 App. Div. 608, 39 N. Y. Supp. 460, holding charge made by defendant to excise commissioner, that plaintiff kept house of ill fame, privileged; Stevenson v. Ward, 48 App. Div. 294, 62 N. Y. Supp. 717, holding slanderous statement made by official in course of official business and on plaintiff's invitation privileged, if made without malice; Sickles v. Kling, 60 App. Div. 517, 69 N. Y. Supp. 944, holding libelous charges in attorney's brief, pertinent to issue, privileged; Union Mut. L. Ins. Co. v. Thomas, 28 C. C. A. 97, 48 U. S. App. 575, 83 Fed. 80, and Harlow v. Carroll, 6 App. D. C. 137, holding irrelevant scandalous matter in answer not privileged; Abbott v. National Bank of Commerce, 20 Wash. 555, 56 Pac. 376, holding allegations in pleadings pertinent to issues absolutely privileged; Hartung v. Shaw, 130 Mich. 179, 89 N. W. 701, holding falsity of privileged statements, or malice of their author, not open to inquiry; Stuart v. Press Pub. Co. 83 App. Div. 474, 82 N. Y. Supp. 401, holding publication of facts not contained in petition for divorce not privileged; King v. McKissick, 126 Fed. 217, holding allegation in petition that parties were asserting claim against estate through "false, fraudulent, and malicious representations" of an attorney named not privileged; Rosenberg v. Dworetzky, 139 App. Div. 520, 124 N. Y. Supp. 191, holding that statement in pleading filed in judicial proceeding pertinent and relevant to issue is absolutely privileged; Myers v. Hodges, 53 Fla. 209, 44 So. 357, holding defamatory words, published by parties, counsel or witnesses in due course of judicial procedure not absolutely privileged, unless connected

with, or relevant or material to cause in hand or subject of inquiry; *Potter v. Troy*, 175 Fed. 129, holding malicious and irrelevant statement not privileged, though contained in answer.

Cited in footnotes to *Rothholz v. Dunkle*, 13 L. R. A. 655, which holds communication by bank cashier to stockholder as to solvency of surety on bond to bank privileged; *Nichols v. Eaton*, 47 L. R. A. 483, which holds communication by principal to agent as to business of agency not actionable unless actuated by malice; *Sullivan v. Strahorn-H.-E. Commission Co.* 47 L. R. A. 859, which holds imputation of evil motives and dishonesty, in letter complaining of nonpayment of debt by third person through bank, not privileged.

Cited in notes (104 Am. St. Rep. 126, 127) on what libelous statements are privileged; (7 Eng. Rul. Cas. 731) on liability of advocate or attorney for defamatory words used in judicial proceeding.

11 L. R. A. 759, *CARPENTER v. NEW YORK*, N. H. & H. R. CO. 124 N. Y. 53, 21 Am. St. Rep. 644, 26 N. E. 277.

Loss of property of passenger.

Cited in *Pullman Palace Car Co. v. Adams*, 120 Ala. 595, 45 L. R. A. 771, 74 Am. St. Rep. 53, 24 So. 921, holding sleeping car company not liable for negligently permitting theft of diamond ring from pocketbook of passenger, placed there on account of loose setting; *Whicher v. Boston & A. R. Co.* 176 Mass. 277, 79 Am. St. Rep. 314, 57 N. E. 601, holding passenger could not recover for loss of bag left for long interval in section near door, while he was in smoking compartment; *Pullman Palace Car Co. v. Hatch*, 30 Tex. Civ. App. 304, 70 S. W. 771, holding lack of reasonable care must be shown to support action against sleeping car company for loss of stolen baggage; *McMurray v. Pullman's Palace Car Co.* 86 Ill. App. 621, holding evidence of negligence on part of carrier must be shown to support recovery for loss of money by passenger; *Holmes v. North German Lloyd S. S. Co.* 184 N. Y. 284, 5 L.R.A.(N.S.) 651, 77 N. E. 21, holding steamship company liable for loss of two suit cases left with their other baggage by passengers at baggage master's direction, though value not declared as required by ticket; *Sperry v. Consolidated R. Co.* 79 Conn. 568, 10 L.R.A.(N.S.) 908, 118 Am. St. Rep. 169, 65 Atl. 962, 9 A. & E. Ann. Cas. 199, holding street railway company not liable for loss of suit case handed by passenger's companion to conductor when passenger got on car.

Cited in footnotes to *St. Louis S. W. R. Co. v. Berry*, 28 L.R.A. 501, which holds carrier liable for more money than traveler needs for journey, when accepted as baggage with knowledge of amount; *Yazoo & M. V. R. Co. v. Blackmar*, 67 L.R.A. 646, which holds papers of employer pertaining to business of an insurance agent not baggage of the latter.

Cited in note (26 Am. St. Rep. 333, 335, 337) on obligations and liabilities of sleeping car companies.

Distinguished in *Adams v. New Jersey S. B. Co.* 151 N. Y. 168, 34 L. R. A. 684, 56 Am. St. Rep. 616, 45 N. E. 369, Affirming 9 Misc. 27, 29 N. Y. Supp. 56, holding steamboat company, without proof of negligence, liable for money lost by passenger from stateroom.

Negligence as basis of liability for loss or injury to passenger.

Cited in *Sessions v. New York*, L. E. & W. R. Co. 78 Hun, 543, 29 N. Y. Supp. 628, holding burden upon plaintiff to prove negligence of sleeping car corporation, resulting in loss of money from berth; *Connell v. Chesapeake & O. R. Co.* 93 Va. 56, 32 L. R. A. 794, 57 Am. St. Rep. 786, 24 S. E. 467, holding sleeping car company not liable for assassination of passenger in berth by robber; *Voss v.*

Wagner Palace Car Co. 16 Ind. App. 297, 43 N. E. 20 (dissenting opinion), majority holding sleeping car company liable for loss of cape given porter to remove from car to station; Pullman's Palace Car Co. v. Hall, 106 Ga. 770, 44 L. R. A. 793, 71 Am. St. Rep. 293, 32 S. E. 923, and Pullman Palace Car Co. v. Freudenstein, 3 Colo. App. 543, 34 Pac. 578, holding negligence basis of sleeping car company's liability to passenger for loss of personal effects; Piper v. New York C. & H. R. R. Co. 76 Hun, 45, 27 N. Y. Supp. 593, holding passenger finding toilet room dark not bound to return to body of car to find porter; Pullman Palace Car Co. v. Gavin, 93 Tenn. 57, 21 L. R. A. 299, 42 Am. St. Rep. 902, 23 S. W. 70, holding sleeping car company liable for theft of money from passenger by porter; Bonner v. Grumbach, 2 Tex. Civ. App. 484, 21 S. W. 1010, holding that passenger may recover for money lost by overturning of car through gross carelessness; Williams v. Webb, 27 Misc. 510, 58 N. Y. Supp. 300, holding sleeping car companies not insurers of baggage, money, or other personal effects of passengers; Hill v. Pullman Co. 188 Fed. 499, 28 Lanc. L. Rev. 266, holding that sleeping car company is liable to passenger for money or personal effects stolen through negligence of company in failing to protect such passenger; Arthur v. Pullman Co. 44 Misc. 231, 88 N. Y. Supp. 981, as to liability of carrier for loss of passenger's hand baggage, without proof of negligence; Weingart v. Pullman Co. 58 Misc. 188, 108 N. Y. Supp. 972, holding sleeping car company not liable, in absence of showing of negligence, for loss of overcoat placed on seat in car by porter at passenger's request; Knieriem v. New York C. & H. R. R. Co. 109 App. Div. 710, 96 N. Y. Supp. 602, holding complaint in action for loss of passenger's watch and money, through giving away of track and turning over of car, improperly dismissed without taking of evidence, where carrier's negligence was conceded; Cohen v. New York C. & H. R. R. Co. 121 App. Div. 7, 105 N. Y. Supp. 483, holding negligence of carrier not shown where passenger's money, carried in trousers and placed beside him in berth, disappeared between time he retired to berth and time he arose.

Cited in note (21 L. R. A. 294) on liability as to passengers on sleeping cars.

Distinguished in Croll v. Pullman Co. 61 Misc. 267, 113 N. Y. Supp. 542, holding sleeping car company liable to passenger for loss of hand-bag and umbrella left with porter by passenger upon going to hotel for night, company being *prima facie* negligent in such case.

11 L. R. A. 763, HOVEY v. STATE, 127 Ind. 588, 22 Am. St. Rep. 663, 27 N. E. 175.

Independence of legislative, executive, and judicial branches of government.

Cited in Langenberg v. Decker, 131 Ind. 479, 16 L. R. A. 112, 31 N. E. 190, holding act conferring upon board of tax commissioners power to fine and imprison for contempt unconstitutional; Parker v. State, 133 Ind. 188, 18 L. R. A. 572, 32 N. E. 836, upholding power of courts to declare apportionment act unconstitutional; White County v. Gwin, 136 Ind. 585, 36 N. E. 237, holding court without power to order repairs amounting to a practical reconstruction of courthouse; Parker v. State, 135 Ind. 536, 23 L. R. A. 860, 35 N. E. 179, upholding power of supreme court to stay execution in capital case pending appeal; State *ex rel.* Terre Haute v. Kolsem, 130 Ind. 442, 14 L. R. A. 570, 29 N. E. 595, holding question whether general law can be made applicable to particular subject on which special laws are not prohibited, exclusively for legislature; Forsyth v. Hammond, 18 C. C. A. 179, 34 U. S. App. 552, 71 Fed. 446, holding act giving right of appeal from decision of legislative body on legislative question void; Fesler v. Brayton, 145

Ind. 82, 32 L. R. A. 581, 44 N. E. 37, holding that one department of government cannot coerce another to exercise a merely discretionary power; Chicago, I. & L. R. Co. v. Railroad Commission, 38 Ind. App. 457, 78 N. E. 338, holding legislature has full power, within constitutional limits as to judiciary, to define procedure and jurisdiction of court of its own creation.

Cited in footnotes to State *ex rel.* Miller v. Barber, 27 L. R. A. 45, which authorizes mandamus to compel secretary of state to countersign and affix great seal of state to certain instruments issued by governor; Turnbull v. Giddings, 19 L. R. A. 853, which holds unenforceable by mandamus, legislature's right to have protest entered on journal.

Cited in notes (58 L.R.A. 866) on original jurisdiction of court of last resort in mandamus case; (35 Am. St. Rep. 63, 64) on judicial investigation of constitutionality of legislative apportionments; (16 Eng. Rul. Cas. 787) on right to mandamus against a public officer.

Governor's independence from interference of courts.

Cited in *Re Legislative Adjournment*, 18 R. I. 830, 22 L. R. A. 719, 27 Atl. 324, holding courts without power to inquire into governor's action in adjourning legislature; Woods v. Sheldon, 9 S. D. 410, 69 N. W. 602, denying peremptory writ of mandamus to compel governor and secretary of state to issue to plaintiff certificate of election as presidential elector; State *ex rel.* Robb v. Stone, 120 Mo. 434, 23 L. R. A. 195, footnote p. 194, 41 Am. St. Rep. 705, 25 S. W. 376, denying mandamus to compel official action by governor; State *ex rel.* State Pub. Co. v. Smith, 23 Mont. 49, 57 Pac. 449, holding governor cannot be compelled by mandamus to perform duty involving judicial discretion; State *ex rel.* Atty. Gen. v. Huston, 27 Okla. 612, 34 L.R.A.(N.S.) 385, 113 Pac. 190; Rice v. The Governor (Rice v. Draper) 207 Mass. 579, 32 L.R.A.(N.S.) 358, 93 N. E. 821,—holding that court has no power to issue writ of mandamus against governor regarding any of his official duties; State *ex rel.* Rawlinson v. Ansel, 76 S. C. 407, 57 S. E. 185, 11 A. & E. Ann. Cas. 613, as to whether writ of mandamus may issue to governor; State *ex rel.* Latture v. Board of Inspectors, 114 Tenn. 519, 86 S. W. 319, holding mandamus will not issue to compel governor to compare vote for representative and declare person receiving highest number of votes elected.

Cited in footnotes to People *ex rel.* Broderick v. Morton, 41 L. R. A. 231, which denies right to mandamus to compel performance of act by governor; Greenwood Cemetery Land Co. v. Routt, 15 L. R. A. 369, which authorizes mandamus to compel governor to execute patent for land purchased from land board; State *ex rel.* Cromelien v. Boyd, 19 L. R. A. 227, which denies mandamus to compel governor to issue election proclamation.

Cited in notes (6 L.R.A.(N.S.) 763; 31 Am. St. Rep. 295, 296, 299) on mandamus against governor.

11 L. R. A. 767, JACOBS'S APPEAL, 140 Pa. 268, 23 Am. St. Rep. 230, 21 Atl. 318.

Construction of will.

Cited in MacConnell v. Wright, 150 Pa. 284, 30 W. N. C. 424, 24 Atl. 517, holding circumstances surrounding testator at time of making will should be considered in construing it; Reimer's Estate, 159 Pa. 219, 33 W. N. C. 379, 28 Atl. 186, construing words "personal effects" in will as meaning personal property; Bruckman's Estate, 195 Pa. 369, 45 Atl. 1078, refusing to construe words "personal estate" to include real estate not specifically devised; Schropp v. Shaeffer, 2 Pa. Dist. R. 362, construing word "effects" to include real estate; Strawbridge's Es-

tate, 18 Pa. Co. Ct. 486, 5 Pa. Dist. R. 693, construing word "money" in codicil to include ground rent; Dickson's Estate, 7 Pa. Dist. R. 700, holding that bequest of money left in house did not entitle legatee to money awarded estate after testatrix's death; Smith's Estate, 19 Pa. Co. Ct. 516, 6 Pa. Dist. R. 329, construing word "money" to include bonds; Eiseman's Estate, 13 Lanc. L. Rev. 402, construing residuary clause bequeathing "such articles of personal goods, money or outstanding money, whatsoever the same may be," not disposed of in will to include real estate not otherwise disposed of; *Re Wilkinson*, 192 Pa. 131, 43 Atl. 411, holding word "money" as used by testator included all specific sums of money possessed at death, available for immediate use in case of need; *Re Brown*, 37 Pittsb. L. J. N. S. 103, holding that bequest in codicil of household furniture and other personal effects carried jewelry and money in bank; *Habecker's Estate*, 27 Lanc. L. Rev. 332, 43 Pa. Super. Ct. 90; *Abicht's Estate*, 58 Pittsb. L. J. 355, 20 Pa. Dist. R. 186,—to the point that gift of "remainder and residue of my money" carried certain real estate not otherwise disposed of; *Herr's Estate*, 27 Lans. L. Rev. 191, holding that it will be presumed that testator intended to dispose of his whole estate in absence of language which expresses the contrary; *Rengier's Estate*, 28 Lanc. L. Rev. 278, holding that word "money" in codicil should not be deemed the equivalent of property, where codicil read "I give all my money to my sister;" *Burr's Estate*, 23 Lanc. L. Rev. 158, 32 Pa. Co. Ct. 11, 14 Pa. Dist. R. 298, holding that ground rent is included in "invested money" in bequest; *Gallagher v. Gallagher*, 36 Pittsb. L. J. N. S. 307, 16 Pa. Dist. R. 460, construing "surplus" as equivalent to residue; *Pearson's Estate*, 10 Pa. Dist. R. 190, holding cash embraced by words "stocks or any other investment" in will.

Cited in footnote to *Mueller v. Buenger*, 67 L.R.A. 648, which holds that will may pass title to after-acquired real estate.

Cited in note (15 L.R.A.(N.S.) 74) on devise or bequest by implication.

Distinguished in *Levy's Estate*, 161 Pa. 194, 28 Atl. 1068, affirming 14 Pa. Co. Ct. 129, 3 Pa. Dist. R. 36, 33 W. N. C. 489, construing word "money" in will as not including estate generally; *Metz v. Metz*, 7 Pa. Dist. R. 195, holding that bequest of money did not include land; *Freas v. Yost*, 23 Montg. Co. L. Rep. 88, holding that residuary clause does not pass realty where testator had only personalty at time of making of will.

"Moneyed Corporation."

Cited in *State v. Chance*, 82 Kan. 396, 108 Pac. 791, holding term "moneyed corporation" in statute forbidding false entries in book accounts of such corporations intended to cover all private corporations having capital stock and employing money for gain, as distinguished from those not designed for pecuniary profit, such as religious, benevolent or educational organizations; *State v. Fidelity & D. Co.* 35 Tex. Civ. App. 230, 80 S. W. 544, holding expression "moneyed corporation" intended to mean all classes of corporations organized and created for business purposes, as distinguished from public, charitable or other corporations, exempted from taxation by law.

11 L. R. A. 769, *CHALMERS v. SMITH*, 152 Mass. 561, 26 N. E. 95.

Improper use of premises by tenant.

Cited in *Hersey v. Chapin*, 162 Mass. 180, 38 N. E. 442, holding tenant at will cannot maintain, as against rights of owner, smallpox hospital on premises, to injury of reversion; *Brown v. Magorty*, 156 Mass. 211, 30 N. E. 1021, holding action *ex contractu* maintainable for breach of agreement by tenant to keep manure on premises; *Mitchell v. Big Six Development Co.* 186 Fed. 556, to the point that tenant is liable for causing permanent injury to demised premises

over and above ordinary wear and tear, when caused by negligence or wrongful act.

Cited in note (9 Eng. Rul. Cas. 473) on liability of tenant from year to year for dilapidations arising in proper use of premises.

11 L. R. A. 771, *STONE v. HOWARD INS. CO.* 153 Mass. 475, 27 N. E. 6.

Construction of insurance policies.

Cited in *Merchants' Ins. Co. v. New Mexico Lumber Co.* 10 Colo. App. 236, 51 Pac. 174, holding condition in policy not waived without evidence of intention of insurer or agent to waive it; *Ehlers v. Aurora F. Ins. Co.* 6 Pa. Dist. R. 443, 19 Pa. Co. Ct. 168, holding stoppage of sawmill longer than specified in policy, caused by severity of climate and breakage of machinery, not within prohibitive clause; *Waukau Mill Co. v. Citizen's Mut. F. Ins. Co.* 130 Wis. 56, 118 Am. St. Rep. 998, 109 N. W. 937, 10 A. & E. Ann. Cas. 795, holding provision as to nonoperation had no reference to temporary cessation occasioned by lack of power, where fact mill could not be operated in severe winter weather on account of lack of power was existing fact known to companies when policies issued; *De Masson v. Liverpool & L. & G. Assur. Co.* Rap. Jud. Quebec, 35 C. S. 462, discussing question as to when premises "unoccupied."

Distinguished in *Home Ins. Co. v. North Little Rock Ice & Electric Co.* 86 Ark. 546, 23 L.R.A.(N.S.) 1204, 111 S. W. 994, where evidence showed property had ceased to be operated or used as factory long before policies issued.

What constitutes manufacturing or mercantile business.

Cited in footnote to *Columbia Iron Works v. National Lead Co.* 64 L. R. A. 645, which holds building, sale, and repairing of vessels, a manufacturing or mercantile pursuit within bankruptcy law.

Effect of custom on insurance contract.

Cited in *Boruszweski v. Middlesex Mut. Assur. Co.* 186 Mass. 593, 72 N. E. 250, holding custom substituting mere notice that fire has occurred for sworn statement in writing required by policy, and making company liable for full amount of policy without regard to damage done by fire, is bad.

Waiver of conditions by agent.

Cited in *Harris v. North American Ins. Co.* 190 Mass. 368, 4 L.R.A.(N.S.) 1139, 77 N. E. 493, holding agent who is without authority to give assurance that company will not insist upon strict compliance with condition as to vacancy, cannot by words or conduct, waive such contractual right of his principal.

11 L. R. A. 773, *ST. LOUIS, A. & T. R. CO. v. TRIPLETT*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266.

Application of fellow servant doctrine.

Cited in *Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 70, 41 Am. St. Rep. 85, 22 S. W. 1089, holding foreman of building and repair gang, with power to employ and discharge men, vice principal; *St. Louis S. W. R. Co. v. Henson*, 61 Ark. 306, 32 S. W. 1079, holding bridge foreman and locomotive engineer fellow servants; *St. Louis, I. M. & S. R. Co. v. Brown*, 67 Ark. 303, 54 S. W. 865, holding locomotive fireman and switchman on train fellow servants; *St. Louis, A. & T. R. Co. v. Torrey*, 58 Ark. 226, 24 S. W. 244, holding master not liable for negligent act of vice principal while performing labor in common with servant; *St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 521, 114 Fed. 901, holding under statute fireman and telegraph operator not fellow servants; *McLaine v. Head & D. Co.* 71 N. H. 307, 58 L. R. A. 469, 93 Am. St. Rep. 522, 52 Atl. 545 (dissenting opinion), majority holding master not liable for negligence of foreman in failing

to notify laborer in trench of dumping of earth; *Kenefick-Hammond Co. v. Rohr*, 77 Ark. 292, 91 S. W. 179, holding persons employed by same master to accomplish one common object and so related in their labors performed in service of master as ordinarily to be exposed to injuries caused by each other's negligence are fellow servants; *Snellen v. Kansas City S. R. Co.* 82 Ark. 337, 102 S. W. 193, holding car inspector and repairer fellow servant of brakeman; *Donnelly v. Cudahy Packing Co.* 68 Kan. 656, 75 Pac. 1017, holding meat trucker in meat packing house fellow servant of operator of elevator upon which trucks are wheeled to be raised; *Collingwood v. Illinois & I. Fuel Co.* 125 Iowa, 544, 101 N. W. 283, holding character of act furnishes test whether person vice principal or fellow servant; *Bryant Lumber Co. v. Stastney*, 87 Ark. 324, 112 S. W. 740, holding duty of master to provide servant with safe place to work, nondelegatory and always master's duty whether performed in fact by president of company, foreman, or day laborer; *Koerner v. St. Louis Car Co.* 209 Mo. 160, 17 L.R.A.(N.S.) 299, 107 S. W. 481, holding act of switchman in moving without warning, car upon which painter at work, act of street car manufacturing company itself; *Archer-Foster Constr. Co. v. Vaughn*, 79 Ark. 24, 94 S. W. 717, holding negligence of master in failing to warn servant that there was dynamite in hole he was drilling, though concurred in by negligence of fellow servant in use of place and means provided for work, renders master liable for injury; *Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 6, 91 S. W. 768, holding complaint against railroad company for negligent killing of fireman in collision states cause of action, though no averment therein that negligence charged was not that of fellow servant.

Cited in footnote to *Buck v. New Jersey Zinc Co.* 60 L. R. A. 453, which holds blacksmith in factory, working link for chain to keep box of dump car in position, fellow servant of one using car.

Cited in notes (50 L. R. A. 425, 427, 434, 435) on what servants are deemed to be in common employment, apart from statutes, where no questions as to vice principalship arise; (51 L. R. A. 519, 592, 593) on vice principalship considered with reference to superior rank of negligent servant; (27 Am. St. Rep. 901) on distinction between fellow servants and vice principals; (75 Am. St. Rep. 604, 640) on who is a vice principal.

Risks assumed by servants.

Cited in *Thomas v. Missouri P. R. Co.* 109 Mo. 211, 18 S. W. 980, holding switchman assumes risk of coupling foreign cars, coming to him in good order; *Graham v. Thrall*, 95 Ark. 563, 129 S. W. 532, holding that servant assumes risk where he knows place where he is required to work, and methods which are employed and continues in employment without complaint.

Cited in note (41 L. R. A. 140) on knowledge as element of employer's liability to injured servant.

Duty of master to provide rules to protect servants.

Cited in *Fordyce v. Briney*, 58 Ark. 213, 24 S. W. 250, holding it duty of railroad to exercise reasonable care in providing regulations to insure safety of car repairers; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 201, 36 N. E. 39, holding master liable for injury to servant through failure of another servant to give notice of danger as required by rule; *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 332, 24 S. W. 723, holding reasonableness of rule adopted for protection of employee, question of law; *St. Louis, I. M. & S. R. Co. v. Inman*, 81 Ark. 598, 99 S. W. 832, defining duties of railroad company in providing for protection of persons engaged in moving wreck of bridge; *Kenefick-Hammond Co. v. Rohr*, 77 Ark. 293, 91 S. W. 179, holding that whether a rule requiring warning before blast is sufficient for protection of servant is a question for the court.

Cited in note (43 L. R. A. 309, 319, 326) on duties of master and servant as to rules promulgated for safe conduct of business.

Distinguished in *Snellen v. Kansas City Southern R. Co.* 82 Ark. 337, 102 S. W. 193, where there was no evidence of negligence of railroad company or its servants in authority in failing to enforce rules.

Errors not requiring reversal of judgment.

Cited in *Fordyce v. Russell*, 59 Ark. 314, 27 S. W. 82, treating amendment marked "filed" by leave of court, evidence being introduced without objection to sustain it, as properly filed; *Missouri, K. & T. R. Co. v. Byrne*, 40 C. C. A. 410, 100 Fed. 359 (dissenting opinion), majority nolding verdict of jury not sustained by evidence.

Amendment of pleadings to conform to proof.

Cited in *McNutt v. McNutt*, 78 Ark. 350, 95 S. W. 778, holding to present issue as both sides have presented it in testimony without objection, by amendment to pleadings after verdict or judgment, is not error; *Roach v. Richardson*, 84 Ark. 41, 104 S. W. 538, holding answer treated as amended to correspond to proof after judgment; *Kahn v. Metz*, 88 Ark. 372, 114 S. W. 911, holding where evidence of settlement and written receipt thereon were received without objection, answer in which settlement not pleaded will be treated on appeal as amended to conform to proof; *James v. Smith*, 3 Ind. Terr. 454, 58 S. W. 714, holding defective complaint curable by proof and verdict.

Master's liability to third person for servant's tort.

Cited in *Stewart v. Cary Lumber Co.* 146 N. C. 50, 59 S. E. 545, holding operator of railroad for conveying lumber liable for injury due to act of engineer in wantonly blowing whistle to frighten plaintiff's mule.

Duty of master to warn servant.

Cited in *Consolidated Stone Co. v. Ellis*, 46 Ind. App. 87, 91 N. E. 1095, holding that servant placed to work in place of danger has right to rely on promise of foreman that he will give him sufficient warning.

Cited in footnotes to *Kentucky & I. B. & R. Co. v. Snyder*, 68 L.R.A. 183, which holds railroad company liable for injuries to car repairer by propelling car against the one under which he was working, notwithstanding his failure to place signal flag in best position, if the flag could have been discovered by exercise of ordinary care by those in charge of train; *Western Electric Co. v. Hanselmann*, 70 L.R.A. 765, which holds master sending employee to repair switches on elevators which requires him to work inside wells in path of cars while in operation liable for injuries due to failure to use necessary means to give him timely warning of approach of cars by means other than persons in charge of such cars; *Louisville & N. R. Co. v. Lowe*, 65 L.R.A. 122, which holds it duty of railroad company in moving engines about its yard to keep lookout for, and give signals for benefit of car inspectors employed therein.

11 L. R. A. 778, *VESTAL v. LITTLE ROCK*, 54 Ark. 321, 15 S. W. 891, 16 S. W. 291.

Extension of limits of municipality.

Cited in *Copeland v. St. Joseph*, 126 Mo. 432, 29 S. W. 281, holding reasonableness of act conferring power by legislature upon municipality to extend its limits, subject to judicial review; *Paul v. Walkerton*, 150 Ind. 570, 50 N. E. 725, holding general laws providing for conditions upon which contiguous territory can be annexed to city, and mode of procedure, valid; *Woodruff v. Eureka Springs*, 55 Ark. 620, 19 S. W. 15, holding land contiguous to city, of little value for county uses but valuable for prospective city uses, properly annexed; *Parker v.*

Zeisler, 73 Mo. App. 550, upholding ordinance extending city limits to take in contiguous, densely populated territory; State *ex rel.* Hammond v. Dimond, 44 Neb. 160, 62 N. W. 498, holding remote territory, without natural connection with village and no adaptability to municipal purposes, not annexable; Gunter v. Fayetteville, 56 Ark. 203, 19 S. W. 577, upholding right of appeal in proceeding for annexation; Chandler v. Kokomo, 137 Ind. 297, 36 N. E. 847, holding reasons stated in petition sufficient for annexation, but reversing because of failure of proof as to platting of annexable territory; State *ex rel.* Major v. Kansas City, 233 Mo. 213, 134 S. W. 1007, holding that whether attempt of city to extend boundaries is reasonable or not, must depend upon the facts, circumstances and conditions of each case; Little Rock v. North Little Rock, 72 Ark. 209, 79 S. W. 785, holding legislative power is not unduly delegated by an act authorizing annexation of a municipality or part thereof to another, and requiring the question to be submitted to vote after assent of council to call election; Harris v. Martindale, 42 Ind. App. 634, 86 N. E. 494, holding inclusion of land in boundaries of a proposed town unjustifiable, where the land is not necessary or desirable for town purposes, and is separated from the platted land by land outside corporate limits.

Cited in footnote to Ferguson v. Snohomish, 24 L. R. A. 795, which upholds right to include dairy farm within city limits.

Cited in notes (27 L.R.A. 740) on power of legislature to annex territory to municipalities; (44 L. ed. U. S. 395) on annexation of rural lands to municipalities.

Construction of words "contiguous" and "adjoining."

Cited in Matthews v. Kimball, 70 Ark. 464, 66 S. W. 651, construing word "adjoining" in improvement statute as not excluding property near to, but not touching, improvement.

11 L. R. A. 784, CHELLIS v. CHAPMAN, 125 N. Y. 214, 26 N. E. 308.

Defendant's reputation for wealth.

Cited in Humphrey v. Brown, 89 Fed. 641; Rime v. Rater, 108 Iowa, 66, 78 N. W. 835; Smith v. Compton, 67 N. J. L. 557, 58 L. R. A. 484, 52 Atl. 386; Ortiz v. Navarro, 10 Tex. Civ. App. 199, 30 S. W. 581; Stratton v. Dole, 45 Neb. 477, 63 N. W. 875,—holding evidence of defendant's reputation for wealth admissible in action for breach of promise of marriage; Vierling v. Binder, 113 Iowa, 342, 85 N. W. 621, holding evidence of specific property owned by defendant admissible in breach of promise of marriage action; Leavell v. Leavell, 114 Mo. App. 33, 89 S. W. 55, holding defendant's wealth may be shown in case of alienation of affections of spouse resulting in abandonment, though punitive damages are not asked, the inquiry is limited, however, to defendant's reputed wealth.

Cited in note (26 Am. St. Rep. 924) on evidence of defendant's wealth in action for breach of marriage promise.

Exemplary damages.

Cited in Kaufman v. Fye, 99 Tenn. 167, 41 S. W. 1031, holding damages for breach of promise to marry may be aggravated if engagement was made as cloak to accomplish seduction of plaintiff; Roberts v. Druillard, 123 Mich. 289, 82 N. W. 49, holding proof of slanderous statement by defendant concerning plaintiff, after breach of contract to marry, proper only to enhance damages; Jacobs v. Sire, 4 Misc. 399, 23 N. Y. Supp. 1063, holding instruction depriving jury of discretion whether exemplary damages for breach of promise of marriage should be awarded erroneous; Wolters v. Schultz, 1 Misc. 202, 21 N. Y. Supp. 768 (dissenting opinion), majority holding verdict of \$25,000 for breach of promise to marry, about one sixth of defendant's fortune, should be set aside; Sneve v. Lun-

der, 100 Minn. 6, 110 N. W. 99, holding it error to direct jury to allow punitive damages in action for breach of promise to marry; *Eupes, v. Nephue*, 120 App. Div. 623, 105 N. Y. Supp. 542, holding instruction in action for criminal conversation which takes from jury discretion as to allowance of punitive damages erroneous.

Cited in notes (28 Am. St. Rep. 874; 8 Eng. Rul. Cas. 375) on right to punitive damages.

Objection to single proposition in charge to jury.

Cited in *Smith v. Matthews*, 152 N. Y. 158, 46 N. E. 164, holding erroneous instruction as to malice harmless in view of entire charge; *Clews v. Alley*, 46 N. Y. S. R. 173, 18 N. Y. Supp. 760, refusing to sustain exceptions to charge conveying as a whole correct rules of law on evidence presented; *Brady v. Cassidy*, 9 Misc. 111, 29 N. Y. Supp. 45, and *Rettig v. Fifth Ave. Transp. Co.* 6 Misc. 335, 26 N. Y. Supp. 896, holding that single proposition in charge will be construed in connection with context to determine whether erroneous.

Breach of marriage contract.

Cited in note (66 L.R.A. 800) on refusal or failure to keep agreement for marriage at specified time or place as breach of marriage contract.

11 L. R. A. 787, *LOUISVILLE, N. A. & C. R. CO. v. WALLACE*, 136 Ill. 87, 26 N. E. 493.

Unequal, partial, or special legislation.

Cited in *Badger v. Mississippi Valley Portland Cement Co.* 247 Ill. 113, 93 N. E. 90, holding that statute relating to placing certain cases on short cause calendar is not unconstitutional as special legislation.

Cited in notes (14 L.R.A. 585) on constitutional equality of privileges, immunities and protection; (31 Am. St. Rep. 653) on general and special laws.

Reasonableness of fees for legal services.

Cited in *Nathan v. Brand*, 167 Ill. 609, 47 N. E. 771, and *Nathan v. Brand*, 67 Ill. App. 541, holding best evidence of reasonableness of attorney's fee may be what is usual fee; *National Home Bldg. & L. Asso. v. Fifer*, 71 Ill. App. 301, holding objection that evidence as to reasonableness of attorney's fee should be confined to what customary fees for similar services are, must be specified; *Wright v. Neely*, 100 Ill. App. 313, holding in foreclosure proceeding of \$38,725.85, allowance of \$750 solicitor's fee reasonable; *Sexton v. Bradley*, 110 Ill. App. 498, holding opinion of lawyers as to reasonable value of services rendered, competent; *Maneaty v. Steele*, 112 Ill. App. 20, holding testimony as to value of services competent, where there is no customary charge for same; *Spencer v. Collins*, 156 Cal. 307, 104 Pac. 320, holding testimony of experts to prove value of attorneys' services admissible, but not essential, to finding value of service; *Sanitary Dist. v. Curran*, 132 Ill. App. 247; *Chicago & S. Traction Co. v. Gaines*, 129 Ill. App. 166,—holding where there is no contract and has been no payment or settlement or charge, inquiry should be as to what is customarily charged and paid for such services; *Morehead v. Anderson*, 125 Ky. 89, 100 S. W. 340, holding testimony of lawyers as to value of legal services admissible but not conclusive.

Evidence of value of services.

Cited in *Swern v. Churchill*, 155 Ill. App. 511, holding that in order to show value of architect's services evidence should be adduced of usual charge for particular services described and detailed.

11 L. R. A. 790, *ADAMS v. STOREY*, 135 Ill. 448, 25 Am. St. Rep. 392, 26 N. E. 582.

Effect of divorce, separation, or abandonment on property rights.

Cited in *Kirkpatrick v. Kirkpatrick*, 197 Ill. 152, 64 N. E. 267, holding wife securing divorce for husband's fault entitled to dower, where right was not barred in decree; *McKelvey v. McKelvey*, 112 Mich. 275, 70 N. W. 582, holding stipulation in divorce proceedings, giving wife specified land and sum of money in full for all expenses and alimony, released dower; *Gallager v. Gallager*, 101 Wis. 205, 77 N. W. 145, holding wife barred from dower by divorce decree and division of property between parties; *Long v. Barton*, 236 Ill. 553, 19 L.R.A.(N.S.) 386, 86 N. E. 127, holding acceptance of provisions of decree of divorce made in lieu of dower operates as abandonment of claim to that which, under antenuptial contract, represented dower.

Cited in footnotes to *Price v. Price*, 12 L. R. A. 359, which holds wife not entitled to dower on annulment of marriage because husband had former wife living; *Burgess v. Muldoon*, 24 L. R. A. 798, which holds inchoate interest of curtesy destroyed by absolute divorce; *Wood v. Wood*, 28 L. R. A. 157, which holds dower barred by divorce; *Meacham v. Bunting*, 28 L. R. A. 618, which holds tenancy by curtesy initiate not defeated by obtaining divorce from wife; *Duffy v. Harris*, 40 L. R. A. 750, which holds homestead rights of widow not forfeited by previous abandonment of husband and living with another man; *Beaty v. Richardson*, 46 L. R. A. 517, which denies forfeiture of right of dower of woman living in adultery after husband's abandonment for other woman; *Brown's Appeal*, 49 L. R. A. 144, which denies right of divorced wife to dower if later lawful wife survives; *Land v. Shipp*, 50 L. R. A. 560, which holds wife's right of dower not affected by release made directly to husband in deed of separation; *Doyle v. Rolwing*, 55 L. R. A. 332, which holds right of curtesy defeated by divorce for wife's fault.

Distinguished in *Barkman v. Barkman*, 94 Ill. App. 442, holding decree awarding wife alimony in gross sum cannot be modified at subsequent term.

Definition of alimony.

Cited in *Anderson v. Norvell-Shapleigh Hardware Co.* 134 Mo. App. 191, 113 S. W. 733, defining alimony as that allowance which is made to a woman on decree of divorce for her support out of her husband's estate.

Cited in note (102 Am. St. Rep. 700) on definition of alimony.

Termination of alimony with life of husband.

Cited in note (2 L.R.A.(N.S.) 233, 242) as to whether alimony terminates on death of husband.

11 L. R. A. 794, *GIFFORD v. RUTLAND SAV. BANK*, 63 Vt. 108, 25 Am. St. Rep. 744, 21 Atl. 340.

By-laws in bank depositors' books.

Cited in *Cosgrove v. Provident Inst. for Sav.* 64 N. J. L. 654, 46 Atl. 617, holding by-law printed in deposit book accepted by depositor as part of contract with bank; *Ladd v. Augusta Sav. Bank*, 96 Me. 513, 58 L. R. A. 290, footnote p. 288, 52 Atl. 1012, which holds depositor bound by rules in bank book.

Payment by bank to wrong person.

Cited in *Crippen v. American Nat. Bank*, 51 Mo. App. 516, denying right of lender to recover from bank money paid by it to person named and intended as payee of draft, although he was a swindler and not the owner of property on which he gave a mortgage to secure the loan; *Chase v. Waterbury Sav. Bank*, 77 Conn. 301, 69 L.R.A. 337, 59 Atl. 37, 1 A. & E. Ann. Cas. 96, holding provisions

in savings-bank deposit book that bank will not be responsible to depositor for fraud in drawing of money from bank by wrong person do not relieve bank from duty to exercise ordinary care to prevent payment to wrong person, though such person presents deposit book.

Cited in notes (13 L.R.A. 737) on possession of bank pass book not conclusive evidence of right to draw deposit; (69 L.R.A. 318, 325, 326, 332, 337) on liability of savings bank for payments to fraudulent claimants; (105 Am. St. Rep. 731, 749, 750, 751) on duties of savings banks toward depositors.

11 L. R. A. 796, *Re CONWAY*, 124 N. Y. 455, 26 N. E. 1028.

Execution of wills.

Cited in *Re Whitney*, 153 N. Y. 263, 60 Am. St. Rep. 616, 47 N. E. 272, Reversing 90 Hun, 141, 35 N. Y. Supp. 798, holding will signed at foot of page containing two subdivisions thereof, with following subdivisions annexed to face of sheet containing signature, invalid; *Re Blair*, 84 Hun, 582, 32 N. Y. Supp. 845, holding will signed by testator at end of testimonial clause, and again at end of clause containing direction to executors, and by witnesses above last signature, invalid; *Re Andrews*, 162 N. Y. 7, 48 L. R. A. 664, footnote p. 662, 76 Am. St. Rep. 294, 56 N. E. 529, Affirming 43 App. Div. 396, 60 N. Y. Supp. 141, holding signature to will on second page, without anything to connect portions contained on third page, insufficient; *Re Fults*, 42 App. Div. 595, 59 N. Y. Supp. 756, holding will signed on printed blank, to the face of which was attached, with pins, double sheet of legal cap containing additional bequests, invalid; *Re Campbell*, 170 N. Y. 86, 62 N. E. 1070, holding codicil to will revoked by later will revives former will and revokes intermediate will; *Re Murphy*, 48 App. Div. 215, 62 N. Y. Supp. 785, holding will not invalidated by blank space of page and a half between disposing clauses and appointment of executor; *Re Field*, 204 N. Y. 455, 39 L.R.A.(N.S.) 1063, 97 N. E. 881, holding that will, which, when read consecutively has signature at physical and natural end thereof should be admitted to probate; *Re Weston*, 60 Misc. 276, 113 N. Y. Supp. 619, holding will cannot be probated or established by proving codicil which refers to it, without showing statutory requisites as to execution of will have been complied with; *Re Emmons*, 110 App. Div. 703, 96 N. Y. Supp. 506, holding prior instrument intended as holographic will not attested as required by statute, cannot be revived by or incorporated into subsequent so called codicil validly executed; *Re Seaman*, 146 Cal. 461, 106 Am. St. Rep. 53, 80 Pac. 700, 2 A. & E. Ann. Cas. 726, holding statute requiring wills to be subscribed at the end thereof not complied with by signing underneath forms for date and filing on outside face of paper when folded; *Re Andrews*, 30 N. Y. Civ. Proc. Rep. 381, holding where will is on two leaves of four pages, second page being marked third page and third page being marked second, it is not subscribed at end thereof by signing on second page, though it is marked third page; *Sears v. Sears*, 77 Ohio St. 123, 17 L.R.A.(N.S.) 361, 82 N. E. 1067, 11 A. & E. Ann. Cas. 1008, holding will not signed at end thereof, where blank for testator's signature was unfilled, though proof offered that name of testatrix was written in attestation clause by herself; *Irwin v. Jacques*, 71 Ohio St. 409, 69 L.R.A. 427, 73 N. E. 683, on construction of statutes as to execution of wills.

Cited in footnotes to *Shaw v. Camp*, 36 L.R.A. 112, which holds unsigned, unattested sheet attached to will made effective by subsequent codicil; *Irwin v. Jacques*, 69 L.R.A. 422, which holds will signed on last page is not signed at end as required where a dispositive clause extends lengthwise of last page from near bottom to near top in no way connected with the body of the instrument.

Distinguished in *Re Snell*, 32 Misc. 614, 67 N. Y. Supp. 581, holding will en-

titled to probate although written on separate pieces of paper not fastened together, where testator signed it; *Cock v. White*, 43 App. Div. 393, 60 N. Y. Supp. 153, holding subsequent will or codicil may act as revival or ratification of previously properly executed will for any reason inoperative.

11 L. R. A. 800, *BATTERMAN v. ALBRIGHT*, 122 N. Y. 484, 19 N. Y. Supp. 510, 25 N. E. 856.

Conditions affecting ownership of property severable from land.

Cited in *Leonard v. Clough*, 37 N. Y. S. R. 816, 14 N. Y. Supp. 339, holding small barn removable without injury to real estate severable therefrom by agreement; *Banta v. Merchant*, 173 N. Y. 296, 66 N. E. 13, holding growing crops insufficiently reserved by referee on partition sale by statement that they were subject to same claim; *Wootton v. White*, 90 Md. 67, 78 Am. St. Rep. 425, 44 Atl. 1026, holding purchaser under foreclosure takes title to unsevered crops; *Jones v. Adams*, 37 Or. 475, 50 L. R. A. 389, 82 Am. St. Rep. 766, 59 Pac. 811, holding chattel mortgage on growing crops not sufficient severance to prevent same passing to purchaser of land on foreclosure sale; *McFadden v. Allen*, 134 N. Y. 494, 19 L. R. A. 448, 32 N. E. 21 (concurring opinion), holding accessions to realty subsequent to mortgage lien, made under agreement not known to mortgagee, subject to mortgage; *East New York Refrigerator & Woodworking Co. v. Halpern*, 140 App. Div. 202, 125 N. Y. Supp. 111, holding that lien of building loan mortgage on mantel pieces subsequently sold to owner under contract of conditional sale and annexed to land, is superior to lien of conditional vendor if mortgagee had no knowledge of lien when advances on mortgage were made.

Annotation cited in *Hetfield v. Lawton*, 108 App. Div. 116, 95 N. Y. Supp. 451, on right of tenant to emblements.

Cited in footnotes to *Goodwin v. Smith*, 17 L. R. A. 284, which holds purchaser on foreclosure entitled to wheat sown by tenant after judgment; *Caldwell v. Alsop*, 17 L. R. A. 782, which holds good title to growing crop on mortgaged premises obtained by purchase before commencement of foreclosure proceedings; *Sievers v. Brown*, 45 L. R. A. 642, which holds vendor entitled to crops planted by one in possession after refusal to comply with contract of purchase; *Noble v. Tyler*, 48 L. R. A. 735, which holds administrator of life tenant entitled to harvest grain and crops; *Salter v. Sutherland*, 50 L. R. A. 140, which denies administrator's title to chattels possessed by his intestate under agreement for use during her life and that of the owner, so as to authorize him to sue third person obtaining possession after his intestate's death; *Whithed v. St. Anthony & D. Elevator Co.* 50 L. R. A. 254, which holds purchaser on foreclosure of leased land entitled to wheat stored by tenant for payment as rent.

Date of title acquired through foreclosure.

Cited in *Delap v. Brooklyn*, 3 Misc. 24, 22 N. Y. Supp. 179; *National Commercial Bank v. Gray*, 71 Hun. 302, 24 N. Y. Supp. 997; *Jaycox v. Smith*, 17 App. Div. 149, 45 N. Y. Supp. 299,—holding title of purchaser at foreclosure sale relates back to date and record of mortgage; *Sprague Nat. Bank v. Erie R. Co.* 22 App. Div. 527, 48 N. Y. Supp. 65, holding action not maintainable by lessee for breach of covenant against purchaser under foreclosure of mortgage recorded prior to lease; *Caccia v. Brooklyn Union Elev. R. Co.* 98 App. Div. 297, 90 N. Y. Supp. 582, holding purchaser at foreclosure sale takes all the interest of mortgagee and mortgagor at date of mortgage and a release of easements by grantee of mortgagor is taken subject to liability of divestiture by foreclosure; *Wacht v. Erskine*, 61 Misc. 98, 113 N. Y. Supp. 130, holding purchaser at foreclosure cannot maintain action for rent against lessee of mortgagor, where

referee's deed conveys subject to leases, and tenant has not attorned to purchaser.
Cited in note (24 Am. St. Rep. 209) on rights of purchaser at foreclosure sale.

11 L. R. A. 804, *SILVERS v. TRAVERSE*, 82 Iowa, 52, 47 N. W. 888.

Followed without comment in *Sweeny v. Traverse*, 82 Iowa, 720 Appx., 47 N. W. 889.

Injunction against maintenance of nuisance.

Cited in *Steyer v. McCauley*, 102 Iowa, 108, 71 N. W. 194, holding injunction enjoining liquor nuisance and pending contempt proceedings bar to action for second injunction; *Newcomer v. Tucker*, 89 Iowa, 487, 56 N. W. 499, holding tenant without knowledge not punishable for violation of injunction against owner of premises from maintenance of liquor nuisance; *Dermedy v. Jackson*, 147 Iowa, 622, 125 N. W. 228, holding that decree restraining sale of liquor in certain place, enjoining in terms defendant and others, is sufficient as public record to impart constructive notice to all persons; *State v. Porter*, 76 Kan. 414, 13 L.R.A. (N.S.) 464, 91 Pac. 1073, holding notice and actual knowledge of order enjoining maintenance of nuisance is not necessary to sustain conviction for violation of such order; *State ex rel. Baker Lodge No. 47 A. F. & A. M. v. Siever*, 49 Or. 9, 88 Pac. 313, holding in case of criminal contempt, affidavit in proceeding for failure to observe injunction is sufficient if it sets out acts done in violation of writ and avers party accused had knowledge of terms and conditions of restraining order; allegation of demand for compliance with injunction being unnecessary.

Cited in footnotes to *Landry v. New Iberia*, 56 L. R. A. 285, which denies city's power to arbitrarily declare particular licensed saloon a nuisance; *Laugel v. Bushnell*, 58 L. R. A. 266, which sustains ordinance declaring places where hop ale, hop and malt mead and cider sold, nuisances; *Northwood v. Barber Asphalt Paving Co.* 54 L. R. A. 454, which holds compliance with insufficient special directions for abatement of nuisance not excuse disobedience of general clause of decree; *Kirkland v. State*, 65 L.R.A. 76, which holds proceeding to condemn and destroy liquor kept for sale in prohibited district not criminal.

Cited in note (13 L.R.A. (N.S.) 462) on effect of judgment enjoining manner of use of realty, upon right of subsequent occupants to use in same manner.

Distinguished in *Buhlman v. Humphrey*, 86 Iowa, 602, 53 N. W. 318, holding injunction restraining persons named therein from keeping liquor nuisance on certain premises not binding on subsequent purchaser or lessee.

Conclusiveness of judgments.

Cited in *McConkie v. Remley*, 119 Iowa, 516, 93 N. W. 505, holding decree of district court as to sufficiency of revocation of consent to sale of liquor binding in subsequent contempt proceeding for violation of decree.

Contempt proceedings.

Cited in *State ex rel. Seifert v. Branner*, 174 Ind. 689, 93 N. E. 70, holding that in criminal or common law contempts defendant is punished or discharged upon return.

11 L. R. A. 805, *BROOK v. LATIMER*, 44 Kan. 431, 21 Am. St. Rep. 292, 24 Pac. 946.

Parol evidence to explain written agreement.

Cited in *Hausbrandt v. Hofer*, 117 Iowa, 106, 94 Am. St. Rep. 289, 90 N. W. 494, holding parol evidence admissible to show that note was intended as receipt, in action for its reformation; *Sutton v. Griebel*, 118 Iowa, 80, 91 N. W. 825, holding contemporaneous parol agreement as to condition under which one signed written agreement provable; *Kernodle v. Williams*, 153 N. C. 478, 34 L.R.A. (N.S.)

936, 69 S. E. 431, holding that in action on bond to pay certain sum on day after date, parol evidence was admissible to show agreement that defendants were to pay and did pay certain amounts and that balance was to be accounted for after death of obligee with his estate.

Cited in notes (4 Eng. Rul. Cas. 208) on parol evidence as to notes or bill of exchange; (11 Eng. Rul. Cas. 230) on parol evidence to contradict written instrument.

Loans and advancements.

Cited in *Sprague v. Moore*, 130 Mich. 100, 89 N. W. 712, holding that money given to son by parent, for which former gives note, presumed a loan; *Plowman v. Nicholson*, 81 Kan. 217, 106 Pac. 279, holding where parents execute series of conveyances, seemingly in pursuance of general plan, their declarations at time of delivering deeds, showing purpose to discriminate between children, are competent for purpose of overthrowing presumption that all deeds were intended as advancements; *Strode v. Beall*, 105 Mo. App. 501, 79 S. W. 1019, holding where parent takes promissory note, payable to himself, from his child, his declarations at the time of transaction, or subsequent thereto, are admissible to show note was taken as receipt or memorandum of advancement and memorandum of decedent is admissible to show his intention as to notes of son-in-law.

11 L. R. A. 807, *PEOPLE v. FLACK*, 125 N. Y. 324, 26 N. E. 267.

Intent as element of crime.

Cited in *People v. Bates*, 79 Hun, 586, 29 N. Y. Supp. 894, holding "wilful" intrusion into public office within Pen. Code, § 56, means act intentionally done with wrongful purpose; *People v. Wiman*, 9 Misc. 448, 29 N. Y. Supp. 1034, holding criminal intent always a question of fact for jury; *Bennett v. State*, 62 Ark. 532, 36 S. W. 947, holding that intent to defraud may be presumed where forgery was committed with intent that instrument should be used as genuine; *State v. Strasburg*, 60 Wash. 120, 32 L.R.A.(N.S.) 1220, 110 Pac. 1020, Ann. Cas. 1912 B, 917, holding that under common law intent was necessary to constitute criminal act, and insane person incapable of forming criminal intent was not responsible for crime; *Pereless v. Weil*, 157 Fed. 422, on treatment of innocent acts done in ignorance of prohibition of statute as criminal conspiracy; *People ex rel. Perkins v. Moss*, 50 Misc. 205, 100 N. Y. Supp. 427, holding where intent is a necessary incident to commission of crime, question of intent must be submitted to jury.

Cited in footnotes to *State v. Kittelle*, 15 L. R. A. 694, which holds proprietor liable for unlawful sale of liquor to minor by clerk in violation of instructions; *State v. Ziehfeld*, 34 L. R. A. 784, which holds man may be guilty of bigamy, notwithstanding belief that former marriage annulled.

Errors of trial court requiring reversal.

Cited in *People v. Glen*, 64 App. Div. 181, 71 N. Y. Supp. 893 (dissenting opinion), majority holding reading of affidavit to grand jurors by trial court, and instructing them to indict if facts found therein were true, not ground for reversal after trial.

Elements of conspiracy.

Cited in *People v. Summerfield*, 48 Misc. 246, 96 N. Y. Supp. 502, 19 N. Y. Crim. Rep. 508, holding indictment for conspiracy showed crime committed in county where agreement was made and overt acts done by one conspirator though other conspirators acted in a foreign country; *People ex rel. Burnham v. Flynn*, 114 App. Div. 580, 100 N. Y. Supp. 31, holding agreement among theatre managers to exclude critic from their theatres not unlawful; *Cohen v. Fisher*, 135-

App. Div. 243, 120 N. Y. Supp. 546, holding allegations of complaint insufficient to show conspiracy falsely to institute bankruptcy proceeding.

— **Proof.**

Cited in *Heughes v. Board of Education*, 37 App. Div. 183, 55 N. Y. Supp. 1106, holding conspiracy to defraud city may be established by circumstantial evidence.

Separate functions of court and jury.

Cited in *People v. Hummel*, 49 Misc. 140, 98 N. Y. Supp. 713, suggesting that it is error to charge that as matter of law there is evidence to corroborate accomplice, leaving jury to determine merely credibility of witnesses.

11 L. R. A. 817, *MERCIER'S SUCCESSION*, 42 La. Ann. 1135, 8 So. 732.

Tax liens and privileges.

Cited in *Girardey's Succession*, 44 La. Ann. 547, 10 So. 851, holding demands of city as ordinary creditor of succession, inferior to demands of secured and privileged creditors; *Miramón v. New Orleans*, 52 La. Ann. 1625, 28 So. 107, holding city taxes themselves imprescriptible; *Leeds v. Hardy*, 43 La. Ann. 813, 9 So. 488, holding that, notwithstanding prescription of tax privileges and mortgages, city could proceed against property assessed to realize taxes; *Gulf States Land Co. v. Parker*, 60 Fed. 976, holding that recorded tax liens and privileges continue to be liens until paid, without reinscription; *Norres v. Hays*, 44 La. Ann. 912, 11 So. 462, holding tax sale under invalid assessment, null and void; *People's Homestead Assn. v. Garland*, 107 La. 478, 31 So. 892, holding taxes a personal obligation, as well as charge upon property; *Koen v. Martin*, 110 La. 245, 34 So. 429, holding cancelation of inscriptions for taxes properly refused where persons to whom assessed not shown not to have been owners of property taxed; *Lisso & Bro. v. Nachitoches Parish*, 127 La. 290, 31 L.R.A.(N.S.) 1147, 53 So. 566, holding that person appearing as owner of record is bound by taxes assessed to him; *Westfeldt's Succession*, 122 La. 841, 48 So. 281, on imposition of inheritance tax.

Cited in footnotes to *Marye v. Diggs*, 51 L. R. A. 902, which denies jurisdiction in equity of suit for collection of taxes; *State v. Georgia Co.* 19 L. R. A. 485, which holds creditor's bill maintainable for collection of tax in proper case.

Cited in note (42 Am. St. Rep. 656, 658) on recovery of personal judgment for taxes.

Rule to show cause.

Cited in *Rouge v. Larfargue Bros. Co.* 47 La. Ann. 1649, 18 So. 652, holding that plaintiff having invoked rule to show cause could not object to defendant's doing so by way of answer.

11 L. R. A. 825, *GOFF v. ANDERSON*, 91 Ky. 303, 15 S. W. 866.

Tenancy by curtesy.

Cited in notes (112 Am. St. Rep. 579) on tenancy by the curtesy; (128 Am. St. Rep. 478, 480) on nature and existence of estates of tenancy by the curtesy.

11 L. R. A. 828, *LEHEW v. BRUMMELL*, 103 Mo. 546, 23 Am. St. Rep. 895, 15 S. W. 765.

Equality of privileges.

Cited in *Younger v. Judah*, 111 Mo. 310, 16 L. R. A. 561, 33 Am. St. Rep. 527, 19 S. W. 1109, upholding rule permitting colored persons to sit in balcony of theater only; *Martin v. Board of Education*. 42 W. Va. 516, 26 S. E. 348, holding state Constitution forbidding teaching of white and colored children in same schools not repugnant to Federal Constitution; *Plessy v. Ferguson*, 163 U. S. 545,

41 L. ed. 258, 16 Sup. Ct. Rep. 1138, Affirming 45 La. Ann. 85, 18 L. R. A. 642, 11 So. 948, upholding statute requiring separate train accommodations for white and black races; Wong Him v. Callahan 119 Fed. 382, upholding act providing for separate schools for Chinese; Berea College v. Com. 123 Ky. 220, 124 Am. St. Rep. 344, 94 S. W. 623, 13 A. & E. Ann. Cas. 337, holding that while statute forbidding operation of school for both whites and negroes is a valid exercise of police power a section thereof prohibiting maintenance of separate branches of an institution for each race respectively within twenty-five miles of each other is in excess of police power; Morrison v. State, 116 Tenn. 550, 95 S. W. 494, holding statute to secure separation of white and colored passengers on street cars valid.

Cited in notes (14 L.R.A. 581) on constitutional equality of privileges, immunities, and protection; (22 L.R.A.(N.S.) 584) on power to require attendance at particular school as affected by location or accessibility; (25 Am. St. Rep. 875) on 14th amendment as to special privileges, burdens and restrictions; (44 L. ed. U. S. 262) on constitutional equality of school privileges.

11 L. R. A. 830, KNOX v. BOARD OF EDUCATION, 45 Kan. 152, 25 Pac. 616.

Exclusion of children from public schools.

Cited in Osborn v. Russell, 64 Kan. 511, 68 Pac. 60, holding board of education without power to deny unvaccinated child permission to attend public schools; Reynolds v. Board of Education, 66 Kan. 673, 72 Pac. 274, upholding right of cities of first class, under statute, to maintain separate schools for white and black children; Rowles v. Board of Education, 76 Kan. 364, 91 Pac. 88, holding city or school district cannot discriminate against child on account of color unless by express grant of authority to do so; Cartwright v. Board of Education, 73 Kan. 34, 84 Pac. 382, granting mandamus to compel admission of minor child to public school by school board at suit brought in father's name.

11 L. R. A. 833, D. M. OSBORNE & CO. v. HUBBARD, 20 Or. 318, 25 Pac. 1021.

Effect of seal on negotiable instruments.

Cited in McLaughlin v. Braddy, 63 S. C. 438, 90 Am. St. Rep. 681, 41 S. E. 523, holding signature to note opposite printed word "seal" renders instrument sealed as to such maker.

Cited in note (35 L. R. A. 606) on effect of seal on negotiability of bill or note.

11 L. R. A. 835, GILSON v. RUSH COUNTY, 128 Ind. 65, 27 N. E. 235.

Local or special legislation.

Cited in Indianapolis v. Navin, 151 Ind. 145, 41 L. R. A. 341, 47 N. E. 525, upholding law regulating street care fares applicable to cities of 100,000; Bell v. Maish, 137 Ind. 230, 36 N. E. 358, holding act applicable to all townships not local; Henderson v. State, 137 Ind. 564, 24 L. R. A. 475, 477, 36 N. E. 257, holding act relating to fees, of uniform operation throughout state, not local and special; Indianapolis Street R. Co. v. Robinson, 157 Ind. 237, 61 N. E. 197, upholding act relieving plaintiffs from alleging and proving freedom from contributory negligence; Barrett v. Millikan, 156 Ind. 516, 83 Am. St. Rep. 220, 60 N. E. 310, holding mechanic's lien law does not grant special privileges to one class of citizens; Johnson County v. Johnson, 173 Ind. 94, 89 N. E. 590, holding that statute providing for taxation of unincorporated banks is not local or special.

Cited in footnote to Milwaukee County v. Isenring, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county local.

Cited in note (31 Am. St. Rep. 653) on general and special laws.

Distinguished in Rushville v. Hayes, 162 Ind. 204, 70 N. E. 134, holding statute authorizing issue of school bonds by school trustees in any city or town of not

more than 4,545 and not less than 4,540, upon compliance with certain conditions is local and special legislation.

Uniform and unjust taxation.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 647, 33 N. E. 432, and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind 536, 18 L. R. A. 740, 33 N. E. 421, upholding statute providing for assessment of all property at true cash value, and at same rate within district subject to taxation; *Vickery v. Hendricks County*, 134 Ind. 555, 32 N. E. 880, holding plaintiff estopped from raising question of constitutionality of tax by delaying action to enjoin same until county received benefit of purchase of road; *Henderson v. London & L. Ins. Co.* 135 Ind. 38, 20 L. R. A. 833, 41 Am. St. Rep. 410, 34 N. E. 565, holding tax on foreign insurance companies doing business in counties having cities with paid fire departments unconstitutional; *Monroe County v. Harrell*, 147 Ind. 503, 46 N. E. 124, upholding act taxing property according to benefit from purchase of free gravel roads; *Byram v. Marion County*, 145 Ind. 250, 33 L. R. A. 480, 44 N. E. 357, holding question of benefit from improvement legislative; *Lowe v. White County*, 156 Ind. 165, 59 N. E. 466, holding gravel roads act of 1893 not unjust exercise of taxing power; *State ex rel. Lewis v. Smith*, 158 Ind. 550, 63 L. R. A. 120, 63 N. E. 25, upholding constitutionality of act authorizing deductions of mortgage indebtedness from assessed valuation for purpose of taxation; *Smith v. Stephens*, 173 Ind. 567, 30 L.R.A.(N.S.) 706, 91 N. E. 167, holding that legislature has power to say what property shall be assessed and how it shall be taxed, so long as there is uniformity and equality of rate as to property of same class; *Voris v. Pittsburg Plate Glass Co.* 163 Ind. 606, 70 N. E. 249, on right of property owner to hearing on question of special benefits from public improvement; *Spaulding v. Mott*, 167 Ind. 67, 76 N. E. 620, holding it is within discretion of legislature, as general rule, to determine what property, as regards location with respect to local improvement, shall be assessed; *Edwards v. Cooper*, 168 Ind. 67, 79 N. E. 1047, holding legislature may devise scheme for accomplishment of drainage which makes no provision for hearing upon necessity of the work or proper bounding of district in which special assessment is to be levied; *State ex rel. Hendricks v. Marion County*, 170 Ind. 610, 82 N. E. 513, holding road improvements may be made by tax on all property in taxing district; *Davern v. Decatur County*, 34 Ind. App. 49, 72 N. E. 268, holding tax to construct road or for other public improvement in one portion of municipality at general expense of taxing district is for governmental purpose and valid.

Cited in footnote to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes, not applying to all parts of state, unconstitutional.

Power to create tax districts.

Cited in *Jackson County v. State*, 147 Ind. 490, 46 N. E. 908, upholding power of legislature to establish special tax district for relocation of county seat; *Spaulding v. Mott*, 167 Ind. 67, 76 N. E. 620, holding that legislature may fix boundaries of districts to be taxed for costs of improvements therein; *Smith v. Hamilton County*, 173 Ind. 377, 90 N. E. 881, holding that legislature has power to fix taxing districts for highway purposes, and may disregard county, town and city boundaries; *State ex rel. Hendricks v. Marion County*, 170 Ind. 611, 82 N. E. 513, holding legislature in exercise of power to establish and repair roads may, by general law provide for taxing districts without regard to boundaries of counties, townships or municipalities.

Judicial character of proceeding relating to roads.

Cited in *State ex rel. Dayton Gravel Road Co. v. Tippecanoe County*, 131 Ind. 94, 30 N. E. 892, holding mandamus will not issue to compel county commissioners to

complete purchase of toll road; *Monroe County v. Conner*, 155 Ind. 487, 58 N. E. 828, holding that injunction will not lie to enjoin commissioners from letting contract for road because of irregularities in election; *Dayton Gravel Road Co. v. Tippecanoe County*, 131 Ind. 591, 31 N. E. 363, holding final judgment of county commissioners refusing to purchase road appealable; *Evans v. West*, 138 Ind. 624, 38 N. E. 65, holding proceedings of commissioners granting petition to establish free road not subject to collateral attack unless utterly void; *Monroe County v. Harrell*, 147 Ind. 503, 46 N. E. 124, holding act of commissioners in ordering election as to only part of roads described in petition not open to collateral attack; *Farneman v. Mt. Pleasant Cemetery Asso.* 135 Ind. 347, 35 N. E. 271, refusing to consider constitutional question not involved in case; *Kirsch v. Braun*, 153 Ind. 265, 53 N. E. 1082, upholding jurisdiction of circuit court over subject-matter of appeal from gravel road proceeding.

Judicial character of acts of board of county commissioners.

Cited in *Duncan v. Cox*, 41 Ind. App. 67, 82 N. E. 125, holding board of county commissioners acts in judicial capacity in determining all questions of sufficiency of petition for railroad aid appropriation, and all steps taken that would authorize it to grant prayer of petition.

Establishment and control of highways.

Cited in *Cummins v. Pence*, 174 Ind. 120, 91 N. E. 529, holding that it is within power of legislature to say what conditions shall exist in order that highways shall be improved; *State ex rel. Hendricks v. Marion County*, 170 Ind. 610, 82 N. E. 513, sustaining law authorizing county commissioners before whom petition is filed to establish highway on boundary line of counties.

— Sufficiency of petition.

Cited in *Brown v. Miller*, 162 Ind. 686, 71 N. E. 122, holding under statute requiring county commissioners to submit question of improvement of roads to vote upon petition of fifty freeholders, voters of contiguous townships, petition signed by fifty freeholders, voters of taxing district composed of more than one township is sufficient; *Davern v. Decatur County*, 34 Ind. App. 49, 72 N. E. 268, holding it is not necessary that petition to create taxing district of two or more townships be signed by fifty freeholders of each township.

11 L. R. A. 839, *STUBBINGS v. EVANSTON*, 136 Ill. 37, 29 Am. St. Rep. 300, 26 N. E. 577.

Taking of leasehold by eminent domain.

Cited in *Gluck v. Baltimore*, 81 Md. 322, 48 Am. St. Rep. 515, 32 Atl. 515, holding taking by eminent domain not an eviction of tenant; *Chicago West Div. R. Co. v. Metropolitan West Side Elev. R. Co.* 152 Ill. 526, 38 N. E. 736, holding remote reversionary interest may be ignored in condemnation proceeding; *Uhler v. Cowen*, 192 Pa. 445, 44 W. N. C. 399, 44 Atl. 42, holding affidavit of defense in action for rent, of eviction from portion of premises by eminent domain, sufficient to prevent judgment; *Chicago & N. W. R. Co. v. Chicago Mechanics' Institute*, 239 Ill. 214, 87 N. E. 933, on separate trials for separate interests in tract of land in condemnation proceedings.

Cited in notes (17 L. R. A. 276) on effect of partial eviction on liability for rent; (21 L. R. A. 215) on rights of tenants and reversioners of property taken by eminent domain.

Separate interests of landlord and tenant.

Cited in *Corrigan v. Chicago*, 144 Ill. 542, 21 L. R. A. 216, 33 N. E. 746, holding verdicts and judgments as to damage to fee and leasehold interests on condemnation, separate and distinct; *Cassard v. Thornton*, 119 Ill. App. 400, holding land-

lord's use of part of premises to build fire escapes in compliance with law does not constitute eviction nor release tenant from payment of any part of rent reserved.

Condemnation of all interests in land.

Cited in *Chicago & N. W. R. Co. v. Miller*, 251 Ill. 62, 95 N. E. 1027, holding that in proceedings to condemn land purpose is to take all interest therein for public use; *Chicago v. Pick*, 251 Ill. 601, 96 N. E. 539 (dissenting opinion), on purpose and effect of condemnation proceedings as appropriation to public use of property and all interest therein.

Constructive eviction of tenant.

Cited in *Olson Land Co. v. Alki Park Co.*, 63 Wash. 524, 115 Pac. 1083, holding that tenant cannot claim eviction because of taking of part of leased premises under power of eminent domain.

Cited in notes (38 Am. St. Rep. 484) on what justifies tenant in abandoning leased premises; (61 Am. St. Rep. 570) on rights and liabilities of tenant on destruction of buildings; (15 Eng. Rul. Cas. 494) on termination of liability for rent by destruction of premises; (15 Eng. Rul. Cas. 810) on statutory requirements as excuse for landlord's breach of covenant.

11 L. R. A. 841, *Re MEYER*, 78 Wis. 615, 23 Am. St. Rep. 435, 48 N. W. 55.

Claims against estates of insolvents.

Cited in *Re Sherry*, 101 Wis. 14, 76 N. W. 611, holding contingent claim against assignor on indorsement, becoming absolute after assignment, provable against estate; *Re Sherry*, 101 Wis. 16, 76 N. W. 611, holding several promises of assignor to pay same debt, differing in form, not provable separately against estate; *Sacramento Bank v. Pacific Bank*, 124 Cal. 148, 45 L. R. A. 864, 71 Am. St. Rep. 36, 56 Pac. 787, holding creditor of insolvent bank entitled to dividends on basis of full claim, without regard to previous collections; *Levy v. Chicago Nat. Bank*, 158 Ill. 96, 30 L. R. A. 382, 42 N. E. 129, holding creditor entitled to receive dividends from insolvent's estate only for balance of claim at date of filing it; *Citizens' Bank v. Kendrick*, 92 Tenn. 440, 36 Am. St. Rep. 96, 21 S. W. 1070, upholding right of holder to prove claim for full amount of note against insolvent estates of maker and indorser; *Ragsdale v. Winnsboro Bank*, 45 S. C. 583, 23 S. E. 947, holding creditor entitled to prove full claim against estates of insolvent sureties, regardless of amount received from estate of principal debtor; *Re Swift*, 106 Fed. 70, holding right of creditor to preference in future dividends not equivalent to declaration of dividend in his favor or part payment of claim; *Re Burke*, 25 R. I. 302, 55 Atl. 825, holding equity allows dividends to secured creditor to full amount of his claim; *Harrigan v. Gilchrist*, 121 Wis. 344, 99 N. W. 909, holding secured creditor may share with all other creditors in every general distribution of trust funds till with dividends received and proceeds of his security, he shall have received full payment.

Cited in footnote to *High v. American Wheel Co.* 21 L. R. A. 822, which holds secured creditor entitled to dividend on full claim.

11 L. R. A. 845, *NORTH HUDSON MUT. BLDG. & L. ASSO. v. FIRST NAT. BANK*, 79 Wis. 31, 47 N. W. 300.

Ultra vires.

Cited in *Witter v. Grand Rapids Flouring Mill Co.* 78 Wis. 546, 47 N. W. 729, holding corporations receiving benefits of mortgage estopped from denying its authority to give it; *Winterfield v. Cream City Brewing Co.* 96 Wis. 242, 71

N. W. 101, holding it not *ultra vires* for brewing corporation to guarantee payment of rent of hotel selling its beer.

Cited in notes (70 Am. St. Rep. 170) on *ultra vires* contracts of private corporation; (111 Am. St. Rep. 319) on implied power of corporations to borrow money and give evidence of indebtedness and security therefor; (11 Eng. Rul. Cas. 72) on extent of estoppel by deed.

Powers of loan associations.

Cited in *Lewis v. American Sav. & L. Asso.* 98 Wis. 222, 39 L. R. A. 567, 73 N. W. 793, upholding power of loan association to deposit securities with treasurer of foreign state in order to do business therein; *Marion Trust Co. v. Crescent Loan & Invest. Co.* 27 Ind. App. 455, 87 Am. St. Rep. 257, 61 N. E. 688; *Cook v. Equitable Bldg. & L. Asso.* 104 Ga. 830, 30 S. E. 911; *Woerheide v. Johnston*, 81 Mo. App. 199,—upholding power of loan association to borrow money; *Williamson v. Eastern Bldg. & L. Asso.* 54 S. C. 596, 71 Am. St. Rep. 822, 32 S. E. 765, holding that loan association, interposing plea of *ultra vires*, cannot retain benefits of contract; *Bowlby v. Kline*, 28 Ind. App. 661, 63 N. E. 723, holding building and loan association notes and mortgages negotiable and transferable prior to act of 1897; *Bohn v. Boone Bldg. & Loan Asso.* 135 Iowa, 143, 124 Am. St. Rep. 263, 112 N. W. 199, holding power of building and loan associations to borrow money is implied from general nature of business they are organized to carry on, in absence of statutory restrictions; *Standard Sav. & Loan Co. v. Aldrich*, 20 L.R.A.(N.S.) 398, 89 C. C. A. 646, 163 Fed. 219, as to power of savings and loan association to borrow money.

Cited in footnote to *People ex rel. Fairchild v. Preston*, 24 L. R. A. 57, which authorizes rebate on payment of loan association dues in advance.

Cited in notes (43 L.R.A. 420) on power of building association to issue negotiable paper; (20 L.R.A.(N.S.) 394) on power of loan association to borrow money to pay withdrawing members.

11 L. R. A. 852, *TAYLOR v. STATE*, 73 Md. 208, 20 Atl. 914.

Equitable defenses in actions at law.

Cited in *Robey v. State*, 94 Md. 71, 89 Am. St. Rep. 405, 50 Atl. 411, holding good defense at law cannot be pleaded on equitable grounds; *Urner v. Sollenberger*, 89 Md. 337, 43 Atl. 810, holding jurisdiction of court of equity not conferred upon court of law by plea in action at law by way of equitable defense; *Conner v. Groh*, 90 Md. 683, 45 Atl. 1024, holding court of law without power to cancel or reform contract; *Whitaker v. McDaniel*, 113 Md. 392, 78 Atl. 388, to the point that statute allowing equitable defenses at law was not intended to destroy distinction which exists between jurisdiction of court of law and court of equity; *Albert v. Freas*, 103 Md. 591, 64 Atl. 282, holding plea of estoppel in pais to set up right to property levied on to satisfy judgment against another than claimant is not permitted by statute.

Liabilities of sureties.

Cited in *Lake v. Thomas*, 84 Md. 623, 36 Atl. 437, holding surety not discharged by creditor's failure to give voluntary information of default of principal; *Warner v. Williams*, 93 Md. 521, 49 Atl. 559, holding mere delay of mortgagee in foreclosing mortgage does not release mortgagor, who has assigned mortgaged premises subject thereto; *Fulton v. Fletcher*, 12 App. D. C. 15, holding suit on appeal bond authorized by decree ratifying auditor's report and ordering distribution; *Berman v. Elm Loan & Sav. Asso.* 114 Md. 195, 78 Atl. 1104, holding that creditor will not lose right to resort to surety by voluntarily forbearing prompt enforcement of claim against surety; *Ward v. State*, 111 Md. 531, 75 Atl.

116, holding that confirmation by court of auditor's account in so far as it allows claim and orders receivers to apply proceeds accordingly is binding on receiver and sureties in an action on receiver's bond.

Cited in footnote to *Abshire v. Salyer*, 56 L. R. A. 936, which holds sureties on guardian's bond, given to obtain release from future liability of surety on prior bond, liable for past defalcations.

Distinguished in *State use of Dorsey v. Banks*, 76 Md. 143, 24 Atl. 415, holding sureties not bound for default of principal before execution of bond; *Jenkins v. State*, 76 Md. 273, 23 Atl. 790 (dissenting opinion), majority holding sureties, although not parties, bound by decree against principal; *Preston v. American Surety Co.* 104 Md. 46, 64 Atl. 292, holding decree dealing with default of principal in bond and to fix liability as against him is only *prima facie* binding on surety.

Adjudications in rem.

Cited in *Berger v. Clendinen*, 88 Md. 154, 40 Atl. 705, holding auditor's report in equity proceeding, when ratified and confirmed, in effect adjudication *in rem*; *Rogers v. Citizens' Nat. Bank*, 93 Md. 616, 49 Atl. 843, holding audit and ratification of receiver's account, not excepted to, has effect of adjudication *in rem*.

Conclusiveness of judgments.

Cited in *State use of Bounds v. Graham*, 115 Md. 522, 81 Atl. 31, holding that in suit on trustee's bond decretal order ratifying trustee's accounts and ordering distribution is *res adjudicata*; *Clark v. Southern Can Co.* 116 Md. 93, 36 L.R.A.(N.S.) 989, 81 Atl. 271, holding that judgment rendered by court having jurisdiction of parties and subject matter cannot be impeached collaterally.

Cited in note (36 L.R.A.(N.S.) 982) on character and kinds of judgments and orders not collaterally assailable for fraud not affecting jurisdiction.

11 L. R. A. 855, *HEssel v. Johnson*, 142 Pa. 8, 21 Atl. 794.

Distress for rent.

Cited in footnote to *Hutsell v. Deposit Bank*, 39 L. R. A. 403, which holds right of distress not pass to assignee of rent note.

11 L. R. A. 857, *RIEGEL v. AMERICAN L. INS. CO.* 140 Pa. 193, 23 Am. St. Rep. 225, 21 Atl. 392.

Second appeal in 153 Pa. 142, 19 L. R. A. 170, 31 W. N. C. 534, 25 Atl. 1070, Reversing 1 Pa. Dist. R. 722, 12 Pa. Co. Ct. 177.

Rescission of contracts for mistake or fraud.

Cited in *Bayley's Estate*, 15 Montg. Co. L. Rep. 186, 23 Pa. Co. Ct. 52, holding contract inoperative where there is mutual mistake as to fact forming basis thereof; *Neale v. Bingler*, 25 Pa. Co. Ct. 366, 32 Pittsb. L. J. N. S. 74, holding contract of sale of real estate, made through mutual mistake due to inaccurate blue print, rescindable; *Sutton v. Morgan*, 24 Pittsb. L. J. N. S. 53, holding purchaser of real estate entitled to rescission for fraudulent representations as to immediate location of shops nearby; *Heiss v. McCauley*, 19 Lanc. L. Rev. 116, holding that estate should be made party to action to reform deed made by one individually, instead of as executrix; *Penn Furniture Co. v. Lumbermen's Mut. F. Ins. Co.* 47 Pa. Super. Ct. 82, 59 Pittsb. L. J. 699, holding that contract is void, if it related to subject matter contemplated by parties as existing, but which did not exist; *Traders' Ins. Co. v. Aachen & M. F. Ins. Co.* 150 Cal. 374, 8 L.R.A.(N.S.) 851, 89 Pac. 109, holding insurance company which surrendered "covering note" in ignorance of fact loss had occurred is entitled to recover amount due when such note was canceled; *Moehlenpah v. Mayhew*, 138 Wis. 570,

119 N. W. 826, holding assignment of interest in estate both parties being ignorant that vested instead of contingent interest is assigned, is such mutual mistake as will avoid contract, in absence of negligence on part of party seeking relief or his acquiescence in contract with knowledge of mistake.

Cited in footnotes to *Duncan v. New York Mut. Ins. Co.* 20 L. R. A. 386, which holds insurer not relieved by cancelation of policy without knowledge of previous loss; *Decker v. Schulze*, 27 L. R. A. 335, which holds mere breach of covenant as to title not ground for rescinding executed sale of land; *Titus v. Rochester German Ins. Co.* 28 L. R. A. 478, which holds fraudulent representations inducing compromise through mistake as to legal rights, ground for relief; *Sears v. Grand Lodge, A. O. U. W.* 50 L. R. A. 204, which holds beneficiary entitled to first payment under compromise agreement, though insured proves to be alive; *Houston & T. C. R. Co. v. McCarty*, 53 L. R. A. 507, which denies right to set aside release in full because of internal injuries unsuspected at time.

Cited in notes (11 L.R.A.(N.S.) 234) on right of insurer to recover payment under erroneous supposition of insured's death; (65 Am. St. Rep. 491) on reformation of contracts for mistakes; (117 Am. St. Rep. 236) on mistakes for which written instruments may be cancelled or corrected in equity.

Distinguished in *New York L. Ins. Co. v. Chittenden*, 134 Iowa, 620, 11 L.R.A. (N.S.) 237, 120 Am. St. Rep. 444, 112 N. W. 96, 13 A. & E. Ann. Cas. 408, where question whether assured was dead was in the contemplation of parties at time insurance was paid by insurer.

11 L. R. A. 860, *STEVENS v. PHILADELPHIA BALL CLUB*, 142 Pa. 52, 21 Atl. 797.

Effect of seal on negotiability of note.

Cited in *Baneroft v. Haines*, 13 Pa. Co. Ct. 119, 2 Pa. Dist. R. 374, 31 W. N. C. 250, holding negotiability of promissory note not destroyed by seal.

Cited in note (35 L. R. A. 608) on effect of seal on negotiability of bill or note.

Nature of limited partnership associations.

Cited in *Youngstown Coke Co. v. Andrews Bros. Co.* 79 Fed. 670, holding Pennsylvania limited partnership association entitled to sue in Federal court of another state; *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 301, 58 U. S. App. 444, 86 Fed. 590, holding Pennsylvania limited partnership association citizen of Pennsylvania as to question of Federal jurisdiction; *Carter v. Producers' & Refiners' Oil Co.* 24 Pittsb. L. J. N. S. 381, applying doctrine of *ultra vires* to limited partnership association.

11 L. R. A. 861, *FOOTE v. CLARK*, 102 Mo. 394, 14 S. W. 981.

Covenants in deeds.

Cited in *Langenberg v. Heer Dry Goods Co.* 74 Mo. App. 21, holding covenant for seizure runs with the land; *Wood v. Cross*, 8 Kan. App. 44, 54 Pac. 12, holding action maintainable against heirs after distribution, to recover for breach of warranty of ancestor; *Rumsey v. Otis*, 133 Mo. 98, 34 S. W. 551, holding judgment in ejectment should be stayed until plaintiff, as devisee of warrantor, could pay share of damages for breach of covenant; *Holzheier v. Hayes*, 133 Cal. 458, 65 Pac. 968, holding covenant against encumbrances, made by two grantors, joint and several personal obligations; *Jones v. Hubbard*, 193 Mo. 165, 90 S. W. 1137, holding privity exists between parties one of whom succeeds to interest of another by sheriff's deed.

Distinguished in *Iowa Loan & T. Co. v. Fullen*, 114 Mo. App. 642, 91 S. W. 58, holding husband having no interest in land, who joins with his wife in deed there-

for, is not bound to remote grantee by his covenants, where husband did not give possession to his grantee.

Set-off.

Cited in Wabash R. Co. v. Bowring, 103 Mo. App. 166, 77 S. W. 106, upholding right of set-off against judgment in favor of insolvent, assigned to attorney in payment of fees.

L. R. A. CASES AS AUTHORITIES.

CASES IN 12 L. R. A.

12 L. R. A. 33, *BOHN MFG. CO. v. KOUNTZE*, 30 Neb. 719, 46 N. W. 1123.

Priority of mechanic's over antecedent liens.

Followed in *Millsap v. Ball*, 30 Neb. 732, 46 N. W. 1125, and *Ragon v. Howard*, 97 Tenn. 343, 37 S. W. 136, upholding mechanic's lien as against vendor under contract requiring vendee to construct building.

Cited in *Shapleigh v. Hull*, 21 Colo. 425, 41 Pac. 1108; *Colorado Iron Works v. Taylor*, 12 Colo. App. 455, 55 Pac. 942; *Sheehy v. Fulton*, 38 Neb. 693, 41 Am. St. Rep. 767, 57 N. W. 395, holding vendor's interest subject to mechanics' liens where contract requires construction of building; *Pickens v. Plattsmouth Invest. Co.* 37 Neb. 280, 55 N. W. 947, holding lien of vendor contracting in conjunction with vendee, for improvements, subject to mechanic's lien; *Cummings v. Emslie*, 49 Neb. 489, 68 N. W. 621, holding mechanic's lien superior to lien of mortgage agreed to be subordinated to cost of building; *Shearer v. Wilder*, 56 Kan. 263, 43 Pac. 224, holding interest of vendor contracting with purchaser of lot to construct building, subject to mechanics' liens; *West v. Reeves*, 53 Neb. 474, 73 N. W. 935, holding lien of vendor not promoting improvement superior to mechanic's lien; *Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 655, 41 Am. St. Rep. 741, 57 N. W. 664 (dissenting opinion), majority holding mechanics' liens superior to mortgage given to company advancing money to construct railroad; *Guion v. Ryckman*, 77 Neb. 837, 124 Am. St. Rep. 877, 110 N. W. 759, holding interests of both vendor and vendee bound for payment of liens for labor and material where contract as to sale of lots was entered into for purpose of having buildings erected on lots sold.

Cited in footnote to *Green v. Williams*, 19 L. R. A. 478, which holds that purchaser takes premises subject to lien subsequently filed within time allowed.

Distinguished in *Burlingim v. Warner*, 39 Neb. 497, 58 N. W. 132, holding vendor not chargeable with liens arising from construction of buildings by vendee taking possession without vendor's consent; *Anglo-American Sav. & L. Asso. v. Campbell*, 13 App. D. C. 598, 43 L. R. A. 626, holding purchase money mortgage superior to mechanic's lien; *Hoagland v. Lowe*, 39 Neb. 411, 58 N. W. 197, holding purchase money mortgage, subordinated by agreement to mortgage securing building loan, superior to mechanic's lien; *Holmes v. Hutchins*, 38 Neb. 607, 57 N. W. 514, holding grantor's knowledge of grantee's intention to build does not postpone purchase money mortgage to mechanic's lien; *Spengler v. Stiles-Tull Lumber Co.* 94 Miss. 812, 48 So. 966, holding right of assignee under contractor's assignment made previous to service of stop notices superior to lien of material men where latter is given lien from service of stop notices only under statute.

Mechanics' liens; liability of one making building loan.

Cited in note (23 L.R.A.(N.S.) 603, 612) on power of lessee or vendee to subject owner's interest to mechanics' liens.

Distinguished in *Fuller v. Detroit Loan & Bldg. Asso.* 119 Mich. 73, 77 N. W. 642, holding vendor agreeing to advance money to complete building not liable for mechanics' liens; *Chappell v. Smith*, 40 Neb. 581, 59 N. W. 110, holding lender of money to erect building not liable for mechanic's liens; *Rogers v. Central Loan & T. Co.* 49 Neb. 685, 68 N. W. 1048, holding lender of money to erect building not liable to mechanics' lienors for amount applied on prior mortgage; *Chaffee v. Sehestedt*, 4 Neb. (Unof.) 742, 96 N. W. 161, holding lien of mortgage given prior to building contract superior to liens of materialmen and mechanics.

12 L. R. A. 37, *BULL v. KENTUCKY NAT. BANK*, 90 Ky. 452, 14 S. W. 425.

Rights of creditors of beneficiary of trust.

Cited in *Re Luscombe*, 109 Wis. 199, 85 N. W. 341, raising, without deciding, question whether income of testamentary trust may be reached by creditors; *Bottom v. Fultz*, 124 Ky. 307, 98 S. W. 1037, upholding clause in will which provided estate should pass at once to children of decedent in case estate in trust given to decedent's husband should be held subject to husband's debts by courts; *Ratliff v. Com.* 139 Ky. 541, 101 S. W. 978, holding that, except where trustee has discretion to withhold all payments, beneficial interest in property held in trust may be subjected to debts of beneficiary.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust, free from rights of creditors; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Re Qua v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest, accepted by husband, not trust beyond reach of creditors; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Cited in notes (13 L.R.A. 213) on limitation in trust estates; (24 Am. St. Rep. 697) on spendthrift trusts.

Distinguished in *Louisville v. Cooke*, 135 Ky. 263, 122 S. W. 144, holding life estate subject to tax claims though devised upon condition estate should cease if held by court subject to debts of devisee.

12 L. R. A. 41, *KERNOHAN v. DURHAM*, 48 Ohio St. 1, 26 N. E. 982.

Rights of indorsees.

Cited in *Watson v. Wyman*, 161 Mass. 99, 36 N. E. 692, holding note and mortgage transferred before maturity good, although previously paid; *Bishop v. Chase*, 150 Mo. 174, 79 Am. St. Rep. 515, 56 S. W. 1080, holding note and mortgage assigned before maturity, as collateral, subject to equities.

Cited in note (46 L. R. A. 760) on rights of holder of negotiable paper transferred after maturity.

Distinguished in *Kernohan v. Manss*, 53 Ohio St. 135, 29 L. R. A. 320, 41 N. E. 258, holding bona fide indorsee of genuine note before maturity secured by recorded mortgage entitled to proceeds of mortgage over prior assignee of forged copy of note, accompanied by assignment and delivery of mortgage.

Rights of transferee after maturity.

Cited in note (46 L.R.A. 760, 768) on rights of transferee after maturity of negotiable paper.

Payment of written obligation to one not in possession.

Cited in *Shelly v. Mikkelson*, 5 N. D. 44, 63 N. W. 210 (dissenting opinion), majority holding vendee under land contract giving notes protected by payment to subsequent transferee of land; *Storey v. Kerr*, 2 Neb. (Unof.) 571, 89 N. W. 601, holding no legal presumption of indorsement of payment on note arises from such payment.

Cited in footnotes to *Harrison Nat. Bank v. Austin*, 59 L. R. A. 294, which holds nonpossession of evidences of indebtedness by one to whom debt paid not conclusive as to lack of authority; *Kohl v. Beach*, 50 L. R. A. 600, which holds mortgagee not bound by collection of principal by subagent authorized to collect overdue interest.

Cited in note (50 L.R.A. 600) on right to pay written obligation to agent who is not in possession of it.

Necessity of indorsing payments upon note.

Cited in *Allen v. Johnson*, 20 Ohio C. C. 16, 11 Ohio C. D. 47, holding maker, when he pays his note before maturity, must, in order to protect himself cancel or destroy it.

Constructive notice from facts sufficient to put party on inquiry.

Cited in *Brickman v. Shale*, 11 Ohio C. C. N. S. 45, 30 Ohio C. C. 375, sustaining executor's sale of realty to pay debts where son of appraiser purchased for father's benefit, but heirs and legatees because duly served with summons of sale were chargeable with notice of circumstances connected with sales.

12 L. R. A. 46, *SMITH v. OLMSTEAD*, 88 Cal. 582, 22 Am. St. Rep. 336, 26 Pac. 521.

Omission to provide for child in will.

Cited in *Re Smith*, 145 Cal. 121, 78 Pac. 369, holding post-testamentary child not provided for succeeds to statutory share as though deceased had died intestate as to such portion.

Cited in footnotes to *Re Callaghan*, 39 L. R. A. 689, which holds inoperative devise of land not owned by testator not omission to provide for child; *Carpenter v. Snow*, 41 L. R. A. 820, which holds that intention not to provide for child already born need not be shown by will itself; *Re Newlin*, 68 L.R.A. 464, which holds sufficient provision for unborn child to sustain will made by establishing remainder to be divided among children and a fee to be divided among or held in trust for them on arriving at maturity.

Cited in notes (115 Am. St. Rep. 580) on pretermitted heirs; (37 L.R.A.(N.S.) 1146) on remedy of pretermitted heirs.

Rights of heirs to decedent's realty.

Cited in *Re Packer*, 125 Cal. 397, 73 Am. St. Rep. 58, 58 Pac. 59, holding real estate vested in heirs cannot be sold by administrator for their benefit under subsequent statute; *State v. Miller*, 149 Cal. 210, 85 Pac. 609, holding under California law of succession title to estate of person dying intestate vests in heirs, whether known or unknown, immediately upon his death.

Cited in note (12 Am. St. Rep. 100) on succession to estates of intestates.

Administrator's lien on decedent's realty.

Distinguished in *Murphy v. Clayton*, 113 Cal. 159, 45 Pac. 267, denying administrator's right to possession of lands held in trust by decedent.

12 L. R. A. 50, *STEWART v. VANDERVORT*, 34 W. Va. 524, 12 S. E. 736.

Statutory construction.

Cited in *Walker v. Burgess*, 44 W. Va. 400, 67 Am. St. Rep. 775, 30 S. E. 99.

and *State v. Mines*, 32 W. Va. 133, 18 S. E. 470, holding statute of limitations operates prospectively, unless otherwise expressly stated or necessarily implied; *Casto v. Greer*, 44 W. Va. 334, 30 S. E. 100, holding statute limiting time to attack preferences does not apply to prior transfers; *Johnson v. Sanger*, 49 W. Va. 411, 38 S. E. 645, holding act prescribing mode of alienation of married women's estates not retrospective; *Walker v. Boggess*, 41 W. Va. 592, 23 S. E. 550, holding deed of trust not affected by subsequent statute changing terms of sale; *Fowler v. Lewis*, 36 W. Va. 133, 14 S. E. 447, holding remedial statute relating to sale under deed of trust operates prospectively; *Despard v. Despard*, 53 W. Va. 446, 44 S. E. 448, holding statute limiting time to complete appeal not retroactive; *Baldwin v. Aberdeen*, 23 S. D. 636, 26 L.R.A.(N.S.) 120, 123 N. W. 80, holding statute making notice of injury to municipality necessary to maintenance of action for negligence against it prospective only.

Cited in footnote to *Dugger v. Mechanics' & T. Ins. Co.* 28 L. R. A. 796, which refuses to construe as retrospective, act making void, stipulations limiting liability on policy to less than full amount of loss.

Annulment of marriage.

Cited in *Floyd County v. Wolfe*, 138 Iowa, 753, 117 N. W. 32, holding woman whose marriage is annulled because of insanity at time of contraction thereof, cannot assert right to homestead; *Martin v. Martin*, 54 W. Va. 302, 46 S. E. 120, 1 A. & E. Ann. Cas. 612, holding under statute marriage between relations of forbidden degrees only voidable, not void.

Cited in notes (102 Am. St. Rep. 710) on power of courts to create and enforce liens to secure payment of alimony; (5 L.R.A.(N.S.) 769) on power, upon annulling marriage, to require man to provide for support of woman or child; (96 Am. St. Rep. 269) on effect of void marriage.

12 L. R. A. 53, *POWELL v. BENTLEY & G. FURNITURE CO.* 34 W. Va. 804, 12 S. E. 1085.

Operation of legitimate business as nuisance.

Cited in *Davis v. Davis*, 40 W. Va. 474, 21 S. E. 906, holding merry-go-round, annoying to persons of ordinary sensibility, nuisance; *McGregor v. Camden*, 47 W. Va. 196, 34 S. E. 936, holding oil well, seriously interfering with ordinary comfort of nearby dwellers, nuisance; *Harper v. Standard Oil Co.* 78 Mo. App. 345, holding gasoline tank on adjoining property not nuisance in absence of evidence showing apprehension of danger by persons of normal sensibility; *McGregor v. Camden*, 47 W. Va. 200, 34 S. E. 936, holding court may direct question whether oil well a nuisance to be tried by jury; *Snyder v. Philadelphia Co.* 54 W. Va. 153, 63 L. R. A. 898, 46 S. E. 366, holding owner negligently "blowing out" gas well liable for frightening team on nearby highway; *Terrell v. Wright*, 87 Ark. 215, 19 L.R.A.(N.S.) 175, 112 S. W. 211, denying injunction to restrain operation of planing mill near residences of plaintiffs, where mill is mere inconvenience or trivial annoyance; *Madison v. Ducktown Sulphur, Copper & I. Co.* 113 Tenn. 361, 83 S. W. 658, holding decree for injunction is matter of sound judicial discretion; *Mountain Copper Co. v. United States*, 73 C. C. A. 621, 142 Fed. 640, denying injunction to restrain production of copper where land in damaged zone mountainous and practically worthless for agriculture or horticulture; *Reilley v. Curley*, 75 N. J. Eq. 60, 138 Am. St. Rep. 510, 71 Atl. 700, holding that operation of steam engine in depositing stone on lots in residential district is nuisance, where noise created, renders it impossible to converse in neighboring houses.

Cited in footnotes to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden; *Hill v. McBurney*

Oil & Fertilizer Co. 52 L. R. A. 398, which authorizes injunction against blowing of loud factory whistle at unreasonable hours in populous community; Froelicher v. Oswald Iron Works, 64 L. R. A. 228, granting injunction against operation of machine shop, disturbing comfort of adjoining owner to injurious extent; Louisville & N. Terminal Co. v. Jacobs, 61 L. R. A. 188, which holds construction of roundhouse for housing engines not render owner liable for nuisance created by tenant's improper manner of using; Wade v. Miller, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance; Sullivan v. Jones & L. Steel Co. 66 L.R.A. 712, which holds that manufacturer of pig iron will be enjoined from changing manner of operating furnaces if result is to cast ore dust on neighboring residential property in such quantity as to destroy homes or other property there situated.

Cited in notes (20 L.R.A. 165) on power of equity to grant mandatory injunctions; (17 L.R.A.(N.S.) 290) on noise incident to lawful industry as nuisance; (107 Am. St. Rep. 201, 205, 211, 212, 218) on what are public nuisances.

Necessity of clearly proving nuisance.

Cited in Chambers v. Cramer, 49 W. Va. 402, 54 L. R. A. 548, 38 S. E. 691, holding fact of nuisance must appear clearly to warrant injunction against blacksmith shop; Pope Bros. v. Bridgewater Gas Co. 52 W. Va. 254, 43 S. E. 87, holding possible danger of fire no ground for enjoining drilling of oil well near another producing well.

Cited in footnote to Redd v. Edna Cotton Mills, 67 L.R.A. 983, which holds that blowing of factory whistle will not be enjoined until fact of nuisance has been established.

Cited in notes (31 L.R.A.(N.S.) 892, 893) on doctrine of comparative injury in suit to enjoin nuisance; (118 Am. St. Rep. 879) on actions against two or more persons creating or maintaining a nuisance.

Distinguished in American Smelting & Ref. Co. v. Godfrey, 89 C. C. A. 139, 158 Fed. 231, 14 A. & E. Ann. Cas. 8, holding rule as to consideration of comparative convenience or inconvenience to parties from granting or withholding injunction not applicable generally where it is sought to abate plain nuisance.

Actionable misuse of own property.

Cited in Griffin v. Fairmont Coal Co. 59 W. Va. 543, 2 L.R.A.(N.S.) 1144, 53 S. E. 24 (dissenting opinion), on maxims "so use your own as not to injure another's property" and "it is prohibited to do on one's own property what may injure another's."

12 L. R. A. 57, CHILD v. BEMUS, 17 R. I. 230, 21 Atl. 539.

Municipal power to license.

Cited in footnote to State v. Finch, 46 L. R. A. 437, which sustains validity of license on express wagons greatly in excess of that imposed on hacks.

Cited in note (20 L. R. A. 724) on delegation of municipal power as to licenses.

Power to revoke license.

Cited in Wallace v. Reno, 27 Nev. 83, 62 L. R. A. 342, 73 Pac. 528, sustaining statute empowering city board to revoke business licenses, without notice to licensee; People ex rel. Lodes v. Health Dept. 189 N. Y. 194, 13 L.R.A.(N.S.) 899, 82 N. E. 187, holding board of health may issue or revoke permits to sell milk in exercise of their best judgment upon or without notice, and their action not subject to review by appeal for certiorari; State ex rel. Nowotny v. Milwaukee, 140 Wis. 41, 133 Am. St. Rep. 1060, 121 N. W. 658, holding city given power to license, restrain, and regulate sale of milk also takes power to revoke licenses, and may

vest such power in health commissioner with right to exercise same summarily and without notice.

Cited in footnote to *Wallace v. Reno*, 63 L.R.A. 337, which upholds statute authorizing revocation of license without notice to licensee.

Cited in notes (13 L.R.A.(N.S.) 896) on right to revoke license from public without notice or hearing; (35 L.R.A.(N.S.) 720) on power of municipality to revoke business license.

12 L. R. A. 58, *CROUSE v. MURPHY*, 140 Pa. 335, 23 Am. St. Rep. 232, 21 Atl. 358.

Identity of name.

Cited in *Work v. Darby* 13 Pa. Co. Ct. 272, holding record of judgment against Jane Thomas no notice to one relying on conveyance by Sarah Jane Thomas; *Delaney v. Becker*, 14 Pa. Super. Ct. 395, Reversing 29 Pittsb. L. J. N. S. 347, holding prior judgments against George A. Baker postponed to judgments against George A. Becker, debtor's correct name; *Davis v. Steeps*, 87 Wis. 477, 23 L. R. A. 821, 41 Am. St. Rep. 51, 58 N. W. 769, holding record of judgment against Edward Davis not notice of lien on real estate of E. A. or Edward A. Davis; *Shaver's Case*, 18 Pa. Co. Ct. 203, denying priority of judgment entered against A. C. Shaver over antecedent judgment against Mary Shaver, debtor's name being Anna Mary Shaver; *Massey v. Noon*, 1 Pa. Super. Ct. 203, 37 W. N. C. 525, holding writ of sci. fa. against Lewis R. Renshan to revive judgment not notice to remote grantee under Lewis S. Renshan; *Rusterholtz v. Brown*, 10 Pa. Dist. B. 22, holding lien of judgment against person usually signing his name as George Brown but entered as against George Brown Sr., is postponed to judgments subsequently entered; *Weaver v. Whitman*, 16 Pa. Dist. R. 867, holding judgment against John E. W—, has priority over judgment against Elmer W—, though latter judgment was entered first, where record title to land is in John E. W—; *Wicker v. Jenkins*, 49 Tex. Civ. App. 369, 108 S. W. 188, holding record of abstract of judgment stating name of plaintiff as W. B. F. W— instead of W. F. B. W—, as it should have been, did not create lien on land; *Stephenson v. Cone*, 24 S. D. 464, 26 L.R.A.(N.S.) 1209, 124 N. W. 439, holding abstractor liable in damages for failure to note on abstract judgments against Ed. J. B.—where search made for judgments against Edward J. B—; *Apollo v. Clepper*, 44 Pa. Super. Ct. 399, to the point that judgment against Lizzie Clepper, would not bind land owned by Nancy E. Clepper as against purchaser of land; *Zimmers' Estate*, 22 Lanc. L. Rev. 395, holding judgment against "Daniel Z. Kline" not a lien on land of Daniel E. Kline.

Cited in footnotes to *Beattie v. National Bank*, 43 L. R. A. 654, holding middle initial letter not part of Christian name; *Stuyvesant v. Weil*, 53 L. R. A. 562, which holds that mistake in Christian name of defendant, duly served and notified that he is person intended, does not prevent jurisdiction.

Cited in notes (24 L. R. A. 544) on form of Christian name required by recording acts; (14 L. R. A. 394) on index as part of records of title; (17 L. R. A. 825) on presumption of identity of person from identity of name; (7 L.R.A.(N.S.) 417) on certainty and accuracy necessary in respect to Christian names or initials in record or index to impart constructive notice; (100 Am. St. Rep. 340) on idem sonans.

Distinguished in *Butts v. Cruttenden*, 14 Pa. Super. Ct. 456, holding judgment against William has priority over subsequent mortgage given by William J., designated in deed by both names; *Fincher v. Hanegan*, 59 Ark. 156, 24 L. R. A. 546, 26 S. W. 821, holding mistake in initial of chattel mortgagor's middle name does not defeat effect of record as notice; *Burns v. Ross*, 215 Pa. 295, 7 L.R.A.

(N.S.) 416, 114 Am. St. Rep. 963, 64 Atl. 526, holding purchaser from heirs of Francis R—bound to look for liens indexed in his lifetime against Frank R—.

Protection of purchaser relying on official certificate.

Cited in *Philadelphia v. Anderson*, 142 Pa. 364, 12 L. R. A. 751, 21 Atl. 976, holding purchaser on faith of certificate that no taxes are unpaid, protected thereby.

12 L. R. A. 60, *BAKER v. HART*, 123 N. Y. 470, 25 N. E. 948.

Construction of grant of right to remove minerals.

Cited in *Butler v. McGorrick*, 52 C. C. A. 214, 114 Fed. 302, construing deed as conveying only all coal mined before certain date; *Phelps v. Church of Our Lady Help of Christians*, 40 C. C. A. 74, 99 Fed. 684, holding lease for years, with "right to quarry and appropriate all marble," etc., passes right of property therein; *Providence Min. & Mill. Co. v. Nicholson*, 101 C. C. A. 157, 178 Fed. 33, holding one acquiring only interest in mineral which one mines, and removes from land not entitled to maintain action against trespasser mining and removing ore from premises without showing direct injury thereby.

License to take minerals as chattel interest.

Cited in *Sanford's Appeal*, 75 Conn. 595, 54 Atl. 739, holding leased quarry not taxable as property of lessee.

Right of lessee of mine to sue for conversion.

Cited in *Buck v. Cleveland*, 143 App. Div. 878, 128 N. Y. Supp. 864, to the point that lessee having exclusive right to enter land for purpose of quarrying stone but for no other purpose, had no right of action against trespasser for quarrying stone on land.

Distinguished in *Hartford Iron Min. Co. v. Cambria Min. Co.* 93 Mich. 93, 32 Am. St. Rep. 488, 53 N. W. 4, holding lessee of mine, obligated to pay royalty on certain amount yearly, may maintain action for conversion of unmined ore.

Damages recoverable by licensee for taking of ore.

Cited in *Arnold v. Bennett*, 92 Mo. App. 161, holding value of ore removed by trespasser not recoverable by licensee of mine.

Liability for waste.

Cited in *Dix v. Jaquay*, 94 App. Div. 556, 88 N. Y. Supp. 228, holding life tenant may recover full damages for waste; *Seigel v. Greenberg*, 134 App. Div. 975, 119 N. Y. Supp. 1144, holding evidence sufficiently strong to require court to pass upon question whether tenant holding over liable for condition of premises beyond wear and tear incident to proper occupation by tenant.

Lessee's rights in action.

Cited in *United Traction Co. v. Ferguson Contracting Co.* 117 App. Div. 309, 102 N. Y. Supp. 190, holding lessee of rights in street and structures therein may ask for injunction restraining entry thereon and destruction of structures to build canal ditch.

12 L. R. A. 62, *MORSE v. HACKENSACK SAV. BANK*, 47 N. J. Eq. 279, 20 Atl. 961.

When deed acquired through judicial proceedings takes effect.

Cited in *First Nat. Bank v. Thompson*, 61 N. J. Eq. 204, 48 Atl. 333, holding master's deed in partition takes effect from date of sale; *Wimpfheimer v. Prudential Ins. Co.* 56 N. J. Eq. 591, 39 Atl. 916, holding deed on confirmation of foreclosure relates back to time of sale; *Missouri Valley Land Co. v. Barwick*, 50 Kan. 61, 31 Pac. 685, holding sheriff's deed on foreclosure entitles purchaser to crops growing at time of sale; *Cropper v. Brown*, 76 N. J. Eq. 413, 139 Am. St.

Rep. 770, 74 Atl. 987, holding that sheriff's deed relates back to time of contract of purchase entered into by purchaser or officer striking off property to him at public sale; *Carpenter v. Shanley*, 75 N. J. Eq. 370, 138 Am. St. Rep. 576, 73 Atl. 64, to the point that sheriff's deed, when delivered, has relation back to time of sale.

Criticized in *Thompson v. Ramsey*, 72 N. J. Eq. 461, 66 Atl. 588, holding sheriff's deed does not relate to sale, so as to give purchaser right to rents and profits intermediate between sale and delivery of deeds.

Right to income of land subject to power of sale.

Cited in *Hatt v. Rich*, 59 N. J. Eq. 509, 45 Atl. 969, holding residuary devisees entitled to use of lands intermediate testator's death and execution of power of sale.

Priority of creditors of heir and decedent.

Cited in notes (5 L.R.A.(N.S.) 365) on testamentary trusts for payment of debts; (25 Eng. Rul. Cas. 817) on what is necessary to exonerate general personal estate of testator from his debts.

Distinguished in *First Nat. Bank v. Thompson*, 61 N. J. Eq. 204, 48 Atl. 333, holding attachment issued by creditor of heir more than year after decedent's death, superior to rights of decedent's creditors.

Right of election under will.

Cited in *Wooster v. Cooper*, 59 N. J. Eq. 229, 45 Atl. 381, and *Huber v. Donoghue*, 49 N. J. Eq. 128, 23 Atl. 495, holding devisees of proceeds of lands which executors have power to sell may elect to take lands; *Doyle v. Blake*, 77 N. J. Eq. 143, 77 Atl. 347, holding that sole devisee's right of election to take land instead of proceeds of sale is substantial right and court will restrain sale by executor.

Effect of lapse of time on testamentary power of sale.

Cited in *Hatt v. Rich*, 59 N. J. Eq. 507, 45 Atl. 969, holding lapse of time will not affect executor's power to sell realty, when testator's purpose may still be accomplished.

Construction of will.

Cited in *Gordon v. McDougall*, 84 Miss. 721, 5 L.R.A.(N.S.) 368, 37 So. 298, holding intent of testator gathered from whole will, not from any single sentence or special provision.

Sheriff's deed.

Cited in *Brady v. Carteret Realty Co.* 67 N. J. Eq. 643, 100 Am. St. Rep. 502, 60 Atl. 938, 3 A. & E. Ann. Cas. 421, Affirming 66 N. J. Eq. 249, 57 Atl. 814, holding sheriff's deed passes same title as would deed of bargain and sale executed by judgment debtor.

Estates subject to power of sale.

Cited in *Condict v. Condict*, 73 N. J. Eq. 307, 75 Atl. 815, holding where trustees are given power to sell testator's realty and share is given absolutely to testator's child, child's share is taken subject to power of sale in trustee.

12 L. R. A. 67, *CHILDERS v. LEE*, 5 N. M. 576, 25 Pac. 781.

Lease; statute of frauds.

Cited in footnote to *Hand v. Osgood*, 30 L. R. A. 379, which holds oral lease of land for one year, with privilege of three, within statute of frauds.

12 L. R. A. 70, *DIBRELL v. LANIER*, 89 Tenn. 497, 15 S. W. 87.

Private statutes.

Cited in note (16 L. R. A. 252) on constitutionality of private statutes to authorize disposal of property.

Right to transmit or transfer property.

Cited in *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 611, 34 L. R. A. 448, 37 S. W. 390, holding act forbidding transfers having effect to prefer creditors, not limited to cases of insolvency, unconstitutional; *Beals v. State*, 139 Wis. 559, 121 N. W. 347 (dissenting opinion), on taking property by taking away power of disposal of thing by absolute interdict or indirectly.

Class legislation.

Cited in *Harbison v. Knoxville Iron Co.* 103 Tenn. 436, 56 L. R. A. 319, 76 Am. St. Rep. 682, 53 S. W. 955, holding general statute embracing all persons who are or may be in like situation and circumstances valid as "law of the land;" *Harbison v. Knoxville Iron Co.* 103 Tenn. 434, 56 L. R. A. 319, 76 Am. St. Rep. 682, 53 S. W. 955, holding statute requiring payment of wages in lawful money constitutional; *Fidelity & C. Co. v. Freeman*, 54 L. R. A. 686, 48 C. C. A. 702, 109 Fed. 856, holding basis of classification adopted by statute must be natural, not arbitrary; *Henley v. State*, 98 Tenn. 698, 39 L. R. A. 136, 41 S. W. 352, holding classification adopted by statute must be natural and reasonable, resting upon some sound legal ground; *Peters v. State*, 96 Tenn. 686, 33 L. R. A. 115, 36 S. W. 399, holding exemption of lakes of 15 square miles and over from operation of game law, valid classification; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 257, 28 L. R. A. 800, 32 S. W. 5, holding statute regulating liability on policies, excepting insurance upon cotton in bales, constitutional; *Condon v. Maloney*, 108 Tenn. 94, 65 S. W. 871, holding road law applying to counties having population of not less than 70,000 nor more than 90,000 under census of 1900, or any subsequent Federal census, constitutional; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 706, 53 L. R. A. 929, 43 S. W. 115, holding act imposing privilege tax on railroads not paying ad valorem tax constitutional; *Debardelaben v. State*, 99 Tenn. 652, 42 S. W. 684, holding act forbidding betting outside of race-track inclosure constitutional; *Breyer v. State*, 102 Tenn. 106, 50 S. W. 769, holding Sunday barbering law constitutional; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 732, 78 Am. St. Rep. 941, 59 S. W. 1033, holding arbitrary and capricious classification renders statute unconstitutional; *School District v. School District*, 22 Pa. Co. Ct. 236, holding act providing for education of soldiers' children at public expense unconstitutional; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 156, 41 L. ed. 668, 17 Sup. Ct. Rep. 255, holding statute requiring railroad companies to pay attorney's fees to parties successfully maintaining stock-killing action unconstitutional; *Sutton v. State*, 96 Tenn. 709, 33 L. R. A. 592, 36 S. W. 697, holding statute prohibiting stock from running at large in certain counties void as based on arbitrary classification; *Henley v. State*, 98 Tenn. 746, 39 L. R. A. 147, 41 S. W. 352, dissenting opinion by Snodgrass, Ch. J., who holds act based upon unnatural, arbitrary, and capricious classification not "law of the land;" *Malone v. Williams*, 118 Tenn. 429, 121 Am. St. Rep. 1002, 103 S. W. 798, holding sections of statute unconstitutional because discriminating between holders of shares of stock and other kinds of property as respects date of delinquency of taxes, and because creating unreasonable discrimination in favor of city as means of collecting taxes and because discriminating in favor of purchasers at tax sales under city's authority; *Ledgerwood v. Pitts*, 122 Tenn. 605, 125 S. W. 1036, holding that statute for compulsory primary elections for political nominations is not unconstitutional because it excludes judiciary.

Scope of legislative power.

Cited in *Henley v. State*, 98 Tenn. 681, 39 L. R. A. 132, 41 S. W. 352, holding scope of legislation limited only by state and Federal Constitutions; *Henley v. State*, 98 Tenn. 735, 39 L. R. A. 144, 41 S. W. 352, dissenting opinion by Snod-

grass, Ch. J., who holds act authorized by one constitutional provision must be unobjectionable under every other; Grainger County v. State, 111 Tenn. 291, 80 S. W. 750, denying unnecessarily implied limitation of power of legislature to deal with subject of redistricting of counties so that it cannot deal therewith by its own immediate action.

Necessity of clearly proving wherein statute is unconstitutional.

Cited in Leeper v. State, 103 Tenn. 511, 48 L. R. A. 169, 53 S. W. 962, and Henley v. State, 98 Tenn. 682, 39 L. R. A. 132, 41 S. W. 352, holding act cannot be annulled upon general or vague interpretation of Constitution; Dayton Coal & I. Co. v. Barton, 103 Tenn. 613, 53 S. W. 970, holding opposition to natural equity or inherent rights no ground for annulling statute; Reelfoot Lake Levee District v. Dawson, 97 Tenn. 159, 34 L. R. A. 728, 36 S. W. 1041, holding statute constitutional unless clearly violating specific provision of state or Federal Constitution.

12 L. R. A. 81, BOWAR v. CHICAGO WEST DIV. R. CO. 136 Ill. 101, 26 N. E. 702.

When writ of possession issuable.

Cited in Wilson v. Trustees of Schools, 138 Ill. 290, 27 N. E. 1103, holding execution not issuable upon judgment in ejectment after seven years, without revival by scire facias.

Effect of appeal.

Cited in Merrifield v. Cottage Piano Co. 238 Ill. 533, 128 Am. St. Rep. 148, 87 N. E. 379, holding trial court should not permit amendment of execution pending appeal from order vacating order setting aside default and staying execution.

12 L. R. A. 84, CALUMET RIVER R. CO. v. BROWN, 136 Ill. 322, 26 N. E. 501.

Rights of lienor to award on condemnation.

Cited in Thompson v. Chicago, S. F. & C. R. Co. 110 Mo. 163, 19 S. W. 77, holding award on condemnation applicable to mortgage; Thomas v. St. Louis, B. & S. R. Co. 164 Ill. 636, 46 N. E. 8, holding vendor's lien attaches to award for property condemned; Nix v. Thackaberry, 240 Ill. 356, 88 N. E. 811, holding effect of judgment in condemnation proceedings is to transfer lien of trust deed from lands to fund awarded; Buchanan v. Kansas City, 208 Mo. 683, 15 L.R.A. (N.S.) 837, 106 S. W. 531, holding lien of assessment continued on condemnation money paid into court; Omaha Bridge & Terminal R. Co. v. Reed, 69 Neb. 515, 96 N. W. 276, holding condemnation money stands in place of land and belongs to mortgagee to extent of value of his lien; North Coast R. Co. v. Hess, 56 Wash. 338, 105 Pac. 853, holding lienors have same claim as against land itself upon money paid into court by railroad company under judgment of condemnation.

Cited in notes (18 L.R.A. 115, 116) on rights of mortgagee of premises taken by eminent domain; (88 Am. St. Rep. 363, 364) on rights and remedies of mortgagee after involuntary transfer of property preventing foreclosure of suit for possession.

Distinguished in Stopp v. Wilt, 177 Ill. 623, 52 N. E. 1028, Affirming 76 Ill. App. 535, holding vendor relinquishing all claims to award on condemnation not entitled to have fund applied on purchase money mortgage.

Right of owner against railroad lawfully in possession.

Cited in Chicago, P. & St. L. R. Co. v. Vaughn, 99 Ill. App. 390, denying right of remainder-man to recover possession of land purchased by railroad from life tenant.

Right of stranger to proceeding to question validity.

Cited in *Payson v. People*, 175 Ill. 272, 51 N. E. 588, holding landowner, not party to drainage assessment proceedings, not concluded by judgment of confirmation.

Power of court over money paid into court.

Cited in footnotes to *Re Rochester*, 19 L. R. A. 161, which holds power of court over fund in court not divested by conditional transfer to one of parties; *Jones v. Merchants' Nat. Bank*, 35 L. R. A. 698, which holds money paid into court exempt from process of litigant, unless consent of court obtained.

12 L. R. A. 87, *DEMBY v. PARSE*, 53 Ark. 526, 14 S. W. 899.

Remainderman's rights in buildings.

Cited in footnote to *Melms v. Pabst Brewing Co.* 46 L. R. A. 478, which holds removal of worthless dwelling house by life tenant not waste.

Fixtures.

Cited in *Tippett v. Barham*, 103 C. C. A. 430, 180 Fed. 81, holding stand pipe erected on land acquired by water company after mortgage is fixture subject to mortgage containing after-acquired property clause.

Cited in note (19 L. R. A. 443) on effect of agreement to prevent fixtures from becoming part of realty.

12 L. R. A. 89, *LONG v. STATE*, 73 Md. 527, 20 Am. St. Rep. 606, 21 Atl. 683.

Lottery schemes.

Second appeal in 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4, which holds gift enterprise not involving element of chance cannot be prohibited.

Cited in *Lansburgh v. District of Columbia*, 11 App. D. C. 529, holding distribution of "trading stamps" within statute prohibiting gift enterprise; *State v. Caspare*, 115 Md. 16, 80 Atl. 606, holding that element of chance, prohibited by statute cannot be found in mere purchase of merchandise and receipt of same accompanied by gift of stamp to be redeemed.

Cited in footnotes to *Meyer v. State*, 51 L. R. A. 496, which holds giving customers chance to operate slot machine and secure, in addition to purchase, article whose value determined by place where revolving wheel stops, a lottery; *Lynch v. Rosenthal*, 31 L. R. A. 835, which holds sale of lots to be drawn by lot, with one prize lot to be given to one of purchasers as result of chance, void; *State ex rel. Prout v. Nebraska Home Co.* 60 L. R. A. 448, which holds scheme by which common fund distributed among contributors, a valuable preference in distribution depending on chance, a lottery; *Thornhill v. O'Rear*, 31 L. R. A. 792, which holds agreement by one person to take all chances of raffle not unlawful; *People ex rel. Ellison v. Lavin*, 66 L.R.A. 601, which holds distribution of prizes to those who shall make closest estimate of number of cigars on which tax is paid during specified month, a lottery; *People v. McPhee*, 69 L.R.A. 506, which holds a scheme by which a certain number of persons pay a small sum weekly and choose by lot each week one of the number to receive a suit of clothes worth much more than the weekly payment after which he ceases to be a member, a lottery, although each member is entitled to trade out the amount paid in whenever he chooses to withdraw; *Equitable Loan & S. Co. v. Waring*, 62 L.R.A. 93, which holds consideration, prize, and chance essential elements of lottery.

Cited in notes (25 Am. St. Rep. 881) on 14th amendment as to special privileges, burdens and restrictions; (78 Am. St. Rep. 268) on acts which legislature may declare criminal.

Right to lottery prize.

Cited in footnote to *Martin v. Richardson*, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to recover proceeds from one fraudulently obtaining after prize drawn.

12 L. R. A. 90, *CORSON v. DUNLAP*, 83 Me. 32, 21 Atl. 173.

Judgments on penal bonds.

Cited in notes (62 L. R. A. 437, 443, 444) on form of judgment on penal bonds.

12 L. R. A. 93, *DUGAN v. LEWIS*, 79 Tex. 246, 23 Am. St. Rep. 332, 14 S. W. 1024.

Interest on contracts between citizens of different states.

Cited in *Jackson v. American Mortg. Co.* 88 Ga. 762, 15 S. E. 812; *Lanier v. Union Mortg. Bkg. & T. Co.* 64 Ark. 49, 40 S. W. 466; *New England Mortg. Secur. Co. v. McLaughlin*, 87 Ga. 4, 13 S. E. 81; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 174, 13 L. R. A. 302, 9 So. 143,—holding parties residing in different states may contract for either rate of interest, without regard to usury laws of place of payment; *Andruss v. People's Bldg. Loan & Sav. Asso.* 36 C. C. A. 341, 94 Fed. 580; *Manship v. New South Bldg. & L. Asso.* 110 Fed. 860; *United States Sav. & L. Co. v. Shain*, 8 N. D. 140, 77 N. W. 1006,—holding borrower and lender residing in different states may agree that laws of either shall govern.

Cited in notes (55 L. R. A. 936) on whether *lex rei sitæ* as to interest and usury necessarily control in action to foreclose mortgage on real property; (62 L. R. A. 51) on conflict of laws as to interest and usury.

Stipulations as to maturity of loan.

Cited in *Glover v. Equitable Mortg. Co.* 31 C. C. A. 107, 59 U. S. App. 151, 87 Fed. 520, holding provision giving mortgagee right to declare principal due if mortgage is taxed not usurious; *Tipton v. Ellsworth*, 18 Idaho, 222, 109 Pac. 134, holding that stipulation in mortgage that principal and interest shall become due at mortgagee's option, is in nature of penalty and will not be enforced as to unearned interest.

Usury.

Cited in *Eldred v. Hart*, 87 Ark. 539, 113 S. W. 213, holding interest notes not rendered usurious by reason of optional payment of principal before they fell due.

Cited in notes (28 L.R.A.(N.S.) 114) on exacting interest for full term upon payment of debt before maturity as usury; (46 Am. St. Rep. 201) on what transactions are usurious.

Right to interest.

Cited in *Dallas Trust & Sav. Bank v. Story*, 55 Tex. Civ. App. 86, 118 S. W. 781, holding that holder of mortgage stipulating that mortgagee might apply insurance money on debt, cannot recover interest upon debt after application of insurance money to its payment.

Conflict of laws as to contracts.

Cited in *Midland Sav. & L. Co. v. Solomon*, 71 Kan. 187, 79 Pac. 1077, holding express provision of contract making it subject to, and entitled to benefits of, laws of given state controls.

Distinguished in *Davis v. Tandy*, 107 Mo. App. 448, 81 S. W. 457, holding parties presumed to intend law recognizing contract as valid where no express stipulations as to which law is to govern are made.

12 L. R. A. 97, *ELL v. NORTHERN P. R. CO.* 1 N. D. 336, 26 Am. St. Rep. 621, 48 N. W. 222.

Liability for superior servant's negligence.

Cited in *Barnicle v. Connor*, 110 Iowa, 240, 81 N. W. 452, denying master's liability to employee for negligence of foreman undertaking to keep column from rolling; *Atchison, T. & S. F. R. Co. v. Martin*, 7 N. M. 172, 34 Pac. 536, holding foreman fellow servant of section hand injured through former's failure to observe approaching train; *Southern Indiana R. Co. v. Martin*, 160 Ind. 289, 66 N. E. 886, denying railroad's liability for negligence of foreman engaged in stretching cable used in unloading stone.

Cited in notes (18 L. R. A. 825) on negligent superiors; (54 L. R. A. 39, 43, 61) on vice principalship as determined with reference to character of act which caused injury; (51 L. R. A. 519, 520, 529, 618) on vice principalship considered with reference to superior rank of negligent servant; (54 Am. St. Rep. 92) on acts of servant for which master is not responsible.

Distinguished in *Standard Cement Co. v. Minor*, 27 Ind. App. 483, 61 N. E. 684, holding complaint alleging injuries received by employee in regular line of employment through negligence of boss, insufficient.

Who are fellow servants.

Cited in *Bennett v. Northern R. Co.* 2 N. D. 116, 13 L. R. A. 468, 49 N. W. 408, holding car inspector not fellow servant of one coupling cars; *Northern P. R. Co. v. Hogan*, 11 C. C. A. 53, 27 U. S. App. 184, 63 Fed. 105, holding brakeman and conductor fellow servants; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 391, 46 L. R. A. 347, 27 S. E. 278, holding conductor assisting in coupling cars brakeman's fellow servant; *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 405, 48 L. R. A. 408, 77 Am. St. Rep. 721, 55 S. W. 108, holding engineer and conductor of freight train fellow servants of fireman; *Missouri P. R. Co. v. Lyons*, 54 Neb. 640, 75 N. W. 13, holding members of two switching crews working in same yard fellow servants; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 485, 13 L. R. A. 826, 22 Atl. 552, holding loom-fixer in cotton mill not fellow servant of weaver; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 378, 18 L. R. A. 807, 19 S. W. 1119 (dissenting opinion), majority holding track repairer and crew of construction train not fellow servants; *Atchison & E. Bridge Co. v. Miller*, 71 Kan. 38, 1 L.R.A.(N.S.) 695, 80 Pac. 18, holding machinist fellow servant with members of pile driving crew and negligence of chainman in securing chain upon pile not negligence of master; *Jemming v. Great Northern R. Co.* 96 Minn. 313, 1 L.R.A.(N.S.) 704, 104 N. W. 1079, holding to extent absolute duties of master are delegated to another latter is vice-principal but where engaged with others in common employment of master he is fellow servant; *Clavin v. William Tinkham Co.* 29 R. I. 604, 132 Am. St. Rep. 836, 73 Atl. 392, holding loom-fixer represented master when fixing loom from which shuttle flew out and injured weaver using loom when it was undergoing repairs.

Cited in footnotes to *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train; *Fisher v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 519, which holds section foreman and conductor not fellow servants; *Daniel v. Chesapeake & O. R. Co.* 16 L. R. A. 383, which holds conductor and brakeman on different trains not fellow servants; *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant roadmaster not fellow servant of gang of men working under him.

Cited in note (75 Am. St. Rep. 588, 589, 591, 596, 597, 600, 602) on who is a vice principal.

Interest on damages in negligence actions.

Cited in footnote to Louisville & N. R. Co. v. Wallace, 14 L. R. A. 548, which denies interest before judgment in action for personal injuries.

Cited in notes (18 L.R.A. 449) on interest on sum allowed as damages; (28 L.R.A.(N.S.) 70) on interest on unliquidated damages; (14 Eng. Rul. Cas. 562) as to when interest will be allowed.

Negligence of fellow servant as defense.

Cited in Longpre v. Big Blackfoot Mill Co. 38 Mont. 105, 99 Pac. 131, holding defense that negligence charged was that of fellow servant must be availed of by special allegation.

Assumptions of risk.

Cited in note (31 Am. St. Rep. 349) on assumption of risks by employee.

Liability of master to servant for injury.

Cited in Hardesty v. Largey Lumber Co. 34 Mont. 163, 86 Pac. 29, holding sections of code under head of "Obligations of Employer" applicable to personal injury cases between master and servant.

Cited in note (27 Am. St. Rep. 819) on master's duty as to place and appliances.

12 L. R. A. 103, TENNESSEE COAL, IRON & R. CO. v. KYLE, 93 Ala. 1, 8 So. 764.

Duty to furnish safe appliances.

Cited in Lutz v. Atlantic & P. R. Co. 6 N. M. 528, 16 L. R. A. 833, 30 Pac. 912, upholding railroad's liability to conductor for failure to furnish suitable caboose.

Cited in note (98 Am. St. Rep. 294) on liability to servant for injuries due to defective machinery and appliances.

12 L. R. A. 104, KELLOGG v. COCHRAN, 87 Cal. 192, 25 Pac. 677.

Effect of failure to consider point on rehearing.

Cited in Wilcox v. Luco, 118 Cal. 643, 45 L. R. A. 584, 62 Am. St. Rep. 305, 50 Pac. 758, holding failure to reconsider opinion not decision adverse to point first raised on motion for rehearing.

Insane persons — Detention, discharge.

Cited in People v. Geiger, 116 Cal. 441, 48 Pac. 389, holding it valid discharge of patient from insane asylum made where person escaped and resident physician recorded his discharge as "recovered" shortly after such escape, no attempt being made to retake him.

Cited in notes (43 Am. St. Rep. 540) on due process of law as applied to insane persons; (71 Am. St. Rep. 427) on contracts of insane persons.

Distinguished in Byers v. Solier, 16 Wyo. 241, 14 L.R.A.(N.S.) 470, 93 Pac. 59, holding legality of detention of person in insane asylum determinable on habeas corpus, though statutory provision made for judicial proceeding for restoration to capacity.

Limited in Aldrich v. Barton, 153 Cal. 493, 95 Pac. 900, holding certificate of discharge by medical superintendent ineffectual for any purpose where person is not patient in asylum at time of said discharge.

— Restoration to capacity.

Cited in Aldrich v. Alameda County, 120 Cal. 142, 52 Pac. 148, holding provision of code authorizing court to restore person adjudged insane or incompetent to capacity not applicable to cases of persons violently insane and committed to

insane asylum because dangerous to health, person, or property; *Aldrich v. Barton*, 153 Cal. 493, 95 Pac. 900, holding court proceeding for restoration to capacity provided for by code not applicable to case of person confined in insane asylum without having been put under guardianship.

Raising new points on rehearing.

Cited in *San Francisco v. Pacific Bank*, 89 Cal. 25, 26 Pac. 835, holding court will not consider petition for rehearing that attempts to discuss case upon grounds not presented in original argument or discussed in its opinion; *Merchant's Nat. Bank v. Greenwood*, 16 Mont. 461, 41 Pac. 851, denying petition for rehearing asked in order to argue objection to judgment as entered in lower court, where such objection made for first time when rehearing asked; *Beck v. Thompson*, 22 Nev. 421, 41 Pac. 1, holding points raised for first time in petition for rehearing not considered; *Powell v. Nevada, C. & O. R. Co.* 28 Nev. 343, 82 Pac. 96, holding if judgment of court below and opinion on appeal correct at time made they cannot be invalidated on rehearing by statute passed subsequently; and that rehearing was not granted for that purpose.

Malicious prosecution of criminal charge.

Cited in note (26 Am. St. Rep. 137) on malicious prosecution of criminal charge.

12 L. R. A. 107, *NATIONAL PROGRESS BUNCHING MACH. CO. v. JOHN R. WILLIAMS CO.* 44 Fed. 190.

Patent for combinations.

Cited in *Fuller & J. Mfg. Co. v. Bender*, 69 Fed. 1001, holding patent on addition of fertilizer hopper to transplanting machine void; *Paul Boynton Co. v. Morris Chute Co.* 82 Fed. 445, holding combination of inclined railway, body of water, and boat-shaped car not patentable; *Merritt v. Middleton*, 55 Fed. 979, holding aggregation of old elements, not producing new result, not patentable; *Dunbar v. Eastern Elevating Co.* 75 Fed. 571, holding combination of movable elevator tower and storage warehouse patentable; *Louden Machinery Co. v. Janesville Hay Tool Co.* 141 Fed. 982, holding combination of old elements of pulley and head with new device of interchangeability, operation and effect of combined devices being same whether third element is present or absent, not patentable; *Western Electric Co. v. Rochester Teleph. Co.* 142 Fed. 775, holding test circuit arrangement for telephone performing no new function when associated with connecting circuit not patentably novel.

Cited in note (20 Eng. Rul. Cas. 157) on right to patent for new combination of machines or processes.

Enlargement of patent by construction.

Cited in *Parry Mfg. Co. v. Hitchcock Mfg. Co.* 58 Fed. 404, holding claim narrowed to precise mechanism of patent cannot be enlarged by construction; *Universal Brush Co. v. Sonn*, 83 C. C. A. 422, 154 Fed. 669, on non-alteration by court of claim as worded by patentee; *Smith & H. Co. v. E. C. Stearns & Co.* 160 Fed. 501, holding court, in view of file wrapper, prior art, and wording of claim, could not rewrite claim or insert words not found therein to make it conform to what court might suppose patentee intended.

12 L. R. A. 110, *BULLARD v. SHIRLEY*, 153 Mass. 559, 27 N. E. 766.

Charitable bequests.

Cited in *Teele v. Bishop of Derry*, 168 Mass. 342, 38 L. R. A. 630, 60 Am. St. Rep. 401, 47 N. E. 422, holding court will not frame scheme to carry out bequest of charitable nature, impossible of performance in manner provided; *Bow-*

den v. Brown, 200 Mass. 271, 128 Am. St. Rep. 419, 86 N. E. 351, holding gift to town toward erection of building for sick and poor, those without homes, failed on refusal of town to accept; Gladding v. St. Matthew's Church, 25 R. I. 637, 65 L.R.A. 230, 105 Am. St. Rep. 904, 57 Atl. 860, 1 A. & E. Ann. Cas. 537, holding legacy lapsed when legatee corporation ceased to exist.

Distinguished in *Sears v. Chapman*, 158 Mass. 401, 35 Am. St. Rep. 502, 33 N. E. 604, holding bequest for educational purposes "to be under control of inhabitants of Q." valid; *Ely v. Atty. Gen.* 202 Mass. 548, 89 N. E. 166, applying *cy pres* rule and ordering gift to found kindergarten home for deaf children to be administered through existing home for deaf children.

Legacy on condition.

Cited in footnote to *Re Jones*, 48 L. R. A. 580, which sustains legacy conditioned on legatee being declared reformed man at expiration of specified time.

Cited in note (27 L.R.A.(N.S.) 687) on effect of involuntary breach of condition in devise or legacy relating to conduct of beneficiary.

Effect of inability to perform condition of gift.

Cited in footnote to *Ellicott v. Ellicott*, 48 L. R. A. 58, which holds gift conditioned on graduation from specified university not divested by death during college course.

Cited in note (25 Eng. Rul. Cas. 627) on conditional gift becoming absolute on impossibility of performance of condition subsequent.

Municipal corporation as trustee of charity.

Cited in note (14 L. R. A. 70) on municipal corporation as trustee of charity.

Suspension of power of alienation.

Cited in footnote to *Murphy v. Whitney*, 24 L. R. A. 123, which holds agreement that land descending to brothers and sisters shall, on death of last survivor, pass to child of only married one, not void as perpetuity.

Cited in note (49 Am. St. Rep. 135) on rule against perpetuities.

Instruments construed as written.

Cited in *Jones v. Parker*, 163 Mass. 568, 40 N. E. 1044, construing covenant thereafter to heat and light demised premises as requiring presence of apparatus therefor at beginning of term.

Distinguished in *Quincy v. Atty. Gen.* 160 Mass. 434, 35 N. E. 1066, construing bequest to town, "to be kept as perpetual fund guaranteed by town with 6 per cent forever," as not requiring giving of guaranty.

12 L. R. A. 113, *PURCELL v. RICHMOND & D. R. CO.* 108 N. C. 414, 12 S. E. 954, 956.

Actions in tort for breach of duty ex contractu.

Cited in *Pickens v. South Carolina & G. R. Co.* 54 S. C. 502, 32 S. E. 567, holding action against railroad for failure to carry passenger to destination sounds in tort; *Solomon v. Bates*, 118 N. C. 315, 54 Am. St. Rep. 725, 24 S. E. 478, holding action for damages for bank director's failure to discharge duties sounds in tort; *Richardson v. Wilmington & W. R. Co.* 126 N. C. 102, 35 S. E. 235, holding action for tort may grow out of breach of contract; *Hood v. Sudderth*, 111 N. C. 222, 16 S. E. 397, holding plaintiff may elect whether ambiguous complaint be construed as one in tort or on contract; *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co.* 155 N. C. 153, 71 S. E. 71, holding that shipper may sue in tort for negligent delay in shipment, of goods by railroad; *Beaulieu v. Great Northern R. Co.* 103 Minn. 60, 19 L.R.A.(N.S.) 572, 114 N. W. 353, 14 A. & E. Ann. Cas. 462 (dissenting opinion), on larger measure of damages in actions ex

delicto than in actions ex contractu; *White v. Eley*, 145 N. C. 37, 58 S. E. 437, holding where action is based either on contract or tort plaintiff may elect to sue in tort.

Damages against carrier for refusal or failure to carry.

Followed in *Thomas v. Southern R. Co.* 122 N. C. 1006, 30 S. E. 343, and *Cable v. Southern R. Co.* 122 N. C. 900, 29 S. E. 377; as to damages recoverable for breach of statutory duty to stop at regular station.

Cited in *Smith v. Wilmington & W. R. Co.* 130 N. C. 312, 41 S. E. 481 (dissenting opinion), majority denying railroad's liability for carrying passenger past destination, in absence of evidence of actual damage; *Story v. Norfolk & S. R. Co.* 133 N. C. 62, 45 S. E. 349, holding exemplary damages allowable for exclusion of passenger for alleged intoxication, made with malice, undue force, or insult; *Brooks v. Jamesville & W. R. Co.* 115 N. C. 625, 20 S. E. 535 (dissenting opinion), as to carrier's liability for exemplary damages, though not physically injured; *Harlan v. Wabash R. Co.* 117 Mo. App. 541, 94 S. W. 737, holding exemplary damages properly allowed where passenger wilfully intentionally, and without lawful excuse carried by destination; *Coleman v. Southern R. Co.* 138 N. C. 354, 50 S. E. 690, holding person asking for ticket for next train and refused it by agent has cause of action against railroad company for damages caused by such refusal; *Williams v. Carolina & W. R. Co.* 144 N. C. 503, 12 L.R.A.(N.S.) 193, 57 S. E. 216, 12 A. & E. Ann. Cas. 1000, holding if engineer fails to see passenger giving requisite signal because of not keeping proper lookout company is liable only for actual damages caused by failure to stop, but is liable for punitive damages if engineer sees passenger and wilfully refuses to stop.

Cited in note (32 L. R. A. 545) on liability to passenger for default or delay in running train.

Distinguished, explained, and reinstated in *Hansley v. Jamesville & W. R. Co.* 117 N. C. 568, 32 L. R. A. 552, 53 Am. St. Rep. 600, 23 S. E. 443, Modifying on rehearing 115 N. C. 614, 32 L. R. A. 548, 44 Am. St. Rep. 474, 20 S. E. 528 (which overruled the main case), denying railroad's liability for punitive damages for failure, by reason of defective equipment, to return excursionist to starting point.

Who may recover statutory penalty for railroad's breach of duty.

Cited in *State ex rel. Carter v. Wilmington & W. R. Co.* 126 N. C. 442, 36 S. E. 14, holding penalties imposed on common carrier for refusal to receive freight recoverable by individuals.

Construction of pleadings.

Cited in *Wilson v. Brown*, 134 N. C. 407, 46 S. E. 762, dissenting opinion by Walker, J., who holds pleadings should be construed, so far as possible, as pleader intended; *New Bern Bkg. & T. Co. v. Duffy*, 156 N. C. 87, 72 S. E. 96, holding that judgment upon ground of frivolousness of pleading will be denied if pleading raises either question of law, or fact fit for consideration; *Blackmore v. Winders*, 144 N. C. 216, 56 S. E. 874, holding complaint cannot be overthrown by demurrer unless wholly insufficient.

Exemplary damages for acts of servant.

Cited in *Stewart v. Cary Lumber Co.* 146 N. C. 69, 59 S. E. 545, on liability of master for exemplary damages where negligence of servant is accompanied by wantonness, insult or oppression.

Cited in notes (28 Am. St. Rep. 878, 882) on exemplary or punitive damages; (59 Am. St. Rep. 603, 606) on exemplary damages against corporations; (37

L. ed. U. S. 99) on liability of railroad or other corporation for punitive or exemplary damages.

12 L. R. A. 115, *SPENCER v. ANDREW*, 82 Iowa, 14, 47 N. W. 1007.

Obstruction of highway as nuisance.

Cited in *Pettit v. Grand Junction*, 119 Iowa, 358, 93 N. W. 381, holding town liable for damages resulting from maintenance of buildings in streets; *Young v. Rothrock*, 121 Iowa, 594, 96 N. W. 1105, holding construction of permanent ice chute across street is actionable nuisance, though permission to construct is given by city authorities; *State v. Smith*, 123 Iowa, 656, 96 N. W. 899, holding location of public market in street not nuisance per se but valid exercise of municipal power; *J. K. & W. H. Gilcrest Co. v. Des Moines*, 128 Iowa, 53, 102 N. W. 831, holding city may not exercise public trust as to streets wholly free from interference by courts.

Cited in footnotes to *Costello, v. State*, 35 L.R.A. 303, which holds permanent appropriation of part of sidewalk for fruit stand indictable nuisance; *Seibert v. Missouri P. R. Co.* 70 L.R.A. 72, which holds safety gates at railroad crossing though placed inside curb not nuisance where sufficient space is left for travel.

Cited in notes (39 L. R. A. 660, 662) on municipal power over nuisances affecting highways and waters; (42 L. R. A. 824) on injunctions by municipalities against nuisances on highways and streets.

Revocation of permission to use street.

Cited in *Levis v. Newton*, 75 Fed. 897, holding mere license to use streets revocable.

Distinguished in *Laing v. Americus*, 86 Ga. 758, 13 S. E. 107, holding city not estopped from revoking permission to maintain structure in street, granted without authority.

Municipalities; implied powers.

Cited in *Levis v. Newton*, 75 Fed. 888, holding authority to light streets implies power to grant franchise to use streets for gas and electric plants.

Cited in footnote to *Augusta v. Reynolds*, 69 L.R.A. 564, which denies authority of city to permit use of streets for purpose of street fair.

Cited in note (125 Am. St. Rep. 353) on grant by city of right to use streets and sidewalks for private purpose.

Revocation of parol license or grant.

Cited in *Gyra v. Windler*, 40 Colo. 370, 91 Pac. 36, 13 A. & E. Ann. Cas. 841, holding prescriptive right of way originally granted by parol not revocable at will of donor; *Ruthven v. Farmers' Co-op. Creamery Co.* 140 Iowa, 575, 118 N. W. 915, holding parol license to construct tile drain fully executed, not revocable at pleasure.

Right of abutter to change conditions in surface of street.

Cited in note (16 L.R.A.(N.S.) 1038) on right of abutter to change conditions in surface of street or highway.

12 L. R. A. 117, *PEOPLE ex rel. ATTY. GEN. v. DASHAWAY ASSO.* 84 Cal. 114, 24 Pac. 277.

Forfeiture of corporate charter.

Cited in *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 487, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding corporation's misconduct gives state right to declare franchise forfeited; *People v. Rosenstein-Cohn Cigar Co.* 131 Cal. 156, 63 Pac. 163, holding (*obiter*) corporation's charter

forfeited by violation of its terms; *People ex rel. Skelton v. Los Angeles*, 133 Cal. 341, 65 Pac. 749, holding that complaint in action by state to exclude city from control over certain territory annexed, may charge usurpation of franchise in general terms or may set out specific grounds relied on; *Madera R. Co. v. Raymond Granite Co.* 3 Cal. App. 679, 87 Pac. 27, holding dissolution of corporation or forfeiture of its franchise can only be accomplished by quo warranto proceedings or under provisions of code; *Atty. Gen. v. New York, N. H. & H. R. Co.* 197 Mass. 197, 83 N. E. 408, on restraint of exercise of unauthorized powers by corporation on information in nature of quo warranto to oust it from enjoyment of usurped franchise; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 350, 116 S. W. 902, holding court has jurisdiction of proceeding on information in nature of warranto against corporations to forfeit charters and revoke licenses to transact business in state on ground of violation of anti-trust laws.

Cited in note (9 L. R. A. 273) on proceedings to forfeit corporate franchise.

Distinguished in *Wright v. Lee*, 4 S. D. 246, 55 N. W. 931, holding statutory provisions as to obtaining in civil action remedies reached by quo warranto and proceedings by information in nature of quo warranto not repealed by provision of constitution defining jurisdiction of courts.

Definiteness of charitable gifts.

Cited in footnote to *Thompson v. Brown*, 62 L. R. A. 398, which sustains devise of fund to be distributed "to the poor" at executor's discretion.

Cited in note (14 L.R.A.(N.S.) 104) on enforcement of general bequest for charity or religion.

Charitable or eleemosynary objects.

Cited in *People ex rel. Ellert v. Cogswell*, 113 Cal. 138, 35 L.R.A. 270, 45 Pac. 270, holding trust for establishment of polytechnic school for boys and girls is charitable; *Hale v. Stimson*, 108 Mo. 157, 95 S. W. 885, on meaning of "eleemosynary."

12 L. R. A. 120, *AUSTIN v. DAVIS*, 128 Ind. 472, 25 Am. St. Rep. 456, 26 N. E. 890.

Agreement to care for person during life.

Cited in *Hershman v. Pascal*, 4 Ind. App. 533, 30 N. E. 932, holding parole agreement to convey land if promisee would live with promisor during lifetime within statute of frauds; *Jordan v. Abney*, 97 Tex. 303, 78 S. W. 486, on specific performance of verbal contract to adopt.

Cited in notes (14 L. R. A. 862-863) on agreement to pay money or give property after death of promisor; (53 L. R. A. 368) on moral obligation as consideration for promise.

Contract contained in more than one instrument.

Cited in *Maris v. Masters*, 31 Ind. App. 243, 67 N. E. 699, upholding land contract in two parts, executed at different times, one containing terms, and other a receipt describing property; *Jennings v. Shertz*, 45 Ind. App. 125, 88 N. E. 729, holding that written contract within statute of frauds may be made up of letters or telegrams, provided meeting of minds is shown; *Warner v. Marshall*, 166 Ind. 109, 75 N. E. 582, holding written evidence of contract may be established through medium of letters so referring to each other as to amount to written evidence of transaction.

Cited in note (6 Eng. Rul. Cas. 254) on requisites of memorandum required by statute of frauds.

Effect of part performance of contract within statute of frauds.

Cited in *Hamilton v. Thirston*, 93 Md. 219, 48 Atl. 709, holding performance by promisee of parol contract to devise property will not, in action at law, take case out of statute; *Swash v. Sharpstein*, 14 Wash. 436, 32 L. R. A. 799, 44 Pac. 862, holding oral agreement to devise property, in settlement of suit, not validated by promisee's surrender of rights; *Lake Erie & W. R. Co. v. Michigan C. R. Co.* 86 Fed. 845, holding possession in common with grantor insufficient to take verbal grant of lands out of statute of frauds.

Disapproved in *Bryson v. McShane*, 48 W. Va. 130, 49 L. R. A. 529, 35 S. E. 848, holding oral agreement to convey property to persons caring for promisor during lifetime enforceable.

Effect of agreement to devise on power of disposition.

Cited in note (18 L.R.A.(N.S.) 220) on rights of promisee, during promisor's lifetime, under contract to leave property.

Distinguished in *Whiton v. Whiton*, 76 Ill. App. 570, holding agreement to devise property prevents transfer in lifetime, which is in effect a testamentary disposal.

Adoption of child as affecting previous will.

Cited in *Re Gregory*, 15 Misc. 409, 37 N. Y. Supp. 925, holding adopted child's right of inheritance subject to parents' testamentary power.

Cited in note (39 Am. St. Rep. 224) on adoption of children as affecting testamentary power of adopting parent.

Contracts by women after disability removed.

Cited in note (7 L.R.A.(N.S.) 1054) on validity of new promise by woman after to pay debt incurred during coverture.

Distinguished in *Purviance v. Purviance*, 14 Ind. App. 273, 42 N. E. 364, holding widow's agreement to pay deceased husband's debt valid; *Lackey v. Boruff*, 152 Ind. 375, 53 N. E. 412, holding married woman's mortgage securing renewal of note signed as surety prior to enabling act of 1881 valid as to creditors.

Oral agreement to devise.

Cited in *Horton v. Stegmyer*, 99 C. C. A. 332, 175 Fed. 760, holding oral agreement to devise real property, or real and personal property void.

Validity of contracts of married woman.

Cited in *Re Carroll*, 37 Pittsb. L. J. N. S. 92, holding married woman incompetent to make contract to adopt child.

12 L. R. A. 125, *MISCH v. RUSSELL*, 136 Ill. 22, 26 N. E. 528.

Jurisdiction of election contests.

Cited in *Murdock v. Weimer*, 55 Ill. App. 527, holding election of drainage commissioners contestable in county court; *Snowball v. People*, 147 Ill. 264, 35 N. E. 538, holding that county court's jurisdiction of contests of school elections does not exclude quo warranto proceedings in another court.

"Ejusdem generis."

Cited in *Ritchie v. People*, 155 Ill. 107, 29 L. R. A. 83, 46 Am. St. Rep. 315, 40 N. E. 454, construing act "to regulate manufacture of clothing, wearing apparel, and other articles," as embracing only manufacture of articles of kind expressly enumerated; *Union County v. Ussery*, 147 Ill. 208, 35 N. E. 618, holding words "or other public measure," following "constitutional amendment," not limited to measures affecting whole state; *Spalding v. People*, 172 Ill. 49, 49 N. E. 993, construing statute concerning "state, county, township, city, town, village, or other officer," as applying to other like officers; *Chicago Union Traction Co. v. Chicago*,

199 Ill. 520, 59 L. R. A. 644, 65 N. E. 451, construing general words "all others pursuing the occupations" as limited by specific words immediately preceding; *First Nat. Bank v. Adam*, 138 Ill. 500, 28 N. E. 955, restricting words "or other property" to meaning analogous to that of preceding words "goods" and "chattels;" *Cameron v. Sexton*, 110 Ill. App. 386, holding claims against land only, assumed by grantee taking deed "subject to mortgages, liens, taxes, and claims of any and every description;" *Baker v. Shinkle*, 249 Ill. 157, 94 N. E. 58, holding that under language in statute "all other officers for contesting whose election no provision is made," county court has jurisdiction to hear contest of election for trustees of pleasure park district; *Ex parte Roquemore*, 60 Tex. Crim. Rep. 286, 32 L.R.A.(N.S.) 1188, 131 S. W. 1101, holding that general term "and such other amusements as are exhibited and for which admission fee is charged" as used in statute, cannot be applied to baseball under doctrine of *ejusdem generis*; *Chicago v. M. & M. Hotel Co.* 248 Ill. 272, 93 N. E. 753, holding that maxim *ejusdem generis* is particularly applicable to statutes granting powers to municipal corporations; *Ex parte Muckenfuss*, 52 Tex. Crim. Rep. 470, 107 S. W. 1131, holding where statute provided for warrant whenever magistrate was informed offense was about to be committed against person or property, or that person had threatened to commit offense, word "offense" in clause "had threatened, etc." limited to offense against person or property.

Cited in footnote to *Capehart v. Burrus*, 42 L. R. A. 152, which holds live stock not included in bequest of "notes, bonds, stock, and money."

Distinguished in *Adams v. Akerlund*, 168 Ill. 637, 48 N. E. 454, holding maxim, *Ejusdem generis* not applicable to construction of phrase "goods and effects" *Gage v. Cameron*, 212 Ill. 159, 72 N. E. 204, holding under assumption clause making property "subject to existing mortgages, liens, taxes, and claims of any and every description," general words "claims of any and every description" are not restricted to claims appearing of record to be liens on property.

12 L. R. A. 129, *UPHAM v. DETROIT CITY R. CO.* 85 Mich. 12, 48 N. W. 199.

Riding on car platform or step as negligence.

Cited in *Bailey v. Tacoma Traction Co.* 16 Wash. 63, 47 Pac. 241; *Seymour v. Citizens' R. Co.* 114 Mo. 271, 21 S. W. 739; *Matz v. St. Paul City R. Co.* 52 Minn. 163, 53 N. W. 1071,—holding standing on street car platform not negligence *per se*, in absence of regulation to contrary; *Archer v. Ft. Wayne & E. R. Co.* 87 Mich. 106, 49 N. W. 488, and *East Omaha Street R. Co. v. Godola*, 50 Neb. 909, 70 N. W. 491, holding standing on platform of crowded car not negligence *per se*; *Pray v. Omaha Street R. Co.* 44 Neb. 173, 48 Am. St. Rep. 717, 62 N. W. 447, holding standing on step of crowded car not negligence *per se*; *Noble v. St. Joseph & B. Harbor R. Co.* 98 Mich. 255, 57 N. W. 126, holding (*obiter*) not negligence to ride on platform of crowded horse car; *North Chicago Street R. Co. v. Baur*, 179 Ill. 129, 45 L. R. A. 110, footnote p. 108, 53 N. E. 568, which holds standing on street car platform, with back against dashboard, not necessarily negligence; *Hart v. Capital Traction Co.* 35 App. D. C. 511, holding that riding on platform of street car is not negligence *per se*, in absence of rule forbidding it.

Cited in footnotes to *Watson v. Portland & C. E. R. Co.* 44 L. R. A. 157, which holds riding on front platform of electric cars not negligence *per se*; *Fisher v. West Virginia & P. R. Co.* 33 L. R. A. 69, which holds riding on car platform, and refusing to go inside at request, negligence; *Sweetland v. Lynn & B. R. Co.* 51 L. R. A. 783, which sustains rule forbidding passengers to ride on front platform of electric car; *Third Ave. R. Co. v. Barton*, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by con-

tact with pillar near track, while passing around conductor; Cleveland, C. C. & St. L. R. Co. v. Moneyhun, 34 L. R. A. 141, which holds it negligent to go on lower step of rapidly moving railroad car to vomit.

Cited in notes (118 Am. St. Rep. 480; 12 L.R.A.(N.S.) 833) on riding on platform of street car as negligence.

Distinguished in Indianapolis Traction & Terminal Co. v. Beckman, 40 Ind. App. 102, 81 N. E. 82, holding mother in charge of boy on street car not contributorily negligent in allowing him to sit on end of seat whence he was thrown to ground when car was going around abrupt curve, run over and killed.

12 L. R. A. 131, FALL RIVER NAT. BANK v. SLADE, 153 Mass. 415, 26 N. E. 843.

Application of collateral to several debts.

Cited in footnote to Hallowell v. Blackstone Nat. Bank, 13 L. R. A. 315, which holds pledge of securities for certain note, with right to apply surplus to any other claims, entitles pledgee to apply it to such other claims regardless of whether or not principal note is paid.

12 L. R. A. 134, *Ex parte* ALABAMA STATE BAR ASSO. 92 Ala. 113, 8 So. 768.

Mandamus; when issuable.

Cited in State *ex rel.* Harmon v. Hamil, 97 Ala. 109, 11 So. 892, holding mandamus does not lie to compel recanvass of votes by board of supervisors.

Cited in notes (98 Am. St. Rep. 891) on mandamus as proper remedy against public officers; (15 Eng. Rul. Cas. 135) on mandamus to compel inferior court to act.

— To compel exercise of judicial functions.

Cited in Montgomery County v. Cochran, 116 Fed. 1002, holding performance of judicial duty compellable by mandamus; Crook v. Newborg, 124 Ala. 484, 82 Am. St. Rep. 190, 27 So. 432, holding mandamus proper to compel judge to certify his incompetency to try case; State *ex rel.* Smith v. Pitts, 139 Ala. 155, 36 So. 20, holding mandamus issuable to correct judge's erroneous adjustment of incompetency; Schintz v. Morris, 13 Tex. Civ. App. 594, 35 S. W. 516, holding mandamus issuable to compel court to retry issue after setting aside verdict; Wilson v. Duncan, 114 Ala. 672, 21 So. 1017, holding mandamus proper to correct rulings of judge failing to require proper bond from contestant in election case; *Ex parte* Hurn, 92 Ala. 104, 13 L. R. A. 122, 25 Am. St. Rep. 23, 9 So. 515, holding mandamus not issuable to compel court to hear motion already overruled; Steele v. Donehoo, 116 Ala. 567, 22 So. 896, holding (*obiter*) mandamus proper to compel court to exercise jurisdiction.

Distinguished in State *ex rel.* Burbridge v. Call, 41 Fla. 459, 26 So. 1016, holding mandamus improper to compel revocation of appealable decision.

What disqualifies judge.

Approved in Fulton v. Longshore, 156 Ala. 614, 19 L.R.A.(N.S.) 602, 46 So. 989, holding fact that judge of probate before whom election contest was to be tried belonged to same party as one of the candidates in the contest and was his active supporter in the election, did not disqualify him.

Cited in Montgomery County v. Cochran, 116 Fed. 1001, holding citizen and taxpayer not disqualified to hear case to which county is party; Medlin v. Taylor, 101 Ala. 242, 13 So. 310, holding judge whose election contested incompetent to hear contest growing out of same election.

Cited in footnotes to Meyer v. San Diego, 41 L. R. A. 762, which holds judge

owning land in city disqualified to sit in suit contesting validity of contract to issue city bonds; *First Nat. Bank v. McGuire*, 47 L. R. A. 413, which holds judge disqualified to try case in which plaintiff is corporation of which his wife is shareholder.

Cited in notes (30 Am. St. Rep. 153) on disqualification of judges; (39 L.R.A.(N.S.) 116) on disqualification of judge by membership in bar association to preside at disbarment proceedings instituted by association.

Judge's adjudication of own disqualification.

Cited in *Medlin v. Taylor*, 101 Ala. 241, 13 So. 310, holding adjudication by judge of own incompetency to hear cause not conclusive.

12 L. R. A. 136, *McCARTY v. WOODSTOCK IRON CO.* 92 Ala. 463, 8 So. 417.

Disaffirmance of infant's contracts.

Cited in *Pippen v. Mutual Ben. L. Ins. Co.* 130 N. C. 27, 57 L. R. A. 508, 40 S. E. 822, holding surrender of insurance policy not disaffirmable by insured's administrator on ground of infancy; *Shroyer v. Pittenger*, 31 Ind. App. 161, 67 N. E. 475, holding infant's deed may be disaffirmed by any act of positive dissent upon reaching majority; *Webb v. Reagin*, 160 Ala. 539, 49 So. 580, holding minor not estopped to disaffirm conveyance where legal title is in minor and there was no testimony to show minor received any benefit for money paid for property though grantee was told by infant's father in presence of infant that infant was of age.

Cited in footnote to *Bullock v. Sprowls*, 47 L. R. A. 327, which holds restoration of consideration unnecessary on infant's disaffirmance of deed after dissipating consideration.

Cited in note (8 L.R.A.(N.S.) 105) on effect upon title of infant's disaffirmance, after majority of contract to pay for property purchased.

Legal title unaffected by estoppel.

Cited in *Nashville, C. & St. L. R. Co. v. Hobbs*, 120 Ala. 610, 24 So. 933; *South & North Ala. R. Co. v. Alabama G. S. R. Co.* 102 Ala. 237, 14 So. 747 (*obiter*); *Hawkins v. Ross*, 100 Ala. 464, 14 So. 278,—holding that legal title to land does not pass by parol estoppel.

Jurisdiction of equity to cancel written instruments.

Cited in footnote to *Ada County v. Bullen Bridge Co.* 36 L. R. A. 367, which denies right to maintain equitable action to cancel county warrants.

Effect of cancelation of delivered deed.

Cited in note (18 L.R.A.(N.S.) 1170) on effect of destruction or cancelation, or redelivery to grantor for that purpose, of delivered but unrecorded deed.

12 L. R. A. 140, *MONTGOMERY v. CROSTHWAIT*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 So. 498.

Effect on negotiability of note of provision for collection costs.

Cited in *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 276, 48 Am. St. Rep. 381, 56 N. W. 458, and *Second Nat. Bank v. Anglin*, 6 Wash. 407, 33 Pac. 1056, holding negotiability of note unaffected by stipulation to pay attorney's fees in case of suit; *Stapleton v. Louisville Bkg. Co.* 95 Ga. 804, 23 S. E. 81, holding stipulation to pay all costs and 10 per cent counsel fees if placed with attorney does not destroy negotiability; *First Nat. Bank v. Slaughter*, 98 Ala. 603, 39 Am. St. Rep. 88, 14 So. 545, holding note containing provision for paying attorney's fee on collection negotiable; *Lockwood v. Lindsey*, 6 App. D. C. 400, holding negotiability of note containing stipulation for payment of collection fees determined by law of place where payable; *Hanover Nat. Bank v. Johnson*, 90 Ala. 553, 8 So. 42,

raising, without deciding, whether stipulation in note to pay costs of collection destroys negotiability; *Sylvester Blackley Co. v. Alewine*, 48 S. C. 311, 37 L. R. A. 88, 26 S. E. 609, holding (*obiter*) note rendered non-negotiable by provision for attorney's fees; *Cudahy Packing Co. v. State Nat. Bank*, 67 C. C. A. 662, 134 Fed. 541, holding that incorporation of provision for payment of attorney's fees in note does not destroy its negotiability; *Green v. Spires*, 71 S. C. 112, 50 S. E. 554, 4 A. & E. Ann. Cas. 261 (dissenting opinion), as to effect upon negotiability of note of stipulation for costs and expenses of collection.

Cited in footnote to *Pattillo v. Alexander*, 29 L. R. A. 616, which sustains payee's guaranty of attorney's fees if note has to be collected by law.

Cited in note (125 Am. St. Rep. 210) on agreements and conditions destroying negotiability.

Material alteration of instrument.

Cited in *Jordan v. Long*, 109 Ala. 418, 19 So. 843, holding unauthorized alteration of indorsement by holder by inserting waiver of exemptions releases indorser; *Green v. Sneed*, 101 Ala. 207, 36 Am. St. Rep. 119, 13 So. 277, holding filling blanks by party in excess of authority vitiates instrument; *White Sewing Mach. Co. v. Saxon*, 121 Ala. 409, 25 So. 784, holding unauthorized attestation after execution vitiates instrument; *Hollis v. Harris*, 96 Ala. 290, 11 So. 377, holding unauthorized substitution of name of another grantee invalidates deed; *Brown v. Johnson Bros.*, 127 Ala. 295, 51 L. R. A. 404, footnote, p. 403, 85 Am. St. Rep. 134, 28 So. 579, which holds maker released by payee's addition of name of other person as comaker; *Payne v. Long*, 121 Ala. 390, 25 So. 780, holding (*obiter*) detachment of memorandum from note avoids it; *Lesser v. Scholze*, 93 Ala. 339, 9 So. 273, holding (*obiter*) unauthorized alteration of date vitiates note; *Rudolph v. Brewer*, 96 Ala. 193, 11 So. 314, holding (*obiter*) signature of another as joint maker after delivery of note releases surety; *Carroll v. Warren*, 142 Ala. 400, 37 So. 687, holding addition of words designating place of payment material alteration of note; *Benton v. Clemmons*, 157 Ala. 660, 47 So. 582, holding insertion of words further describing mortgaged property after description in mortgage immaterial alteration.

Cited in footnotes to *Gleason v. Hamilton*, 21 L. R. A. 210, which holds mortgage not invalidated by alteration by attorney drawing same without mortgagee's knowledge; *Simmons v. Atkinson & L. Co.* 23 L. R. A. 599, which holds insertion of words "or bearer," and place of payment, a material alteration; *Rochford v. McGee*, 61 L. R. A. 335, which holds removal of note written below perforated line on application for insurance, material alteration rendering it void; *Foxworthy v. Colby*, 62 L. R. A. 393, which holds insertion of "gold" before "dollars," material alteration.

Cited in note (86 Am. St. Rep. 89, 108, 126, 127, 128) on unauthorized alteration of written instruments.

Distinguished in *Winter v. Pool*, 104 Ala. 582, 16 So. 543, *Modifying* 100 Ala. 504, 14 So. 411, holding maker negligently leaving blank, rendering possible alteration of note, liable to bona fide holder; *Alabama State Land Co. v. Thompson*, 104 Ala. 573, 53 Am. St. Rep. 80, 16 So. 440, holding unauthorized material alteration by grantee of deed does not divest title.

Ratification of alteration.

Cited in *Dickson Bros. v. Bamberger*, 107 Ala. 299, 18 So. 290, holding offer to pay and request for time, made with knowledge of alteration of bond, constitute ratification; *Stringfellow, v. Petty*, 14 N. M. 19, 89 Pac. 258, holding that maker of note is bound thereby, although payee made material alterations in it, provided he ratifies such act.

Necessity of consideration for ratification.

Cited in *State v. Paxton*, 65 Neb. 131, 90 N. W. 983, holding ratification by sureties of instrument as altered requires no new consideration; *Holyfield v. Harrington*, 84 Kan. 763, 39 L.R.A.(N.S.) 135, 115 Pac. 546, on same point.

Cited in note (39 L.R.A.(N.S.) 131, 132) on necessity of consideration for ratification of unauthorized alteration.

Burden of proof as to alteration.

Cited in *Bouldin v. Barclay*, 121 Ala. 428, 25 So. 827, holding burden of proof on maker to show unauthorized alteration of note after execution, unless apparently tampered with; *Hart v. Sharpton*, 124 Ala. 642, 27 So. 450, holding burden of proof on mortgagee to explain suspicious alterations; *United States Fidelity & G. Co. v. Damskibsaktieselskabet Habi*, 138 Ala. 365, 35 So. 344, holding burden of proof on party alleging alteration not apparent on face of instrument.

Cited in note (39 L.R.A.(N.S.) 115) on presumption as to time of alteration in instrument and its effect on burden of proof.

Construction of stipulation to pay costs of collecting note.

Cited in *Laning v. Iron City Nat. Bank*, 89 Tex. 602, 35 S. W. 1048, and *Reeves v. Estes*, 124 Ala. 306, 26 So. 935, holding stipulation in note for paying costs of collection includes attorney's fees; *Tompkins v. Drennen*, 95 Ala. 466, 10 So. 638, holding stipulation in note to pay costs of collection, not less than 10 per cent, covers reasonable attorney's fees; *McGhee v. Importers & T. Nat. Bank*, 93 Ala. 195, 9 So. 734, holding guaranty of payment "with all legal or other expenses of or for collection" covers reasonable attorney's fees.

Cited in note (55 Am. St. Rep. 438) on validity of stipulations for attorneys' fees.

Estoppel by conduct.

Cited in note (11 Eng. Rul. Cas. 101) on estoppel by conduct.

12 L. R. A. 146, *DURANT v. PIERSON*, 124 N. Y. 444, 21 Am. St. Rep. 686, 26 N. E. 1095.

Followed without discussion in *Miller v. Pierson*, 124 N. Y. 654, 27 N. E. 413.

Powers of surviving partner.

Cited in *Bell v. Hepworth*, 134 N. Y. 449, 47 N. Y. S. R. 812, 31 N. E. 918, holding surviving partner has power to mortgage firm assets in aid of business; *Burchinell v. Koon*, 8 Colo. App. 465, 46 Pac. 932, holding surviving partner may mortgage firm assets to secure firm debt; *First Nat. Bank v. Cody*, 93 Ga. 149, 19 S. E. 831, holding partnership assets liable for payment of renewal, by surviving partner, of firm note; *McCann v. Hazard*, 36 Misc. 11, 72 N. Y. Supp. 45, and *Dawson v. Parsons*, 46 N. Y. S. R. 724, 20 N. Y. Supp. 65, holding (*obiter*) surviving partner has sole control of assets for purpose of closing up business; *Rogers v. Flournoy*, 21 Tex. Civ. App. 558, 54 S. W. 386, holding (*obiter*) surviving partner may make assignment for benefit of creditors; *People's Nat. Bank v. Wilcox*, 136 Mich. 577, 100 N. W. 24, 4 A. & E. Ann. Cas. 465, holding surviving partner may give mortgage on partnership property to secure payment of debt which should be paid out of partnership assets; *Chambers v. Smith*, 60 Hun, 258, 14 N. Y. Supp. 706 (dissenting opinion), on right of surviving partner to prefer note of deceased partner, money from which used in firm's business.

Cited in note (79 Am. St. Rep. 709) on powers of surviving partner.

Legal title to assets of partnership dissolved by death.

Cited in *Willis v. McKinnon*, 37 Misc. 388, 75 N. Y. Supp. 770, holding devisees,

of deceased partner acquire no legal title to assets until final settlement of firm business.

Equitable lien of firm creditors.

Cited in *Citizens' Bank v. Williams*, 35 N. Y. S. R. 544, 12 N. Y. Supp. 678, holding firm note given for individual debt invalid as against firm creditors; *Schwab v. Kaughran*, 42 N. Y. S. R. 408, 17 N. Y. Supp. 926, holding partner's payment of individual debt out of firm assets invalidates general assignment; *Bush Co. v. Gibbons*, 87 App. Div. 580, 84 N. Y. Supp. 478, holding creditors of firm and of partner as surviving member have right to reimbursement out of fund paid into court under judgments in action of partner as surviving member, as against judgment creditors of partner individually, or his subsequent bankruptcy creditors.

Distinguished in *Dexter v. Dexter*, 43 App. Div. 275, 60 N. Y. Supp. 371, holding creditors of business carried on by surviving partner have no preference over individual creditors.

Dissolution of firm by death of partner.

Cited in notes (24 Am. St. Rep. 185; 69 Am. St. Rep. 414) on death as ground for dissolution of partnership.

12 L. R. A. 150, *OLYMPIA v. MANN*, 1 Wash. 389, 25 Pac. 337.

Municipal power to regulate erection of buildings.

Cited in *Hubbard v. Medford*, 20 Or. 318, 25 Pac. 640, upholding city ordinance prohibiting erection of wooden buildings within fire limits; *Fellows v. Charleston*, 62 W. Va. 670, 13 L.R.A.(N.S.) 738, 125 Am. St. Rep. 990, 13 A. & E. Ann. Cas. 1185, holding ordinance requiring permit to be obtained before erection of building valid.

Cited in footnotes to *Eichenlaub v. St. Joseph*, 18 L. R. A. 590, which holds ordinance prohibiting wooden buildings within fire limits cannot be suspended by simple resolution; *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings; *Sioux Falls v. Kirby*, 25 L. R. A. 621, which holds void, ordinance making owner's right to improve and use property depend on decision of city inspector.

Cited in notes (38 L. R. A. 171, 174) on municipal power over buildings and other structures as nuisances; (18 L.R.A.(N.S.) 403) on power of municipality granting permission to build or repair wooden building within fire limits to limit time of continuance of structure; (21 L.R.A.(N.S.) 455) on power to require removal, or to prohibit repairs, of wooden building within fire limits when damaged by fire; (28 Am. St. Rep. 198) on ordinances to secure protection against fire; (16 Eng. Rul. Cas. 529) on what constitutes a building within act relating to fire limits.

Reasonableness of municipal ordinances.

Cited in footnotes to *Slaughter v. O'Berry*, 48 L. R. A. 442, which holds void, ordinance making city provide materials and make sewer connections to within 3 feet of building; *Beiling v. Evansville*, 35 L. R. A. 272, which refuses to hold void, ordinance prohibiting maintenance of slaughterhouse within city when authorized by statute.

12 L. R. A. 155, *LYONS v. PLANTERS' LOAN & SAV. BANK*, 86 Ga. 485, 12 S. E. 882.

Effect of general demurrer.

Cited in *Paulk v. Tanner*, 106 Ga. 220, 32 S. E. 99; *Southern R. Co. v. Cook*, 106

Ga. 453, 32 S. E. 585; Savannah, F. & W. R. Co. v. Atkinson, 94 Ga. 782, 21 S. E. 1010,—holding general demurrer precludes motion to dismiss for want of process; Dykes v. Jones, 129 Ga. 103, 58 S. E. 645, holding absence of process or prayer for process cured by appearing and demurring generally thereto; Cowart v. Caldwell Co. 134 Ga. 550, 30 L.R.A.(N. S.) 724, 68 S. E. 500, holding to demur generally is to plead to merits of case; Emmett v. Dekle, 132 Ga. 598, 64 S. E. 682, holding same and that appearance and pleading to merits amount to waiver of process and service; Cincinnati, N. O. & T. P. R. Co. v. Pless, 3 Ga. App. 404, 60 S. E. 8, holding filing of general demurrer or answer without protestation, and without expressly reserving special appearance, waives special appearance.

Necessity of exhibits to pleadings.

Cited in Harp v. Abbeville Invest. & Constr. Co. 108 Ga. 179, 33 S. E. 998, holding exhibits unnecessary to accompany averment of termination of suit; Moody v. Muscogee Mfg. Co. 134 Ga. 730, 68 S. E. 604, holding where record is referred to as on file and defendant by his pleadings invokes construction of record, he cannot complain that court considered such record in determining whether judgment void for vagueness, or because it was only interlocutory.

Liability of church property for debts.

Cited in Josey v. Union Loan & T. Co. 106 Ga. 612, 32 S. E. 628, holding church edifice and site liable for debt incurred by congregation; Kelsey v. Jackson, 123 Ga. 114, 50 S. E. 951, holding trust property of church may be subjected to payment of pastor's salary and rent of parsonage where both included in contract of employment.

Cited in note (38 L. R. A. 689) on liability for salary of pastor.

Church property as private property.

Cited in Macon & A. R. Co. v. Riggs, 87 Ga. 159, 13 S. E. 312, holding church property subject to railroad condemnation proceedings.

Omission of prayer from pleading.

Cited in Fitzpatrick v. Paulding, 131 Ga. 693, 63 S. E. 213, holding omission of specific prayer for recovery of damages amendable defect and want of prayer curable by verdict.

Payment by commercial paper.

Cited in note (35 L.R.A.(N.S.) 5), on payment by commercial paper.

12 L. R. A. 157, BAIRD v. BROOKIN, 86 Ga. 709, 12 S. E. 981.

Interest of afterborn children under deed or devise.

Cited in Davis v. Hollingsworth, 113 Ga. 211, 84 Am. St. Rep. 233, 38 S. E. 827, holding deed to woman "and her children should any be born" conveys no interest to subsequently born children; Hollis v. Lawton, 107 Ga. 106, 73 Am. St. Rep. 114, 32 S. E. 846, holding conveyance in trust for woman and issue does not include subsequently born children; McCord v. Whitehead, 98 Ga. 385, 25 S. E. 767, holding devise to parent and children vests fee in parent and child living at date of will and at testator's death; Plant v. Plant, 122 Ga. 766, 50 S. E. 961, holding children born after execution of deed excluded where land is deeded in trust for wife and children; Dix v. Bigham, 124 Ga. 1069, 53 S. E. 571, holding decree giving property to wife and children, treated as voluntary conveyance, excludes after born children.

Distinguished in Riggins v. Adair, 105 Ga. 730, 31 S. E. 743, holding deed in trust for use of beneficiary "during natural life," and at death "then" to beneficiary's children, includes children subsequently born; Sumpter v. Carter, 115 Ga.

902, 60 L. R. A. 278, 42 S. E. 324, construing devise of estate to "daughters and their children" at termination of life tenancy as vesting interest in children living at life tenant's death; *Stiles v. Cummings*, 122 Ga. 637, 50 S. E. 484, holding child born after execution of deed not excluded where certain children named and unborn children expressly referred to.

Rule of construction of Code.

Cited in *Lamar v. McLaren*, 107 Ga. 599, 34 S. E. 116, holding, unless contrary manifestly appears, language of Code sections regarded as declaratory of existing law.

12 L. R. A. 160, *HOWARD v. WORCESTER*, 153 Mass. 426, 25 Am. St. Rep. 651, 27 N. E. 11.

Liability of municipality for negligence.

Cited in *Johnson County v. Reinier*, 18 Ind. App. 121, 47 N. E. 642, and *Jasper County v. Allman*, 142 Ind. 577, 39 L. R. A. 62, 42 N. E. 206, denying county's liability in absence of statute for negligence in failing to repair bridge; *Huges v. Monroe County*, 79 Hun, 126, 29 N. Y. Supp. 495, denying county's liability for negligence of persons in charge of lunatic asylum; *Russell v. Tacoma*, 8 Wash. 159, 40 Am. St. Rep. 895, 35 Pac. 605, denying city's liability for negligence of employees improving public park; *Ulrich v. St. Louis*, 112 Mo. 147, 34 Am. St. Rep. 372, 20 S. W. 466, denying city's liability for negligence of workhouse superintendent; *Brown v. New York*, 32 Misc. 574, 66 N. Y. Supp. 382, denying city's liability for defect in floor of school building; *Ernst v. West Covington*, 25 Ky. L. Rep. 1028, 63 L. R. A. 654, 76 S. W. 1089, denying municipal liability for injury to child falling from unfenced playground into street; *Freel v. Crawfordsville*, 142 Ind. 29, 37 L. R. A. 304, 41 N. E. 312, denying liability in absence of statute, of school corporation for negligence of agent; *McKay v. Reading*, 184 Mass. 142, 68 N. E. 43, denying municipality's liability to person injured by defect in walk on public common; *Kerr v. Brookline*, 208 Mass. 191, 34 L.R.A.(N. S.) 465, 94 N. E. 257, holding that city was not liable to person injured through negligence of servants in discharging fireworks; *Johnson v. Somerville*, 195 Mass. 380, 10 L.R.A.(N.S.) 720, 81 N. E. 268, holding relation of master and servant does not exist between municipality and man employed by it in carrying out specific public duty directly imposed upon it.

Cited in footnote to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in notes in (37 L. R. A. 301) on liability of school district or school corporation to action for damages from negligence; (25 L.R.A.(N.S.) 90) on liability of municipality for tort in connection with buildings used by it; (30 Am. St. Rep. 398) on liability of cities for negligence and other misconduct of officers and agents; (108 Am. St. Rep. 140) as to what municipal corporations are answerable for injuries due to defects in streets and other public places.

Distinguished in *Butman v. Newton*, 179 Mass. 6, 88 Am. St. Rep. 349, 60 N. E. 401, holding city liable for negligence of agent making repairs on highway; *Miles v. Worcester*, 154 Mass. 513, 13 L. R. A. 842, 26 Am. St. Rep. 264, 28 N. E. 676, holding city liable for encroachment of retaining wall on adjoining premises; *Buchanan v. Barre*, 66 Vt. 132, 23 L. R. A. 489, 44 Am. St. Rep. 829, 28 Atl. 878, denying liability of town renting town hall for private use, for defective sidewalk for which village responsible.

Distinction between public and private municipal enterprises.

Cited in *Mt. Hope Cemetery v. Boston*, 158 Mass. 513, 35 Am. St. Rep. 515, 33 N. E. 695, holding city's title to cemetery not subject to legislative control.

Liability of public officer or governmental agent for acts in performing public duty.

Cited in *Moynihan v. Todd*, 188 Mass. 305, 108 Am. St. Rep. 473, 74 N. E. 367, holding party guilty of personal act of misfeasance liable to one injured thereby as well when in performance of public duty as when otherwise engaged; *Barry v. Smith*, 191 Mass. 91, 5 L.R.A.(N.S.) 1036, 77 N. E. 1099, 6 A. & E. Ann. Cas. 817, holding case against board of health not made out by showing smallpox hospital was nuisance and under their control at such time; *Rosenblit v. Philadelphia*, 28 Pa. Super. Ct. 594, holding school district not liable for negligence of its officers in performing their duty.

12 L. R. A. 161, *POTTER v. JONES*, 20 Or. 239, 25 Pac. 769.

Insane delusions.

Cited in *Skinner's Will*, 40 Or. 579, 67 Pac. 951, holding idea based upon untrue statements of others not insane delusion; *Re Cline*, 24 Or. 177, 41 Am. St. Rep. 851, 33 Pac. 542, holding erroneous belief as to feelings of children toward testator, having basis in fact, not insane delusion; *McClary v. Stull*, 44 Neb. 189, 62 N. W. 501, holding belief in spiritualism, not engendering delusion respecting facts connected with will, no evidence of want of testamentary capacity; *Re Scott*, 128 Cal. 63, 60 Pac. 527, holding wife's unjust suspicion that husband wished to poison her not insane delusion; *Layer v. Layer*, 110 Ky. 552, 62 S. W. 15, holding that instruction that testator's unfounded belief that contestant was not his son, affecting disposition of property, invalidates will, should have been given; *Taylor v. McClintock*, 87 Ark. 277, 112 S. W. 405, holding if will is directly traceable to another cause it should not be avoided, notwithstanding delusion also that belief founded on evidence as basis is not insane delusion; *Morgan v. Morgan*, 30 App. D. C. 453, 13 A. & E. Ann. Cas. 1037, holding one acting under delusion for which there is no reasonable foundation, or retaining belief, which under conditions shown, every sane mind would reject or surrender, is victim of insane delusion; *Owen v. Crumbaugh*, 228 Ill. 400, 119 Am. St. Rep. 442, 81 N. E. 1044, 10 A. & E. Ann. Cas. 606, holding insane delusion must be such aberration as indicates unsound or deranged condition of mental faculties, as distinguished from mere belief in existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence; *Gesell v. Baugher*, 100 Md. 686, 60 Atl. 481, holding existence of delusion in mind of testator, at time of making will, as to particular persons or things will not invalidate will, unless it is product of the delusion.

Cited in notes (37 L.R.A. 262) on what are insane delusions; (63 Am. St. Rep. 82, 83, 87, 96) on insane delusions.

Testamentary capacity.

Cited in *Re Gorkow*, 20 Wash. 570, 56 Pac. 385, holding clear comprehension of property and intended disposition sufficiently shows testamentary capacity; *Gesell v. Baugher*, 100 Md. 688, 60 Atl. 481, holding uneven division of property among testator's descendants made by will does not establish his incapacity.

Cited in note (27 L.R.A.(N.S.) 64, 71 88) on what is testamentary capacity.

Validity of will; how determined.

Cited in *Richardson v. Green*, 9 C. C. A. 569, 15 U. S. App. 488, 61 Fed. 426, holding, under Oregon laws, validity of will must be determined upon formal suit.

Absolute right as to disposition of property.

Cited in *Holman's Will*, 42 Or. 357, 70 Pac. 908, holding unnatural disposition
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of property does not invalidate will; *Turner's Will*, 51 Or. 8, 93 Pac. 461, holding alleged unnatural and unjust disposition made by testatrix of her property not ground for setting aside will; *Hunt v. Phillips*, 34 Wash. 370, 75 Pac. 970, holding right of independent disposition is as potent as that conferred by laws of descent and disposition and no presumption can be indulged in against its exercise.

12 L. R. A. 168, *WOOD v. CORRY WATERWORKS CO.* 44 Fed. 146.

Acquiescence of stockholders in action irregularly taken.

Cited in *Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co.* 67 Fed. 58, holding stockholders acquiescing in increase of indebtedness cannot deny validity on ground of failure to give statutory notice of meeting; *Nelson v. Hubbard*, 96 Ala. 253, 17 L. R. A. 381, 11 So. 428, holding bond issue authorized at meeting not called as required by statute, ratified by all stockholders, valid; *Riesterer v. Horton Land & Lumber Co.* 160 Mo. 152, 61 S. W. 238, holding valid, bonds issued upon resolution signed by all stockholders, waiving statutory notice of meeting; *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 447, upholding validity of corporation mortgage assented to by stockholders, although not in statutory manner; *Bishop v. Kent & S. Co.* 20 R. I. 688, 41 Atl. 255, upholding validity of mortgage acquiesced in by stockholders, although authorized by less number than required by charter; *Bridgeport Electric & Ice Co. v. Meader*, 18 C. C. A. 456, 30 U. S. App. 580, 72 Fed. 115, upholding equitable lien created by promotor's agreement to give mortgage, acquiesced in by stockholders; *Garmany v. Lawton*, 124 Ga. 880, 110 Am. St. Rep. 207, 53 S. E. 669, on acquiescence of directors and stockholders in act of officer intrusted with performance of entire functions of corporation in executing mortgage; *Hill v. Atlantic & N. C. R. Co.* 143 N. C. 559, 9 L.R.A.(N.S.) 617, 55 S. E. 854, holding silence and inaction of stockholder waiver of right to object to proceedings in entering into lease.

Estoppel to set up defense of ultra vires.

Cited in *Beach v. Wakefield*, 107 Iowa, 586, 76 N. W. 688, holding railway corporation exceeding statutory limit of indebtedness liable for loan of which it received benefit; *G. V. B. Min. Co. v. First Nat. Bank*, 36 C. C. A. 640, 95 Fed. 30, holding corporation receiving proceeds cannot deny validity of mortgage; *Rankin v. Southwestern Brewery & Ice Co.* 12 N. M. 54, 73 Pac. 612, holding stockholder cannot enjoin payment for benefits received by corporation, since latter estopped to assert contract ultra vires from which benefits were derived.

Cited in notes (11 L.R.A.(N.S.) 600) on enforceability of loan to private corporation which has exceeded borrowing powers; (7 Eng. Rul. Cas. 373) on estoppel to set up defense of ultra vires.

Distinguished in *Red Cross Protective Soc. v. Wayte*, 96 C. C. A. 126, 171 Fed. 644, holding corporation not estopped to deny authority of general manager to bind it by contract employing agent to secure control of another corporation where corporation was without knowledge of contract.

Who may set up defense of ultra vires.

Cited in *G. B. V. Min. Co. v. First Nat. Bank*, 36 C. C. A. 644, 95 Fed. 34, holding plea of *ultra vires* not available where stockholders and directors are same persons; *Steger v. Davis*, 8 Tex. Civ. App. 29, 27 S. W. 1068, holding purchase acquiesced in by stockholders cannot be repudiated; *Central Trust Co. v. Columbus, H. V. & T. R. Co.* 87 Fed. 828, holding indebtedness in excess of statutory limit valid as to subsequent mortgagee with notice; *Campbell v. Argenta Gold & Silver Min. Co.* 51 Fed. 6, holding junior lienors cannot assert invalidity of mortgage authorized by all stockholders at meeting convened without observing stat-

utory requirements; *Galbraith v. Shasta Iron Co.* 143 Cal. 99, 76 Pac. 901, holding that none but stockholders can attack corporate deed unratified by stockholders; *McKee v. Title Ins. & T. Co.* 159 Cal. 223, 113 Pac. 140, holding that neither corporation nor its creditors can set up *ultra vires* in action on bonds, where corporation received and holds proceeds.

Cited in footnote to *Bath Gaslight Co. v. Claffy*, 36 L. R. A. 664, which denies right of lessee of corporation to escape payment of rent on ground that law *ultra vires*.

Action by stockholders.

Cited in *Just v. Idaho Canal & Improv. Co.* 16 Idaho, 650, 133 Am. St. Rep. 140, 102 Pac. 381, holding minority stockholders entitled to maintain action to collect debt due their corporation from another corporation controlled by same directors.

Cited in note (20 L.R.A.(N.S.) 1079) on effect on one's right as stockholder of wrongful issuance of his stock as full-paid.

12 L. R. A. 171, *LEE v. FLETCHER*, 46 Minn. 49, 48 N. W. 456.

Deeds; sufficiency of delivery.

Cited in *Barnard v. Thurston*, 86 Minn. 347, 90 N. W. 574; *Cummings v. Newell*, 86 Minn. 133, 90 N. W. 311,—holding delivery of deed to third person for grantee sufficient; *Chastek v. Souba*, 93 Minn. 419, 101 N. W. 618, holding an actual manual delivery not essential to a valid delivery of a deed; *Dodsworth v. Sullivan*, 95 Minn. 43, 103 N. W. 719, holding same as to the delivery of a mortgage; *Hooper v. Vanstrum*, 92 Minn. 409, 100 N. W. 229, on the sufficiency of the delivery of a deed.

Cited in footnotes to *Martin v. Flaharty*, 19 L. R. A. 242, which holds manual delivery of deed not essential; *Robbins v. Rascoe*, 38 L. R. A. 238, which holds delivery of deed to natural child to deputy clerk of court, with instructions for proving it, passes title; *Parrot v. Avery*, 22 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery.

Cited in notes (54 L.R.A. 886) on delivery of deed to third person or delivery for record by grantor; (53 Am. St. Rep. 545, 549, 552) on what is a delivery of a deed; (8 Eng. Rul. Cas. 597) on delivery of deed for record.

Describing condition of indebtedness in mortgage.

Cited in *Cable v. Minneapolis Stock-Yards & Packing Co.* 47 Minn. 420, 50 N. W. 528, holding sheriff's certificate of sale on foreclosure not invalidated by error in stating amount secured.

Cited in note (49 Am. St. Rep. 209) on description of indebtedness in mortgage.

Amount of lien created by a mortgage.

Cited in *Kingsley v. Anderson*, 103 Minn. 511, 115 N. W. 642, holding a mortgage covenanting to pay a definite sum according to the effect of certain notes, providing for the payment of the sum with interest and exchange, creates a lien for such sum with interest and exchange.

Right to enter judgment against part of defendants.

Cited in *Illinois C. R. Co. v. Foulks*, 191 Ill. 70, 60 N. E. 890, holding court may enter judgment against part of defendants in tort action, upon verdict against all.

12 L. R. A. 178, *WETZLER v. DUFFY*, 78 Wis. 170, 47 N. W. 184.

Who must bear loss by fire on premises sold.

Cited in *Sutton v. Davis*, 143 N. C. 484, 55 S. E. 844, holding purchaser not entitled to reduction on note for purchase price where deed was only delivered

in escrow, but purchaser in possession, having repaired and added to building, insured same and collected amount of policy when building destroyed.

Cited in footnote to *Phinizy v. Guernsey*, 50 L. R. A. 680, which holds vendor entitled to insurance on buildings destroyed while in his possession during investigation of title.

Cited in note (27 L.R.A.(N.S.) 234) as to who must bear loss from destruction or deterioration of realty before contract of sale completely performed by transfer of title.

Failure to find; when available on appeal.

Cited in *Darling v. Neumeister*, 99 Wis. 428, 75 N. W. 175, holding neglect of court to make unrequested finding, not required by law, not available on appeal.

Distinguished in *Grunert v. Speich*, 114 Wis. 367, 89 N. W. 496, holding failure to except to omissions to find does not preclude consideration on appeal, to prevent injustice.

12 L. R. A. 180, *STATE ex rel. GRADY v. CHICAGO, M. & N. R. CO.* 79 Wis. 259, 48 N. W. 243.

Mandamus to compel performance of corporate duty.

Cited in *State ex rel. Elmendorf v. San Antonio Street R. Co.* 10 Tex. Civ. App. 14, 30 S. W. 266, holding mandamus proper to compel operation of street railway; *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 Wis. 80, 22 L. R. A. 763, 41 Am. St. Rep. 23, 57 N. W. 970, holding mandamus proper to compel electric railway company to place wires guarding contact with telephone wires, required by ordinance; *Evans v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 604, 39 Am. St. Rep. 908, 57 N. W. 354, holding statutory duty to restore highway by railroad using it enforceable by courts; *Swinney v. Chicago, R. I. & P. R. Co.* 123 Iowa, 221, 98 N. W. 635, holding mandamus lies to compel construction of farm crossing, without recourse to railroad commissioners; *State ex rel. Boagni v. Colorado Southern, N. O. & P. R. Co.* 120 La. 15, 44 So. 905, holding duty to construct cattle guards enforceable by mandamus, though such duty results only from common law; *State ex rel. Jacquith v. Wisconsin C. R. Co.* 123 Wis. 556, 102 N. W. 16, holding duty to construct and maintain crossings, imposed by statute, enforceable by mandamus.

Cited in note (7 Eng. Rul. Cas. 464) on right to compel public service corporation to perform its obligations and to refrain from exceeding its powers.

To whom mandamus directed.

Cited in *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 397, 27 So. 225, holding writ of mandamus to compel performance of corporate duty properly directed to corporation.

Duty to fence railroad tracks.

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L. R. A. 768, which holds company liable to brakeman for failure to maintain fences, causing derailment; *Gould v. Great Northern R. Co.* 30 L. R. A. 590, which requires railroad fences to be on outside margin of right of way.

Cited in notes (25 L.R.A. 163) on constitutionality of statutes making railroad companies absolutely liable for damage by fires set out by them, or for stock killed by them, irrespective of negligence; (9 L.R.A.(N.S.) 390) on duty to fence right of way.

12 L. R. A. 184, *PATTON v. EAST TENNESSEE, V. & G. R. CO.* 89 Tenn. 370, 15 S. W. 919.

Proximate cause.

Cited in footnote to *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which

holds failure to build fence not proximate cause of injury to one pushed on track by cow.

Cited in note (36 Am. St. Rep. 816) on proximate and remote cause.

Duty to station lookout on train.

Cited in *Katzenberger v. Lawo*, 90 Tenn. 237, 13 L. R. A. 185, 25 Am. St. Rep. 681, 16 S. W. 611, holding railroad must observe statutory precautions while running trains on streets; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 34, 20 S. W. 348, sustaining charge that railroad must have person on lookout on moving train; *Felton v. Newport*, 34 C. C. A. 473, 92 Fed. 473, holding railroad liable to trespasser for failure to keep lookout on engine as required by statute; *Towles v. Southern R. Co.* 103 Fed. 409, holding common-law, not statutory, duty to keep lookout on trains, prevails where cars precede engine; *Rogers v. Cincinnati, N. O. & T. P. R. Co.* 69 C. C. A. 321, 136 Fed. 575, holding Tennessee statute as to maintaining lookout and taking precautions to prevent collision inapplicable to trackmen.

Cited in notes (25 L.R.A. 292) on duty to maintain lookout on railroad train; (69 L.R.A. 543) on duty to discover persons on track.

Distinguished in *Mobile & O. R. Co. v. House*, 96 Tenn. 555, 35 S. W. 561, holding railroad required to observe statutory precautions within station grounds; *Southern R. Co. v. Simpson*, 65 C. C. A. 563, 131 Fed. 710, holding railroad not absolutely liable under Tennessee statute for collision, though engine was being operated backwards, where plaintiff's vehicle seen by engineer and proper efforts were made to avert accident.

Duty of railroad to trespassers.

Cited in *Smith v. Norfolk & S. R. Co.* 114 N. C. 747, 25 L. R. A. 295, 19 S. E. 863, holding (*obiter*) it railroad's duty to keep reasonable lookout for trespassers.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 98, which denies duty towards trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

Cited in note (69 L.R.A. 547) on duty to trespassers.

Contributory negligence of person on track.

Cited in *Louisville & N. R. Co. v. Satterwhite*, 112 Tenn. 202, 79 S. W. 106, holding failure to look and listen before going upon railroad track not negligence per se where there was loud noise and side tracks were full of cars.

Cited in footnote to *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track by train running at excessive speed without ringing bell.

Distinguished in *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L. R. A. 186, 13 C. C. A. 371, 31 U. S. App. 277, 66 Fed. 123, holding failure of licensee passing through railroad yard, to keep watch to rear, contributory negligence.

Doctrine of "last clear chance."

Cited in *Baltimore & O. R. Co. v. Hellenthal*, 31 C. C. A. 418, 60 U. S. App. 156, 88 Fed. 120, holding contributory negligence no bar to recovery where injury avoidable by defendant's exercise of reasonable care; *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 66, 79 Am. St. Rep. 149, 25 So. 338, holding contributory negligence of person crossing track not bar to recovery for injury avoidable by railroad's exercise of reasonable care.

Question of contributory negligence for jury.

Cited in *Wilson v. Citizens' Street R. Co.* 105 Tenn. 84, 58 S. W. 334, holding contributory negligence of person injured in darkness at unfamiliar crossing,

in failing to look and listen, question for jury; Baltimore & O. S. W. R. Co. v. Rosborough, 40 Ind. App. 23, 80 N. E. 869, holding issue of contributory negligence of person crossing highway where flying switch is being made is for jury.

Mitigation of damages in case of contributory negligence.

Cited in *Artenberry v. Southern R. Co.* 103 Tenn. 269, 52 S. W. 878; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 700, 9 C. C. A. 675, 22 U. S. App. 220, 61 Fed. 605; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 33, 20 S. W. 348; *Cincinnati, N. & T. P. R. Co. v. Davis*, 62 C. C. A. 568, 127 Fed. 936, holding contributory negligence mitigates damages in action against railroad for failure to observe statutory precautions; *Saunders v. City & Suburban R. Co.* 99 Tenn. 136, 41 S. W. 1031, holding rule that contributory negligence only mitigates damages does not apply in common-law action against electric road; *Louisville & N. R. Co. v. Martin*, 113 Tenn. 278, 87 S. W. 418, holding charge that contributory negligence might be considered by jury in mitigation of damages instead of that it must be, is erroneous.

Cited in note (25 L. R. A. 573) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

Liability as to detached moving cars.

Cited in footnote to *West Virginia C. & P. R. Co. v. State*, 61 L. R. A. 574, which holds company liable for injury to bystander by car broken loose from train and thrown from track by collision with other car at foot of decline.

Cited in notes (18 L. R. A. 64, 66) on negligence of railroad company as to flying switches or detached cars moving by their own momentum.

Liability of railroad company for collision.

Explained in *Chesapeake & N. R. Co. v. Crews*, 118 Tenn. 62, 99 S. W. 368, holding charge on common law liability error where both counts in declaration for injury to property on railway company's track through being struck by engine were under statute.

Railroad statutes as declaratory of common law.

Cited in *St. Louis & S. F. R. Co. v. Finley*, 122 Tenn. 134, 118 S. W. 692, 18 Ann. Cas. 1141, holding that statutory precautions to prevent accidents on railroads are declaratory of common law, except as to burden of proof and absolute liability.

12 L. R. A. 187, *ROZELLE v. HARMON*, 103 Mo. 339, 15 S. W. 432.

Liability of person receiving assets of estate.

Cited in *Richardson v. Dreyfus*, 64 Mo. App. 603, holding one collecting debt due decedent, applying it on decedent's indebtedness, liable to administrator; *Hayes v. Fry*, 110 Mo. App. 26, 83 S. W. 772, on obsolescence of executors de son tort under Missouri statute and probate system.

Cited in note (98 Am. St. Rep. 191) on executors de son tort.

Statutory construction.

Cited in *State ex rel. Crow v. Bland*, 144 Mo. 555, 41 L. R. A. 303, 46 S. W. 440, holding "corrupt practices act" must be strictly construed; *Heman v. McNamara*, 77 Mo. App. 11, holding statute regulating practice should be liberally construed; *State ex rel. Wheeler v. Adams*, 101 Mo. App. 476, 74 S. W. 497, holding statutory penalty of double damages imposed on county treasurer refusing in good faith, to pay warrant; *Kansas City Loan Guarantee Co. v. Kansas City*, 200 Mo. 168, 98 S. W. 459, holding ordinance to prohibit assignment of earned wages and containing penal section strictly construed; *Perry v. Strawbridge*, 209 Mo. 638, 16 L.R.A.(N.S.) 250, 123 Am. St. Rep. 510, 108

S. W. 641, 14 A. & E. Ann. Cas. 92, holding statutes in derogation of common law strictly construed and that "widower" in statute of descent and distribution does not mean murderer of wife; *Dooley v. Jackson*, 104 Mo. App. 32, 78 S. W. 330, holding word "election" in statute imposing penalty for receiving as stakeholder money bet on election does not include primary election for nominating candidate for office.

12 L. R. A. 189, ST. LOUIS, I. M. & S. R. CO. v. HOPKINS, 54 Ark. 209, 15 S. W. 610.

Accident as prima facie evidence of negligence.

Cited in *Arkansas Teleph. Co. v. Ratteree*, 57 Ark. 436, 21 S. W. 1059, holding proof of fall of telephone wire, frightening horse, raises presumption of negligence; *St. Louis & S. F. R. Co. v. Mitchell*, 57 Ark. 421, 21 S. W. 883, holding proof of derailment of car raises presumption of negligence; *Fordyce v. Jackson*, 56 Ark. 598, 20 S. W. 528, holding prima facie case made by proof of accident due to train running into bull; *Jacks v. Reeves*, 78 Ark. 429, 95 S. W. 781, holding evidence of accident and resulting injury due to sagging of overhead electric wire prima facie evidence of negligence; *Gurdon & Ft. S. R. Co. v. Calhoun*, 86 Ark. 82, 109 S. W. 1017, holding falling of "tie-jack" weighing three hundred pounds from railroad car raises presumption of negligence; *Southwestern Teleg. & Teleph. Co. v. Bruce*, 89 Ark. 588, 117 S. W. 564, holding prima facie negligence shown by occurrence of injury through telephone wire breaking and coming in contact with trolley wire below; *Drake Standard Mach. Works v. Brossman*, 135 Ill. App. 222, holding doctrine of *res ipsa loquitur* applicable to case of injury of plaintiff teamster not in defendant's employ by heavy piece of machinery falling upon plaintiff because of hook furnished by defendant breaking while loading piece of machinery; *Mitchell v. Brady*, 124 Ky. 416, 13 L.R.A.(N.S.) 752, 124 Am. St. Rep. 408, 99 S. W. 266, holding owner and lessee of building both prima facie responsible for child in street having been killed through iron pipe falling upon him from building; *McCrorey v. Thomas*, 109 Va. 381, 63 S. E. 1011, 17 A. & E. Ann. Cas. 373; *Waller v. Ross*, 100 Minn. 9, 12 L.R.A.(N.S.) 726, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715,—holding doctrine of *res ipsa loquitur* applicable to case of person injured while on sidewalk by fall of awning attached to building; *McHarge v. Newcomer*, 117 Tenn. 617, 9 L.R.A.(N.S.) 303, 100 S. W. 700, holding falling of awning or portion thereof erected over public street, causing injury, raises presumption of negligence, which unexplained is sufficient to support verdict in favor of injured party; *Jefferys v. Nebraska Bridge Supply & Lumber Co.* 157 Fed. 934, holding maxim of *res ipsa loquitur* applicable to case of timber inspector injured by breaking of rope used for loading timber on cars, causing log to roll back and strike others on ground.

Cited in notes (6 L.R.A.(N.S.) 800) on applicability of *res ipsa loquitur* in absence of contractual relations; (113 Am. St. Rep. 1011) on presumption of negligence from happening of accident causing personal injuries.

Explained in *Everett v. Foley*, 132 Ill. App. 444, holding rule that when doctrine of *res ipsa loquitur* is applicable burden of explaining negligence on defendant does not mean burden shifts to defendant, but that defendant must rebut presumption arising from proven facts.

Liability for fall of object.

Cited in *Southwestern Teleg. & Teleph. Co. v. Beatty*, 63 Ark. 80, 37 S. W. 570, denying liability, in absence of negligence of telephone company, for fall of brick to which wire fastened.

Cited in footnotes to *Wolf v. Downey*, 51 L. R. A. 241, which denies liability of contractor for either carpenter or mason work for injury from fall of brick from unknown cause; *Detzur v. B. Stroh Brewing Co.* 44 L. R. A. 500, which holds it negligent to leave broken pane in window above sidewalk; *Cork v. Blossom*, 26 L. R. A. 256, which holds one maintaining high chimney liable for fall on adjoining building.

Cited in note (12 L.R.A.(N.S.) 722) on liability for falling of object suspended over street.

Act of God.

Cited in footnotes to *Libby v. Maine C. R. Co.* 20 L. R. A. 812, which holds unprecedented flood, causing washout of railroad culvert, act of God; *Lang v. Pennsylvania R. Co.* 20 L. R. A. 360, which holds theft or destruction of whiskey after train wrecked by flood not due to inevitable accident.

Cited in note (1 Eng. Rul. Cas. 209) on liability for injury by inevitable accident.

12 L. R. A. 192, *RYMER v. LUZERNE COUNTY*, 142 Pa. 108, 21 Atl. 794.

Repeal of statute by implication.

Cited in *Re Reynolds Street*, 6 Kulp, 481, 9 Lanc. L. Rev. 335, 2 Pa. Dist. R. 66, holding general law, applying in terms to all municipalities, not repeal law applying to boroughs only; *Com. use of Cambria County v. Lloyd*, 2 Pa. Super. Ct. 17, 38 W. N. C. 295, holding general statute without negative words does not repeal previous local statute; *Moore v. Lancaster County*, 19 Lanc. L. Rev. 187, holding local act fixing jailer's salary not repealed upon increase of population bringing county within provisions of general act; *Com. v. Vetterlein*, 21 Pa. Super. Ct. 591, holding act limiting time to appeal in certain cases not repealed by act affirming right without limiting time; *Flemming v. Bush*, 43 Pa. Super. Ct. 408, holding that general affirmative statute, without negative words will not repeal previous particular one upon same subject; *State ex rel. Seng v. Peter*, 101 Minn. 465, 112 N. W. 866, holding special laws enacted for certain county respecting board of county commissioners not repealed by general revision; *Nissley v. Lancaster County*, 215 Pa. 568, 64 Atl. 794, 22 Lane. L. Rev. 205, affirming 27 Pa. Super. Ct. 412, on nonimplication of repeal of special by general statute; *Re Loyalsock Twp. Road No. 1*, 26 Pa. Super. Ct. 229, holding local act relating to compensation of land owners for damages due to laying out, altering or vacating highway not repealed by law relating to general subject of altering roads; *Moore v. Lancaster County*, 11 Pa. Dist. R. 717, holding salary of county prison keeper a fixed local act and not by subsequent general salary act.

Distinguished in *Jadwin v. Hurley*, 10 Pa. Super. Ct. 110, holding special statute repealed by general where legislature discloses purpose to bring about uniformity.

12 L. R. A. 193, *CASEY v. CINCINNATI TYPOGRAPHICAL UNION*, NO. 3, 45 Fed. 135.

Illegal conspiracies and boycotts.

Cited in *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 797, 62 Fed. 821, holding combination of railway employees to compel railroads to cease using Pullman cars unlawful conspiracy; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 699, holding boycott by members of trade unions of articles manufactured by certain party unlawful; *National Protective Asso. v. Cumming*, 170 N. Y. 348, 58 L. R. A. 148, footnote p. 135, 88 Am. St. Rep. 648, 63 N. E. 369 (dissenting opinion), majority denying liability of members of

labor union for causing discharge of nonmembers by threatening to strike unless latter discharged; *Baldwin v. Escanaba Liquor Dealers' Asso.* 165 Mich. 110, 130 N. W. 214, holding that "boycott" is unlawful conspiracy in restraint of trade; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 456, 22 L.R.A.(N.S.) 620, 128 Am. St. Rep. 492, 114 S. W. 997, holding combination to injure or destroy trade, business or occupation of another by threatening or producing injury to trade, business or occupation of those who have business relations with him is unlawful conspiracy regardless of name by which known, and may be restrained by injunction; *Carter v. Oster*, 134 Mo. App. 154, 112 S. W. 995, on means which may be lawfully used by workmen to cause discharge of other workmen; *Huskie v. Griffin*, 75 N. H. 350, 27 L.R.A.(N.S.) 970, 139 Am. St. Rep. 718, 74 Atl. 595, holding a desire to promote his own welfare will not justify an employer's interfering with his employee's obtaining employment elsewhere, if his act constitutes an unreasonable interference with employee's right to an open market; *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, 150 Fed. 176, holding act not criminal or actionable if done by one may become both if done by many.

Cited in footnotes to *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. of L. 19 L. R. A. 408, which holds incorporated labor union liable for causing discharge of nonunion man; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, which holds criminal, combination of railroad employees to quit employment; *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, which holds valid, voluntary agreement to refrain from dealing with certain persons; *Cote v. Murphy*, 23 L. R. A. 135, which holds lawful, combination of employers to prevent advance in wages; *Waterhouse v. Comer*, 19 L. R. A. 403, which holds illegal, rule against handling property of railroad against which labor organization has grievance; *United States v. Workingmen's Amalgamated Council*, 26 L. R. A. 158, which holds stopping of transportation between states by strike in certain city unlawful restraint of commerce; *Employing Printers' Club v. DeBlosser Co.* 69 L.R.A. 90, which holds actionable, a combination to injure person in his trade in inducing employees to break contract or to decline to continue longer in his employment.

Cited in notes (64 L.R.A. 94) on liability for damage to business by injuring tangible property of other party; (16 L.R.A.(N.S.) 88) on legality of "secondary boycott" by labor union; (103 Am. St. Rep. 499) on boycotting; (1 Brit. Rul. Cas. 249, 268) on liability of labor union for boycott.

Distinguished in *Master Builders' Asso. v. Domascio*, 16 Colo. App. 33, 63 Pac. 782, holding members of builders' association may lawfully decline to bid in competition with certain other person; *Ætna Ins. Co. v. Com.* 106 Ky. 889, 45 L. R. A. 361, 51 S. W. 624, holding combination to maintain insurance rates not indictable; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 320, holding combination of fire underwriters to prevent representation by agents of companies not members lawful.

Injunctions against boycotts, strikes, etc.

Cited in *Coeur D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 386, footnote p. 382, 51 Fed. 266, refusing to dissolve injunction against workmen interfering with employer's property on ground of his duplicity; *Matthews v. Shankland*, 25 Misc. 612, 56 N. Y. Supp. 123, holding circulation of placards and circulars for carrying out conspiracy to boycott enjoined; *Barr v. Essex Trades Council*, 53 N. J. Eq. 128, 30 Atl. 881, granting injunction against boycott of newspaper; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 524, 42 L. R. A. 418, footnote p. 407, 74 Am. St. Rep. 421, 77 N. W. 13, sustaining injunction against boycott by picketing of premises and distribution of circulars; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 106, 49 U. S. App. 709, 83 Fed. 919, sus-

taining injunction against boycott of machine-made barrels by inducing persons not to purchase goods packed therein; *Blindell v. Hagan*, 54 Fed. 42, granting injunction against interference with, and preventing ship owners from shipping, crew; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 392, footnote p. 387, 5 Inters. Com. Rep. 534, 54 Fed. 738, which grants injunction against labor organization putting into operation rule against handling cars of certain company; *Kemp v. Division No. 241*, A. A. S. & E. R. E. 153 Ill. App. 378, holding that equity has jurisdiction to restrain unlawful conspiracy to intimidate former employers of complainant for purpose of bringing about their discharge; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 621, 21 L.R.A.(N.S.) 570, 98 Pac. 1027, 16 A. & E. Ann. Cas. 1165 (dissenting opinion), on illegality of use of undue influence to compel or bring about action of one person to injury of third; *My Maryland Lodge No. 186 v. Adt*, 100 Md. 251, 68 L.R.A. 758, 59 Atl. 721, sustaining jurisdiction of equity to restrain boycott of employer of labor; *Gray v. Building Trades Council*, 91 Minn. 179, 63 L.R.A. 758, footnote p. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1 A. & E. Ann. Cas. 172, defining boycott and holding it may be restrained by injunction; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 292, 71 S. W. 455, holding conspiracy to boycott master plumbers shown by allegation of petition for injunction; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 38, 62 L.R.A. 648, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion), on unlawfulness of means employed by association to prevent others from selling goods to plaintiff; *Loewe v. California State Federation of Labor*, 139 Fed. 81, holding use of power of combined members, acting in concert to drive person out of business and destroy his property is unlawful and may be restrained by injunction.

Cited in footnotes to *Erdman v. Mitchell*, 63 L.R.A. 534, which upholds right to enjoin acts of council of allied labor unions seeking by intimidation to coerce laborers to join particular organization; *My Maryland Lodge v. Adt*, 68 L.R.A. 752, which sustains right to injunction against boycott.

Cited in notes (28 L. R. A. 465) on injunction against strikes; (20 L. R. A. 342) on injunctions against blacklisting.

Distinguished in *Longshore Printing Co. v. Howell*, 26 Or. 548, 28 L. R. A. 474, 46 Am. St. Rep. 640, 38 Pac. 547, denying injunction to restrain continuance of strike and boycott in absence of evidence of impending irreparable injury.

— Against violence and intimidation.

Cited in *Arthur v. Oakes*, 25 L. R. A. 428, 4 Inters. Com. Rep. 758, 11 C. C. A. 220, 24 U. S. App. 239, 63 Fed. 321, sustaining injunction against combination of railroad employees to quit, with object of interfering with operation of road by violence and intimidation; *Davis v. Zimmerman*, 91 Hun. 492, 36 N. Y. Supp. 303, granting injunction against execution of conspiracy by union, to injure property and intimidate employees; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 825, sustaining injunction against gatherings of union men near works, for purpose of intimidating workmen; *American Steel & Wire Co. v. Wire Drawers' & D. M. Unions Nos. 1 & 3*, 90 Fed. 615, enjoining patrol of strikers in front of mill; *Union P. R. Co. v. Ruef*, 120 Fed. 105, granting injunction against picketing, accompanied by violence and intimidation; *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 437, 14 L.R.A.(N.S.) 1024, 83 N. E. 940, 13 A. & E. Ann. Cas. 54, perpetually enjoining interference with complainant's business picketing his premises, and other acts of labor union; *Pickett v. Walsh*, 192 Mass. 588, 6 L.R.A.(N.S.) 1081, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638, holding strike against one, with whom strikers have no trade dispute, to compel him to force another to yield to striker's de-

mands, is unjustifiable interference with right to pursue lawful calling as he thinks best.

Cited in footnotes to *Vegelein v. Guntner*, 35 L. R. A. 722, which holds patrol of strikers in front of factory unlawful; *Plant v. Woods*, 51 L. R. A. 339, which sustains injunction against threats by labor union to make employers induce employees to leave other union and rejoin former; *O'Neil v. Behanna*, 38 L. R. A. 382, which holds actual use of force unnecessary to constitute intimidation by strikers making display of force.

— **Of publications.**

Cited in *A. B. Farquhar Co. v. National Harrow Co.* 49 L. R. A. 756, 42 C. C. A. 601, 102 Fed. 715, sustaining right to injunction against sending out notices, in bad faith, threatening agents and customers with suits for infringing patent; *American Federation of Labor v. Buck's Stove & Range Co.* 33 App. D. C. 108, 32 L.R.A.(N.S.) 762, holding constitutional guaranty of freedom of speech and of press not infringed by restraint of use of "We don't patronize," or "Unfair list" in furtherance of boycott.

Cited in footnote to *Marx & H. Jeans Clothing Co. v. Watson*, 56 L. R. A. 951, which denies power to enjoin publication of circular letter and solicitation of merchants not to deal with boycotted firm.

Cited in note (32 L.R.A.(N.S.) 1013, 1014) on injunction against publishing or circulating statements relative to industrial disputes by labor union.

Distinguished in *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 395, 59 L. R. A. 314, 64 N. E. 163, Reversing 68 App. Div. 91, 74 N. Y. Supp. 84, holding publication of unjust and malicious criticism of manufactured article not enjoinable; *Everett Piano Co. v. Bent*, 60 Ill. App. 378, denying injunction against publication of claim that certain article infringes patent.

— **To protect property rights.**

Cited in *Grand Rapids School Furniture Co. v. Haney School Furniture Co.* 92 Mich. 562, 16 L. R. A. 722, 31 Am. St. Rep. 611, 52 N. W. 1009, granting injunction against use of decree collusively obtained in patent case, to influence any person from purchasing from complainant; *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 489, 84 N. W. 870, sustaining injunction against prosecution of criminal actions pending appeal of civil case involving same questions.

Distinguished in *Computing Scale Co. v. National Computing Scale Co.* 79 Fed. 963, denying injunction, pending suit to determine validity of patent, against suing or warning users of alleged infringing machine.

12 L. R. A. 202, *STATE ex rel. VAN AMRINGE v. TAYLOR*, 108 N. C. 196, 23 Am. St. Rep. 51, 12 S. E. 1005.

Effect of failure to comply with election law.

Cited in *State ex rel. Brown v. McMillan*, 108 Mo. 161 18 S. W. 784, holding failure to comply with provisions of election law invalidates election; *Atty. Gen. v. McQuade*, 94 Mich. 443, 53 N. W. 944, holding failure to comply with mandatory provisions of election law as to rejection of votes of unregistered persons and of persons whose marked ballots are exposed to view vitiates vote of entire election district; *Dial v. Hollandsworth*, 39 W. Va. 9, 19 S. E. 557 (dissenting opinion), majority holding appointment by commissioners of election of additional ballot clerks does not invalidate poll; *Hughes v. Roberts*, 142 Ky. 144, 134 S. W. 168, holding that election for imposition of tax prescribed must be conducted in accordance with prescribed authority in every material respect; *Rodwell v. Rowland*, 137 N. C. 650, 50 S. E. 319 (dissenting opinion), on necessity of elections being in accordance with law to be valid.

Cited in note (90 Am. St. Rep. 53, 73) on irregularities avoiding elections.

Distinguished in *Deaver v. State*, 27 Tex. Civ. App. 455, 66 S. W. 256, holding election conducted by persons without legal authority in absence of proper officers, without objection from voters, valid.

Public officers de facto.

Cited in *Waite v. Santa Cruz*, 184 U. S. 323, 46 L. ed. 566, 22 Sup. Ct. Rep. 327, Affirming 89 Fed. 627, holding whether person is *de facto* officer when assuming to perform duties of public office, mixed question of law and fact; *Buck v. Hawley*, 129 Iowa, 409, 105 N. W. 688, holding fact person signs return of service of original notice as deputy sheriff insufficient to show such person is *de facto* officer; *Heard v. Elliott*, 116 Tenn. 157, 92 S. W. 764, holding person entry taker *de facto* where he performed duties of office for long time, held himself out as officer and was reputed to be and recognized as such by public.

Cited in note (140 Am. St. Rep. 167) on *de facto* officers.

12 L. R. A. 205, *DEVEREUX v. McMAHON*, 108 N. C. 134, 12 S. E. 902.

Competency of copy of record of deed.

Cited in *Ratliff v. Ratliff*, 131 N. C. 427, 63 L. R. A. 966, 42 S. E. 887, holding copy of record of deed competent evidence, where no rule obtained for production of original.

What signature sufficient.

Cited in *Horton v. Murden*, 117 Ga. 74, 43 S. E. 786, holding deed operative if grantor affixes his mark to any part thereof with intent to give it force and effect of deed, where grantor's name clearly appears in body of instrument; *Re Pope*, 139 N. C. 486, 7 L.R.A.(N.S.) 1195, 111 Am. St. Rep. 813, 52 S. E. 235, 4 A. & E. Ann. Cas. 635, holding signature of witness to will sufficient where witness held pen during entire time her name was being written, though able to write her own name; *Kessel v. Austin Min. Co.* 144 Fed. 860, on sufficiency of signature by mark.

Cited in note (22 L. R. A. 372) on signature by mark.

Evidence of delivery of deed.

Cited in *Whitman v. Shingleton*, 108 N. C. 194, 12 S. E. 1027, holding signing of deed by grantor and possession by grantee *prima facie* evidence of delivery; *Herndon v. Imperial F. Ins. Co.* 110 N. C. 284, 14 S. E. 742, holding (*obiter*) registration of deed creates rebuttable presumption of actual delivery.

Cited in note (53 Am. St. Rep. 550) on what is a delivery of a deed.

12 L. R. A. 209, *BRACE v. CHARTRAND*, 16 Colo. 19, 25 Am. St. Rep. 235, 26 Pac. 152.

Legal status of mutual benefit associations.

Cited in *National Council, K. & L. of S. v. Phillips*, 63 Kan. 807, 66 Pac. 1011, holding mutual benefit association not exempt from taxation as benevolent association; *Head Camp, W. W. v. Sloss*, 49 Colo. 180, 31 L.R.A.(N.S.) 833, 112 Pac. 49, holding that mutual benefit certificate is life insurance policy within meaning of statute withdrawing from life insurance companies defense of suicide of policy holders.

Cited in footnote to *State ex rel. Covenant Mut. Ben. Asso. v. Root*, 19 L. R. A. 271, which holds foreign assessment insurance company entitled to license to do business.

Cited in notes (38 L. R. A. 34, 55) on whether benefit association is an insurance company; (24 L. R. A. 303) on restrictions on business of foreign insurance companies.

Rights under mutual benefit certificates.

Cited in *Overhiser v. Overhiser*, 14 Colo. App. 6, 59 Pac. 75, and *Brown v. Iowa L. of H.* 107 Iowa, 442, 78 N. W. 73, holding mutual benefit association certificate construable as written contract fixing rights of parties; *Fischer v. Fischer*, 99 Tenn. 635, 42 S. W. 448, holding rights of beneficiary of mutual benefit certificate determinable by laws, charter, and membership certificates of order.

Cited in note (52 Am. St. Rep. 555, 556, 568, 571) on mutual or membership life or accident insurance.

Testamentary nature of life insurance policy.

Cited in *Knights Templars & M. Mut. Aid Asso. v. Greene*, 79 Fed. 465, and *McNally v. Metropolitan L. Ins. Co.* 16 Pa. Super. Ct. 116, holding life insurance policy construable in analogy to will; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 580, 19 S. W. 25, sustaining right of holder of mutual benefit certificate to change beneficiary without latter's consent.

12 L. R. A. 216, *RODGERS v. LEES*, 140 Pa. 475, 23 Am. St. Rep. 250, 21 Atl. 399.

Liability for injury to trespassers.

Cited in *Newark Electric Light & P. Co. v. Garden*, 37 L. R. A. 728, 23 C. C. A. 653, 39 U. S. App. 416, 78 Fed. 78, denying liability of electric light company for defective insulation of wire touched by trespasser; *Words v. Thompson*, 15 Pa. Dist. R. 941, holding owner of ground not liable for injury sustained thereon by person not invited to come upon it, where owner not shown to be maintaining public resort.

— To trespassing children.

Cited in *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 355, 67 Am. St. Rep. 252, 49 N. E. 388, holding child two years old a trespasser on railroad, subject to consequences; *Feehan v. Dobson*, 10 Pa. Super. Ct. 9, 44 W. N. C. 67, denying right of child burned by hot ashes while trespassing on inclosed lot, to recover; *Buch v. Amory Mfg. Co.* 69 N. H. 262, 76 Am. St. Rep. 163, 44 Atl. 809, denying obligation of owner of dangerous machinery in operation, to actively intervene to protect infant trespasser; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 465, 38 Am. St. Rep. 254, 21 S. W. 1062, denying liability of railroad to boy stealing ride; *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 301, 38 L. R. A. 459, 67 Am. St. Rep. 116, 22 So. 546, denying liability for injuries to child trespassing upon dummy train in street; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 413, 54 L. R. A. 321, 39 S. E. 82, denying liability of owner of premises for injury to children attracted by unguarded excavation; *Hoberg v. Collins, L. & Co.* 80 N. J. L. 431, 31 L.R.A.(N.S.) 1068, 78 Atl. 166, holding that rule that denies to trespasser duty on part of others to observe care towards him is not changed by fact that he is infant; *Driscoll v. Clark*, 32 Mont. 188, 80 Pac. 1, holding one operating endless chain with sharp projections unguarded not liable for injury of child trespasser caught in chain and injured; *Thompson v. Baltimore & O. R. Co.* 218 Pa. 451, 19 L.R.A.(N.S.) 1166, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894, holding railroad company not liable for injury to eight year old child coming on company's premises at night through open gateway and injured at turntable.

Cited in footnotes to *Brinkley Car Works Mfg. Co. v. Cooper*, 57 L. R. A. 724, which denies liability for injury to six-year-old boy from carelessly walking into pool of hot water; *Paolino v. McKendall*, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish, to guard young children accustomed to play there from fire; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which

holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Ryan v. Towar*, 55 L. R. A. 310, which denies landowner's duty to make premises safe for attempting to rescue trespassing child caught in waterwheel in unused building; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Uttermohlen v. Bogg's Run Min. & Mfg. Co.* 55 L. R. A. 911, which denies liability of mine owner for injury to trespassing child by cable and pulleys hauling coal cars.

Cited in notes (19 L.R.A.(N.S.) 1133) on attractive nuisance; (32 L.R.A.(N.S.) 560) on duty of property owner to trespassing child; (49 Am. St. Rep. 416) on injury to trespassing children.

Distinguished in *Kreiner v. Straubmuller*, 30 Pa. Super. Ct. 613, holding brewer liable for injury sustained by five year old child while playing on pyramidal pile of beer barrels on sidewalk adjoining brewery.

Contributory negligence of children.

Cited in footnotes to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground; *Graney v. St. Louis, I. M. & S. R. Co.* 38 L. R. A. 633, which denies negligence *per se* of twelve-year-old boy in standing so near passing train as to be drawn under by current of air.

Cited in notes (26 Am. St. Rep. 866; 49 Am. St. Rep. 410) on contributory negligence of infants.

12 L. R. A. 219, *JOHNSON v. ASH*, 142 Pa. 45, 21 Atl. 754.

Reservation of rent in Spanish milled dollars.

Cited in *Milligan v. Marshall*, 38 Pa. Super. Ct. 64, holding tender of rent in Spanish milled dollars good where rent was reserved in that form of money.

Distinguished in *Cook v. Lovett*, 17 Pa. Dist. R. 348, where rent was reserved in Spanish milled dollars each weighing seventeen pennyweights and six grains, "lawful money of the United States."

12 L. R. A. 220, *WILLIAMSPORT & N. B. R. CO. v. PHILADELPHIA & E. R. CO.* 141 Pa. 407, 21 Atl. 645.

Location in taking by eminent domain.

Cited in *Peiffer v. Harrisburg, P. M. I. & L. R. Co.* 12 Lanc. L. Rev. 274, holding act of location of railroad also act of appropriation; *Kanawha, G. J. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co.* 45 W. Va. 125, 30 S. E. 86, holding priority of location of railroad gives priority of title; *Biddle v. Wayne Waterworks Co.* 190 Pa. 96, 42 Atl. 380, holding equity will not undertake to control discretion of waterworks corporation in locating right of way; *Southern Indiana R. Co. v. Indianapolis & L. R. Co.* 168 Ind. 370, 13 L.R.A.(N.S.) 197, 81 N. E. 65, holding lands remain open to location by another company where purchased but not located or actually occupied; *Pacific R. & Nav. Co. v. Astoria & C. R. R. Co.* 53 Or. 251, 99 Pac. 1044, holding general rule is that equity will intervene to protect rights acquired by prior location against trespasses by another road, but such doctrine protects only against longitudinal construction and protects only for reasonable time; *Nicomen Boom Co. v. North Shore Boom & Driving Co.* 40 Wash. 326, 82 Pac. 412, holding by analogy to case of railroad boom company making prior location of territory for boom has right to retain it as against another boom company; *Mack v. Eastern & N. R. Co.* 10 Pa. Dist. R. 103, holding railroad company acquires absolute title to servitude of right of way by possession and occupancy, by act of location, after prior release of owner; *Calkin v.*

Postal Teleg. Co. 11 Pa. Dist. R. 306, holding where entry of corporation having right of eminent domain is unlawful, and no steps are taken to fix damages for permanent occupancy grantee of person who owned land at time of unlawful entry is entitled to damages from inception of his title; *Arnold v. Buffalo*, R. & P. R. Co. 32 Pa. Super. Ct. 457, holding wife's inchoate right defeated by adoption of right of way by railroad company on agreement with husband as to amount of damages, payment thereof, grant of right to construct and release of damages by husband, and construction and operation of road.

Cited in notes (66 L.R.A. 589) on right of railroad to keep trespassers from track or right of way; (24 L.R.A. (N.S.) 385) on right to condemn property previously condemned or purchased for public use, but not actually used.

— How effected.

Approved in *Southern Indiana R. Co. v. Indianapolis & L. R. Co.* 168 Ind. 370, 13 L.R.A. (N.S.) 197, 81 N. E. 65, holding land not pre-empted as against another company by merely running preliminary line and purchasing as ordinary purchaser without occupation or filing of map and profile.

Cited in *Utah, N. & C. R. Co. v. Utah*, & C. R. Co. 110 Fed. 892, holding priority of corporate adoption of route determines right of railroad to contested location; *Schaadt v. Ironton R. Co.* 6 Northampton Co. Rep. 336, 22 Pa. Co. Ct. 104, holding land cannot be appropriated by railroad by act of president alone; *Weidenfeld v. Sugar Run R. Co.* 48 Fed. 617, holding location of railroad made by executive committee void; *Southern P. R. Co. v. United States*, 48 C. C. A. 720, 109 Fed. 921, holding survey for railroad does not effect location giving title; *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.* 116 Iowa, 690, 88 N. W. 1082, holding preliminary survey does not give prior right as against another railroad; *Lehigh Valley Coal Co. v. United States Pipe-Line Co.* 7 Kulp, 82, 3 Pa. Dist. R. 74, holding preliminary survey for pipe line, in absence of corporate action, not a location; *Kanawha, G. J. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co.* 45 W. Va. 128, 30 S. E. 86 (dissenting opinion by Brannon, Pres.), who holds survey alone cannot effect location of railroad; *Delabole Slate Co. v. Bangor & P. R. Co.* 6 Northampton Co. Rep. 343, raising, without deciding, question whether corporate action of location, incident to appropriation, must be by formal resolution; *Ft. Wayne & S. W. Traction Co. v. Ft. Wayne & W. R. Co.* 170 Ind. 55, 16 L.R.A. (N.S.) 539, 83 N. E. 665, holding under statute, filing of instrument, describing property seized and declaring intention to appropriate is formal assertion of absolute right to appropriate, after which nothing remains to be done but to compensate owner; *Fayetteville Street R. Co. v. Aberdeen & R. R. Co.* 142 N. C. 430, 55 S. E. 345, 9 A. & E. Ann. Cas. 683, holding prior right to use of road bed as right of way established by company adopting it as permanent location by resolution of directors, giving direction to mark and stake line; and after this done by company's agent, ratifying such action by resolutions of directors; *Toledo & I. Traction Co. v. Toledo & C. I. R. Co.* 171 Ind. 226, 86 N. E. 54, holding lands still subject to appropriation for public use where private promoters of unorganized railway company caused route to be surveyed and staked off and acquired title by conveyance from landowners; *Re Buffalo & S. R. Co.* 17 Pa. Dist. R. 72, holding making of preliminary survey by railroad company does not prevent owner from alienating his title pending final adoption of line by board of directors; *West Virginia S. L. R. Co. v. Belington, & N. R. Co.* 56 W. Va. 367, 49 S. E. 460, holding action of board of directors in ratifying resolution of stockholders to adopt route shown by map and profile gives priority of right to condemn; *Chesapeake & O. R. Co. v. Deepwater R. Co.* 57 W. Va. 655, 50 S. E. 890, holding survey adopted by corporate action as and for location, con-

stitutes appropriation as against third persons, condemnation not being part of location.

Distinguished in *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 578, 28 Pittsb. L. J. N. S. 167, 41 W. N. C. 197, holding taking by water company of part of stream without formal appropriation does not divest rights of lower riparian owner; *Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co.* 149 Ill. 286, 37 N. E. 91, holding petition for condemnation for switch need not contain averment of corporate direction of location.

Adoption of survey.

Cited in *Johnston v. Callery*, 184 Pa. 151, 39 Atl. 73, S. C. on prior appeal, 173 Pa. 137, 33 Atl. 1036, holding servitude fastened upon land by railroad's survey and adoption of line by directors.

Distinguished in *Milwaukee Light, Heat & Traction Co. v. Milwaukee Northern R. Co.* 132 Wis. 341, 112 N. W. 663, where directors themselves fixed route and located line.

Effect of filing bond or making compensation to divest title.

Cited in *Mack v. Easton & N. R. Co.* 7 Northampton Co. Rep. 320, holding purchaser on foreclosure cannot recover possession of premises taken by railroad compensating mortgagor; *Fischer v. Catawissa R. Co.* 175 Pa. 558, 38 W. N. C. 559, 34 Atl. 860, holding owner's title to land appropriated by railroad divested by filing of bond for damages; *Shevalier v. Postal Teleg. Co.* 22 Pa. Super. Ct. 511, holding damages for previously constructed telegraph line belong to owner at, and are assessable as of, date of filing petition for condemnation; *Re Franklin Street* 14 Pa. Super. Ct. 417 (dissenting opinion), majority holding that filing of bond by city for damages on taking property for street does not divest title; *Quade v. Columbia & P. D. R. Co.* 27 Lanc. L. Rev. 218, holding that land is realty taken by railroad under eminent domain at time when its bond is filed and approved by court; *Mitchell v. Columbia & P. D. R. Co.* 28 Lanc. L. Rev. 35, to the point that until compensation is made by railroad or security given title of owner is not divested.

Grant of right to construct street railway before incorporation.

Cited in *Homestead Street R. Co. v. Pittsburg & H. Electric Street R. Co.* 166 Pa. 174, 27 L. R. A. 387, 30 Atl. 950, holding municipal consent obtained prior to incorporation of street railway company ineffective to exclude company obtaining consent after incorporation.

12 L. R. A. 223, *THIRD NAT. BANK'S APPEAL*, 141 Pa. 214, 21 Atl. 598, 773.

Liability of corporation borrowing on note of individuals.

Cited in note (21 L.R.A.(N.S.) 1074) on liability of principal on negotiable paper executed by agent.

Distinguished in *Andrews Co. v. National Bank*, 129 Ga. 58, 121 Am. St. Rep. 186, 58 S. E. 633, 12 A. & E. Ann. Cas. 616, where loan was not to corporation but to individuals.

12 L. R. A. 227, *Re VANCE*, 141 Pa. 201, 23 Am. St. Rep. 267, 21 Atl. 643.

Effect of widow's election to take against will.

Cited in *Beebe's Estate*, 24 Pa. Co. Ct. 272, 9 Pa. Dist. R. 296; *Griffin's Estate*, 11 Pa. Co. Ct. 446, 1 Pa. Dist. R. 317; *McIntosh's Estate*, 158 Pa. 534, 27 Atl. 1044, holding widow's election to take against husband's will renders legacies payable to her distributable as though she were dead; *Sawyer v. Freeman*, 161 Mass. 547, 37 N. E. 942, holding widow's election not to take under will devising income to her for life does not entitle legatee of principal sum if living at

widow's death to such principal during widow's lifetime; *Pagles's Estate*, 20 Pa. Dist. R. 666, holding that in construing will election of widow to take against it must be considered as having same effect as her death; *Fennell v. Fennell*, 81 Kan. 643, 106 Pac. 1040, holding widow's life estate is as effectually terminated by her refusal to take it as by her death, and bequest to son payable upon death becomes payable immediately; *Levingood's Estate*, 38 Pa. Super. Ct. 500, holding where widow takes adversely to will property to which she is by law entitled, will operate upon remainder of estate precisely as if widow were dead; *McGuire v. Luckey*, 129 Iowa, 562, 105 N. W. 1004, holding where life estate given widow by will, upon extinguishment thereof by widow's election to take distributive share, devisees became entitled to same rights they would have had on widow's death.

Cited in footnote to *Tripp v. Nobles*, 67 L.R.A. 449, which holds widow offering for probate and undertaking to carry out as administratrix with the will annexed husband's will devising her own land to her for life with remainder over and an additional sum of money estopped to assert her absolute title to the land.

Cited in notes (14 L.R.A. 295) on effect on third persons of widow's election to take against will; (18 L.R.A.(N.S.) 274, 276) on acceleration of gift over by widow's election against will giving life estate; (27 L.R.A.(N.S.) 606, 607) on effect of spouse's election to take against, upon rest of, will.

Distinguished in *Portuondo's Estate*, 185 Pa. 473, 39 Atl. 1105, Affirming 7 Pa. Dist. R. 92, holding widow's election does not affect bequest to another of one third of income of residuary estate during widow's life; *Re Ballantine*, 25 Pittsb. L. J. N. S. 416, holding widow's election does not affect bequest of maintenance of another out of income during her life.

Compensation of devisees disappointed by election against will.

Cited in *Lyon's Estate*, 15 Pa. Co. Ct. 353, 3 Pa. Dist. R. 740, holding legacy to husband electing to take against will sequestered in favor of devisee of realty to extent of loss resulting from election; *Re McCombs*, 32 Pittsb. L. J. N. S. 219, holding, where widow elects against will, testamentary provision for her will be sequestered to compensate disappointed legatees; *Re Borland*, 34 Pittsb. L. J. N. S. 228, holding administrator's expenses payable out of residuary estate; *Re Lammert*, 39 Pittsb. L. J. N. S. 162, holding that remaindermen disappointed by widow's election against will giving her one half of income during life are entitled to have one-sixth of income accumulate to make up principal; *Dunlap v. McCloud*, 84 Ohio St. 282, 35 L.R.A.(N.S.) 854, 95 N. E. 774, holding that residuary estate must bear loss resulting from widow's election to be endowed of lands of her husband in preference to specific devisees, unless contrary intention appears in will; *Klenke's Estate*, 210 Pa. 576, 60 Atl. 167, as to residuary legatee bearing whole loss caused by widow's election to take against the will.

Distinguished in *Latta v. Brown*, 96 Tenn. 352, 31 L. R. A. 843, 34 S. W. 417, holding other devisees must contribute toward deficit in devise occasioned by widow's election against will; *Re Kerr*, 27 Pittsb. L. J. N. S. 122, holding specific legacy payable out of fund given widow for life not payable out of specific devise of residue upon widow's election against will; *Collins's Estate*, 10 Pa. Dist. R. 249, where testator gave widow use of dwelling house and furniture, and income of certain sum for life, and, at her death the income, including rental to children for their lives, and devised certain realty in fee to grandchildren.

Criticized in *Cumming's Estate*, 13 Pa. Dist. R. 462, 30 Pa. Co. Ct. 463, granting application by specific devisees, joined in by trustees of residuary devisee to have sequestrator appointed to take charge of rents of properties devised for life to widow who elected to take against will.

12 L. R. A. 232, *HOLLAND v. TENNESSEE COAL, IRON & R. CO.* 91 Ala. 444, 8 So. 524.

Master's duty as to employment of servants.

Cited in *Weeks v. Scharer*, 49 C. C. A. 374, 111 Fed. 332, holding it master's duty to use reasonable care in selecting competent and careful servants; *Owen v. Moxon*, 168 Ala. 621, 52 So. 527, holding that master must exercise due care to ascertain servant's incompetency for protection of other employees; *Woodward Iron Co. v. Curl*, 153 Ala. 225, 44 So. 969, holding master does not warrant competency of servants and to permit recovery it must appear he failed to use ordinary care in selection of them; *Wilkinson v. Kanawha & H. Coal & Coke Co.* 64 W. Va. 101, 20 L.R.A.(N.S.) 336, 61 S. E. 875, holding negligence not shown in employment of fifteen year old boy as "chock-block" operator at device for raising empty and lowering loaded coal cars at mine.

Cited in notes (48 L. R. A. 372, 377, 381) on master's duty as to employment of servants; (25 L. R. A. 711) on master's liability for injuries caused to one servant by incompetency of fellow servant; (41 L. R. A. 91) on knowledge as element of employer's liability to injured servant; (1 L.R.A.(N.S.) 288) on duty of master to servant to keep informed as to fitness of coservants.

Master's duty to furnish safe appliances.

Cited in *Louisville & N. R. Co. v. Campbell*, 97 Ala. 152, 12 So. 574, denying liability of railroad to brakeman for defect in brake-rod not discoverable by most careful inspection.

Cited in note (31 Am. St. Rep. 349) on master's duty to provide safe appliances and competent collaborators.

Evidence of custom as bearing on negligence.

Limited in *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 251, 12 So. 88, holding similar usage by other railroads not justify leaving car on switch in dangerous proximity to track.

Construction of contract according to common usage.

Cited in *Gaines v. Virginia & A. Coal Co.* 124 Ala. 400, 27 So. 477, construing contract to mine such coal "as can be reasonably mined out" as requiring operation customary with persons performing same kind of work.

Master's duty to warn servants as to perils of employment.

Cited in *Worthington v. Goforth*, 124 Ala. 661, 26 So. 531, holding employer not bound to warn employee of obvious danger incident to climbing upon moving cars; *Louisville & N. R. Co. v. Banks*, 104 Ala. 516, 16 So. 547, holding railroad not bound to advise employee how to avoid danger from low bridge; *Louisville & N. R. Co. v. Stutts*, 105 Ala. 376, 53 Am. St. Rep. 127, 17 So. 29, denying railroad's liability to engineer for obvious defects in trestle and engine; *Louisville & N. R. Co. v. Boland*, 96 Ala. 632, 18 L. R. A. 263, 11 So. 667, holding brakeman sufficiently warned of increased danger in coupling cars of different patterns by general caution; *Robinson Min. Co. v. Tolbert*, 132 Ala. 466, 31 So. 519, holding employer liable for failure to warn inexperienced employee of presence of dangerous explosive; *Alabama Steel & Wire Co. v. Wrenn*, 136 Ala. 493, 34 So. 970, sustaining instruction imposing on master duty of warning inexperienced employee of dangers of service; *Borkowski v. American Radiator Co.* 165 Mich. 272, 130 N. W. 640, holding that master is bound to instruct inexperienced servant as to latent dangers, likely to result from contact of molten metal with water; *Fisher v. Prairie*, 26 Okla. 345, 109 Pac. 514, holding that master is bound to warn inexperienced servant in respect to dangers, and he is not relieved from such duty by fact that servant solicited employment.

Cited in notes (44 L. R. A. 38, 76) on master's duty to instruct and warn servants as to perils of employment.

Explosive nature of molten iron or mineral as latent danger.

Cited in *Hall v. United States Radiator Co.* 52 App. Div. 94, 64 N. Y. Supp. 1002, holding employer liable for failure to instruct inexperienced molder that contact of molten iron with rust causes explosion; *Adams v. Grand Rapids Refrigerator Co.* 160 Mich. 595, 27 L.R.A.(N.S.) 957, 125 N. W. 724, holding question whether explosion resulting from contact of molten porcelain with small amount of water is in accordance with natural law which master should understand and communicate to servant for jury and servant in such case is not presumed to have scientific knowledge.

Degree of care required in face of danger.

Cited in *Louisville & N. R. Co. v. Stewart*, 128 Ala. 331, 29 So. 562, and *Richmond & D. R. Co. v. Farmer*, 97 Ala. 145, 12 So. 86, holding one brought into sudden danger by another's wrong bound only to exercise prudence of reasonable person in like circumstances; *Alabama G. S. R. Co. v. Fulton*, 144 Ala. 342, 30 So. 282, holding standard of care on issue of contributory negligence is what reasonably careful and prudent man would have done, considering particular exigencies of his situation.

Cited in note (37 L.R.A.(N.S.) 51) on care required in sudden emergency.

Limited in *Bessemer Land & Improv. Co. v. Campbell*, 121 Ala. 61, 77 Am. St. Rep. 17, 25 So. 793, holding excitability of defendant's superintendent does not excuse failure to act with ordinary care and prudence.

Correctness of charge, how determined.

Cited in *McDonald v. Montgomery Street R. Co.* 110 Ala. 178, 20 So. 317, and *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 51, 30 Am. St. Rep. 28, 9 So. 303, holding correctness of charge tested by evidence with respect to which given.

Master's liability for coemployee's negligence.

Cited in *Sheffield v. Harris*, 101 Ala. 570, 14 So. 357, holding charge that defendant is liable for negligence of coemployee not exercising superintendence erroneous; *Northern Alabama R. Co. v. Mansell*, 138 Ala. 560, 36 So. 459, holding complaint in administrator's action against intestate's employer, not imputing negligence to fellow servants, not demurrable.

12 L. R. A. 235, *JOHNSTON v. STATE*, 128 Ind. 16, 25 Am. St. Rep. 412, 27 N. E. 422.

Mandamus to election board.

Followed in *State ex rel. Hadfield v. Grace*, 83 Wis. 298, 53 N. W. 444; *Kimerer v. State*, 129 Ind. 590, 29 N. E. 178; *Wills v. State*, 128 Ind. 359, 27 N. E. 423, holding that mandamus lies to compel determination of tie vote by lot; *Smith v. Lawrence*, 2 S. D. 197, 49 S. W. 7, holding mandamus issuable to compel adjourned board of canvassers to canvass omitted returns; *State ex rel. Bennett v. Barber*, 4 Wyo. 73, 32 Pac. 14, holding mandamus issuable to compel state board to canvass entire vote.

Cited in note (36 L.R.A.(N.S.) 1092) on mandamus to compel officer after expiration of term, to perform official duty.

Construction of Constitution or statute.

Cited in *Van Walters v. Children's Guardians*, 132 Ind. 569, 18 L. R. A. 432, 32 N. E. 568, holding constitutional provisions construable in light of established principle of state's right to guardianship of children; *Townsend v. State*, 147 Ind. 634, 37 L. R. A. 299, 62 Am. St. Rep. 477, 47 N. E. 19, holding courts cannot overthrow statute as encroaching upon citizen's natural rights.

Constitutionality of statute providing for decision of tie vote.

Cited in State *ex rel.* Crow v. Kramer, 150 Mo. 93, 47 L. R. A. 553, 51 S. W. 716, holding statute authorizing determination of tie vote, in absence of constitutional provision, unconstitutional.

Cited in notes (47 L. R. A. 555, 560) on decision of tie vote at election; (17 L. R. A. 842) on implied restrictions on power of legislatures.

12 L. R. A. 237, HOPPER v. HOPPER, 125 N. Y. 400, 26 N. E. 457.

Powers of ancillary administrator.

Cited in Smith v. Second Nat. Bank, 169 N. Y. 472, 62 N. E. 577, holding ancillary administrator may pledge estate assets for estate purposes.

Status of foreign personal representative.

Cited in Ferguson v. Harrison, 27 Misc. 381, 58 N. Y. Supp. 850, holding foreign administrator cannot be sued in state courts; Flandrow v. Hammond, 13 App. Div. 326, 43 N. Y. Supp. 143, holding foreign executor not entitled to be substituted as defendant; McGrath v. Weiller, 98 App. Div. 294, 90 N. Y. Supp. 420, holding court without jurisdiction to grant order reviving against foreign executor action pending against testator at time of his death; De Coppet v. Cone, 199 N. Y. 61, 139 Am. St. Rep. 844, 92 N. E. 411, 20 Ann. Cas. 841, holding that ordinarily suit at law will not lie against foreign executor, but action in equity may lie; Courtney v. Pradt, 87 C. C. A. 463, 160 Fed. 563, holding foreign executor not suable on testator's debt, and questioning whether distinction exists between rule forbidding suits by and that forbidding suits against foreign executor; Courtney v. Pradt, 135 Fed. 824, as to maintenance of suit against foreign executor grounded on possession of assets.

Distinguished in Richards v. Blaisdell, 12 Cal. App. 107, 106 Pac. 732, holding judgment against executor in state of decedent's residence and death not conclusive upon ancillary administrator with will annexed in another state.

Foreign judgments against executor.

Cited in Jefferson v. Beall, 117 Ala. 439, 67 Am. St. Rep. 177, 23 So. 44, holding foreign judgment against executor void.

Cited in note (27 L. R. A. 102) on judgments of another state or country rendered against executor or administrator.

12 L. R. A. 239, FRINK v. THOMAS, 20 Or. 265, 25 Pac. 717.

When time of essence of contract.

Cited in Jacobson v. Rotzien, 111 Minn. 531, 127 N. W. 856, to the point that time is not of essence of contract unless made so by express agreement or by nature of contract.

Cited in footnotes to Garrison v. Cooke, 61 L. R. A. 342, which holds time of essence of subscription for cost of railroad, in consideration of running of trains by specified date; Glock v. Howard & W. Colony Co. 43 L. R. A. 199, which denies right of vendee making default in contract of which time is of the essence, to recover money paid without excusing default.

Cited in notes (15 L.R.A. 737) on making time of essence of contract by demand or notice; (104 Am. St. Rep. 267, 275) on time as of essence of contract for sale of land.

Distinguished in Cosby v. Honaker, 57 W. Va. 518, 50 S. E. 610, holding time was not made essence of contract by a notice not indicating contract must be abandoned on failure to comply, which notice was followed by giving of further time.

Readiness to perform concurrent act as working default.

Cited in *Lewis v. Craft*, 39 Or. 310, 64 Pac. 809, holding offer to deliver goods on payment therefor puts other party in default; *Sayre v. Mohney*, 30 Or. 246, 47 Pac. 197, holding failure to make title defense to action on note for purchase price; *Kessler v. Pruitt*, 14 Idaho, 187, 93 Pac. 965, holding where both parties treat contract as in force after time limit fixed in contract, and time is not of essence of contract, one party is not in position to put other in default without tendering abstract showing title and giving notice payment must be made in reasonable time or contract will be rescinded; *Stein v. Waddell*, 37 Wash. 639, 80 Pac. 184, holding to maintain action on contract for sale of realty or declare forfeiture thereof tender of deed is required where covenants to convey property and take mortgage back upon payment of instalment, and covenant to pay are mutual, concurrent and dependent.

Rescission of contract for default.

Cited in *Holbrook v. Investment Co.* 30 Or. 265, 47 Pac. 920, holding in action at law vendor may enforce contract provisions for forfeiture against defaulting purchaser; *Graham v. Merchant*, 43 Or. 304, 72 Pac. 1088, sustaining provision in land contract giving vendor right of forfeiture upon default in payment; *Roberts v. Braffett*, 33 Utah, 79, 92 Pac. 789 (dissenting opinion), on maxim "compensation not forfeiture," favored in equity.

Cited in note (30 L. R. A. 44) on right to rescind or abandon contract because of other party's default.

Restoration of status quo on rescission of contract.

Cited in *Dundee Mortg. Co. v. Goodman*, 36 Or. 456, 60 Pac. 3; *Vaughn v. Smith*, 34 Or. 57, 55 Pac. 99; *Crossen v. Murphy*, 31 Or. 118, 49 Pac. 858,—holding defrauded party rescinding sale must account for consideration; *State v. Blize*, 37 Or. 408, 61 Pac. 735, holding party cannot rescind land contract while retaining consideration; *Sievers v. Brown*, 36 Or. 221, 56 Pac. 170, holding vendee under land contract cannot rescind and sue for payments before returning possession; *Pierce v. Staub*, 78 Conn. 467, 3 L.R.A.(N.S.) 789, 112 Am. St. Rep. 163, 62 Atl. 760, holding money paid upon rescinded contract must be returned to party who advanced; *Ward v. Warren*, 44 Or. 105, 74 Pac. 482, holding vendor of realty cannot rescind contract and recover purchase money; *Brixen v. Jorgensen*, 28 Utah, 297, 107 Am. St. Rep. 720, 78 Pac. 674, holding ejectment not maintainable by vendor against vendee where purchase money paid in part, time not of essence of contract and contract not rescinded.

Cited in note (107 Am. St. Rep. 728) on return of consideration on rescission of contract.

Effect of pending controversy in Land Department.

Reaffirmed on second appeal in *Frink v. Hoke*, 35 Or. 22, 56 Pac. 1093, holding statute of limitations does not begin to run against right to recover lands until termination of controversy in United States Land Department.

Cited in *Robertson v. State Land Board*, 42 Or. 189, 70 Pac. 614, holding courts cannot control decision of state land board.

Distinguished in *Huffman v. Smyth*, 47 Or. 578, 114 Am. St. Rep. 938, 84 Pac. 80, 8 A. & E. Ann. Cas. 678, where existence of controversy in Land Department did not appear.

Purchase of superior title by vendee under land contract.

Reaffirmed on second appeal in *Frink v. Hoke*, 35 Or. 17, 56 Pac. 1093, holding purchaser rescinding land contract cannot assert outstanding superior title against vendor.

Cited in *Garvey v. Lashells*, 151 Cal. 533, 91 Pac. 498, holding defect in vendor's

title consisting of outstanding title is removed by vendor's act in purchasing such outstanding title; *Brown v. Thompson*, 81 S. C. 383, 62 S. E. 440, holding vendee buying bid of another at sale of land under judgment against grantor of vendor entitled to have amount he pays deducted from purchase price.

Specific performance.

Cited in *Wright v. Astoria Co.* 45 Or. 229, 77 Pac. 599, holding contract for sale of realty specifically enforceable though purchase money not paid or tendered at exact time fixed by contract; *Davis v. Wilson*, 55 Or. 407, 106 Pac. 795, holding that vendor cannot put vendee in default, so as to escape specific performance, without tendering deed, where time was not essence of contract.

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co.* 35 L. R. A. 167, which refuses to require payment of interest not provided for as condition of specific performance of contract; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 26 L. R. A. 610, which authorizes specific enforcement of contract to run street cars over other company's track to depot.

Interest as compensation for delay.

Cited in *Scott v. Smith*, 58 Or. 604, 115 Pac. 969, to the point that interest on deferred payments will be deemed sufficient compensation, for delay in performance of contract to convey, unless time is expressly made essence of contract.

12 L. R. A. 247, *CONSOLIDATED COAL CO. v. BAKER*, 135 Ill. 545, 26 N. E. 651.

Tax; burden of proof as to validity.

Cited in *People ex rel. Funk v. Keener*, 194 Ill. 18, 61 N. E. 1069, holding party objecting to tax has burden of showing invalidity; *People ex rel. Sanders v. Cairo, V. & C. R. Co.* 249 Ill. 100, 94 N. E. 11, holding that burden of proof is upon objector in proceeding by tax collector where his report of delinquent lands, together with proof of publication and statutory notice is produced; *Singer Mfg. Co. v. Denver*, 46 Colo. 53, 103 Pac. 294, holding burden of proof on party assessed to show assessment excessive or erroneous; *People ex rel. Thompson v. Hulin*, 237 Ill. 124, 86 N. E. 666, holding presumption is that taxing or assessing officers have performed their duty and that tax or special assessment is valid.

What taxable as real estate.

Cited in *Re Maplewood Coal Co.* 213 Ill. 286, 72 N. E. 786, holding mining rights taxable as realty; *People ex rel. Carrell v. Bell*, 237 Ill. 339, 19 L.R.A.(N.S.) 748, 86 N. E. 593, 15 A. & E. Ann. Cas. 511, holding mining right under lease taxable separately from land and as realty.

Cited in notes (15 L.R.A. 297) on what constitutes real estate for process of taxation; (17 L.R.A.(N.S.) 689) on interest in mineral in situ unaccompanied by ownership of soil as independent subject of taxation; (140 Am. St. Rep. 968) on separate taxation of minerals and surface.

Distinguished in *Hancock County v. Imperial Naval Stores Co.* 93 Miss. 834, 17 L.R.A.(N.S.) 697, 47 So. 177, holding turpentine lease not assessable as land.

12 L. R. A. 249, *HAYES v. HYDE PARK*, 153 Mass. 514, 27 N. E. 522.

Injuries from electric wires.

Cited in footnotes to *Haynes v. Raleigh Gas Co.* 26 L. R. A. 810, which holds negligence shown by guy wire charged with deadly current hanging to ground from tree; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flag-staff on other building by telephone wire renders company liable for loss of barn by lightning striking flag-staff; *Ahern v. Oregon Teleph. & Teleg. Co.* 22 L. R. A. 635, which holds telephone company liable for injury from electric

wire left hanging on electric light company's pole; *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552, which holds reasonable care required to keep electric wires safe towards persons licensed to approach them.

Distinguished in *Frauenthal v. Laeledge Gaslight Co.* 67 Mo. App. 8, holding boy of seventeen guilty of contributory negligence in touching electric wire.

Effect of co-operating cause on liability for negligence.

Cited in *Pomeroy v. Westfield*, 154 Mass. 464, 28 N. E. 899, holding endeavor to avoid mudhole does not prevent recovery for injuries received in consequence; *McCauley v. Norcross*, 155 Mass. 587, 30 N. E. 464, holding employer liable for fall of beams left near hole in floor above, carelessly toppled over by third person; *Denver v. Johnson*, 8 Colo. App. 391, 46 Pac. 621, holding city liable for defect in highway co-operating with fright of horse and collision with street car to produce injury; *Glynn v. Central R. Co.* 175 Mass. 511, 78 Am. St. Rep. 507, 56 N. E. 698, holding railroad's liability for defect in car ceases after opportunity for inspection by connecting road on which accident occurs; *Southwestern Teleg. & Teleph. Co. v. Bruce*, 89 Ark. 590, 117 S. W. 564, holding defendant not excused though injury result of concurring negligence of himself and another; *Block v. Worcester*, 186 Mass. 528, 72 N. E. 77, holding if defect in highway is proximate cause of accident, other concurring conditions not involving negligence or culpability do not relieve city or town from liability.

Distinguished in *Feeley v. Melrose*, 205 Mass. 333, 27 L.R.A. (N.S.) 1157, 137 Am. St. Rep. 445, 91 N. E. 306, holding defect in highway not sole cause of injury within meaning of Massachusetts decisions if negligence of automobile driver was in part responsible for accident.

Proximate cause.

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 540, 41 L. R. A. 797, 51 N. E. 1, holding railroad negligently storing oil not liable for fire started by match carelessly dropped.

Cited in note (36 Am. St. Rep. 841) on proximate and remote cause.

Charging remote effect to original wrongdoer.

Cited in *Graves v. Johnson*, 156 Mass. 213, 15 L. R. A. 838, 32 Am. St. Rep. 446, 30 N. E. 818, holding sale of liquor with view to illegal resale by purchaser in another state illegal; *Burt v. Advertiser Newspaper Co.* 154 Mass. 247, 13 L. R. A. 102, 28 N. E. 1, holding publisher of libel not liable for republication by others; *Zinn v. Rice*, 161 Mass. 574, 37 N. E. 747, raising, without deciding question whether one levying excessive attachment liable for injury to trade from wrongful acts of others resulting therefrom; *May v. Wood*, 172 Mass. 15, 51 N. E. 191, dissenting opinion by Holmes, J., who holds action lies for inducing master to break contract with servant.

Duty to anticipate another's wrongful act.

Cited in *Chenery v. Fitchburg R. Co.* 160 Mass. 213, 22 L. R. A. 577, 35 N. E. 554, holding railroad not bound to anticipate presence of trespassers; *Davis v. New York, N. H. & H. R. Co.* 159 Mass. 536, 34 N. E. 1070, holding failure to anticipate foreman's failure to give warning of approaching train not contributory negligence; *Citizens' Teleph. Co. v. Thomas*, 45 Tex. Civ. App. 24, 99 S. W. 879, holding it reasonably to be anticipated that passerby will pick up wire in street and endeavor to put it out of the way.

Liability for defects in highway.

Cited in *Griffin v. Boston*, 182 Mass. 411, 65 N. E. 811, holding city may be liable to traveler injured by falling of handle of gravel heater standing unused in street; *Meaney v. Boston*, 194 Mass. 398, 80 N. E. 522, holding city may be liable for defect in highway under statute, though obstacle which constitutes defect in

use at time of accident; *Johnson v. Fargo*, 15 N. D. 531, 108 N. W. 243, holding evidence not conclusive that city had no constructive notice of existence of obstruction in sidewalk consisting of wire guy rope attached to fruit stand and that question of notice to city is for jury in doubtful case.

Cited in notes (2 L.R.A.(N.S.) 477) on duty of municipality to inspect electric wires maintained by others in streets; (13 L.R.A.(N.S.) 1231, 1248, 1257; 20 L.R.A.(N.S.) 648, 733) on liability of municipality for defects or obstructions in streets; (21 L.R.A.(N.S.) 671) on contributory negligence as affecting municipal liability for defects and obstructions in streets.

12 L. R. A. 251, *PEOPLE ex rel. WESTERN U. TELEG. CO. v. DOLAN*, 126 N. Y. 166, 27 N. E. 269.

Assessment of railroads.

Cited in *People ex rel. Manhattan R. Co. v. Barker*, 165 N. Y. 325, 59 N. E. 151, dissenting opinion by O'Brien, J., who holds railroad's real estate must be assessed at not to exceed cost to produce it in condition at date of assessment; *People ex rel. Hudson & M. R. Co. v. State Tax Comrs.* 143 App. Div. 40, 127 N. Y. Supp. 918, to the point that property should not be assessed for more than its full and true value.

Distinguished in *Newark v. State Bd. of Taxation*, 66 N. J. L. 469, 49 Atl. 525, holding street railway's interest in highways taxable as real estate.

Effect on certiorari proceedings of failure to appear before assessors.

Distinguished in *People ex rel. Buffalo, R. & P. R. Co. v. Duguid*, 68 Hun, 244, 22 N. Y. Supp. 988, holding omission to appear before assessors on grievance day not essential to entitle person to certiorari to review; *Re Cathedral of Incarnation*, 91 App. Div. 546, 86 N. Y. Supp. 900, refusing to quash writ of certiorari, where petitioner appeared before assessors on day following designated "first day" for hearing objections.

Right to costs.

Cited in *People ex rel. Oak Hill Cemetery Asso. v. Pratt*, 66 Hun, 579, 21 N. Y. Supp. 853, holding costs in certiorari to review assessments governed by act, and not by Code.

Construction of telegraph and telephone lines along highway.

Cited in *Utica v. Utica Teleph. Co.* 24 App. Div. 373, 48 N. Y. Supp. 916 (dissenting opinion), majority holding act authorizing construction of telephone line upon public streets or other lands, subject to owner's right to compensation, does not authorize erection of poles in street without city's consent.

Power of state over interstate telephone or telegraph companies.

Cited in notes (24 L. R. A. 162) on power of states to control or impose burdens on interstate telegraph or telephone companies; (60 L. R. A. 669) on corporate taxation and the commerce clause; (39 L. ed. U. S. 539) on state taxation and licenses as affecting interstate commerce.

Title acquired on condemnation.

Cited in *People ex rel. Bryan v. State Tax Comrs.* 142 App. Div. 804, 127 N. Y. Supp. 858 (dissenting opinion), on title derived from condemnation proceedings as base or terminable fee.

12 L. R. A. 254, *HUNDLEY v. FARRIS*, 103 Mo. 78, 23 Am. St. Rep. 863, 15 S. W. 312.

Relative rights of individual and firm creditors.

Cited in *Freedman v. Holberg*, 89 Mo. App. 346, sustaining preference of firm

to individual creditors in distribution of partnership assets; *Re Edwards*, 122 Mo. 431, 29 L. R. A. 686, 25 S. W. 904, Reversing 47 Mo. App. 307, holding owners of firm notes given in satisfaction of individual debts, in absence of fraud, entitled to participate in distribution of partnership assets; *Talbott v. Great Western Plaster Co.* 86 Mo. App. 567, holding partner cannot without firm's consent apply firm assets to individual debt; *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 225, 60 S. W. 87, holding partner may, with consent of others, mortgage partnership property to secure individual debt; *Re Wilcox*, 94 Fed. 102, holding firm creditors postponed to individual in distributing assets of bankrupt partner, though no partnership assets; *Funk v. Seehorn*, 99 Mo. App. 598, 74 S. W. 445, holding lien of one tenant in common against another for contribution to purchase price superior to judgments of individual creditors; *Hemm v. Juede*, 153 Mo. App. 271, 133 S. W. 620, holding that assets of firm must be applied to satisfaction of firm creditors to exclusion of individual creditors of individual partners; *Ault v. Bradley*, 191 Mo. 731, 90 S. W. 775, holding partnership creditors have first and exclusive claim on partnership assets of bankrupt and insolvent partners, individual creditors first and exclusive claim on property of individual partners; *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 658, 78 S. W. 1049, holding prior attachment of partnership property by individual creditor cannot give him prior rights over partnership creditor, when all proceedings are pending at same time, and partnership creditors have set up claim of priority by proceeding for receiver; *Blake v. Sargent*, 152 Fed. 265, holding preferential right of partnership creditors to partnership assets does not constitute lien in law upon assets, but exists in equity, between the partners, through whom it is worked out for benefit of society creditors.

Cited in footnotes to *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate, with other partners' consent, interest in firm to pay individual in preference to firm debts; *Re Baldwin*, 58 L. R. A. 122, which sustains individual liability of member of banking firm, signing name to certificate of deposit, enforceable against estate in preference to claims against firm.

Cited in note (43 Am. St. Rep. 370) on rights and remedies of partnership creditors.

Limited in *McDonald v. Cash*, 57 Mo. App. 543, holding partnership creditor's priority over individual does not prevail in case of bona fide sale of firm assets to one partner.

12 L. R. A. 257, *SCHUMAKER v. ST. PAUL & D. R. CO.* 46 Minn. 39, 48 N. W. 559.

Proximate cause.

Cited in *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 158, 84 N. E. 549, holding that it is not necessary to show that consequences of negligence could have been foreseen; *Elliff v. Oregon R. & Nav. Co.* 53 Or. 76, 99 Pac. 76, holding that case should be submitted to jury, where it is doubtful which of several probable causes produced injury; *Washington, A. & M. V. R. Co. v. Lukens*, 32 App. D. C. 455, on what is the proximate cause of an injury as being a question for the jury.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors blown on track by severe gale, not proximate cause of derailment of engine.

Cited in note (36 Am. St. Rep. 848, 851) on proximate and remote cause.

Duty to transport employee.

Distinguished in *King v. Interstate Consol. R. Co.* 23 R. I. 590, 70 L.R.A. 924,

51 Atl. 301, holding declaration alleging railroad's refusal to carry snow shoveller home, not showing express or implied promise, demurrable.

Measure of damages in actions for torts.

Cited in *Beaulieu v. Great Northern R. Co.* 103 Minn. 63, 19 L.R.A.(N.S.) 574, 114 N. W. 353, 14 A. & E. Ann. Cas. 462 (dissenting opinion), on the measure of damages in a tort action.

Expert evidence.

Cited in *Galveston, H. & S. A. R. Co. v. Stoy*, 44 Tex. Civ. App. 452, 99 S. W. 135, holding answer of medical expert to hypothetical question based on proven facts, that plaintiff's nervous condition was due to injuries inflicted by defendant, instead of the outcome of a previous nervous attack, admissible.

Duty of master to protect servant from cold.

Cited in note (70 L.R.A. 925) on duty of master to furnish protection to servant whose work requires exposure to cold.

12 L. R. A. 259, *LOSTUTTER v. AURORA*, 126 Ind. 436, 26 N. E. 184.

Nuisance.

Cited in *Savage v. Salem*, 23 Or. 385, 24 L. R. A. 789, 37 Am. St. Rep. 688, 31 Pac. 832, holding street tanks to supply contractor's street sprinklers not nuisances per se; *League v. Bloomington*, 40 Ind. App. 73, 81 N. E. 103, holding grass plots and shade trees along sidewalk lawful obstructions.

Ownership of fee and servitudes in highways.

Cited in *Hamilton County v. Indianapolis Natural Gas. Co.* 134 Ind. 213, 33 N. E. 972, holding abutting owners presumptively entitled to all rights in highway not inconsistent with public easement; *Egbert v. Lake Shore & M. S. R. Co.* 6 Ind. App. 354, 33 N. E. 659, holding railroad liable to abutting owner for changing grade of street under statutory authority; *Haslett v. New Albany Belt & Terminal R. Co.* 7 Ind. App. 607, 34 N. E. 845, holding abutting owner entitled to damages for additional burden of railroad constructed in street by municipal permission; *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 162, 39 N. E. 423, holding abutting owner entitled to compensation for pipe line in highway; *Kinsey v. Union Traction Co.* 169 Ind. 578, 81 N. E. 922, holding abutting owner cannot be deprived of special rights or interests in highway which he has in addition to fee therein except upon appropriation by state for public, upon payment of just compensation; *Mordhurst v. Ft. Wayne & S. W. Traction Co.* 163 Ind. 281, 66 L.R.A. 106, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967, holding inter-urban electric railroad not additional servitude upon street; *Sandpoint v. Doyle*, 14 Idaho, 758, 17 L.R.A.(N.S.) 501, 95 Pac. 945, on abutting owner's right of ingress to and egress from his property by way of street; *Mordhurst v. Ft. Wayne & S. W. Traction Co.* 163 Ind. 273, 66 L.R.A. 316, 106 Am. St. Rep. 222, 71 N. E. 642, 2 A. & E. Ann. Cas. 967, holding railroad presumed to use good faith and fair dealing and not break its contract with city concerning use of streets for its road.

Cited in footnote to *Wright v. Austin*, 65 L.R.A. 949, which holds that highway easement does not include the right to bore wells within highway limits to obtain water for sprinkling and keeping roads in repair.

12 L. R. A. 261, *WALLER v. BOWLING*, 108 N. C. 289, 12 S. E. 990.

Trial practice; submission of issues.

Cited in *Smith v. Norfolk & S. R. Co.* 114 N. C. 763, 19 S. E. 923, holding trial judge may submit all or portion of issues raised by pleadings, if sufficient basis for court to proceed to judgment.

Distinguished in *Parker v. Brown*, 136 N. C. 289, 48 S. E. 657, holding court properly refused to dismiss action for an accounting where reason giving amounted in effect to a denial of a duty to account.

Liability of cotenant for use of common property.

Cited in footnote to *Gage v. Gage*, 28 L. R. A. 829, holding cotenant accountable for use of common lands occupied without attempt to exclude other.

Cited in note (32 L. R. A. 422) on title by accession to crops, fruit, and timber wrongfully severed.

Sale of property by cotenant.

Cited in footnote to *Nevels v. Kentucky Lumber Co.* 49 L. R. A. 416, holding cotenant cannot without authority convey good title to timber standing on common land.

Fixtures.

Cited in *Cox v. Bern Lighting & Fuel Co.* 151 N. C. 66, 134 Am. St. Rep. 966, 65 S. E. 648, holding the mortgagee of realty has no equitable claim to chattels subsequently annexed by a conditional sale superior to claims of seller.

12 L. R. A. 268, *BUNTING v. HOGSETT*, 139 Pa. 363, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34.

Proximate cause of injury.

Cited in *Quigley v. Delaware & H. Canal Co.* 142 Pa. 397, 24 Am. St. Rep. 504, 21 Atl. 827, holding engineer's failure to signal approach proximate cause of injury to horse resulting from entanglement in wheel of lines dropped by driver; *Williams v. Woodward Iron Co.* 106 Ala. 258, 17 So. 517, holding closing of switch proximate cause of collision between runaway car and train on main line; *Gudfelder v. Pittsburg, C. C. & St. L. R. Co.* 207 Pa. 634, 57 Atl. 70, sustaining jury's finding that negligence in moving leaking car of naphtha near switch-light was proximate cause of injury by explosion of naphtha at sewer outlet; *Fishburn v. Burlington & N. W. R. Co.* 127 Iowa, 492, 103 N. W. 481, holding one may be held liable for anything which, after injury is complete, appears to have been a natural and probable consequence of his act; *Brady v. Kansas City, St. L. & C. R. Co.* 206 Mo. 537, 102 S. W. 978, holding it sufficient if injury was such as might have been foreseen and avoided by exercise of reasonable prudence on part of agent of company.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors blown on track by severe gale not proximate cause of derailment of engine.

Cited in note (36 Am. St. Rep. 810, 827, 851) on proximate and remote cause.

Imputing driver's negligence to passenger.

Cited in *Jones v. Lehigh & N. E. R. Co.* 202 Pa. 83, 51 Atl. 590, holding negligence of omnibus driver not imputable to passengers; *Duval v. Atlantic Coast Line R. Co.* 134 N. C. 345, 65 L. R. A. 728, 101 Am. St. Rep. 830, 46 S. E. 750, and *Farley v. Wilmington & N. C. Electric R. Co.* 3 Penn. (Del.) 586, 52 Atl. 543, holding negligence of driver not imputable to gratuitous passengers; *Kammerdiener v. Rayburn Twp.* 233 Pa. 330, 82 Atl. 464, holding that negligence of driver in taking unsafe horse on dangerous road when he could have taken safe road, cannot be imputed to person, merely riding with him; *Shultz v. Old Colony Street R. Co.* 193 Mass. 315, 8 L.R.A.(N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 A. & E. Ann. Cas. 402, holding the guest is not precluded from recovery against the third person by reason of the negligence of the driver where relation of master and servant, parent and child, or passenger and

carrier does not exist; *Loso v. Lancaster County*, 77 Neb. 470, 8 L.R.A.(N.S.) 625, 109 N. W. 752, holding recovery may be had by one riding in a wagon where free from negligence and injured by reason of defective bridge, though the driver may have been negligent.

Cited in footnote to *East Tennessee, V. & G. R. Co. v. Markens*, 14 L. R. A. 281, which holds hack driver's negligence in colliding with train not imputable to passenger.

Cited in notes (110 Am. St. Rep. 290; 8 L.R.A.(N.S.) 610, 619) on imputed negligence of driver to passenger.

Proximate cause; when question for jury.

Cited in *Van Houten v. Fleischman*, 1 Misc. 135, 20 N. Y. Supp. 643, holding proximate cause question for jury where accident attributable to either cause; *Hunter v. Pennsylvania R. Co.* 45 Pa. Super. Ct. 475, to the point that if facts are in dispute question of remote or proximate cause must go to jury.

Liability for concurrent negligence.

Cited in *Washington & G. R. Co. v. Hickey*, 5 App. D. C. 470, holding railroad and street car companies jointly and severally liable for concurrent negligence; *Downey v. Philadelphia Traction Co.* 14 Pa. Co. Ct. 252, 3 Pa. Dist. R. 82, holding railroad and street car companies jointly and severally liable for collision caused by negligence of both; *Brown v. Cox Bros. & Co.* 75 Fed. 691, holding steamboat and coal companies jointly and severally liable for falling of bucket on steamboat employee during delivery of coal; *Pugh v. Chesapeake & O. R. Co.* 101 Ky. 83, 72 Am. St. Rep. 392, 39 S. W. 695, holding railroad company and its employees jointly and severally liable for injury resulting from defective equipment and negligent management of train; *Eckert v. Pennsylvania R. Co.* 211 Pa. 272, 107 Am. St. Rep. 571, 60 Atl. 781, holding though defendant's choice of another car was a negligent act if defective condition of car aided in bringing about injuries carrier was liable; *Gibson v. Bessemer & L. E. R. Co.* 37 Pa. Super. Ct. 75, holding railroad liable to liveryman for death of horse from joint negligence of railroad and bailee.

12 L. R. A. 270, *LEMMON v. STRONG*, 59 Conn. 448, 21 Am. St. Rep. 123, 22 Atl. 293.

Incidents following assigned instrument.

Cited in *Wooley v. Moore*, 61 N. J. L. 18, 38 Atl. 758, holding assignment of bond carries with it collateral guaranty; *Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 149, holding the assignment of an underwriting agreement and bonds to secure loan carried with it title to certificates of stock to make it effective.

Cited in note (64 Am. St. Rep. 402) on assignment of note as carrying guaranty of collection.

Distinguished in *Smith v. Williams*, 117 Ga. 784, 97 Am. St. Rep. 220, 45 S. E. 394, holding a warranty of title in the sale of personal property does not run with the article sold.

Rights of assignee of guaranty.

Cited in *Weir v. Anthony*, 35 Neb. 399, 53 N. W. 206, upholding right of assignee of contract of guaranty to maintain action in own name.

12 L. R. A. 273, *BUTLER v. BARNES*, 60 Conn. 170, 21 Atl. 419.

Report of second appeal in 61 Conn. 399, 24 Atl. 328.

Mutual mistake as ground for equitable relief.

Cited in *Ezell v. Peyton*, 134 Mo. 490, 36 S. W. 35, reforming deed so as to

embrace all land pointed out by grantor; *Eustis Mfg. Co. v. Saco Brick Co.* 198 Mass. 220, 84 N. E. 449, on ground for reformation in accordance with intention of parties.

Cited in footnotes to *Bigham v. Madison*, 47 L. R. A. 267, which authorizes rescission for mutual mistake as to location of boundary lines pointed out by vendor; *Decker v. Schulze*, 27 L. R. A. 335, which holds mere breach of covenant as to title not ground for rescinding executed sale of land.

Cited in notes (28 L.R.A.(N.S.) 898, 908) on relief from mistake of law as to effect of instrument; (65 Am. St. Rep. 482; 37 L. ed. U. S. 455) on reformation of contract for mutual mistake.

Joinder of causes of action.

Cited in *Thresher v. Stonington Sav. Bank*, 68 Conn. 205, 36 Atl. 38, holding legal and equitable relief demandable in one complaint; *West v. Suda*, 69 Conn. 63, 36 Atl. 1015, holding reformation of contract and damages for breach as reformed may be demanded in same action.

Covenants running with land.

Cited in *Hall v. Allis*, 73 Conn. 245, 47 Atl. 362, holding covenant to save grantee harmless from all encumbrances runs with land.

Cited in note (82 Am. St. Rep. 676, 685, 686, 689) on what covenants run with the land.

Effect of grant of new trial.

Distinguished in *Fritts v. New York & N. E. R. Co.* 63 Conn. 458, 28 Atl. 529, holding unqualified grant by supreme court of new trial means new trial of entire cause.

12 L. R. A. 279, *SMITHWICK v. HALL & U. CO.* 59 Conn. 261, 21 Am. St. Rep. 104, 21 Atl. 924.

Proximate cause.

Cited in *Nugent v. New Haven Street R. Co.* 73 Conn. 141, 46 Atl. 875, holding standing on footboard of car not proximate cause of injury to passenger struck by pole; *Lake Erie & W. R. Co. v. Craig*, 19 C. C. A. 635, 37 U. S. App. 654, 73 Fed. 645, holding proximate cause of injury to switchman negligently going between moving cars, catching foot in unblocked frog, question for jury.

Annotation cited in *Noe v. Rapid R. Co.* 133 Mich. 163, 94 N. W. 743 (dissenting opinion), on what constitutes proximate cause.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire cause of destruction of property by back fire; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall while horse attempting to rise; *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Bunting v. Hogsett*, 12 L. R. A. 268, which holds negligence of engineer of donkey engine on circular track, in causing collision with passenger train at one crossing, proximate cause of injury by second collision on other crossing; *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, which holds master's neglect to furnish transportation proximate cause of injury received while walking to find shelter; *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors, blown on track by severe gale, not proximate cause of derailment of engine; *Nelson v. Narragansett E. L. Co.* 67 L.R.A. 116, which holds placing

of electric light close to trolley wire at a curve not proximate cause of injury to one struck by glass falling from globe when broken byrolley leaving wire; *Stephenson v. Corder*, 69 L.R.A. 246, which holds striking of one horse of heavily loaded team by boy in turning over hitching rail proximate cause of their breaking loose and running over person; *Cohn v. May*, 69 L.R.A. 800, which holds occupant of lower floors who block stairway liable for injury to tenant of upper floor who is thereby compelled to drop a considerable distance to escape a fire.

Cited in note (43 L. R. A. 354) on duties of master and servant as to rules promulgated for safe conduct of business.

Intervening of co-operating causes.

Cited in footnotes to *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds negligent jolting of train, hurling passenger through door on track insensible, cause of death by train of other company; *Hayes v. Hyde Park*, 12 L. R. A. 249, which holds town guilty of negligence not relieved from liability by third person's co-operation; *Daniels v. New York, N. H. & H. R. Co.* 62 L. R. A. 751, denying liability of one causing negligent injury, for suicide of one rendered insane thereby; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416, which denies liability of owner of building to visitor falling down elevator shaft, unfastened door of which was thrown open by stranger.

Cited in note (17 L. R. A. 38) on effect of concurring negligence of third person on liability of one sued for negligently causing injury.

Effect of omission increasing loss from another's negligence.

Cited in *Belcher v. Missouri, K. & T. R. Co.* 92 Tex. 597, 50 S. W. 559, holding neglect to procure other feed for cattle does not defeat, but reduces, recovery in action against railroad for delay in transporting feed.

Contributory negligence.

Cited in *McElligott v. Randolph*, 61 Conn. 165, 29 Am. St. Rep. 181, 22 Atl. 1094, holding employee's remaining late at work, although requested by superintendent to go home early, not contributory negligence; *Julian v. Stony Creek Red Granite Co.* 71 Conn. 638, 42 Atl. 994, holding employee not knowing derrick likely to fall not guilty of contributory negligence in working beneath it; *Morelli v. Noera Mfg. Co.* 81 Conn. 449, 71 Atl. 353, holding there can be no recovery where workman persistently and wilfully disregarded warnings and disobeyed reasonable directions given him by superintendent; *Pilmer v. Boise Traction Co.* 14 Idaho, 340, 15 L.R.A.(N.S.) 264, 125 Am. St. Rep. 161, 94 Pac. 432, holding any negligence not the proximate cause will not bar a recovery; *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 396, 102 Pac. 347; *Union P. R. Co. v. Connolly*, 77 Neb. 276, 109 N. W. 368,—holding an act or omission to constitute contributory negligence, must operate as a proximate cause, and not merely as a condition; *Bowman v. Humphrey*, 132 Iowa, 238, 6 L.R.A.(N.S.) 1113, 109 N. W. 714, 11 A. & E. Ann. Cas. 131, holding fact that plaintiff had cast foul material in same stream would not preclude recovery for damages due to a nuisance created on plaintiff's land by reason of defendant's act in casting waste materials in stream; *Cavanaugh v. Windsor Cut Stone Corp.* 80 Conn. 592, 69 Atl. 345, holding disobedience of workman in not changing position as directed where personal safety was not involved in order is considered a condition and does not preclude a recovery; *Gilmore v. American Tube & Stamping Co.* 79 Conn. 506, 66 Atl. 4, holding a workman is not necessarily negligent in failing to move a dome in a particular way where he had no reason to anticipate danger, where he successfully avoids the danger against which he is warned; *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 214, 40 So. 280, hold-

ing if a person chooses to be negligent as to one danger pointed out it does not necessarily follow that he is guilty of contributory negligence as to another arising from intervention of act he did not have notice of.

Cited in note (24 Am. St. Rep. 398) on contributory negligence as a bar to recovery.

Distinguished in *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 535, holding contributory negligence of a brakeman was defense where injuries result while coupling cars without using couplers provided though he trips over a defective switch block.

What constitutes negligence.

Cited in notes (24 Am. St. Rep. 343) on what constitutes negligence; (69 L.R.A. 537) on negligence in not guarding against unknown danger.

12 L. R. A. 285, *MANSFIELD v. LYNCH*, 59 Conn. 320, 22 Atl. 313.

Right of administrator de bonis non to recover administered assets.

Cited in *Mills v. Britton*, 64 Conn. 25, 24 L. R. A. 542, 29 Atl. 231, upholding right of administrator *de bonis non* to recover stock erroneously transferred by executor in payment of debt; *Chamberlin's Appeal*, 70 Conn. 376, 41 L. R. A. 207, 39 Atl. 734, sustaining right of administrator *de bonis non* to recover property placed by executor in hands of trustee of invalid trust; *Woodruff v. H. B. Claflin Co.* 198 N. Y. 474, 28 L.R.A.(N.S.) 443, 91 N. E. 1103, holding administrator paying a claim in full under belief that estate is solvent may recover money paid in excess of pro rata dividend rightfully belonging to a creditor.

Right to recover payment made under mistake.

Cited in *Tarplee v. Capp*, 25 Ind. App. 61, 56 N. E. 270, holding overpayment to creditor by executor in mistaken belief of solvency of estate recoverable; *Bristol v. New Britain*, 71 Conn. 206, 41 Atl. 548, upholding town's right to recover from another town payment mistakenly made for support of paupers; *Thorsen v. Hooper*, 57 Or. 80, 109 Pac. 388, holding that administrator may recover back from creditor sum in excess of pro rata share, which was paid through mistake of fact; *New York, N. H. & H. R. Co. v. Ansonia Electrical Co.* 83 Conn. 464, 76 Atl. 1004, holding that carrier, who under belief that goods had been lost in transitu paid shipper, may upon discovering that goods were delivered in due course, recover back amount so paid.

Cited in footnotes to *Behring v. Somerville*, 49 L.R.A. 578, which denies right of mortgagor, compelled to pay first assignee, to recover amount previously paid second assignee who surrendered mortgage; *Scott v. Ford*, 68 L.R.A. 469, which denies right to recover back money paid by executors under mistaken belief that payee was entitled thereto as representative of a deceased legatee.

Cited in note in (28 L.R.A.(N.S.) 883, 908) on relief from mistake of law as to effect of instrument.

Distinguished in *First Nat. Bank v. Alton*, 60 Conn. 409, 22 Atl. 1010, denying right of bank discounting supposed negotiable note to recover amount advanced from accommodation indorser; *Monroe Nat. Bank v. Catlin*, 82 Conn. 231, 73 Atl. 3, holding there can be no recovery by reason of mistake as to legal liability where payment is made with full knowledge of facts of a moral obligation—the object being to avoid litigation.

12 L. R. A. 288, *ZINN v. RICE*, 154 Mass. 1, 27 N. E. 772.

Malicious prosecution.

Cited in *American Circular Loom Co. v. Wilson*, 198 Mass. 211, 126 Am. St. Rep. 409, 84 N. E. 133, holding where defendant in equity suit has suffered

damages by reason of injunction pendente lite without bond of indemnity his only action is for malicious abuse of legal process.

Cited in footnote to *Luby v. Bennett*, 56 L. R. A. 261, which holds suit for malicious prosecution maintainable if material issues of prosecution decided in defendant's favor before suit commenced.

Cited in notes (2 L.R.A.(N.S.) 950) as to when action sufficiently at an end to support action for malicious prosecution; (93 Am. St. Rep. 471) on liability for malicious prosecution of civil action.

Excessive attachment.

Cited in *Tamblyn v. Johnston*, 62 C. C. A. 605, 126 Fed. 271, holding malicious excessive attachment actionable.

12 L. R. A. 290, *RAY v. WESTERN PENNSYLVANIA NATURAL GAS CO.* 138 Pa. 576, 21 Am. St. Rep. 922, 20 Atl. 1065.

Rights of parties to a lease of oil and gas lands.

Cited in *Ulrey v. Poe*, 134 Ill. App. 304, holding a lease authorizing explorations for gas or oil confers merely an inchoate right of exploration only, until gas or oil is actually found, when it becomes vested; *Toothman v. Courtney*, 62 W. Va. 173, 58 S. E. 915, holding courts recognize an implied obligation on part of grantee or lessee, in construing contracts and deeds relating to oil and gas, in favor of the grantor or lessor; *Vanvoorhis v. Oliver*, 22 Pittsb. L. J. N. S. 114; *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 148, 71 N. E. 489,—holding payment in advance of a stipulated price for each year of delay in exploring and developing land for gas or oil was a matter about which parties had a right to contract.

Distinguished in *Ringle v. Quigg*, 74 Kan. 590, 87 Pac. 724, holding a lease not void as inherently vicious from facts that lease is ambiguous or from stipulation that at end of five years lessee may keep lease in force by an act he is unable to perform at date of lease.

Occupancy of lessor as re-entry.

Cited in *Wilson v. Goldstein*, 12 Pa. Co. Ct. 338, holding occupancy of lessor at and after breach of covenant in gas lease will not work forfeiture against his will.

Re-entry as essential to forfeiture.

Cited in *Johnson v. Lehigh Valley Traction Co.* 130 Fed. 942, holding forfeiture of lease for default in payment, lessor not resuming possession, will not be enforced where payment was subsequently accepted.

Default creating forfeiture as defense.

Cited in *Verdolite Co. v. Richards*, 7 Northampton Co. Rep. 119, holding provision for forfeiture of lease for nonperformance by lessee, for benefit of lessor alone; *Chambers v. Anderson*, 51 Kan. 392, 32 Pac. 1098, holding provision avoiding land contract on default in payments available to vendor only; *Cape May Real Estate Co. v. Henderson*, 42 Pa. Super. Ct. 4, holding that grantee cannot set up his own default as defense to action for money due, unless language clearly expresses that right; *Cape May Real Estate Co. v. Henderson*, 231 Pa. 84, 79 Atl. 982, holding that covenants that contract shall become void on failure of grantee to pay at specified time, are not self-operating.

Cited in notes (26 Am. St. Rep. 911, 912, 913) on forfeiture of lease for breach of condition by lessee; (15 Eng. Rul. Cas. 566) on lessor's option to avoid lease on lessee's omission or commission of acts stipulated for or against.

— Oil and gas leases.

Followed in *Edmonds v. Mounsey*, 15 Ind. App. 404, 44 N. E. 196; *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 128, 55 N. E. 233; *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 353, 52 N. E. 182; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 178, 34 L. R. A. 67, 44 N. E. 1093; *Wheeling v. Phillips*, 10 Pa. Super. Ct. 637; *Miller v. Logan*, 31 Pittsb. L. J. N. S. 217; *Cochran v. Pew*, 159 Pa. 187, 33 W. N. C. 548, 28 Atl. 219; *Gibson v. Oliver*, 158 Pa. 280, 27 Atl. 961; *Jones v. Western Pennsylvania Natural Gas Co.* 146 Pa. 211, 29 W. N. C. 268, 23 Atl. 386; *Ogden v. Hatry*, 145 Pa. 641, 23 Atl. 334; *Springer v. Citizens' Natural Gas Co.* 145 Pa. 435, 22 Atl. 986,—holding forfeiture clause in oil lease inures to benefit of lessor only.

Cited in note (31 L. R. A. 675) on forfeiture of oil and gas lease.

Distinguished in *Glasgow v. Chartiers Oil Co.* 152 Pa. 52, 31 W. N. C. 209, 25 Atl. 232, denying liability of lessee after forfeiture where lease provides for forfeiture unless well is completed within certain time, or payment is made for each additional month.

— Leases by married women.

Followed in *Agerter v. Vandergrift*, 138 Pa. 593, 21 Atl. 202, holding fact that gas lease by married woman was not acknowledged so as to bind her, no defense to action for rentals after performance on her part.

Provision ending lessees' liability on surrender.

Cited in *Bettman v. Shadle*, 22 Ind. App. 548, 53 N. E. 662, and *Aderhold v. Oil Well Supply Co.* 33 W. N. C. 338, holding lessee liable on oil lease providing that surrender terminates liability, for rent previously accruing; *Douthett v. Gibson*, 11 Pa. Super. Ct. 546, raising, without deciding, question of liability of lessee surrendering lease providing that surrender releases him from moneys due, after rent accrued.

Distinguished in *Ramsey v. White*, 21 Pittsb. L. J. N. S. 426, holding surrender of oil lease defense to rent, where lease provided that payments made would be full damages for breach of lease.

— Implied covenant to develop.

Cited in *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 563, 61 U. S. App. 576, 90 Fed. 181, and *Aye v. Philadelphia Co.* 193 Pa. 455, 74 Am. St. Rep. 696, 44 Atl. 555, holding lessee under oil lease providing for test well, which proves dry, impliedly bound to proceed with exploration with reasonable diligence; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 593, 59 L. R. A. 570, 40 S. E. 655, holding oil lease forfeited by failure to proceed with development, though lessor completed well agreed upon; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 162 Ind. 14, 62 L.R.A. 899, 67 N. E. 259, 22 Mor. Min. Rep. 680, holding condition subsequent to develop property implied in oil lease providing penalty for delay in completing test well; *Barnsdall v. Boley*, 119 Fed. 201, holding lessee completing only one well cannot enforce agreement for extension for "so long as oil or gas is found in paying quantities;" *Sharp v. Behr*, 117 Fed. 872, 8 Del. Co. Rep. 474, holding lessee on royalty impliedly bound to operate mine with reasonable diligence; *Mansfield Gas Co. v. Alexander*, 97 Ark. 171, 133 S. W. 837, holding that in lease of lands for purpose of prospecting for gas, upon consideration of payment of royalties, implied agreement to begin exploration within reasonable time exists; *Wilmore Coal Co. v. Brown*, 147 Fed. 942, holding a covenant to mine with reasonable diligence is unquestionably implied although no minimum amount is stated in the lease of coal mines; *Daughetee v. Ohio Oil Co.* 151 Ill. App. 107, holding it the duty of the lessee of oil lands to proceed with due diligence to fully develop the premises; *McIntosh v. Robb*,

4 Cal. App. 486, 88 Pac. 517, holding lessee of a mining lease providing for payment of royalties must proceed with the mining operations with reasonable diligence.

Effect of change in law on existing contracts or vested rights.

Cited in *Harlow v. Beaver Falls*, 188 Pa. 266, 41 Atl. 533, holding subsequent decision altering construction of statute granting municipal powers does not affect validity of contract made in reliance on former construction; *Weston v. Ralston*, 48 W. Va. 190, 36 S. E. 446 (concurring opinion), as to change in course of judicial decisions relating to real property not impairment of vested rights; *Middletown Drainage Co. v. Middletown*, 1 Dauphin Co. Rep. 113, holding contract between borough and drainage company not alterable by amendment of ordinance without latter's consent; *Falconer v. Simmons*, 51 W. Va. 175, 41 S. E. 193, holding change in judicial construction of statute not affect existing contract rights.

Cited in notes (16 L.R.A. 647) on change of decision of state court as unconstitutional impairment of contract; (44 L. ed. U. S. 886) on same point.

Adoption of judicial construction.

Cited in *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 33, 13 L. R. A. 244, 27 N. E. 849, holding judicial exposition in another state of common law applicable to commercial transactions not binding on courts; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 694, 56 L. R. A. 493, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority holding that contract will be interpreted by statutes of state where made, as construed by its courts, although conflicting with construction in forum; *Tennent v. Union Central L. Ins. Co.* 133 Mo. App. 353, 112 S. W. 754, holding when decision turns upon construction of the common law of a sister state, the court will follow its own precedents in expounding rules applicable to a particular transaction.

Judicial opinion as rule of decision.

Cited in *Crigler v. Shepler*, 79 Kan. 842, 23 L.R.A.(N.S.) 506, 101 Pac. 619, holding courts do not and cannot change the law by overruling or modifying former opinions; *Swanson v. Ottumwa*, 131 Iowa, 550, 5 L.R.A.(N.S.) 867, 106 N. W. 9, 9 A. & E. Ann. Cas. 1117, holding a judicial decision is not a law; *Pickens v. Coal River Boom & Timber Co.* 66 W. Va. 24, 24 L.R.A.(N.S.) 362, 65 S. E. 865 (dissenting opinion), on justification for following judicial decision where erroneous; *State v. O'Neil*, 147 Iowa, 526, 33 L.R.A.(N.S.) 796, 126 N. W. 454, Ann. Cas. 1912B, 691, holding that person cannot be punished for selling liquor under void statute subsequently held valid; *Bethlehem v. Hemingway*, 9 North Co. Rep. 367, 14 Pa. Dist. R. 657, on effect of a decision on a similar obligation arising from subsequent action.

Waiver of forfeiture of lease.

Cited in note (15 Eng. Rul. Cas. 790) on waiver of forfeiture incurred by breach of covenant.

12 L. R. A. 293, *GRAHAM v. PENNSYLVANIA CO.* 139 Pa. 149, 21 Atl. 151.

Admissibility of witness's opinion.

Cited in *McNerney v. Reading City*, 150 Pa. 616, 30 W. N. C. 535, 25 Atl. 57, holding witness's opinion that unguarded areaway in sidewalk is dangerous admissible; *Ryan v. Bristol*, 63 Conn. 38, 27 Atl. 309, holding opinions as to dangerous condition of bridge admissible; *Edwards v. Worcester*, 172 Mass. 105, 51 N. E. 447, holding opinion as to safety of described highway inadmissible; *Beardslee v. Columbia Twp.* 5 Lack. Legal News, 293, holding opinion as to safety of clearly described road inadmissible; *Siegler v. Mellinger*, 203 Pa. 259, 93 Am. St. Rep.

768, 52 Atl. 175, holding opinions as to safety of footpath inadmissible; *Closser v. Washington Twp.* 11 Pa. Super. Ct. 124, holding opinion as to safety of road described by plans and photographs inadmissible; *Salsberg v. Dallas*, 10 Kulp, 48, holding opinion of witnesses not testifying to actual condition, as to safety of highway, improperly admitted; *Platz v. McKean Twp.* 178 Pa. 611, 39 W. N. C. 481, 36 Atl. 136, holding opinion evidence as to condition of sluice in highway inadmissible; *Auberle v. McKeesport*, 179 Pa. 324, 39 W. N. C. 424, 36 Atl. 212, holding opinions as to whether absence of guard rail rendered bridge dangerous inadmissible; *Louisville & N. R. Co. v. Tegner*, 125 Ala. 600, 28 So. 510, holding opinion as to dangerous condition of worn track inadmissible. (Reversed on rehearing in 125 Ala. 602, 28 So. 513); *Dooner v. Delaware & H. Canal Co.* 164 Pa. 33, 30 Atl. 269, holding opinion evidence that freight car without handles, grab-irons, or ladders, dangerous, inadmissible; *Woekner v. Erie Electric Motor Co.* 187 Pa. 208, 43 W. N. C. 52, 41 Atl. 28, holding opinion that motorman exercised good judgment in releasing brake inadmissible; *Reese v. Clark*, 198 Pa. 320, 47 Atl. 994, holding opinion as to whether watchman could give sufficient notice to permit person to escape from falling plate inadmissible; *Beardslee v. Columbia Twp.* 188 Pa. 503, 44 W. N. C. 338, 68 Am. St. Rep. 883, 41 Atl. 617, holding opinion of nonexpert as to contributory negligence in highway, based on hypothetical case, as to horses, harness, wagon and load, inadmissible; *Com. v. Hufnal*, 4 Pa. Super. Ct. 327, 40 W. N. C. 367, holding opinion evidence as to meaning of term "skimmed milk" inadmissible; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 371, 36 U. S. App. 682, 74 Fed. 159, holding opinion as to safety of drawing marble slabs vertically placed, with man standing between, inadmissible; *Bruce v. Beall*, 99 Tenn. 313, 41 S. W. 445, holding opinion of expert that keeping elevator cable running for more than six or seven years would be imprudent, inadmissible; *Easler v. Southern R. Co.* 59 S. C. 314, 37 S. E. 938, holding opinion of passenger whether fellow passenger had time to get off train at station admissible; *State v. Barrett*, 33 Or. 196, 54 Pac. 807, holding witness's opinion that body of person shot was not, when he saw it, in original position, admissible; *First Nat. Bank v. Fire Asso.* 33 Or. 181, 53 Pac. 8, holding evidence of skilled firemen as to whether fire burned naturally, or as if accelerated by inflammable substance, admissible; *Com. v. Gibbons*, 3 Pa. Super. Ct. 411, 39 W. N. C. 567, holding opinion of witness in abortion case as to cause of soiled bedclothing admissible; *Whitaker v. Campbell*, 187 Pa. 117, 41 Atl. 38, holding opinion evidence as to safety of cleaning machine in motion admissible; *Cookson v. Pittsburg & W. R. Co.* 179 Pa. 193, 40 W. N. C. 106, 36 Atl. 194, holding opinions as to relative advantages of places to look and listen for approaching train admissible; *Shapter v. Pillar*, 28 Colo. 215, 63 Pac. 302, holding opinions as to incapacity of alleged insane person to manage business inadmissible; *Weiss v. Kohlhausen*, 58 Or. 152, — L.R.A.(N.S.) —, 113 Pac. 46, holding that necessity for opinion evidence only exists where facts in controversy are incapable of being detailed and described so as to give jury intelligible understanding concerning them; *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 110 Va. 267, 65 S. E. 557, holding that witness who has made floating logs a business, and who is acquainted with stream, may give his opinion as to whether or not stream is floatable; *McKim v. Philadelphia*, 217 Pa. 252, 19 L.R.A.(N.S.) 519, 66 Atl. 340, holding where mere descriptive language is inadequate to convey to the jury the precise facts, a witness may be allowed to supplement it by his opinion; *Com. v. Eyler*, 217 Pa. 515, 11 L.R.A.(N.S.) 641, 66 Atl. 746, 10 A. & E. Ann. Cas. 786, holding it allowable that a witness who had actual knowledge and observation of a crime should supplement by giving his opinion; *Philadelphia v. Dobbins*, 24 Pa. Super. Ct. 140, holding

urban or rural character of land not question for experts when full situation may be elicited by evidence to jury; *National Biscuit Co. v. Nolan*, 70 C. C. A. 436, 138 Fed. 9, holding the opinion of so-called experts is not received if all the facts can be ascertained and made intelligible to the jury.

Cited in footnote to *Tullis v. Rankin*, 35 L. R. A. 449, which holds opinion of surgeon as to cause of fully described condition of limb admissible.

Cited in notes (26 Am. St. Rep. 515) on expert testimony; (30 Am. St. Rep. 39) on admissibility of nonexpert opinions.

Contributory negligence.

Cited in *Mahler v. Hartman*, 27 Lanc. L. Rev. 317, to the point that if any act of commission or omission, on part of passenger, contributed to injury, he cannot recover.

Duty of railway as to platform.

Cited in *Stein v. White City Amusement Co.* 23 Montg. Co. L. Rep. 147, holding that railway must keep platform reasonably safe for passengers.

Presumable negligence.

Cited in *Clunn v. Williamsport & N. B. R. Co.* 39 Pa. Super. Ct. 596, holding presumption of negligence not applicable where departing passenger after train had gone stumbled over car stool which she might have seen in the way; *Green v. Baltimore & O. R. Co.* 14 Pa. Dist. R. 293, 32 Pa. Co. Ct. 279, holding negligence not presumable from mere fact that passenger fell over a cuspidor which had been moved out into aisle of station room.

12 L. R. A. 297, *WILLIAMSON v. NEWPORT NEWS & M. VALLEY CO.* 34 W. Va. 657, 26 Am. St. Rep. 927, 12 S. E. 824.

Servant's assumption of risk.

Cited in *Woodell v. West Virginia Improv. Co.* 38 W. Va. 44, 17 S. E. 386, holding employee on construction train continuing in employment with knowledge of dangerous overhanging limb assumes risk.

Cited in footnotes to *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds risk from wing fences at cattle guards assumed by brakemen; *Coyle v. Griffing Iron Co.* 47 L. R. A. 147, which holds servant assumes obvious risk from using machine from which bolt missing.

Demurring to evidence.

Cited in *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 431, 32 L. R. A. 361, 34 S. W. 1029, holding practice of demurring to evidence prevails in Tennessee.

12 L. R. A. 301, *SMITH v. CARROLL*, 17 R. I. 125, 20 Atl. 227, 21 Atl. 343.

Sufficiency of amended plea, how raised.

Cited in *Griswold v. Hazard*, 141 U. S. 289, 35 L. ed. 690, 11 Sup. Ct. Rep. 972, holding demurrer appropriate to raise questions arising upon amended pleas, filed after demurrer to original pleas.

Right to garnish a verdict.

Cited in *Cappelli v. Wood*, 27 R. I. 413, 4 L.R.A.(N.S.) 625, 114 Am. St. Rep. 54, 62 Atl. 978, holding a verdict cannot be made the subject of garnishment.

12 L. R. A. 302, *BERNARD v. WHITNEY NAT. BANK*, 43 La. Ann. 50, 8 So. 702.

Liability of bank on unrepresented check.

Cited in *State ex rel. St. Amand v. Bank of Commerce*, 49 La. Ann. 1079, 22 So. 207, denying bank's liability on unrepresented check.

Cited in footnote to *Love v. Ardmore Stock Exchange*, 67 L.R.A. 617, which

holds check on open bank account not an assignment of the fund or superior to subsequent attachment levied on such fund before presentation of check for payment.

Effect of drawer's death on payment of check.

Cited in footnote to *Raesser v. National Exch. Bank*, 56 L. R. A. 174, which holds bank's authority to pay check working assignment *pro tanto* of fund not revoked by depositor's death.

12 L. R. A. 307, *ELYTON LAND CO. v. BIRMINGHAM WAREHOUSE & ELEVATOR CO.* 92 Ala. 407, 25 Am. St. Rep. 65, 9 So. 129.

Corporate capital as trust fund.

Cited in *Corey v. Wadsworth*, 99 Ala. 75, 23 L. R. A. 620, 42 Am. St. Rep. 29, 11 So. 350, holding director of insolvent corporation cannot be made preferred creditor.

Limitation on issue of stock and bonds.

Cited in *Coe v. East & West R. Co.* 52 Fed. 538, holding stock and bonds issued for construction of railroad at fair valuation valid; *Grant v. East & West R. Co.* 4 C. C. A. 518, 13 U. S. App. 1, 54 Fed. 576, holding stock and bonds issued for railroad property at fair valuation valid; *Williams v. Searey*, 94 Ala. 363, 10 So. 632, excluding parol evidence to show contract to issue stock to certain amount for property purchased meant double amount; *Kolsky v. Enslen*, 103 Ala. 102, 15 So. 558, holding (*obiter*) only stock issued for money, labor, or property at reasonable value, valid; *McKee v. Title Ins. & T. Co.* 159 Cal. 219, 113 Pac. 140, holding that corporation which is going concern may discount its bonds; *Lea v. Iron Belt Mercantile Co.* 147 Ala. 423, 8 L.R.A.(N.S.) 280, 119 Am. St. Rep. 93, 42 So. 415, on requirement that stock be paid in money or property at its reasonable value; *Macbeth v. Banfield*, 45 Or. 565, 106 Am. St. Rep. 670, 78 Pac. 693, holding right of directors of corporation to pay stock subscription in property is limited to payment in that which may fairly and justly be considered as moneys worth.

Distinguished in effect in *Nelson v. Hubbard*, 96 Ala. 250, 17 L. R. A. 379, 11 So. 428, holding limitation on issue of corporate bonds, except for full value in money or property, does not prevent pledge in excess of indebtedness.

Right of stockholders in insolvent corporation.

Cited in *Birmingham Min. & Mfg. Co. v. Mutual Loan & T. Co.* 96 Ala. 368, 11 So. 368, sustaining right of stockholders of insolvent corporation to enjoin suits brought by collusion with directors.

Pleading in action against holder of fictitious stock.

Cited in *Lea v. Iron Belt Mercantile Co.* 119 Ala. 276, 24 So. 28, holding averment in corporation creditor's bill that stock issued for grossly overvalued property sufficiently charges fraud.

Fraudulent representation.

Distinguished in *Griel v. Lomax*, 94 Ala. 645, 10 So. 232, holding expression of opinion as to legal effect of contract not fraudulent representation.

Liability on stock issued for overvalued property.

Followed without special discussion in *Montgomery Iron Works v. Capital City Ins. Co.* 137 Ala. 146, 34 So. 210.

Cited in *Van Cleve v. Berkey*, 143 Mo. 126, 42 L. R. A. 601, 44 S. W. 743; *Gilkie & A. Co. v. Dawson Town & Gas Co.* 46 Neb. 349, 64 N. W. 978; *Roman v. Dimmick*, 123 Ala. 374, 26 So. 214 (*obiter*); *Pickering v. Townsend*, 118 Ala. 359, 23 So. 703; *Roman v. Dimmick*, 115 Ala. 238, 22 So. 109,—holding stockholder liable to corporate creditors for difference between amount of stock and fair

value of consideration, irrespective of fraud; *Manhattan Trust Co. v. Seattle Coal & I. Co.* 16 Wash. 520, 48 Pac. 333, holding issue of stock for grossly overvalued property fraudulent as matter of law; *Kelly v. Clark*, 21 Mont. 325, 42 L. R. A. 629, 69 Am. St. Rep. 668, 53 Pac. 959, and *McClure v. Paducah Iron Co.* 90 Mo. App. 578, holding owners of shares issued for property knowingly overvalued liable to creditors for difference between fictitious and real value; *State Trust Co. v. Turner*, 111 Iowa, 669, 53 L. R. A. 138, 82 N. W. 1029, holding owner of stock issued for patent at speculation value liable to creditors for difference between fictitious and real value; *Kelley Bros. v. Fletcher*, 94 Tenn. 14, 28 S. W. 1099, and *Jones v. Whitworth*, 94 Tenn. 608, 30 S. W. 736, holding creditors must show fraud in issue of stock for overvalued property; *Jones v. Whitworth*, 94 Tenn. 614, 30 S. W. 736, raising, without deciding, question whether, in creditor's action against owners of stock issued for fraudulently overvalued property, recovery of difference or rescission of contract proper remedy; *Shields v. Clifton Hill Land Co.* 94 Tenn. 172, 26 L. R. A. 523, 45 Am. St. Rep. 700, 28 S. W. 668 (dissenting opinion), majority holding corporate creditors in action against owners of stock issued for property or services must prove fraud; *Vaughn v. Alabama Nat. Bank*, 143 Ala. 578, 42 So. 64, 5 A. & E. Ann. Cas. 665, holding creditor may enforce payment of note given in payment of stock issued under illegal agreement as to amount to be paid; *Allen v. Grant*, 122 Ga. 557, 50 S. E. 494, holding a contract between stockholder and corporation to receive less in money than fall of stock will not defeat right of creditors to full value; *Wall v. Basin Min. Co.* 16 Idaho, 330, 22 L.R.A.(N.S.) 1021, 101 Pac. 733, holding as between the company and stockholders a contract for stock providing that they should never be called upon to pay any further assessments upon stock is a valid agreement; *Re L. M. Alleman Hardware Co.* 172 Fed. 614, holding when only payment that can be shown for shares accepted, is by property fraudulently overvalued, it is the same as no payment whatever as against creditor's claims.

Cited in note (42 L. R. A. 600, 618) on how far payment of stock in corporation by transfer of property will protect shareholder against corporate creditors.

Distinguished in effect in *Nicrosi v. Irvine*, 102 Ala. 654, 48 Am. St. Rep. 92, 15 So. 429, holding owner of stock issued for overvalued property not liable as garnishees to judgment creditor.

12 L. R. A. 315, *FOLLETT v. UNITED STATES MUT. ACCL. ASSO.* 107 N. C. 240, 22 Am. St. Rep. 878, 12 S. E. 370.

False statements in application known to insurer's agent.

Reaffirmed on second appeal in 110 N. C. 377, 15 L. R. A. 668, 28 Am. St. Rep. 693, 14 S. E. 923, holding false statement in insurance application, known to local agent, will not avoid policy.

Cited in *New York L. Ins. Co. v. Russell*, 23 C. C. A. 52, 40 U. S. App. 530, 77 Fed. 104, holding information communicated to agent writing answers in insurance application attributable to company.

Cited in note (16 L. R. A. 34) on effect of knowledge by insurer's agent of falsity of statements in application.

Waiver of conditions in policy by agent.

Cited in *Dibrell v. Georgia Home Ins. Co.* 110 N. C. 209, 28 Am. St. Rep. 678, 14 S. E. 783, holding insurance adjuster may waive stipulation in policy limiting time to sue; *Bergeron v. Pamlico Ins. & Bkg. Co.* 111 N. C. 47, 15 S. E. 883, holding insurance company bound by waiver of condition in policy by agent's clerk; *Horton v. Home Ins. Co.* 122 N. C. 504, 65 Am. St. Rep. 717, 29 S. E. 944, holding failure of agent knowing of pending foreclosure, to cancel policy, waives condition avoiding it if foreclosure commenced.

Cited in note (13 L.R.A.(N.S.) 848) on effect of nonwaiver agreement on conditions existing at inception of policy.

Insurance company bound by agent's agreement.

Cited in *Bresee v. Crumpton*, 121 N. C. 125, 28 S. E. 351, holding premium note assigned by local to general agent of insurance company subject to equities.

12 L. R. A. 318, *OAKES v. NORTHERN P. R. CO.* 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230.

Carrier's duty as to baggage.

Cited in *Chicago, B. & Q. R. Co. v. Steear*, 53 Neb. 99, 73 N. W. 466, holding check prima facie evidence of receipt and nondelivery of baggage; *Cleveland, C. C. & St. L. R. Co. v. Tyler*, 9 Ind. App. 690, 35 N. E. 523, holding carrier's duty as to baggage arises from contract to carry passenger; hence, presentation of check unnecessary; *Illinois C. R. Co. v. Matthews*, 114 Ky. 978, 60 L. R. A. 847, 72 S. W. 302, holding statute requiring carrier to check baggage applies only to articles carried for personal use and convenience; *Saunders v. Southern R. Co.* 62 C. C. A. 529, 128 Fed. 21, holding carrier's implied contract to carry passenger's baggage without additional compensation does not cover theatrical paraphernalia; *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 384, 51 S. E. 973, holding where carrier knowingly permits passenger to take an article as baggage not properly such it will be liable for loss or damage to it; *New Orleans & N. E. R. Co. v. Shackelford*, 87 Miss. 615, 4 L.R.A.(N.S.) 1038, 112 Am. St. Rep. 461, 40 So. 427, 6 A. & E. Ann. Cas. 826, holding if carrier wishes to avoid liability for articles as baggage he must refuse to receive them in that way.

Carrier's liability for articles transported as baggage.

Cited in *Kansas City, Ft. S. & M. R. Co. v. McGahey*, 63 Ark. 348, 36 L. R. A. 784, 58 Am. St. Rep. 111, 38 S. W. 659, holding carrier knowingly receiving as baggage packages containing more than ordinary baggage liable therefor; *Armory v. Wabash R. Co.* 130 Mich. 408 90 N. W. 22, holding railroad company with knowledge or notice of contents of trunks liable for merchandise carried as baggage; *Wells v. Great Northern R. Co.* 59 Or. 172, 34 L.R.A.(N.S.) 823, 114 Pac. 92, holding that carrier accepting as baggage tools of watchmaker is liable for their loss; *Brooks v. Northern P. R. Co.* 58 Or. 391, 114 Pac. 949, holding that carrier is responsible for any delay in transporting baggage checked by it for passenger.

Cited in notes (14 L. R. A. 516) on liability of passenger carrier in transporting merchandise intrusted to it by passenger; (99 Am. St. Rep. 345, 346, 347, 355) on liability for loss of baggage.

What is baggage.

Cited in *Yazoo & M. Valley R. Co. v. Baldwin*, 113 Tenn. 213, 81 S. W. 599, holding baggage includes articles of necessary and personal convenience, usually carried by passengers for personal use, and depends on taste, habits, condition and station of the passenger; *Choctaw, O. & G. R. Co. v. Zwirtz*, 13 Okla. 416, 73 Pac. 941, holding it does not include tools, merchandise or articles intended for business purposes.

Cited in footnote to *Yazoo & M. V. R. Co. v. Blackmar*, 67 L.R.A. 646, which holds papers of employer pertaining to business of an insurance agent not baggage of the latter.

12 L. R. A. 321, *GLENNON v. LEBANON MFG. CO.* 140 Pa. 594, 21 Atl. 429.

Set-off for damage by negligence in performing services.

Cited in *The Tom Lysle*, 48 Fed. 692, holding loss sustained through pilot's negligence defense to action for wages.

Distinguished in effect in *Clark v. Cook*, 14 Pa. Super. Ct. 321, denying set-off for damage caused by strikers against sheriff's claim for expense of special deputies; *Jenkins v. Rushbrook Coal Co.* 8 Northampton Co. Rep. 336, 8 Lack. Legal News, 277, holding claim for secret profit made in transacting corporation business cannot be set off against officer's claim for salary.

Right to offset damages for tort growing out of contract.

Cited in *Cornelius v. Lincoln Nat. Bank*, 15 Pa. Super. Ct. 86, holding bank discounting note with forged indorsement may set off amount advanced in action to recover bank balance; *Hutchinson v. Hutchinson*, 35 Pa. Co. Ct. 169, holding act of January 12, 1705, upon which set-off actions are founded, has been stretched to make it apply to a class of cases in which action might be either *ex contractu* or *ex delicto*.

Error in refusing plea.

Cited in *Mulhearn v. Roach*, 24 Pa. Super. Ct. 485, holding action of court in refusing the plea of *non est factum* to a contract, is not prejudicial where record of the continuance docket was admitted as secondary evidence of the written contract.

12 L. R. A. 322, *CURTIN v. SOMERSET*, 140 Pa. 70, 23 Am. St. Rep. 220, 21 Atl. 244.

Liability for negligent injury.

Cited in *Western Maryland R. Co. v. Kehoe*, 83 Md. 450, 35 Atl. 90, denying liability of railroad for failure to anticipate presence of person wrongfully on track; *Glynn v. Central R. Co.* 175 Mass. 512, 78 Am. St. Rep. 507, 56 N. E. 698, denying liability of railroad company to brakeman of other company for injury by defective car delivered to latter company; *Eshleman v. Union Stock Yards Co.* 25 Lanc. L. Rev. 78, holding stock yards company not liable to buyer of cattle for Texas fever communicated by other cattle in its yards; *Rech v. South Bethlehem*, 10 North Co. Rep. 231, holding municipality liable to traveler from building material placed in street by abutter without permit; *Laudeman v. Russell*, 46 Ind. App. 37, 91 N. E. 822, holding that vendor of boiler is liable only on contract, and not for injuries sustained by explosion thereof caused by negligent construction; *Dialesanter v. Philadelphia Co.* 59 Pittsb. L. J. 2, 47 Pa. Super. Ct. 341, holding that company assuming control of another company's property is liable for injury caused by its negligence in control of property; *Kamsey v. Martin*, 45 Pa. Super. Ct. 651, holding that wrongdoer is answerable for all consequences that may ensue in natural course of events, though such consequences be immediately brought about by intervening causes; *Davis v. Arkansas Southern R. Co.* 117 La. 325, 41 So. 587, on liability for negligent injury to trespasser.

Cited in notes (46 L. R. A. 44, 108) on right of servant to recover damages from persons other than his master for injuries received in performance of his duties; (69 L.R.A. 514) on care due to sick, infirm or helpless persons with whom no contract relation is sustained; (100 Am. St. Rep. 200) on right to recover for negligence in absence of privity.

Distinguished in *Glenn v. Winters*, 17 Misc. 600, 40 N. Y. Supp. 659, holding lessor of unsafe coach liable to lessee's guest.

— Of contractors.

Cited in *Daugherty v. Herzog*, 145 Ind. 259, 32 L. R. A. 838, 44 N. E. 457, denying liability of contractor negligently remodeling building, to third person subsequently injured by falling wall; *Fitzmaurice v. Fabian*, 147 Pa. 201, 29 W. N. C. 339, 23 Atl. 444, holding contractor not liable for board falling on

tenant's child, after property delivered to owner; *Anderson v. Pittsburgh & L. E. R. Co.* 5 Pa. Dist. R. 402, 26 Pittsb. L. J. N. S. 471, holding contractor not liable to third person for negligence in placing cars with defective brakes on gravity switch; *First Presby. Congregation v. Smith*, 163 Pa. 576, 26 L. R. A. 508, 43 Am. St. Rep. 808, 30 Atl. 279, holding contractor negligently constructing city sewer not liable to property owner for injury after acceptance; *Field v. French*, 80 Ill. App. 88, denying liability of builder of elevator to passengers; *Dawson v. St. Louis Expanded Metal Fireproofing Co.* 94 Tex. 427, 61 S. W. 118, denying liability of subcontractor to contractor's employee for defective floor; *Salliotte v. King Bridge Co.* 65 L. R. A. 632, 58 C. C. A. 469, 122 Fed. 381, denying contractor's liability for injury resulting from defective construction of bridge, after town's acceptance; *Thornton v. Dow*, 60 Wash. 640, 32 L.R.A.(N.S.) 979, 111 Pac. 899, holding that contractor is not liable for injury caused by giving away of gallery railing because of insufficiency, if without negligence he followed plans given him, where building has been accepted; *Galbraith v. Illinois Steel Co.* 66 C. C. A. 359, 133 Fed. 487, holding a contractor is not liable to owner of property damaged by reason of collapse of tank due to negligence in construction where he had no contractual relation with him; *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 62, 89 S. W. 330, holding contractor, after acceptance of work by the owner, is not liable to third parties, who have no contractual relations with him; *Willis v. White*, 150 N. C. 204, 134 Am. St. Rep. 906, 63 S. E. 942, holding in absence of any negligence in construction, a contractor is not liable to a third person for damages caused by mistake of railroad's engineer.

Cited in notes (26 L. R. A. 504) on liability of contractor to third persons for defects in his work after completion and acceptance; (2 L.R.A.(N.S.) 800) on liability of subcontractor for injury to property resulting from defective performance of work; (21 L.R.A.(N.S.) 478) on liability of contractor to tenant for injury by defects in building.

—Of manufacturer or supplyman.

Cited in *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 570, 58 U. S. App. 91, 87 Fed. 111, Affirming 28 Pittsb. L. J. N. S. 388, denying right of noncontracting party to recover from maker and seller for injury resulting from defective saddle; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 611, 15 L. R. A. 823, 33 Am. St. Rep. 482, 19 S. W. 630, denying liability of manufacturer, not knowing of defect, to vendee's employee injured by explosion of threshing-machine cylinder; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 387, 55 L. R. A. 825, 91 Am. St. Rep. 637, 50 Atl. 651, denying liability of manufacturer to purchaser's employee for defect in press; *Moriarty v. Porter*, 22 Misc. 538, 49 N. Y. Supp. 1107, holding (*obiter*) manufacturer of bicycle not liable to lessee from third person; *Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 927, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 111, holding maker of an article not inherently dangerous is not liable to third persons who may be injured by reason of negligence of maker in constructing the article; *Keep v. National Tube Co.* 154 Fed. 129, holding the manufacturer of a thing inherently dangerous, must respond in damages where injuries result as natural and proximate result of negligence in manufacture; *Southern Oil Co. v. Church*, 32 Tex. Civ. App. 327, 74 S. W. 797, holding party furnishing a derrick to an independent contractor is not liable for injuries resulting to servant of such contractor in absence of proof that derrick was inherently dangerous; *King v. Greekmore*, 117 Ky. 177, 77 S. W. 689, holding lessor of a mill is not liable for injuries resulting to employee of lessee by reason of explosion of boiler; *Simons v. Gregory*, 120 Ky. 123, 85 S. W. 751,

holding vendor of an elevator not inherently dangerous is not liable to third persons injured after it has passed into control of vendee.

Cited in notes (19 L.R.A.(N.S.) 934) on liability of manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in article; (111 Am. St. Rep. 713) on manufacturer's liability to third persons.

Distinguished in *Empire Laundry Machinery Co. v. Brady*, 164 Ill. 62, 45 N. E. 486, holding manufacturer repairing customer's machine liable to customer's employee injured through improper construction; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 306, 57 C. C. A. 240, 120 Fed. 868, holding manufacturer of threshing machine liable to purchaser's employee for giving way of insufficient cylinder cover, intended to be walked on.

Proximate cause.

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 540, 41 L. R. A. 797, 51 N. E. 1, holding negligence in storing oil not proximate cause of fire started by match dropped by third person; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 586, 11 C. C. A. 257, 24 U. S. App. 7, 63 Fed. 404, holding negligence in not having proper valve not proximate cause of fire from oil escaping from tank car, flowing into furnace room of mill; *Lake Shore & M. S. R. Co. v. Wilson*, 11 Ind. App. 501, 38 N. E. 343 (dissenting opinion), majority holding open switch, not engineer's violation of rule requiring stop on failing to observe signal, proximate cause of collision; *Bannon v. Pennsylvania R. Co.* 29 Pa. Super. Ct. 237, holding if there intervenes between defendant's act and the injury, an independent illegal act, which produces the injury the defendant is not liable.

Cited in note (36 Am. St. Rep. 813) on approximate and remote cause.

12 L. R. A. 324, *GUEST v. LOWER MERION WATER CO.* 142 Pa. 610, 21 Atl. 1001.

Validity of liens on property of public or quasi-public corporations.

Cited in *Atascosa County v. Angus*, 83 Tex. 203, 29 Am. St. Rep. 637, 18 S. W. 563, holding builder's lien not enforceable against public buildings unless expressly provided by statute; *Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.* 110 Wis. 642, 84 Am. St. Rep. 948, 86 N. W. 592, upholding mechanic's lien against street railway power-house, not essential to operation of road; *Phoenix Iron Works Co. v. Lancaster City Street R. Co.* 10 Lanc. L. Rev. 73, holding mechanic's lien may be filed against street railway power-house; *Oberholtzer v. Norristown Pass. R. Co.* 16 Pa. Co. Ct. 14, 12 Lanc. L. Rev. 60, holding street railway power-house not subject to mechanic's lien; *Valcanite Paving Co. v. Philadelphia Rapid Transit Co.* 220 Pa. 606, 17 L.R.A.(N.S.) 885, 69 Atl. 1117, holding electric street railway power house is not subject to a mechanic's lien; *Arrison v. Company D, North Dakota Nat. Guard*, 12 N. D. 558, 98 N. W. 83, 1 A. & E. Ann. Cas. 368, holding a national guard's armory building subject to a mechanic's lien.

Distinguished in *Badger Lumber Co. v. Marion Water Supply Electric Light & P. Co.* 48 Kan. 189, 30 Am. St. Rep. 306, 30 Pac. 117, holding property of electric light company subject to mechanic's lien; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 53, holding water company's plant subject to material man's lien; *Philadelphia use of Pugh v. Philadelphia & R. R. Co.* 1 Pa. Super. Ct. 248, 38 W. N. C. 20, holding railroad lands, not essential to exercise of franchise, salable under lien for municipal assessment.

Sale of corporate property on fl. fa.

Cited in *Smith v. Altoona & P. Connecting R. Co.* 182 Pa. 147, 41 W. N. C. 5, 37 Atl. 930, holding sheriff must make demand at company's principal office

before selling property on fi. fa.; *Bell v. Wood*, 181 Pa. 178, 37 Atl. 201, holding land forming part of water company's plant salable on fi. fa.

Distinguished in *East Side Bank v. Columbus Tanning Co.* 170 Pa. 6, 32 Atl. 539, Affirming 15 Pa. Co. Ct. 361, and *Reynolds v. Reynolds Lumber Co.* 169 Pa. 629, 36 W. N. C. 539, 47 Am. St. Rep. 935, 32 Atl. 537, holding property of private corporation may be sold under writ of fi. fa.

12 L. R. A. 326, *UNION COAL CO. v. LA SALLE*, 136 Ill. 119, 26 N. E. 506.

Title to minerals under streets.

Cited in *Sears v. Chicago*, 247 Ill. 216, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 539, holding that abutting owner cannot justify exclusive appropriation of any portion of street either on surface or above or below it, without city's consent.

Cited in (8 L.R.A.(N.S.) 424) on right to mineral under surface of street or highway where fee is in public; (101 Am. St. Rep.) 112) on right of persons over whose land a highway runs to soil and minerals.

Distinguished in *Snoddy v. Bolen*, 122 Mo. 490, 24 L. R. A. 512, footnote p. 507, 24 S. W. 142, which holds minerals reserved on dedicating street pass by conveyance of abutting lots.

Necessity of recording plat.

Cited in *People ex rel. Kochersperger v. Clifford*, 166 Ill. 170, 46 N. E. 770, holding acknowledging and recording of plat necessary to vest fee of streets in municipality.

12 L. R. A. 328, *REPUBLIC L. INS. CO. v. SWIGERT*, 135 Ill. 150, 25 N. E. 680.

Prayer of creditors to be substituted as parties complainant denied in *Fairbanks v. Farwell*, 141 Ill. 363, 30 N. E. 1056.

Stockholders' liability to creditors.

Cited in *Pullman v. Railway Equipment Co.* 73 Ill. App. 319, denying liability of purchaser from corporation below par of stock once fully paid for; *First Nat. Bank v. Peoria Watch Co.* 191 Ill. 134, 60 N. E. 859, denying liability to corporation creditors of stockholder surrendering unpaid stock in good faith; *Chrisman-Sawyer Bkg. Co. v. Independence Wool Mfg. Co.* 168 Mo. 641, 68 S. W. 1026, holding shareholder not relieved of liability to creditors, existing or subsequent, by surrender of unpaid stock to company.

Right of corporation to purchase its own stock.

Cited in *Douglas v. Aurora Daily News Co.* 160 Ill. App. 510, holding that it is not against law for corporation acting in good faith to buy and sell its own stock, where creditors are not affected; *Atlanta & W. Butter & Cheese Assn. v. Smith*, 141 Wis. 382, 32 L.R.A.(N.S.) 140, 135 Am. St. Rep. 42, 123 N. W. 106, holding in absence of prohibition in charter or statutes a corporation may purchase its own stock; *Porter v. Plymouth Gold Min. Co.* 29 Mont. 358, 101 Am. St. Rep. 569, 74 Pac. 938; *United States Mineral Co. v. Camden*, 106 Va. 665, 117 Am. St. Rep. 1028, 56 S. E. 561,—holding they may purchase, hold and sell shares of their own stock, provided they act in good faith and without intent to injure creditors; *Vrooman v. R. P. Vansant*, 215 Pa. 78, 64 Atl. 394, holding as between itself and its stockholders a solvent corporation may cause a reduction of subscription by taking over shares of stock itself; *Thomas v. Wentworth Hotel Co.* 16 Cal. App. 410, 117 Pac. 1041, holding that directors of corporation may in consideration of payment of one-half of subscription price in cash, release subscriber who because of losses is unable to pay for all stock subscribed.

Cited in notes (18 L. R. A. 254) on power of corporation to deal in stock of other corporation or in its own; (33 Am. St. Rep. 341) on power of corporation to purchase its own stock.

Rights of receivers and assignees.

Cited in *Young v. Stevenson*, 180 Ill. 614, 72 Am. St. Rep. 236, 54 N. E. 562, affirming 81 Ill. App. 47, denying right of receiver of loan association to compel member to refund withdrawal; *Gottlieb v. Miller*, 154 Ill. 56, 39 N. E. 992, holding receiver of insolvent firm estopped to assert fraudulent transfer of goods by principals; *Weill v. Zacher*, 92 Ill. App. 299, holding receiver cannot set aside fraudulent transfer by insolvent; *Cohn v. Waters*, 83 Ill. App. 390, holding receiver winding up insolvent corporation cannot have fraudulent conveyance set aside; *Ross v. Saylor*, 104 Ill. App. 24, holding assignee of insolvent corporation cannot set aside fraudulent executed contract; *Peabody v. United Waterworks Co.* 184 Ill. 629, 75 Am. St. Rep. 195, 56 N. E. 957, reversing 80 Ill. App. 461, holding receiver to wind up corporation may have collusive judgment opened; *Christie v. Burns*, 83 Ill. App. 516, holding receiver in foreclosure powerless as to persons not parties or privies; *First Nat. Bank v. Baker*, 62 Ill. App. 163 (dissenting opinion), majority holding defectively acknowledged chattel mortgage invalid against receiver; *Burke v. Scheer*, 89 Neb. 86, 33 L.R.A.(N.S.) 1061, 130 N. W. 962, holding that receiver of mutual association cannot join in one action all policy holders who are severally liable for unpaid assessments regardless of residence; *Marion Trust Co. v. Blish*, 170 Ind. 693, 18 L.R.A.(N.S.) 352, 84 N. E. 814, holding a receiver succeeds to the title and rights of action of the corporation itself, and takes all such rights as it originally had, and may enforce them by the same legal remedies.

— To enforce stockholders' liability.

Cited in footnotes to *Colton v. Mayer*, 47 L. R. A. 617, which denies receiver's right to enforce stockholders' liability; *Howarth v. Lombard*, 49 L. R. A. 301, which authorizes suit to enforce stockholders' liability in foreign jurisdiction.

Cited in note (18 L.R.A.(N.S.) 348) on right, in action by receiver to recover unpaid balance of stock subscriptions, to interpose defense available against corporation.

Distinguished in *Cole v. Satsop R. Co.* 9 Wash. 494, 43 Am. St. Rep. 858, 37 Pac. 700, holding receiver appointed in creditor's proceeding may maintain action on stock subscription; *Smith v. Johnson*, 57 Ohio St. 489, 49 N. E. 693, holding receiver succeeds to corporation's right to enforce unpaid stock subscriptions; *Wyman v. Bowman*, 62 C. C. A. 197, 127 Fed. 265, holding receiver may enforce stockholders' liability for debts to amount of unpaid subscriptions.

Constitutionality of law authorizing dissolution on application of stockholders.

Cited in *Cullom v. Traders' Ins. Co.* 89 C. C. A. 295, 163 Fed. 47, holding provisions of statute authorizing a majority of stockholders to apply for voluntary dissolution where no controversy exists for adjudication is constitutional.

Right of appeal by corporation.

Cited in note (119 Am. St. Rep. 752) on right of corporation to appeal as a party interested or injured.

12 L. R. A. 337, *LAFITTE v. NEW ORLEANS CITY & LAKE R. CO.* 43 La. Ann. 34, 8 So. 701.

Master's liability for insults or violence of servants.

Cited in *Cole v. Atlanta & W. P. R. Co.* 102 Ga. 477, 31 S. E. 107, holding railroad liable for conductor's unprovoked use of abusive language to passengers;

Knoxville Traction Co. v. Lane, 103 Tenn. 383, 46 L. R. A. 551, 53 S. W. 557, holding street car company liable for motorman's insulting and indecent language to passengers; Davis v. Houghtellin, 33 Neb. 585, 14 L. R. A. 740, 50 N. W. 765, denying master's liability for shooting of trespasser by servant employed to guard property; McDermott v. American Brewing Co. 105 La. 127, 52 L. R. A. 686, 83 Am. St. Rep. 225, 29 So. 498, denying employer's liability for violence of servant collecting account for which personally liable, through failure to deliver for cash; Jackson v. Old Colony Street R. Co. 206 Mass. 486, 30 L.R.A.(N.S.) 1049, 92 N. E. 725, 19 Ann. Cas. 615, holding that offensive language addressed by passenger to conductor is no justification for assault on him by conductor; Bleecker v. Colorado & S. R. Co. 50 Colo. 143, 33 L.R.A.(N. S.) 388, 114 Pac. 481, holding that carrier is answerable for offensive language addressed by conductor to passenger, without provocation which is of character calculated to humiliate and disgrace him; Humphrey v. Michigan United R. Co. 166 Mich. 649, 132 N. W. 447, holding that passenger has ground of action against carrier for breach of duty to protect him against insulting, abusive or opprobrious language; Decker v. Lackawanna & W. Valley R. Co. 39 Pa. Super. Ct. 231, holding no liability exists against railroad company by reason of action of conductor in pointing out to the police, upon request, persons who had been disorderly on train; Queen v. Schwann, 119 La. 500, 44 So. 276, holding shooting of overseer on sugar plantation by a laborer was not within scope of his employment so as to render master liable; Osteryoung v. St. Louis Transit Co. 108 Mo. App. 707, 84 S. W. 179, on liability of carrier for insulting conduct of its servants unaccompanied by actual violence.

Cited in footnotes to Farber v. Missouri P. R. Co. 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment; Gillespie v. Brooklyn Heights R. Co. 66 L.R.A. 618, which holds street car company not absolved from liability for malicious act of conductor in calling passenger a deadbeat when asked for change due her.

Cited in notes (14 L. R. A. 796) on master's liability for false arrest, imprisonment, or malicious prosecution by servant; (14 L. R. A. 739) on master's liability for assaults by servant; (4 L.R.A.(N.S.) 497) on liability for malicious act of servant when master owes special duty to party injured; (40 L.R.A.(N.S.) 1021, 1049, 1052) on liability of carrier for wilful torts of servants to passengers; (7 L.R.A.(N.S.) 171) on liability of carrier for arrest of passenger by servant; (32 Am. St. Rep. 101) on carrier's duty to protect passengers from assault; (54 Am. St. Rep. 89, 91) on acts of servant for which master is not responsible; (118 Am. St. Rep. 467) on duties and liabilities of street railway companies toward passengers; (35 L. ed. U. S. 920) on negligence of railroad companies toward passengers; (25 Eng. Rul. Cas. 142) on master's liability for tort committed by servant.

Distinguished in Schmidt v. New Orleans R. Co. 116 La. 322, 7 L.R.A.(N.S.) 175, 40 So. 714, holding where act of conductor in having a passenger arrested was not malicious but was within line of his duty carrier cannot escape liability for his act; Singer Mfg. Co. v. Taylor, 150 Ala. 578, 9 L.R.A.(N.S.) 931, 124 Am. St. Rep. 90, 43 So. 210, holding a corporation is not liable for tort of agent in calling one a "thief" in its office, where it does not authorize or ratify such act.

Measure of damages; mental suffering.

Cited in Graham v. Western U. Teleg. Co. 109 La. 1075, 34 So. 91, holding mental anguish, without material injury, resulting from negligence in transmitting telegram, ground for damages; St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 51, holding damages for mental suffering is allowable where the natural

direct and inseparable accompaniment of the wilful and malicious maltreatment.

Cited in note (13 L.R.A.(N.S.) 159) on liability of carrier for mental suffering of passenger from mere verbal abuse.

12 L. R. A. 340, *FONSECA v. CUNARD S. S. CO.* 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665.

Acceptance of terms of contract.

Cited in *Reinstein v. Watts*, 84 Me. 142, 24 Atl. 719, holding reception of merchandise by bailee under invoice deemed acceptance of its terms; *Cox v. Central Vermont R. Co.* 170 Mass. 137, 49 N. E. 97, holding receipt of bill of lading without objection equivalent to assent, so far as provisions are lawful; *Wood v. Massachusetts Mut. Acci. Asso.* 174 Mass. 221, 54 N. E. 541, holding signer presumed to have read and understood release of liability; *Singer v. Merchants' Despatch Transp. Co.* 191 Mass. 454, 114 Am. St. Rep. 635, 77 N. E. 882, holding party by accepting the receipt, which states conditions upon which the property is received, he accepts those terms as part of the contract.

— Railway and steamship tickets.

Cited in *Crary v. Lehigh Valley R. Co.* 203 Pa. 528, 59 L. R. A. 815, 93 Am. St. Rep. 778, 53 Atl. 363; *New York, L. E. & W. R. Co. v. Bennett*, 1 C. C. A. 549, 6 U. S. App. 95, 50 Fed. 501; *Walker v. Price*, 62 Kan. 331, 84 Am. St. Rep. 392, 62 Pac. 1001,—holding passenger accepting ticket bound by contract printed on face; *Jacobs v. Central R. Co.* 208 Pa. 539, 57 Atl. 982, and *Aiken v. Wabash R. Co.* 80 Mo. App. 15, holding passenger bound by limitation of liability as to baggage, printed on face and as part of ticket; *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 123, 51 Am. St. Rep. 206, 30 N. E. 424, holding acceptance of ticket containing limitation of liability as to baggage binding on passenger, though not read; *Ketcheson v. Southern P. Co.* 19 Tex. Civ. App. 291, 46 S. W. 907, holding purchaser of ticket bound by condition that he would sign name when requested by conductor; *Wheeler v. Oceanic Steam Nav. Co.* 72 Hun, 8, 25 N. Y. Supp. 578, holding acceptance of steamship passenger's contract ticket, not read by passenger, equivalent to assent thereto; *Rogers v. Kennebec S. B. Co.* 86 Me. 269, 25 L. R. A. 496, 29 Atl. 1069, holding person traveling on invitation of friend having pass, not knowing contents, bound by conditions thereon; *Holden v. Rutland R. Co.* 73 Vt. 320, 50 Atl. 1096, holding purchaser of mileage book bound by signed contract; *Sanden v. Northern P. R. Co.* 43 Mont. 218, 34 L.R.A.(N.S.) 714, 115 Pac. 408, to the point that ordinary card ticket for which full fare is paid is regarded as mere token or check, purpose of which is to indicate route; *Doyle v. Central R. Co.* 45 Pa. Super. Ct. 223, holding that passenger is not bound by terms of special contract contained in paper which he has right to assume is mere voucher or receipt for baggage; *French v. Merchants' & M. Transp. Co.* 199 Mass. 435, 19 L.R.A.(N.S.) 1007, 127 Am. St. Rep. 506, 85 N. E. 424, holding a passenger who accepts a ticket on which the contract of transportation is stated is bound by its terms whether he reads it or not; *Brian v. Oregon Short Line R. Co.* 40 Mont. 113, 25 L.R.A.(N.S.) 461, 105 Pac. 489, holding a party by accepting a coupon ticket, acting upon it, and receiving transportation one way on it, assents to all its terms and conditions as fully as if he had read and signed it.

Cited in footnote to *Gulf, C. & S. F. R. Co. v. Henry*, 16 L. R. A. 318, which holds ticket good for continuous passage only not give right to carriage after leaving train at intermediate point.

Cited in notes (23 L. R. A. 746) on notice to passenger of conditions on:

ticket; (84 Am. St. Rep. 402, 404) on binding effect of conditions in unsigned passenger tickets; (99 Am. St. Rep. 366, 367, 368) on ticket as contract.

Limited in *Krueger v. Chicago, St. P. M. & O. R. Co.* 68 Minn. 449, 64 Am. St. Rep. 487, 71 N. W. 683, holding passenger not bound by erroneous limitation of mileage book to day of issue.

When law of place of contract governs.

Cited in *Baxter Nat. Bank v. Talbot*, 154 Mass. 216, 13 L. R. A. 55, 28 N. E. 163, holding liability of indorser of note depends on *lex loci contractus*; *Mitten-thal v. Mascagni*, 183 Mass. 22, 60 L. R. A. 813, 97 Am. St. Rep. 404, 66 N. E. 425, sustaining provision in foreign contract that suits thereon may be brought only in country where executed.

Cited in notes (45 Am. St. Rep. 454) on asserting against married woman a liability valid in state where created but not in foreign; (55 Am. St. Rep. 54) on place of contract; (5 Eng. Rul. Cas. 889) on presumption that parties to contract intended to adopt law of place where contract was made.

— Contracts of carriage.

Cited in *Palmer v. Atchison, T. & S. F. R. Co.* 101 Cal. 195, 35 Pac. 630, and *Southern R. Co. v. Harrison*, 119 Ala. 545, 43 L. R. A. 387, 72 Am. St. Rep. 936, 24 So. 552, holding contract of shipment from one state to another governed by law of place where made, unless otherwise agreed; *Brockway v. American Exp. Co.* 168 Mass. 258, 47 N. E. 87, same case on second appeal, 171 Mass. 160, 50 N. E. 626, holding contract for transportation of animals through several states governed by law of state where made; *Potter v. The Majestic*, 23 L. R. A. 750, 9 C. C. A. 164, 20 U. S. App. 503, 60 Fed. 627, holding contract for transportation from Liverpool to New York governed by law of place of making, in absence of contrary intention; *O'Regan v. Cunard S. S. Co.* 160 Mass. 361, 39 Am. St. Rep. 484, 35 N. E. 1070, and *Pittman v. Pacific Exp. Co.* 24 Tex. Civ. App. 598, 59 S. W. 949, holding validity of provision in contract limiting carrier's liability determined by law of place of making; *Chicago B. & Q. R. Co. v. Gardiner*, 51 Neb. 78, 70 N. W. 508, holding limitation of carrier's liability, valid where made, not enforceable in state where illegal and against public policy.

Cited in footnote to *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 557, which holds prohibition against carriers limiting liability inapplicable to contract in other state by domestic corporation for transportation entirely outside of state.

Cited in notes (63 L.R.A. 527, 528) on conflict of laws as to carrier's contracts; (5 L.R.A.(N.S.) 426) on refusal to give effect to foreign contract exempting carrier from liability; (99 Am. St. Rep. 367) on conflict of laws as to ticket.

Disapproved in *Southern Exp. Co. v. Hanaw*, 134 Ga. 455, 67 S. E. 944, holding where a contract to limit liability of carrier for negligence of its agents is against public policy of state where performed it will not be enforced although valid by *lex loci contractus*.

Right of carrier to limit liability.

Cited in *Doyle v. Fitchburg R. Co.* 166 Mass. 496, 33 L. R. A. 846, 55 Am. St. Rep. 417, 44 N. E. 611, holding railroad cannot contract to exempt itself from liability to passenger for negligence.

Cited in notes (19 L.R.A.(N.S.) 1007) on limitation of carrier's liability for baggage; (99 Am. St. Rep. 364) on limitation of liability for loss of baggage.

12 L. R. A. 342, *GEORGIA P. R. CO. v. DOOLY*, 86 Ga. 294, 12 S. E. 923.

Rules for safe conduct of business.

Cited in *Seaboard Air Line R. Co. v. Shanklin*, 78 C. C. A. 334, 148 Fed. 345,

holding where definite rules are established and promulgated in some practical and reasonable way, and employees have knowledge of them, they are as laws in the regulation of their conduct.

Cited in footnote to *Ford v. Lake Shore & M. S. R. Co.* 12 L. R. A. 454, which holds general rule that freight shall be safely loaded insufficient as to timber piled above sides of car without stakes.

Cited in note (43 L. R. A. 361) on duties of master and servant as to rules promulgated for safe conduct of business.

Master's duty to secure servant's safety.

Cited in footnote to *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds placing wing fences at cattle guard almost 4 feet from track not negligence.

*** Servant's assumption of risk.**

Annotation cited in *Lynch v. Saginaw Valley Traction Co.* 153 Mich. 177, 21 L.R.A.(N.S.) 779, 116 N. W. 983, holding where experienced lineman continued, if he did not accept, his employment, with full knowledge of method of examination of poles, he assumed the risks attendant thereon.

Cited in footnotes to *Mensch v. Pennsylvania R. Co.* 17 L. R. 450, which holds danger from projection of bolt from end of car assumed by brakeman; *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

Cited in note (21 L.R.A.(N.S.) 779) on injury to electric lineman through defect in pole or its appurtenances.

Allowing jury to see former verdict.

Cited in *Fulton County v. Phillips*, 91 Ga. 65, 16 S. E. 260, holding court's refusal to conceal former verdict from jury, not affecting verdict, not reversible error; *Smalls v. State*, 105 Ga. 675, 31 S. E. 571, holding, in absence of request, failure to conceal previous verdict from jury no error; *Russell v. Brunswick Grocery Co.* 120 Ga. 43, 47 S. E. 528, holding inadvertent sending to the jury room pleadings containing a verdict formerly rendered in same case by a prior jury will not be sufficient ground for vacating verdict, unless some harmful result is shown; *Birmingham R. & Electric Co. v. Mason*, 144 Ala. 392, 39 So. 590, 6 A. & E. Ann. Cas. 929, holding it not error to receive affidavits of jurors in evidence, on motion for new trial, that they did not read papers improperly sent to the jury room.

— Papers calculated to affect verdict.

Cited in *Shedden v. Stiles*, 121 Ga. 640, 49 S. E. 719, holding of paper calculated to influence jury in favor of prevailing party, goes to and is considered by them while deliberating as to their verdict, it is cause for a new trial.

Rules of employment and compensation.

Cited in *Galton v. Fulton Bag & Cotton Mills*, 5 Ga. App. 421, 63 S. E. 520, holding contract stipulation that a week's wages shall be retained by employer as liquidated damages if employee quits without giving one week's notice is reasonable and enforceable.

Setting aside verdict.

Cited in *Southern R. Co. v. Brock*, 132 Ga. 863, 64 S. E. 1083, holding verdict will not be disturbed as excessive where trial judge refused a new trial on ground that verdict was contrary to law and evidence, or so excessive as to justify inference of bias or mistake.

12 L. R. A. 346, *FARMERS' CO-OP. TRUST CO. v. FLOYD*, 47 Ohio St. 525, 21 Am. St. Rep. 846, 26 N. E. 110.

Liability of person misrepresenting authority to act.

Cited in *Roberts v. Tuttle*, 36 Utah, 634, 105 Pac. 916, holding that agent who undertakes to act without authority is liable to person with whom he contracts for damages sustained because of such want of authority.

Distinguished in *Raudabaugh v. Hart*, 61 Ohio St. 85, 76 Am. St. Rep. 361, 55 N. E. 214, holding one contracting in own name, with representations of authority to sell joint property, not regarded as agent of co-owners.

— Assumed agency for corporation.

Cited in notes (48 Am. St. Rep. 914) on personal liability of corporate officers to third persons; (35 L.R.A.(N.S.) 454) on liability of directors for permitting business before capital stock all subscribed.

Distinguished in *American Radiator Co. v. Kinnear*, 56 Wash. 212, 35 L.R.A.(N.S.) 455, 105 Pac. 630, holding where statute does not impose individual liability in express terms and subscription to capital stock is not essential to legal existence of corporation, there is no individual liability of officers; *Love v. Ramsey*, 139 Mich. 49, 102 N. W. 279, holding where declaration sets forth a cause of action against a party for goods sold and delivered with no averment of liability of a corporation, by reason of informal organization question of corporate liability is not involved; *Dickason v. Grafton Sav. Bank Co.* 6 Ohio C. C. N. S. 336, 27 Ohio C. C. 363, holding that a creditor could bring his action against the stockholders of an association assuming corporate franchises without lawful authority and they are estopped to deny that they are stockholders.

Agent's responsibility on contracts.

Cited in *Anderson v. Adams*, 43 Or. 626, 74 Pac. 215, and *Conant v. Alvord*, 166 Mass. 315, 44 N. E. 250, holding agent misrepresenting authority liable for damages, irrespective of fraud; *Campbell v. Muller*, 19 Misc. 192, 43 N. Y. Supp. 233, holding one acting as agent without authority liable for all resulting damages; *Dexter Sav. Bank v. Friend*, 90 Fed. 705, holding officer executing corporation notes without authority liable to bona fide holder for damages; *Kent v. Addicks*, 60 C. C. A. 662, 126 Fed. 114, holding officer executing contract in name of corporation liable on implied warranty of authority; *Groeltz v. Armstrong*, 125 Iowa, 42, 99 N. W. 128, holding one who assumes to make binding contract as agent for another without authority, renders himself liable in damages to the other party to the assumed contract; *Woodward v. Beasley*, 2 Tenn. Ch. App. 358, holding directors and officers of a corporation liable on notes issued which they had no legal right to issue; *Stanley v. Martin*, 19 Ohio S. & C. P. Dec. 866, as to the liability of an agent upon a contract in his own name without disclosing his agency.

Cited in footnotes to *Citizens' Bank v. Millett*, 44 L. R. A. 664, which holds drawer personally liable on draft drawn to payee's knowledge for payment of drawee's debt; *Reeve v. First Nat. Bank*, 16 L. R. A. 143, which holds note signed by corporate name with officer's name following, corporate obligation; *Le Roy v. Jacobosky*, 67 L.R.A. 977, which denies personal liability of guardian on option contract for breach of unauthorized contract to convey interest of himself and ward in land held as tenants in common where he signed the contract personally and also as guardian.

Cited in notes (2 Eng. Rul. Cas. 496; 34 L.R.A.(N.S.) 530, 536) on liability of one assuming without authority, to contract as agent; (2 Eng. Rul. Cas. 389) on liability of agents on contracts.

Measure of damages against agent on unauthorized contract.

Cited in *Roberts v. Tuttle*, 36 Utah, 634, 105 Pac. 916, holding that where an agent for the sale of lands made an unauthorized contract and placed the vendee in possession he was liable for the money paid on the purchase price, with interest thereon, the value of improvements, the costs of defending the ejectment suit and the loss of the bargain.

Ratification of agent's acts.

Cited in note (2 Eng. Rul. Cas. 357) as to when agent's act may be ratified.

12 L. R. A. 353, *GALLUP v. SMITH*, 59 Conn. 354, 22 Atl. 334.

Decrees of probate court, how assailable.

Cited in *State v. Blake*, 69 Conn. 78, 36 Atl. 1019, holding that decrees of probate court can be attacked only by appeal; *Plant v. Harrison*, 36 Misc. 690, 74 N. Y. Supp. 411, holding Connecticut decree probating will may be collaterally attacked as to testator's residence.

Statutes conferring remedies mandatory.

Cited in *Casey & H. Mfg. Co. v. Weatherly*, 101 Tenn. 321, 47 S. W. 432, holding failure to make demand required by statute defense to enforcement of lien against steamboat; *Leete v. Anderson*, 83 Conn. 230, 76 Atl. 466, holding that statute requiring duplicate of call or notice of school district meeting to be left with clerk of district for filing is directory, not mandatory; *Boyd v. Bickel*, 13 Idaho, 195, 89 Pac. 631, holding provision of statute requiring signature "of three fourths of voters as shown by last preceding general village election" directory only where no prior election has been held; *Spencer's Appeal*, 78 Conn. 303, 61 Atl. 1010, holding provision requiring railroad commissioners to communicate decision to parties within twenty days directory only.

Annotation cited in *Van Etten v. Daugherty*, 83 Ark. 542, 103 S. W. 737, holding statute requiring personal service of summons in delinquent tax proceeding mandatory.

12 L. R. A. 359, *PRICE v. PRICE*, 124 N. Y. 589, 27 N. E. 383.

Rights on annulment of marriage because former marriage in force.

Cited in *Safford v. Safford*, 31 Abb. N. C. 74, 27 N. Y. Supp. 641, holding, upon annulment of marriage in good faith because woman's former marriage in force, neither party entitled of right to custody of children; *Hunt v. Trusts & Guarantee Co.* 10 Ont. L. Rep. 149, holding that New York statute making marriage in good faith, in belief that former spouse was dead, voidable only, is retrospective and issue of such marriage prior to the statute is legitimate; *Berry v. Berry*, 130 App. Div. 60, 114 N. Y. Supp. 497, holding that court will not annul a marriage at instance of husband who entered into second marriage after wife's absence for 5 years and continued living with second wife after knowledge that first wife was living.

Cited in note (79 Am. St. Rep. 379) on invalidity of bigamous marriages.

Effect of divorce on dower.

Cited in *Wood v. Wood*, 59 Ark. 451, 28 L. R. A. 160, 43 Am. St. Rep. 42, 27 S. W. 641, holding statute denying dower to wife divorced for misconduct does not impliedly reserve dower to innocent wife; *Coats v. Coats*, 160 Cal. 676, 36 L.R.A.(N.S.) 848, 118 Pac. 441, to the point that when marriage is annulled dower right is terminated; *Voke v. Platt*, 48 Misc. 275, 96 N. Y. Supp. 725, holding that wife obtaining absolute divorce in a foreign state without personal service on husband resident in this state, has no dower right in his lands.

Cited in footnote to *Land v. Shipp*, 50 L. R. A. 560, which holds wife's right of dower not affected by release made directly to husband in deed of separation.

Cited in note (96 Am. St. Rep. 272) on effect of void marriage on dower.

Distinguished in *Re McKinley*, 66 Misc. 130, 122 N. Y. Supp. 807, holding that woman who is married in good faith, where husband has been absent and unheard of for more than five years, and who lives with second husband until his death, without any annulment of said marriage, is entitled to dower in estate of second husband.

12 L. R. A. 362, *RUCKS v. RENFROW*, 54 Ark. 409, 16 S. W. 6.

Declarations of voters as evidence of disqualification.

Cited in *Sharp v. McIntire*, 23 Colo. 103, 46 Pac. 115, holding unsworn declarations of elector at time of voting admissible to show disqualification.

County seat removal.

Cited in *Reese v. Steel*, 73 Ark. 69, 83 S. W. 335, on procedure to determine contest as to county seat removal.

12 L. R. A. 364, *STEUSOFF v. STATE*, 80 Tex. 428, 15 S. W. 1100.

Residence or inability to vote as affecting eligibility to office.

Cited in *Harkrader v. State*, 35 Tex. Crim. Rep. 252, 60 Am. St. Rep. 40, 33 S. W. 117, holding, in absence of statute prescribing qualifications, minor eligible to office of deputy county clerk; *Finklea v. Farish*, 160 Ala. 235, 49 So. 266, holding that one not a qualified elector because of failure to pay poll tax, may be elected tax assessor.

Cited in footnote to *Gibson v. Wood*, 43 L. R. A. 699, which holds residence in suburb before annexation, residence within city for purpose of determining eligibility to city office.

12 L. R. A. 366, *EMPIRE MILLS v. ALSTON GROCERY CO.* (Tex. App.) 15 S. W. 505.

Recognition of foreign corporation.

Cited in *Cleaton v. Emery*, 49 Mo. App. 353, holding comity does not require recognition of corporation chartered in one state for sole purpose of doing business in another; *Demarest v. Flack*, 128 N. Y. 220, 13 L. R. A. 858, footnote p. 854, 28 N. E. 645, which holds foreign corporation void as evasion of laws of state in which all incorporators reside and where principal place of business is; *Coler v. Tacoma, R. & P. Co.* 64 N. J. Eq. 137, 53 Atl. 680, to the point that repeal of act authorizing formation of mercantile companies in state superseded rule of comity as to foreign corporations; *American Tribune New Colony Co. v. Schuler*, 34 Tex. Civ. App. 569, 79 S. W. 370, on effect that should be given to acquisition and corporate dealings with lands in disobedience of express statute.

Cited in footnote to *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639, which holds that recognition will not be denied foreign corporation by courts of state because it is composed exclusively of its own citizens.

Cited in note (24 L. R. A. 292, 293, 297) on recognition or exclusion of foreign corporation.

Distinguished in *Wright v. Lee*, 4 S. D. 249, 55 N. W. 931, holding foreign corporation failing to comply with domestic statutory requirements, corporation de facto; *Cumberland Teleg. & Teleph. Co. v. Louisville Home Teleph. Co.* 114 Ky. 896, 72 S. W. 4, holding that foreign corporation owning property within the state may maintain suit in the state courts to protect its rights though the incorporators were residents but had organized in another state to obtain bene-

fit of more favorable laws; *Wright v. Lee*, 4 S. D. 249, 55 N. W. 931, holding that corporation duly organized in another state, doing business in this state, without having complied with statutory requirements, is until authority is challenged by state a de facto corporation.

Prohibition by implication from grant of powers.

Cited in *Van Steuben v. Central R. Co.* 178 Pa. 373, 34 L. R. A. 579, 35 Atl. 992, holding that statute conferring leasing powers on railroads does not authorize domestic corporation to lease railroad held by it in other state, contrary to policy of that state.

Estoppel by dealing to deny legal corporate existence.

Cited in footnote to *Washington Nat. Bldg., Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds borrower from foreign loan association estopped to defeat foreclosure of mortgage on ground that corporate articles not properly acknowledged.

Cited in note (94 Am. St. Rep. 597) on estoppel by dealing to deny legal corporate existence.

Stockholders of defective corporation as copartners.

Cited in *Jones v. Aspen Hardware Co.* 21 Colo. 271, 29 L. R. A. 145, 52 Am. St. Rep. 220, 40 Pac. 457, holding members of company failing in attempt to acquire corporate existence may sue as copartners; *Cleaton v. Emery*, 49 Mo. App. 353; *Cumberland Teleg. & Teleph. Co. v. Louisville Home Teleph. Co.* 114 Ky. 896, 72 S. W. 4,—to the point that where statute did not allow carrying on certain business by corporation, citizens of such state who incorporated in another state and then did business in that state are liable as partners.

Cited in notes (17 L.R.A. 550) on partnership liability of stockholders in case of defective or illegal incorporation; (6 L.R.A. (N.S.) 1007) on common law liability of officers or stockholders to other party to ultra vires or unlawful transaction.

12 L. R. A. 370, *MAINE TRUST & BKG. CO. v. BUTLER*, 45 Minn. 506, 48 N. W. 333.

Assignor of note as indorser.

Cited in *Citizens Nat. Bank v. Walton*, 96 Va. 438, 31 S. E. 890, holding signed assignment on back of note equivalent to blank indorsement; *Mayes Mercantile Co. v. Handley*, 6 Ind. Terr. 360, 98 S. W. 125, holding words "The Mayes Mercantile Co. Transferred to W. H. Handley" on back of note created an indorsement; *Citizens' Nat. Bank v. Walton*, 96 Va. 438, 31 S. E. 890; *Leahy v. Haworth*, 4 L.R.A. (N.S.) 665, 73 C. C. A. 84, 141 Fed. 860,—holding a signed assignment on back of note was equivalent of a blank indorsement; *German American Sav. Bank v. Hanna*, 124 Iowa, 378, 100 N. W. 57, holding, when payee of note, with provision that indorsers waive presentment for payment and protest, indorses with words payment guaranteed that he becomes indorser with enlarged liability.

Cited in footnote to *De Hass v. Dibert*, 30 L. R. A. 189, which holds liability as indorser not prevented by preceding assignment without recourse.

Cited in note (36 L. R. A. 117) on assignor of promissory note as indorser.

12 L. R. A. 373, *BROWN v. BALFOUR*, 46 Minn. 68, 48 N. W. 604.

Exemption of insurance money.

Cited in *Re How*, 59 Minn. 418, 61 N. W. 456, holding statute exempting mutual insurance money from seizure for debts of insured or beneficiary, without limiting amount, void for unreasonableness; *First Nat. Bank v. How*, 65 Minn. 189, 67 N. W. 994, holding proceeds of co-operative life insurance exempt from

execution while in beneficiary's hands; *Holmes v. Marshall*, 145 Cal. 780, 69 L.R.A. 69, footnotes p. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 A. & E. Ann. Cas. 88, holding the proceeds of a policy payable to the administrators of a deceased husband may be set apart to the widow as being exempt from execution.

Cited in footnotes to *Re Heilbron*, 35 L. R. A. 602, which holds act exempting proceeds of life policies from debts not retroactive; *Williams v. Donough*, 56 L. R. A. 766, which holds void, statute exempting proceeds of fraternal benefit certificate from liability for debts.

Disapproved in *Recor v. Commercial & Sav. Bank (Recor v. Recor)* 142 Mich. 483, 5 L.R.A.(N.S.) 474, 106 N. W. 82, 7 A. & E. Ann. Cas. 754, holding the proceeds of a benefit certificate which have been paid over and placed on deposit in a bank to beneficiary's credit are not exempt.

Creditor's rights in proceeds of life insurance.

Cited in footnotes to *Morris v. Georgia Loan, Sav. & Bkg. Co.* 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds sufficient to pay debt and advances only; *Boisseau v. Penn.* 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life, which ceases on failure to pay premiums; *Com. ex rel. Hensel v. Provident Bicycle Asso.* 36 L.R.A. 589, which holds association guaranteeing to clean and repair bicycles and replace when stolen not an insurance company.

Cited in notes (38 L.R.A. 49, 55) on whether benefit association is insurance company; (6 L.R.A.(N.S.) 236) on liability of funds of mutual benefit societies to claims of their creditors.

Exemption from debts.

Cited in *Ferguson's Estate*, 140 Wis. 588, 123 N. W. 123, 17 A. & E. Ann. Cas. 1189, holding property purchased with pension money not exempt.

12 L. R. A. 375, *CRAWFORD v. OMAN & S. STONE CO.* 34 S. C. 90, 12 S. E. 929.

12 L. R. A. 379, *SCOTT v. ELDRIDGE*, 154 Mass. 25, 27 N. E. 677.

Right to arrest without warrant.

Cited in *Palmer v. Maine C. R. Co.* 92 Me. 409, 44 L. R. A. 675, 69 Am. St. Rep. 513, 42 Atl. 800, denying authority of constable to arrest without warrant on information of misdemeanor; *Com. v. Wright*, 158 Mass. 159, 19 L. R. A. 210, 35 Am. St. Rep. 475, 33 N. E. 82, denying authority of officer to arrest without warrant for statutory misdemeanor not amounting to breach of peace; *Jackson v. Knowlton*, 173 Mass. 97, 53 N. E. 134, holding (*obiter*) peace officer may arrest without warrant on reasonable suspicion of felony; *Westberry v. Clanton*, 136 Ga. 796, 72 S. E. 238, holding that arrest for misdemeanor, cannot be made without warrant on authority of telegram from police officer in another state.

Cited in footnotes to *McCullough v. Greenfield*, 62 L.R.A. 906, which holds arrest under telephonic direction from officer holding warrant illegal; *State ex rel. Livingstone v. Williams*, 67 L.R.A. 166, which holds that mandamus will not lie to compel arrest without warrant of designated persons for alleged commission of a misdemeanor.

Cited in notes (51 L.R.A. 211) on liability of officer for making arrest; (84 Am. St. Rep. 694) on right of policeman to make arrest.

12 L. R. A. 382, *GLENN v. JACKSON*, 93 Ala. 342, 9 So. 259.

Innkeepers' liability.

Cited in footnotes to *Cunningham v. Buckey*, 35 L. R. A. 850, which holds

innkeeper liable for theft of servants from guests while asleep; *Cohen v. Manuel*, 40 L. R. A. 491, which sustains innkeeper's liability for goods stolen from unlicensed peddler's cart; *Amey v. Winchester*, 39 L. R. A. 760, which denies hotelkeeper's liability for loss of hats left on racks by persons attending club banquet at hotel; *Bradley Livery Co. v. Snook*, 55 L. R. A. 208, which denies innkeeper's liability for team tied under shed without his attention being called to fact; *Rains v. Maxwell House Co.* 64 L.R.A. 471, which holds watch within operation of a statute providing that the retention of jewels by a guest at a hotel shall be at his own risk.

Cited in notes (2 L.R.A.(N.S.) 100) on duty of innkeeper as to effects of one who has ceased to be guest; (99 Am. St. Rep. 587) on liability of innkeepers for injury to, or loss of, guest's property; (13 Eng. Rul. Cas. 130) on liability of innkeeper for property of guest.

Distinguished in *Baehr v. Downey*, 133 Mich. 168, 103 Am. St. Rep. 444, 94 N. W. 750, holding innkeeper liable for loss of package delivered to him after guest had departed but which he had agreed to forward.

Who is guest.

Cited in footnote to *Fay v. Pacific Improv. Co.* 16 L. R. A. 188, which holds character as guest at hotel not lost by merely inquiring as to price of room and board.

Cited in note (105 Am. St. Rep. 940) on who are guests at inn.

12 L. R. A. 384, *RITCHIE v. GRIFFITHS*, 1 Wash. 429, 22 Am. St. Rep. 155, 25 Pac. 341.

Followed without discussion in *Andressen v. Griffiths*, 1 Wash. 445, 25 Pac. 346; *Derrickson v. Griffiths*, 1 Wash. 446, 25 Pac. 346.

Protection of bona fide purchaser from holder of record title.

Cited in *Sadler v. Niesz*, 5 Wash. 192, 31 Pac. 630, holding wife living in distant part of country cannot assert community rights against bona fide purchaser from husband; *Bernard v. Benson*, 58 Wash. 195, 137 Am. St. Rep. 1051, 108 Pac. 439, holding that record of executory contract for sale of land in miscellaneous records does not import notice.

Cited in note (13 L. R. A. 238) on recording acts.

Indexing of records.

Cited in *Sawyer v. Vermont Loan & T. Co.* 41 Wash. 530, 84 Pac. 8 (dissenting opinion), on priorities where deed was recorded but not indexed at time of filing of notice of lis pendens.

Cited in note (14 L. R. A. 395, 396) on index as part of record of title.

Limited in *McPherson v. Smith*, 14 Wash. 229, 44 Pac. 255, holding affirmative proof of proper indexing of notice of logging lien not essential to recovery; *Malbon v. Grow*, 15 Wash. 303, 46 Pac. 330, holding index to mortgage records, giving names of mortgagor and mortgagee and general description of land, sufficient.

12 L. R. A. 393, *PERRY v. JENSEN*, 142 Pa. 125, 21 Atl. 866.

12 L. R. A. 395, *CANNELL v. SMITH*, 142 Pa. 25, 21 Atl. 793.

Breach of fiduciary relation affecting agent's right to compensation.

Cited in *Wilkinson v. McCullough*, 196 Pa. 209, 79 Am. St. Rep. 702, 46 Atl. 357, holding real estate broker concealing material facts from principal to prevent raising price cannot recover commissions; *Borie v. Satterthwaite*, 12 Montg. Co. L. Rep. 207, holding (*obiter*) commissions paid broker before discovering

failure to reveal material facts recoverable; *Hogle v. Meyering*, 161 Mich. 486, 126 N. W. 1063, holding that agent of buyer secretly making a profit upon the transaction is liable therefor to his principal; *Marshall v. Reed*, 32 Pa. Super. Ct. 65, holding explicit consent of both parties essential before agent can recover compensation from both buyer and seller.

Cited in footnote to *Strong v. Brennan*, 47 L. R. A. 792, which denies right of attorney to recover for services to association employing him, when also engaged and paid by adverse party.

Brokers acting for both parties.

Cited in *Campbell v. Baxter*, 41 Neb. 736, 60 N. W. 90, upholding vendor's right to recover commissions ignorantly paid broker in vendee's employ; *Addison v. Wanamaker*, 185 Pa. 543, 42 W. N. C. 129, 39 Atl. 1111, holding real estate broker cannot act for vendor and vendee unless with knowledge of both; *Maxwell v. West*, 23 Pa. Co. Ct. 303, 30 Pittsb. L. J. N. S. 340, holding commissions recoverable from vendor and vendee knowing agent represented both; *Bryan Slate Co. v. Seip*, 10 North Co. Rep. 208, holding that broker concealing from vendor and vendee that he is acting for both cannot recover commissions from either; *Burnham City Lumber Co. v. Rannie*, 59 Fla. 191, 50 So. 617, holding that person cannot act as agent for both parties to transaction in cases requiring discretion, unless with principal's consent; *Lightcap v. Nicola*, 34 Pa. Super. Ct. 202, holding that vendee may rescind contract where his agent secretly receives a commission upon the sale from vendor; *Hanna v. Haynes*, 42 Wash. 291, 84 Pac. 861, holding contract to be against public policy where agent of vendee accepts commission upon the sale from vendor without vendee's knowledge.

Cited in notes (45 L.R.A. 47, 49) on fraud and secret dealings or interest of real estate brokers as affecting their commissions; (139 Am. St. Rep. 257) on right of broker, acting for both parties, to commissions.

Purchase by agent of subject of agency.

Cited in *Pomeroy v. Wimer*, 167 Ind. 451, 79 N. E. 446, holding that agent with power to buy and sell, may not buy from himself without full disclosure to his principal.

Cited in footnote to *Kimball v. Ranney*, 46 L. R. A. 403, which denies right of agent employed to sell mortgaged property for owner, to purchase at sale.

Contracts against public policy.

Cited in *Devries v. Orem*, 104 Md. 653, 65 Atl. 430, holding that contract by which creditor of bankrupt agrees to pay additional compensation to the trustee in bankruptcy, is void.

Distinguished in *Kauffman v. Keiper*, 18 Pa. Co. Ct. 184, 5 Pa. Dist. R. 622, holding note given to effect withdrawal of director's opposition to proposed purchase by corporation invalid.

12 L. R. A. 397, *FARKAS v. POWELL*, 86 Ga. 800, 13 S. E. 200.

Liability for exceeding time or place fixed in hiring.

Cited in *Spencer v. Shelburne*, 11 Tex. Civ. App. 522, 33 S. W. 260, holding hirer using horse on longer journey not liable for loss, if extra journey did not materially contribute to injury; *Doolittle v. Shaw*, 92 Iowa, 352, 26 L. R. A. 369, 54 Am. St. Rep. 562, 60 N. W. 621, holding mere going beyond point fixed in hiring horse not conversion; *Palmer v. Mayo*, 80 Conn. 356, 15 L.R.A. (N.S.) 429, 125 Am. St. Rep. 123, 68 Atl. 369, 12 A. & E. Ann. Cas. 691, holding that one hiring a horse to go to a certain place is liable for accidental injury to the horse while driving to a different place; *Carney v. Rease*, 60 W. Va. 677, 55 S. E. 729, on liability where horse is used in deviation from trip for which hired; *Breswell*

v. Garfield Cotton Oil Mill Co. 7 Ga. App. 171, 66 S. E. 539, on liability where minor is hired to do certain work and master has him do other more dangerous work by which he is injured.

Cited in notes (26 L.R.A. 367) on liability of hirer for driving team to places where it was not hired to go; (25 Eng. Rul. Cas. 172) on deviation as to place or time fixed in hiring as conversion.

12 L. R. A. 399, JONES v. McEWAN, 91 Ky. 373, 16 S. W. 81.

Effect of acceptance of goods sold under contract.

Cited in Florida Athletic Club v. Hope Lumber Co. 18 Tex. Civ. App. 168, 44 S. W. 10, holding acceptance after opportunity to examine lumber waives visible defects; Parker v. Fenwick, 138 N. C. 215, 50 S. E. 627, holding claims for damages to machine waived where it was accepted and used for two years without claim of any defects; Gentilli v. Starace, 27 Jones & S. 455, 14 N. Y. Supp. 764, on acceptance of goods and retention after opportunity to examine, as waiver of any defect as to quality.

Cited in footnotes to Morse v. Moore, 13 L. R. A. 224, which holds vendor's obligation not terminated by acceptance of goods; Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co. 53 L. R. A. 681, which requires buyer to pay for fruit received under contract, knowing full amount cannot be delivered.

Cited in notes (17 L.R.A. 209) on promise to give full satisfaction, subject to judgment of promisee; (25 L.R.A.(N.S.) 161) as to whether words constituting basis of implied warranty of quality may be considered an express warranty; (35 L.R.A.(N.S.) 281) on effect of acceptance after inspection on sale with particular description of kind or quality.

Distinguished in Munford v. Kevil, 109 Ky. 250, 58 S. W. 703, holding buyer taking bill of lading does not waive right to damages for nonconformity to description by receiving wheat on arrival; Webb v. Milford Shoe Co. 128 Ky. 312, 108 S. W. 229, holding breach of warranty of quality of shoes not waived by acceptance after inspection, where its defect was not apparent; Wallace v. Knoxville Woolen Mills, 117 Ky. 455, 78 S. W. 192, holding the same in case of sale of yarn.

Disapproved in Atkins Bros. Co. v. Southern Grain Co. 119 Mo. App. 126, 95 S. W. 949, holding that acceptance after inspection or opportunity to inspect is not a waiver of breach of warranty as to quality.

12 L. R. A. 401, *Re* ROMAINE, 127 N. Y. 80, 27 N. E. 759.

What subject to succession tax.

Cited in *Re* Burr, 16 Misc. 90, 38 N. Y. Supp. 811, holding nonresident decedent's savings bank deposit, money in hands of attorney, and bonds secured by mortgage in state, subject to transfer tax; *Re* Blackstone, 69 App. Div. 129, 74 N. Y. Supp. 508, and *Re* Houdayer, 150 N. Y. 40, 34 L. R. A. 237, 55 Am. St. Rep. 642, 44 N. E. 718, Reversing 3 App. Div. 479, 38 N. Y. Supp. 323, holding nonresident decedent's bank deposit in state subject to transfer tax; Blackstone v. Miller, 188 U. S. 204, 47 L. ed. 444, 23 Sup. Ct. Rep. 277, sustaining state's right to subject to collateral inheritance tax debts due nonresident decedent; *Re* Whiting, 150 N. Y. 29, 34 L. R. A. 233, 55 Am. St. Rep. 640, 44 N. E. 715, Modifying 2 App. Div. 590, 38 N. Y. Supp. 131, holding foreign and domestic bonds, and stock of domestic corporations, owned by nonresident decedent, deposited within state, subject to transfer tax; *Re* Crerar, 31 Misc. 482, 65 N. Y. Supp. 573, holding nonresident decedent's stock in domestic corporations and interest in firm doing business in state subject to transfer tax; *Re* King, 30

Misc. 577, 63 N. Y. Supp. 1100, holding nonresident decedent's interest in firm doing business in state subject to transfer tax; *Eidman v. Martinez*, 184 U. S. 587, 46 L. ed. 703, 22 Sup. Ct. Rep. 515, holding bonds of nonresident alien passing to nonresident alien son by will and intestate laws of foreign country not subject to Federal transfer tax; *Moore v. Ruckgaber*, 184 U. S. 597, 46 L. ed. 707, 22 Sup. Ct. Rep. 521, holding intangible personality of nonresident alien passing to nonresident alien under will executed in United States not subject to transfer tax; *Lewis's Estate*, 203 Pa. 218, 52 Atl. 205, Affirming 10 Kulp, 448, holding intangible property on nonresident decedent in state subject to collateral inheritance tax; *Re Phipps*, 77 Hun, 327, 28 N. Y. Supp. 330, holding nonresident decedent's right to legacy under will of resident not subject to collateral inheritance tax; *Re Swift*, 137 N. Y. 83, 18 L. R. A. 711, 32 N. E. 1096, Same Case in Surrogate's Court, 2 Connolly, 651, 16 N. Y. Supp. 193, holding personality of resident decedent without state subject to collateral inheritance tax; *Re Sutton*, 15 Misc. 659, 38 N. Y. Supp. 102, holding equitable conversion under will does not subject real estate to transfer tax; *Re Bronson*, 150 N. Y. 11, 34 L. R. A. 243, 55 Am. St. Rep. 632, 44 N. E. 707, Modifying 1 App. Div. 548, 37 N. Y. Supp. 476 (dissenting opinion), majority holding bonds of domestic corporations held by nonresident decedent at domicile not subject, and stocks subject, to transfer tax; *People v. Griffith*, 245 Ill. 539, 92 N. E. 313, holding stocks and bonds of foreign corporation held by decedent not liable to succession tax; *Neilson v. Russell*, 76 N. J. L. 41, 69 Atl. 476, holding that succession tax attaches to all property within the state regardless of the domicile of the decedent; *Re Hartman*, 70 N. J. Eq. 666, 62 Atl. 560, holding personal property of decedent wherever situated liable to inheritance tax in state of his domicile, though foreign state has law taxing such part of it as is within such state.

Cited in footnotes to *Re Swift*, 18 L. R. A. 709, as to what is subject to succession tax; *Howe v. Howe*, 55 L. R. A. 626, which authorizes transfer tax on contingent interests although they do not vest within fixed time for paying tax; *Re Stewart*, 14 L. R. A. 836, which authorizes succession tax on contingent interests under power of appointment after vesting of same; *Re Pell*, 57 L. R. A. 540, which holds void, tax on all remainders vesting prior to certain date, but not coming into possession till after passage of act; *Re Roosevelt*, 25 L. R. A. 695, which holds life annuities contingent on survivorship not subject to succession tax until they vest; *People v. McCormick*, 64 L. R. A. 775, which holds present succession tax not imposable upon property to be divided at termination of trust among persons not at present ascertainable; *Re Dows*, 52 L. R. A. 433, which holds real property subject to power of appointment converted into personality, subject to transfer tax on personality.

Distinguished in *Re Leopold*, 35 Misc. 370, 71 N. Y. Supp. 1032, holding temporary deposit of nonresident decedent not subject to transfer tax; *Re Preston*, 37 Misc. 236, 75 N. Y. Supp. 251, holding bonds held by nonresident decedent at domicile, secured by mortgage on lands in state, not subject to transfer tax; *Re James*, 144 N. Y. 12, 43 Am. St. Rep. 725, 38 N. E. 961, Affirming 77 Hun, 213, 28 N. Y. Supp. 351, Which Reverses 6 Misc. 207, 1 Power, 604, 27 N. Y. Supp. 288, holding nonresident decedent's certificates of stock of foreign corporation not subject to collateral inheritance tax; *Re Gibbes*, 84 App. Div. 512, 83 N. Y. Supp. 53, Reversing 40 Misc. 582, 83 N. Y. Supp. 56, holding nonresident's foreign bonds, on deposit in state, which pass to nonresidents, not subject to inheritance tax; *Fidelity & D. Co. v. Crenshaw*, 120 Tenn. 616, 110 S. W. 1017, holding that there is no inheritance tax on personality, of foreign decedent, which under the laws of his domicile goes to his mother, though there would have been a tax thereon if it had been distributed according to the law of this state.

Validity of succession and collateral inheritance taxes.

Cited in *State v. Alston*, 94 Tenn. 682, 28 L. R. A. 180, 30 S. W. 750, and *Calhahan v. Woodbridge*, 171 Mass. 597, 51 N. E. 176, holding collateral inheritance tax law constitutional; *People ex rel. Hatch v. Reardon*, 184 N. Y. 451, 8 L.R.A. (N.S.) 324, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515, holding that state may tax the transfer, within this state, of stock of a foreign corporation, though such transfer is between nonresidents.

Cited in footnotes to *State v. Hamlin*, 25 L. R. A. 632, which holds succession tax valid; *State ex rel. Schwartz v. Ferris*, 30 L. R. A. 218, which holds void, for lack of uniformity, statute exempting estates less than \$20,000 in value; *State ex rel. Gelsthorpe v. Furnell*, 39 L. R. A. 170, which sustains exemption from succession tax of estate less than \$7,500.

Cited in note (41 Am. St. Rep. 584) on constitutionality of collateral inheritance tax law.

Collateral inheritance tax; jurisdiction of surrogate's court.

Cited in *Re Embury*, 19 App. Div. 215, 79 N. Y. S. R. 882, 45 N. Y. Supp. 881, holding surrogate's court without jurisdiction to enforce collateral inheritance tax where nonresident decedent had no realty in state; *Re Ullmann*, 137 N. Y. 408, 33 N. E. 480, holding surrogate may determine validity of devise in assessing collateral inheritance tax.

Situs for purpose of taxation.

Cited in *Buck v. Beach*, 164 Ind. 44, 108 Am. St. Rep. 272, 71 N. E. 963, holding notes and mortgages kept by agent of lender in this state though owing and secured in another state are taxable.

Cited in notes (62 Am. St. Rep. 455) on situs of personal property for purposes of taxation; (127 Am. St. Rep. 1092, 1094) on situs of money and securities for purpose of inheritance taxation.

Distinguishable in *Adams v. Colonial & U. S. Mortg. Co.* 82 Miss. 393, 17 L.R.A. (N.S.) 147, 100 Am. St. Rep. 633, 34 So. 482, holding loans by nonresident lenders without an agency in the state, not taxable in the absence of statute.

12 L. R. A. 409, *BURBAGE v. WINDLEY*, 108 N. C. 357, 12 S. E. 839.

Rights of party to illegal contract.

Cited in *McNeill v. Durham & C. R. Co.* 135 N. C. 733, 47 S. E. 765 (dissenting opinion), majority holding passenger on pass illegally issued may recover for railroad's negligence; *McNeill v. Durham & C. R. Co.* 135 N. C. 733, 67 L.R.A. 250, 47 S. E. 765 (dissenting opinion), as to right of parties in *pari delicto* to recover from each other; *King v. Raleigh & P. S. R. Co.* 147 N. C. 266, 125 Am. St. Rep. 546, 60 S. E. 1133, 15 A. & E. Ann. Cas. 40, holding that newspaper cannot recover for publication of editorials, under contract with railroad, to aid in carrying an election for a bond issue; *Lloyd v. North Carolina R. Co.* 151 N. C. 540, — L.R.A. (N.S.) —, 66 S. E. 604, holding that railroad employee violating statute governing hours of labor on railroads cannot recover for injury resulting from his being employed longer hours than lawful.

Wager policies.

Cited in *Powell v. Dewey*, 123 N. C. 106, 68 Am. St. Rep. 818, 31 S. E. 381, holding life insurance void on which premium paid by beneficiary who has no insurable interest; *Cisna v. Sheibley*, 88 Ill. App. 389, holding life insurance obtained by parties without insurable interest, as speculation, void; *Hinton v. Mutual Reserve Fund Life Asso.* 135 N. C. 321, 65 L. R. A. 165, 47 S. E. 474, holding life insurance taken under agreement that one without insurable interest should pay premiums and have benefits void; *Maynard v. Life Ins. Co.* 132 N.

C. 713, 44 S. E. 405, holding debtor's administrator cannot contest validity of creditor's insurance on decedent's life; *Hinton v. Mutual Reserve Fund Life Asso.* 135 N. C. 321, 65 L.R.A. 165, 102 Am. St. Rep. 545, 47 S. E. 474, holding where it was agreed at the time of the application for a life policy was made that a person having no insurable interest in life of the insured should pay all the premiums and receive proceeds of the policy, it was void.

Distinguished in *Albert v. Mutual L. Ins. Co.* 122 N. C. 94, 65 Am. St. Rep. 693, 30 S. E. 327, sustaining validity of policy payable to one without insurable interest in insured's life, where insured paid premiums; *Hardy v. Aetna L. Ins. Co.* 152 N. C. 291, 67 S. E. 767, holding that insured holding policy payable to himself or his estate may assign same to one having no insurable interest where done in good faith; *Bendet v. Ellis*, 120 Tenn. 291, 18 L.R.A.(N.S.) 118, 127 Am. St. Rep. 1000, 111 S. W. 795, holding assignee, having no insurable interest, but paying premium, liable to administrator of insured for amount received on policy less amount of premiums paid thereon by him.

12 L. R. A. 412, *STATE v. NEIS*, 108 N. C. 787, 13 S. E. 225.

Sale of liquors by social club.

Cited in *State v. Shumate*, 44 W. Va. 491, 29 S. E. 1001, holding unlicensed sale of liquors by social club illegal; *People ex rel. Stevenson v. Law & Order Club*, 203 Ill. 132, 62 L. R. A. 887, 67 N. E. 855, holding unlicensed furnishing of liquors at cost, out of common stock, to members of social club, illegal; *Mohrman v. State*, 105 Ga. 715, 43 L. R. A. 401, 70 Am. St. Rep. 74, 32 S. E. 143, holding social clubhouse where liquor dispensed to members, within statute prohibiting open tippling house on Sabbath; *People v. Adelphi Club*, 149 N. Y. 13, 31 L. R. A. 513, footnote p. 510, 52 Am. St. Rep. 700, 43 N. E. 410, which holds distribution of liquor by social club to members not illegal sale; *State v. Boston Club*, 45 La. Ann. 592, 20 L. R. A. 187, footnote p. 185, 12 So. 895, which holds incorporated clubs selling liquor to members owe license; *State ex rel. Bell v. St. Louis Club*, 125 Mo. 328, 26 L. R. A. 580, footnote p. 573, 28 S. W. 604, which holds valid distribution of liquor among members by social club; *State v. Colonial Club*, 154 N. C. 184, 31 L.R.A.(N.S.) 390, 69 S. E. 771, Ann. Cas. 1912 A, 1079, holding that social club does not sell liquor, where it receives and transmits together with money, order from member to manufacturer, to ship to club, which liquor is then delivered to buyer on coupons showing kind and amount; *Manning v. Canon City*, 45 Colo. 577, 23 L.R.A.(N.S.) 195, 101 Pac. 978; *State ex rel. Young v. Minnesota Club*, 106 Minn. 524, 20 L.R.A.(N.S.) 1106, 119 N. W. 494,—holding that bona fide social club furnishing liquors to members without profit, must have a license as provided by law for sales.

Cited in footnote to *State ex rel. Stevenson v. Law & Order Club*, 62 L.R.A. 885, which denies right of incorporated social club to dispense liquor to members without license.

Cited in notes (12 L.R.A.(N.S.) 521) on applicability of liquor laws to social club; (24 Am. St. Rep. 36, 42) on distribution of liquor by social clubs.

Disapproved in *Moriarty v. State*, 122 Tenn. 445, 25 L.R.A.(N.S.) 1253, 124 S. W. 1016, holding that bona fide fraternal lodge furnishing members liquor at cost is not engaged in sale thereof so as to be subject to license tax.

12 L. R. A. 414, *ALMY v. JONES*, 17 R. I. 265, 21 Atl. 616.

Charitable bequests.

Cited in *Palmer v. Union Bank*, 17 R. I. 631, 24 Atl. 109, holding bequest in trust, income to be used as prizes for medical essays, valid; *Wood v. Paine*, 66 Fed. 809, holding devise to town council in trust for support of town poor valid;

Kelly v. Nichols, 18 R. I. 83, 19 L. R. A. 432, 25 Atl. 840 (dissenting opinion), majority holding devise for hospitable entertainment of ministers and others invalid; Franklin v. Hastings, 253 Ill. 52, 97 N. E. 265, holding that gift for charitable uses may depend for its going into effect upon conditions to be performed by others which may or may not be performed within period allowed by statute; Coleman v. O'Leary, 114 Ky. 403, 70 S. W. 1068, holding valid, a bequest in trust to be used for rewards of merit to poor pupils in parochial schools of a certain city; Hubbard v. Worcester Art Museum, 194 Mass. 290, 9 L.R.A.(N.S.) 695, 80 N. E. 490, 10 A. & E. Ann. Cas. 1025; Wood v. Fourth Baptist Church, 26 R. I. 602, 61 Atl. 279,—holding that equity will not permit a valid charitable trust to fail for want of a competent trustee, but will appoint one to carry out intent of donor.

Cited in footnotes to Johnson v. Johnson, 22 L. R. A. 179, which holds devise to trustees for some charitable purpose, with preference for something of educational nature, bad for indefiniteness; Gambel v. Trippe, 15 L. R. A. 235, which holds bequest to trustees, to be paid over "to some Presbyterian institution" in specified city, void for indefiniteness; Thompson v. Brown, 62 L. R. A. 398, which sustains devise of fund to be distributed "to the poor" in executor's discretion; Crerar v. Williams, 21 L. R. A. 454, which holds arbitrary powers invalidating gift not given trustees of charity by authority to set aside amount of income to pay expenses.

Cited in notes (14 L.R.A.(N.S.) 67, 99, 104) on enforcement of general bequest for charity or religion; (63 Am. St. Rep. 261) on what are charitable uses or trusts; (64 Am. St. Rep. 760) on certainty and unity required in charitable trusts; (5 Eng. Rul. Cas. 578) on invalidity of charitable bequest for indebtedness.

Distinguished in Gladding v. St. Mathews' Church, 25 R. I. 639, 65 L.R.A. 231, 105 Am. St. Rep. 904, 57 Atl. 860, 1 A. & E. Ann. Cas. 537, holding that legacy to a named church lapsed where the church was consolidated with another under a new name.

Distinction between useful and fine arts.

Cited in Bleistein v. Donaldson Lithographing Co. 98 Fed. 611, denying copyright to engravings designed for use as circus show bills.

Application of statute giving share of deceased devisee to descendants.

Cited in Nicholson v. Nicholson, 115 Iowa, 497, 91 Am. St. Rep. 175, 88 N. W. 1064, holding child of niece dying before will executed does not share in devise to nephews and nieces; Murphy v. McKeon, 53 N. J. Eq. 409, 32 Atl. 374, holding statute vesting devise to brother dying before testator, in children, does not apply where devisee dies before enactment; Kiske v. Fiske, 26 R. I. 516, 59 Atl. 740, on construction of statute governing disposition of share of deceased devisee.

Cited in note (25 Eng. Rul. Cas. 555) on statutory provisions as to lapse of devise or bequest to relatives.

Distinguished in Pimel v. Petjemann, 183 N. Y. 197, 2 L.R.A.(N.S.) 584, 76 N. E. 157, 5 A. & E. Ann. Cas. 239, holding that a legacy to testator's "children" does not include a child deceased before the will is made and the issue of such deceased child takes nothing under such will.

Disapproved in Lewis v. Corbin, 195 Mass. 524, 122 Am. St. Rep. 261, 81 N. E. 248, holding that issue of legatee deceased before the making of the will, takes the share of such legatee where the will makes no different provision.

12 L. R. A. 417, *Re KINGMAN*, 153 Mass. 566, 27 N. E. 778.

Appeal from commissioners' award in 156 Mass. 365, 30 N. E. 820.

Legislative control of municipal property.

Cited in *South Portland v. Cape Elizabeth*, 92 Me. 334, 69 Am. St. Rep. 502, 42 Atl. 503, holding legislature dividing town may apportion town property; *Re De Las Casas*, 178 Mass. 218, 59 N. E. 664, same case on appeal from supplemental award, 180 Mass. 472, 62 N. E. 738, holding legislature may impose expense of metropolitan parks upon towns and cities in district; *Prince v. Crocker*, 166 Mass. 359, 32 L. R. A. 611, 44 N. E. 446, holding legislature may authorize construction and impose on city expense of subway without consent of city council; *Browne v. Turner*, 176 Mass. 14, 56 N. E. 969, sustaining act requiring leasing of subway constructed at city's expense to certain company at specified rental; *Gooch v. Exeter*, 70 N. H. 416, 85 Am. St. Rep. 637, 48 Atl. 1100, sustaining statute creating board of commissioners, with authority to control and fix pay of police; *Reynolds v. Waterville*, 92 Me. 32C, 42 Atl. 553, dissenting opinion by Savage, J., who holds legislature can control use and disposition of municipal property applied to public municipal uses; *Williams v. Parker*, 188 U. S. 504, 47 L. ed. 563, 23 Sup. Ct. Rep. 440, Affirming 174 Mass. 481, 47 L. R. A. 317, 55 N. E. 77, sustaining statute imposing on city liability for damages sustained by persons constructing buildings, through enactment limiting height; *Ware v. Fitchburg*, 200 Mass. 68, 85 N. E. 951, on legislative control over municipal corporations.

Distinguished in effect in *Mt. Hope Cemetery v. Boston*, 158 Mass. 511, 35 Am. St. Rep. 515, 33 N. E. 695, holding legislature cannot require transfer of municipal property to private corporation without compensation.

Purposes for which taxes assessable.

Cited in *Re Adams*, 165 Mass. 499, 43 N. E. 682, holding taxes leviable for specific object yet to be accomplished; *State ex rel. Bulkeley v. Williams*, 68 Conn. 151, 48 L. R. A. 494, 35 Atl. 24, holding legislature may require town tax for moneys to be paid to treasurer of bridge or highway district including town; *Hodgdon v. Haverhill*, 193 Mass. 411, 79 N. E. 830, holding that the legislature may authorize or require cities to build armories and assess the cost thereof upon the city; *Re Trecothick Marsh*, 38 N. S. 30, holding that amounts not yet paid out may be included in assessment for public improvement.

Cited in note (14 L. R. A. 474) on public purposes for which money may be appropriated or raised by taxation.

Disapproved in *Atty. Gen. ex rel. Brotherton v. Detroit*, 148 Mich. 101, 111 N. W. 860, holding that city has no power to lay street railway tracks in its streets to be leased to private parties for street railway purposes.

Delegation of power as to local improvement.

Cited in *Re Northampton*, 158 Mass. 301, 33 N. E. 568, and *Boston & L. R. Corp. v. Winchester*, 156 Mass. 219, 30 N. E. 439, holding legislature may, without prescribing definite rule, delegate apportionment between town and railroad of expense of grade crossings; *Re De Las Casas*, 178 Mass. 219, 59 N. E. 664, holding legislature may delegate to commissioners power to apportion expense of metropolitan parks, subject to sanction of court; *Masonic Bldg. Asso. v. Brownell*, 164 Mass. 311, 41 N. E. 306, holding legislature may delegate to board appointed by courts power to apportion expense of public improvement; *Brodline v. Reverse*, 182 Mass. 602, 66 N. E. 607, sustaining statute empowering park commissioners to make regulations breaches of which punishable as breaches of peace; *Welch v. Swasey*, 193 Mass. 375, 23 L.R.A.(N.S.) 1162, 118 Am. St. Rep. 523, 79 N. E. 745, upholding delegation by legislature, to a building commission, of the duty to establish districts for purpose of regulating the height of buildings.

Cited in notes (61 L. R. A. 674) on duty and liability of municipality with

respect to drainage; (60 L. R. A. 227) on procedure for the establishment of drains and sewers.

Power of court to review decision of commissioners.

Cited in *Re Old Colony R. Co.* 163 Mass. 357, 40 N. E. 198, holding provision that decree confirming decision of grade-crossing commissioners shall be final empowers court to confirm or reject report; *Newburyport Water Co. v. Newburyport*, 168 Mass. 552, 47 N. E. 533, holding commissioners' interpretation of statutory rule for determining fair value of water plant to city, reviewable by courts.

Apportionment by commission of expense of local improvement.

Cited in *Re Kingman*, 170 Mass. 112, 48 N. E. 1075, upholding apportionment of cost of constructing metropolitan sewerage system upon basis of real and personal valuation; *Re Metropolitan Park Comrs.* 209 Mass. 384, 95 N. E. 866, holding that commissioners appointed to apportion expenses of park districts are clothed with wide discretion in making such apportionment; *Soliah v. Cormack*, 17 N. D. 402, 117 N. W. 125, holding that part of cost of drain may be apportioned to a city town or township benefited thereby.

Necessity of special benefit to sustain local assessment.

Cited in *Smith v. Worcester*, 182 Mass. 234, 59 L. R. A. 730, 65 N. E. 40, upholding power of legislature to impose cost of sewers on particular district, irrespective of benefits to individual landowners; *Rolph v. Fargo*, 7 N. D. 662, 42 L. R. A. 655, 76 N. W. 242, sustaining front-foot paving assessment, irrespective of increase in value; *Martin v. Tyler*, 4 N. D. 304, 25 L. R. A. 848, 60 N. W. 392, raising, without passing upon, question of constitutionality of statute charging property with special assessments for improvements in excess of actual benefits.

Cited in notes (14 L. R. A. 756, 757) on necessity of special benefit to sustain assessments for local improvements.

Limited in *Sears v. Boston*, 173 Mass. 78, 43 L. R. A. 837, 53 N. E. 138, sustaining front-foot assessments for street-sprinkling.

12 L. R. A. 425, *LONG v. STATE*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4.

What constitutes lottery.

Cited in *Com. v. Sisson*, 178 Mass. 581, 60 N. E. 385, and *State v. Dalton*, 22 R. I. 87, 48 L. R. A. 781, 84 Am. St. Rep. 818, 46 Atl. 234, holding distribution of trading stamps not lottery; *Horner v. United States*, 147 U. S. 462, 37 L. ed. 242, 13 Sup. Ct. Rep. 409, holding Australian bonds giving holders opportunity of determining prize by lot, lottery scheme; *Winston v. Beeson*, 135 N. C. 285, 47 S. E. 457, holding trading-stamp business not taxable as "gift enterprise;" *State v. Ramseyer*, 73 N. H. 36, 58 Atl. 958, 6 A. & E. Ann. Cas. 445; *State v. Dodge*, 76 Vt. 205, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; *Leonard v. Bassindale*, 46 Wash. 302, 89 Pac. 879,—holding act prohibiting use of trading stamps, unconstitutional; *Denver v. Frueauff*, 39 Colo. 33, 7 L.R.A.(N.S.) 1136, 88 Pac. 389, 12 A. & E. Ann. Cas. 521, holding invalid ordinance prohibiting use of trading stamps; *Humes v. Little Rock*, 138 Fed. 933; *Montgomery v. Kelly*, 142 Ala. 559, 70 L.R.A. 212, 110 Am. St. Rep. 43, 38 So. 67,—holding invalid ordinance imposing license fee upon merchants issuing trading stamps; *Hewin v. Atlanta*, 121 Ga. 729, 67 L.R.A. 798, 49 S. E. 765, 2 A. & E. Ann. Cas. 296, holding invalid statute imposing license tax upon the giving of trading stamps; *O'Keefe v. Somerville*, 190 Mass. 113, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684, holding unconstitutional act imposing an excise tax upon the giving of trading stamps.

Cited in footnotes to *State ex rel. Sheets v. Interstate Sav. Invest. Co.* 52 L. R. A. 530, which holds unlawful, investment securities, etc., incapable of accumulating reserve fund required within period fixed, without aid from lapses on appropriations from premiums on new business; *State ex rel. Prout v. Nebraska, Home Co.* 60 L. R. A. 448, which holds scheme by which common fund is distributed among contributors and a valuable preference in distribution is made to depend on chance, a lottery; *Equitable Loan & S. Co. v. Waring*, 62 L.R.A. 93, which holds consideration, prize, and chance essential elements of lottery; *People ex rel. Ellison v. Lavin*, 66 L.R.A. 601, which holds distribution of prizes to those who shall make closest estimate of number of cigars on which tax is paid during specified month, a lottery; *People v. McPhee*, 69 L.R.A. 506, which holds a scheme by which a certain number of persons pay a small sum weekly and choose by lot each week one of the number to receive a suit of clothes worth much more than the weekly payment after which he ceases to be a member, a lottery, although each member is entitled to trade out the amount paid in whenever he chooses to withdraw.

Cited in note (2 L.R.A.(N.S.) 590) on trading stamps.

Distinguished in *Lansburgh v. District of Columbia*, 11 App. D. C. 529, holding distribution of "trading stamps" within statute prohibiting gift enterprise; *State v. Hawkins*, 95 Md. 142, 93 Am. St. Rep. 328, 51 Atl. 850, sustaining statute prohibiting giving trading stamps; *State ex rel. Simpson v. Sperry & H. Co.* 110 Minn. 392, 30 L.R.A.(N.S.) 970, 126 N. W. 120, holding trading stamp act constitutional so far as it prohibited issue and redemption of trading stamps in any way depending upon chance, uncertainty or contingency.

Legislative power to prohibit gambling.

Cited in *Ford v. State*, 85 Md. 475, 41 L. R. A. 552, 60 Am. St. Rep. 337, 37 Atl. 172, sustaining constitutionality of statute prohibiting possession of lottery or policy slips; *Re Opinion of the Justices*, 208 Mass. 609, 94 N. E. 848; *State v. Caspare*, 115 Md. 26, 80 Atl. 606,—holding that legislature may not arbitrarily interfere with private business, or impose unnecessary restrictions upon lawful occupations.

12 L. R. A. 428, *CHAPLIN v. BROWN*, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 1074.

Contracts tending to restrain trade.

Cited in *Downing v. Lewis*, 56 Neb. 388, 76 N. W. 900, holding contract by person selling business not to engage therein in city for limited time, valid; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 119, 50 L. R. A. 178, 85 Am. St. Rep. 125, 28 So. 669, holding contract, without sale of business to discontinue manufacture of ice in certain town for fixed period, void; *Mallinekrodt Chemical Works v. Nemnich*, 83 Mo. App. 14, holding employee's contract not to engage in manufacture or sale of articles manufactured by employer, within United States, for six years after leaving service, invalid; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 135, 29 C. C. A. 158, 54 U. S. App. 723, 85 Fed. 271, holding agreement restricting competition between iron-pipe companies, unlawful; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 388, 61 L. R. A. 473, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination to control price of meat illegal; *State v. Smiley*, 65 Kan. 264, 69 Pac. 199, holding grain-buyers' agreement limiting competition among themselves, contrary to public policy; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 70, 71 S. W. 691, holding brewer's agreement not to sell to persons indebted to any of them, illegal; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 47, 45 L. R. A. 377, 52 S. W. 595, sustaining constitutionality of statute prohibiting insurance companies from contracting with

each other for maintenance of rates; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 408, 55 L. ed. 519, 31 Sup. Ct. Rep. 376, holding that agreements, having for sole purpose destruction of competition and fixing of prices are void; *Barrone v. Moseley Bros.* 144 Ky. 702, 139 S. W. 869, holding that contract, sole object of which is to restrain competition is void; *Clemons v. Meadows*, 123 Ky. 183, 6 L.R.A.(N.S.) 851, 124 Am. St. Rep. 339, 94 S. W. 13, holding contract between proprietors of competing hotels invalid where one for a consideration payable monthly agreed to close his hotel for three years; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 461, 116 S. W. 902, on validity of legislation against trusts and combinations in restraint of trade.

Cited in notes (6 L.R.A.(N.S.) 848) on validity of stipulation not to engage in particular business, not ancillary to lawful contract; (12 L.R.A.(N.S.) 151) on combination among produce buyers as monopoly; (74 Am. St. Rep. 255, 268) on combinations constituting unlawful trusts; (49 Am. St. Rep. 789, 790; 41 L. ed. U. S. 1010) on validity of contracts in restraint of trade.

Distinguished in *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.* 114 Iowa, 576, 87 N. W. 496, upholding validity of agreement not to sell paving material to city for certain period; *Swigert v. Tilden*, 121 Iowa, 658, 63 L. R. A. 612, 100 Am. St. Rep. 374, 97 N. W. 82, holding agreement by vendor of business not to engage therein within certain territory, valid.

Necessity of consideration for contract not under seal.

Cited in note (6 Eng. Rul. Cas. 7) on necessity of consideration for promise not under seal.

12 L. R. A. 429, *HUNTER v. COOPERSTOWN & S. VALLEY R. CO.* 126 N. Y. 18, 26 N. E. 958.

Contributory negligence.

Cited in *Sias v. Rochester R. Co.* 92 Hun, 148, 36 N. Y. Supp. 378 (by Hardin, J., dissenting) majority holding negligence of passenger unnecessarily standing on platform and leaning over side of street car, question for jury; *Jackson v. Greene*, 134 App. Div. 918, 118 N. Y. Supp. 930 (dissenting opinion), on attempt to leave elevator cage suspended between two floors, but in which employee was safe, as being contributory negligence; *Hawley v. Wright*, 37 N. S. 92, on attempt to leave moving elevator cage as contributory negligence.

— In getting on or off moving train.

Followed in *Myers v. New York C. & H. R. R. Co.* 88 Hun, 620, 34 N. Y. Supp. 807, same case on former appeal, 82 Hun, 38, 31 N. Y. Supp. 153, holding one attempting to board train moving at rate of 2 miles per hour negligent *per se* though conductor told him to do so.

Cited in *Heaton v. Kansas City P. & G. R. Co.* 65 Mo. App. 484, holding boarding train moving at 6 miles per hour, conductor saying "jump on," negligence *per se*; *Connaughton v. Brooklyn & B. B. R. Co.* 13 Misc. 403, 34 N. Y. Supp. 243, holding person attempting to board moving train guilty of negligence; *Fahr v. Manhattan R. Co.* 9 Misc. 60, 29 N. Y. Supp. 1, and *Robinson v. Manhattan R. Co.* 5 Misc. 211, 25 N. Y. Supp. 91, holding boarding moving elevated train while gate closing, negligence *per se*; *Mearns v. Central R. Co.* 163 N. Y. 114, 57 N. E. 292, holding person alighting from moving train erroneously supposing it had stopped, guilty of negligence *per se*; *Louisville, N. A. & C. R. Co. v. Johnson*, 44 Ill. App. 58, and *Scully v. New York, L. E. & W. R. Co.* 80 Hun, 199, 30 N. Y. Supp. 61, holding jumping from moving train negligence; *Geogagn v. New York, N. H. & H. R. Co.* 10 App. Div. 455, 42 N. Y. Supp. 205, holding negligence of passengers jumping from slowly moving train, question for jury; *Geiler v. Manhattan R. Co.* 11 Misc. 416, 32 N. Y. Supp. 254, holding negligence of passenger

directed to jump from moving train, question for jury; *Gannon v. Chicago, R. I. & P. R. Co.* 141 Iowa, 42, 23 L.R.A.(N.S.) 1063, 117 N. W. 966, holding that attempt to board moving car is not of itself conclusively negligence.

Cited in note (21 L. R. A. 356) on injuries in getting on and off railroad trains.

Distinguished in *Lewis v. Delaware & H. Canal Co.* 145 N. Y. 516, 40 N. E. 248. Reversing 80 Hun, 195, 30 N. Y. Supp. 28, holding negligence of person getting off slowly moving train at conductor's suggestion, question for jury; *Mahar v. New York C. & H. R. R. Co.* 5 App. Div. 29, 39 N. Y. Supp. 63, holding contributory negligence of passenger about to alight when train starts and passenger attempts to return to car, for jury; *Reid v. New York*, 68 Hun, 112, 22 N. Y. Supp. 623, holding negligence of passenger alighting from car just starting, for jury.

Limited and distinguished in *Distler v. Long Island R. Co.* 151 N. Y. 426, 35 L. R. A. 764, 45 N. E. 937, Reversing 78 Hun, 253, 28 N. Y. Supp. 865, holding boarding slowly moving train by conductor's direction, where no unusual or peculiar danger appears, not negligence *per se*.

When testimony on former trial may be considered on appeal.

Cited in *Williams v. Delaware, L. & W. R. Co.* 92 Hun, 222, 36 N. Y. Supp. 274, following former decision of court of appeals where plaintiff apparently attempted to change testimony to avoid former decision.

12 L. R. A. 433, *GILL v. STATE*, 86 Ga. 751, 13 S. E. 86.

Sale of liquor to minor.

Followed in *Dixon v. State*, 86 Ga. 755, 13 S. E. 87, holding written order from parent to dealer requesting him to supply liquors to minor whenever he wanted them, void.

Cited in *Hamer v. People*, 104 Ill. App. 556, holding parent's order to liquor seller to let son "have what he wants" until further notice, insufficient; *Connolly v. People*, 42 Ill. App. 38, holding that under statute written authority of parent for selling liquor to minor must be special for each occasion.

Cited in footnotes to *State v. Neelly*, 27 L. R. A. 503, which holds sale of liquor to minor claiming to buy as agent illegal; *Pressly v. State*, 69 L.R.A. 291, which holds prosecution for furnishing liquor to minors without parent's consent not prevented by mother's general consent in writing that addressee may furnish liquor to the minor whenever he desired to do so.

Disapproved in *Smith v. State*, 132 Ala. 40, 31 So. 352, sustaining validity of parent's consent to sale of liquor to minor "whenever he wants it."

12 L. R. A. 434, *HAMER v. BRAINARD*, 7 Utah, 245, 26 Pac. 299.

Necessity of demand on negotiable instrument.

Cited in footnote to *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.

12 L. R. A. 436, *BURLINGTON, C. R. & N. R. CO. v. DEY*, 82 Iowa, 312, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

State regulation of carrier's rates.

Reaffirmed on second appeal, in 89 Iowa, 14, 56 N. W. 267, holding statutes involved constitutional.

Cited in *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 264, 46 L. ed. 1156, 22 Sup. Ct. Rep. 900, sustaining act providing for establishment of joint rates over lines of independent connecting railroads; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 496, 42 L. ed. 252, 17 Sup.

Ct. Rep. 896, denying power of Interstate Commerce Commission to prescribe rates; *Jacobson v. Wisconsin*, M. & P. R. Co. 71 Minn. 532, 40 L. R. A. 392, footnote p. 389, 70 Am. St. Rep. 358, 74 N. W. 893, which sustains interchange of loaded cars and making of joint rates for through shipments over connecting railroads.

Cited in footnotes to *Chicago, B. & Q. B. Co. v. Jones*, 24 L.R.A. 141, which holds interstate commerce not affected by statute as to transportation within state; *Southern Exp. Co. v. Goldberg*, 62 L.R.A. 669, denying right of state to fix rates to be charged within state by interstate carrier.

Cited in notes (33 L. R. A. 179) on legislative power to fix tolls, rates or prices; (33 L. R. A. 209) as to when rates fixed by penal statute are sufficiently definite and certain; (6 L.R.A.(N.S.) 835) on businesses affected with public interest subjecting them to regulation and control in respect to rates or prices.

"Joint rate" defined.

Cited in *State v. Chicago, B. & Q. R. Co.* 90 Iowa, 603, 58 N. W. 1060, holding rate for shipment over more than one road, joint, though order fixes charge for each road.

Railroad's obligation to accept shipment.

Cited in *Inman v. St. Louis Southwestern R. Co.* 14 Tex. Civ. App. 52, 37 S. W. 37, holding railway bound to accept goods consigned to point on connecting line on tender of through joint rate; *Gulf, C. & S. F. R. Co. v. State*, 56 Tex. Civ. App. 364, 120 S. W. 1028, holding that railroad cannot be required to furnish cars for transportation of freight beyond its own line when to do so would impair its equipment; *Louisville & N. R. Co. v. Central Stock Yards Co.* 133 Ky. 168, 97 S. W. 778, holding that constitutional provision requiring interchange of cars and switching by connecting carriers is valid and does not interfere with interstate commerce.

Authority of railroad commissioners.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Railroad Commission*, 171 Ind. 204, 86 N. E. 328, holding that railroad may be compelled to construct interchange track to another road; *Chicago, I. & L. R. Co. v. Railroad Commission*, 38 Ind. App. 453, 78 N. E. 338, holding that if court finds rate established by railroad commission to be unreasonable, such rate is invalid; *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 220, 21 L.R.A.(N.S.) 913, 100 Pac. 11, holding rates promulgated by corporation commission of state only *prima facie* reasonable.

Cited in footnote to *State ex rel. Tompkins v. Chicago, M. & St. P. R. Co.* 47 L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

Carrier's liability for exacting unreasonable charges.

Cited in *Winsor Coal Co. v. Chicago & A. R. Co.* 52 Fed. 722, denying liability of carrier for exacting unreasonable charges where not exceeding maximum permitted by statute; *Foster, Glassel Co. v. Kansas City Southern R. Co.* 121 La. 1058, 46 So. 1014, holding that schedule rates adopted with sanction of the Interstate Commerce Commission are *prima facie* reasonable.

Equal rights of connecting carriers.

Cited in footnote to *Little Rock & M. R. Co. v. St. Louis, & S. W. R. Co.* 26 L. R. A. 192, which holds others connecting carriers not entitled to through billing; rating, use of tracks, and terminals conceded to one.

Constitutionality of statute prescribing rules of evidence.

Cited in *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 384, 24 L. R. A. 147, 4 Inters.

Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247, sustaining statute making rates fixed by railroad commissioners *prima facie* reasonable.

Cited in footnotes to *Missouri, K. & T. R. Co. v. Simonson*, 57 L. R. A. 765, which holds void, statute making specifications of weights in bills of lading, conclusive; *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which holds void, statute preventing railroad company from setting up in defense of suit for injury to employee, decisions of state where injury occurred.

Statutes permitting recovery of attorney's fee.

Cited in *Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 716, 55 L. R. A. 265, 86 Am. St. Rep. 393, 87 N. W. 714, sustaining statute requiring railroad to pay to landowner reasonable attorney's fees in condemnation proceedings; *Farmers & M. Ins. Co. v. Dohney*, 62 Neb. 222, 97 Am. St. Rep. 624, 86 N. W. 1070, and *Lancashire Ins. Co. v. Bush*, 60 Neb. 124, 82 N. W. 313, sustaining statute permitting recovery of attorney's fee from insurance company in action on real-estate policy; *Liquidating Comrs. v. Marrero*, 106 La. 135, 30 So. 305, sustaining statute permitting recovery of attorney's fee in proceeding to collect taxes; *Dell v. Marvin*, 41 Fla. 228, 45 L. R. A. 203, 79 Am. St. Rep. 171, 26 So. 188, sustaining statute permitting recovery of attorney's fee in enforcing liens on mechanics, laborers, and materialmen; *Duckwall v. Jones*, 156 Ind. 685, 58 N. E. 1055, and *Wortman v. Kleinschmidt*, 12 Mont. 332, 30 Pac. 280 (distinguished in dissenting opinion) sustaining statute allowing recovery of reasonable attorney's fee on foreclosure of mechanic's lien; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 168, 41 L. ed. 672, 17 Sup. Ct. Rep. 255 (dissenting opinion) majority holding statute permitting recovery of attorney's fee in action against railroad, unconstitutional; *Thompson v. Wise Boy Min. & Mill Co.* 9 Idaho, 370, 74 Pac. 958, holding valid provision for attorney's fee to one enforcing a lien; *Pyramid Land & Stock Co. v. Pierce*, 30 Nev. 248, 95 Pac. 210, holding valid statute providing for attorney's fee in favor of plaintiff recovering in action against one unlawfully grazing stock on his land.

Cited in notes (14 L. R. A. 586) on constitutional equality of privileges, immunities, and protection; (17 L.R.A.(N.S.) 911; 79 Am. St. Rep. 178, 185) on constitutionality of statutes allowing attorney's fee.

Distinguished in *Davidson v. Jennings*, 27 Colo. 192, 48 L. R. A. 341, 83 Am. St. Rep. 49, 60 Pac. 354, holding statute permitting recovery of attorney's fee on foreclosing mechanic's lien unconstitutional.

Penalties.

Cited in *Com. v. Aul*, 18 Pa. Dist. R. 1047, sustaining validity of statute imposing greater penalty upon conviction for second offense; *People v. Baltimore & O. S. W. R. Co.* 246 Ill. 483, 92 N. E. 934, holding that proof that railroad charged more for hauling freight certain distance than it charged for hauling same class of freight, in same direction for longer distance, *prima facie* entitles people to judgment for penalty.

Cited in notes (35 L. R. A. 567) on cruel and unusual punishments; (64 Am. St. Rep. 382) on constitutionality of statutes imposing heavier penalty for second offense.

When statute held unconstitutional.

Cited in *Page v. Millerton*, 114 Iowa, 382, 86 N. W. 440, holding unconstitutionality of statute must clearly appear; *State ex rel. Hughes v. Reusswig*, 110 Minn. 476, 126 N. W. 279, on duty of court to give statute such construction as would make it valid, where it permits of two constructions.

Class legislation and equal protection.

Cited in *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 350, 33 L.R.A.(N.S.)

712, 108 N. W. 902, holding valid fellow servant law made applicable to railroads only; *Mier v. Phillips Fuel Co.* 130 Iowa, 577, 107 N. W. 621, holding valid statute making mine operator liable in double damages for taking minerals from lands of another.

Cited in notes (25 Am. St. Rep. 878) on 14th amendment as to special privileges, burdens and restrictions; (62 Am. St. Rep. 173) on protection of corporations from special and hostile legislation.

Delegation of power.

Cited in *Brady v. Mattern*, 125 Iowa, 169, 106 Am. St. Rep. 291, 100 N. W. 358, holding valid statute delegating to executive council and to auditor power to pass upon plans and methods adopted by building and loan association.

Cited in note (62 Am. St. Rep. 295) on delegation of power to fix rates.

Application of statute pertaining to remedies.

Cited in *Rauen v. Prudential Ins. Co.* 129 Iowa, 730, 106 N. W. 198, on statute pertaining wholly to remedies as being applicable to all actions brought within the state without regard to where the cause of action arose.

Dissolution of injunction.

Cited in *Lapland v. Marshalltown*, 134 Iowa, 264, 111 N. W. 816, holding that question of dissolving or continuing a temporary injunction where allegations of petition have been denied rests within discretion of trial court; *Swan v. Indianola*, 142 Iowa, 735, 121 N. W. 547, on dissolution of injunction upon appeal where only questions of law are involved.

Judicial notice.

Cited in note (124 Am. St. Rep. 55) on facts of which courts will take judicial notice.

12 L. R. A. 446, *TUFTS v. D'ARCAMBAL*, 85 Mich. 185, 24 Am. St. Rep. 79, 48 N. W. 497.

Conditional sales.

Cited in *Lippincott v. Rich*, 22 Utah, 202, 61 Pac. 526, holding return of unpaid notes not condition precedent to replevin of property conditionally sold; *Tufts v. Brace*, 103 Wis. 345, 79 N. W. 414, upholding vendor's right to resume possession under contract provision for retaking on default in payment of instalment; *Wiggins v. Snow*, 89 Mich. 478, 50 N. W. 991, holding vendor in contract of sale reserving title, without provision for retaking possession on default, may replevy property; *Maxwell v. Tufts*, 8 N. M. 400, 33 L. R. A. 856, 45 Pac. 979, upholding right of vendor retaining title to property conditionally sold to maintain replevin against vendee's creditor, though instrument unrecorded; *Ryan v. Wayson*, 108 Mich. 522, 66 N. W. 370, holding in replevin by vendor under contract of conditional sale, judgment in vendee's favor for excess of value over unpaid purchase price, error.

Cited in footnote to *Crompton v. Beach*, 18 L. R. A. 187, which holds that conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

Cited in notes (32 L. R. A. 466) on rights and liabilities of vendor and purchaser by conditional sale on default of payment; (3 L.R.A.(N.S.) 786) on effect of default in payment followed by rescission, as forfeiture of payments already made; (38 L.R.A.(N.S.) 893) on right of purchaser on conditional sale to recover back payments where the seller retakes the property.

12 L. R. A. 449, *BENNETT v. STATE*, 86 Ga. 401, 22 Am. St. Rep. 465, 12 S. E. 806.

Prosecutor's comment on extraneous facts as error.

Cited in *Ivey v. State*, 113 Ga. 1064, 54 L. R. A. 960, 39 S. E. 423, holding prosecutor's use of improper language not authorized by evidence or any fair deduction therefrom, error; *Washington v. State*, 87 Ga. 16, 13 S. E. 131, holding prosecutor's urging jury to strictly enforce law in arson case on trial because of frequent burnings, error; *Western & A. R. Co. v. Morrison*, 102 Ga. 340, 40 L. R. A. 91, 66 Am. St. Rep. 173, 29 S. E. 104, by Simmons, Ch. J. dissenting, who holds improper remarks by counsel will not justify improper remarks by opposing counsel; *State v. Dudley*, 147 Iowa, 655, 126 N. W. 812, holding that it is improper for prosecuting counsel, in argument to state that law gives prisoner right to show his good character and that they had right to infer that he would have done so if he could; *Georgia R. & Electric Co. v. Dougherty*, 4 Ga. App. 619, 62 S. E. 158, holding it error for court, after objection, to permit attorney to call the jury's attention to their own personal knowledge of plaintiff's good character.

Cited in notes (46 L. R. A. 666, 672) on reversal of conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorney; (37 L. ed. U. S. 1004) as to when counsel's address to jury is ground of error.

Prosecutor's comments on absence of testimony.

Cited in *Thompson v. State*, 92 Ga. 448, 17 S. E. 265, holding prosecutor's comment on defendant's failure to offer proof of good character, error; *Earle v. State*, 1 Ala. App. 188, 56 So. 32, holding it not error for prosecutor to state that as defendant had not impeached state witness, jury could infer that he could not be impeached; *Lowdon v. United States*, 79 C. C. A. 361, 149 Fed. 677, holding it error to permit counsel in argument to jury to presume defendant's character to be bad because of absence of evidence of good character.

Cited in note (20 L. R. A. 609) on evidence and instructions as to character of accused.

Presumption as to character.

Cited in *McClure v. State*, 6 Ga. App. 305, 65 S. E. 33, holding that every person is presumed to be of good character.

12 L. R. A. 452, *Re BOOTH*, 127 N. Y. 109, 24 Am. St. Rep. 429, 27 N. E. 826.

Sufficiency of signature to will.

Cited in *Meads v. Earle*, 205 Mass. 557, 29 L.R.A.(N.S.) 67, 91 N. E. 916, holding that signature of testator written at beginning of will drawn by himself is sufficient, if done with intent that it should stand as signature.

Cited in footnotes to *Re Andrews*, 48 L. R. A. 662, which holds signature to will on second page, without anything to connect portions contained on third page, insufficient; *Shaw v. Camp*, 36 L. R. A. 112, which holds unsigned, unattested sheet attached to will made effective by subsequent codicil; *Irwin v. Jacques*, 69 L.R.A. 422, which holds will signed on last page is not signed at end as required where a dispositive clause extends lengthwise of last page from near bottom to near top in no way connected with the body of the instrument.

Cited in note (29 L.R.A.(N.S.) 65) on name in body of will as signature.

12 L. R. A. 454, *FORD v. LAKE SHORE & M. S. R. CO.* 124 N. Y. 493, 26 N. E. 1101.

Master's liability for fellow servant's negligence.

Cited in *Chamberlain v. Southern R. Co.* 159 Ala. 175, 48 So. 703, holding

railroad liable to employee for injury resulting from improper loading of its cars.

Cited in footnote to *Dewey v. Detroit*, G. H. & M. R. Co. 22 L. R. A. 292, which holds railroad company not liable for injury to brakeman by load projecting beyond end of flat car.

Cited in notes (18 L. R. A. 827) on superior employees; (54 L. R. A. 44, 86, 161) on vice principalship as determined with reference to character of act which caused injury; (4 L.R.A.(N.S.) 517) on negligence of fellow servant concurring with failure to establish or enforce proper rules for conduct of business.

Distinguished in *Corcoran v. New York*, N. H. & H. R. Co. 46 App. Div. 203, 61 N. Y. Supp. 672, denying railroad's liability for brakeman's failure to warn yardman of approaching car; *Bailey v. Delaware & H. Canal Co.* 27 App. Div. 307, 50 N. Y. Supp. 87, denying railroad's liability to employee injured by projecting timber while coupling cars.

Duty to promulgate rules.

Cited in *Mulvaney v. Brooklyn City R. Co.* 1 Misc. 426, 21 N. Y. Supp. 427, holding failure to make rules as to trains passing on dangerous curve, negligence; *Rutledge v. Missouri P. R. Co.* 110 Mo. 319, 19 S. W. 38, holding rules adopted by employees will not excuse railroad's failure to promulgate rules; *Rutledge v. Missouri P. R. Co.* 123 Mo. 139, 24 S. W. 1053, by McFarlane, J., dissenting, who holds to same effect; *Devoe v. New York C. & H. R. Co.* 174 N. Y. 10, 66 N. E. 568, holding sufficiency and proper promulgation of verbal rule for protection of car inspectors, for jury; *Van Tassell v. New York*, L. E. & W. R. Co. 1 Misc. 303, 48 N. Y. S. R. 769, 20 N. Y. Supp. 708, holding (*obiter*) railroad may perform duty to employees by adopting rules for inspection and repairing of appliances; *Shields v. Kansas City Suburban Belt R. Co.* 87 Mo. App. 645, holding (*obiter*,) master liable for failure to make proper rules for conducting business; *Gerrish v. New Haven Ice Co.* 63 Conn. 17, 27 Atl. 235, holding employer liable for failure of superintendent to observe rule; *Crawford v. United R. & Electric Co.* 101 Md. 418, 70 L.R.A. 495, 61 Atl. 287, holding street railway company liable for injury to employee resulting from its failure to enforce proper rules for inspection of its cars; *Bain v. Northern P. R. Co.* 120 Wis. 420, 98 N. W. 241, holding it to be the duty of a railroad company to promulgate rules requiring warning before moving cars on warehouse tracks; *Gaska v. American Car & Foundry Co.* 127 Mo. App. 183, 105 S. W. 3; *Polaski v. Pittsburgh Coal Dock Co.* 134 Wis. 262, 14 L.R.A.(N.S.) 953, 114 N. W. 437,—holding it to be master's duty to promulgate rules for warnings where he employs many servants working independently of each other, in work which is at times dangerous; *Stone v. Union P. R. Co.* 35 Utah, 358, 100 Pac. 362 (dissenting opinion), on necessity of promulgating rules for running a railroad and sufficiency of such rules; *McCoy v. New York*, C. & H. R. R. Co. 185 N. Y. 283, 77 N. E. 1174, holding question whether or not a rule should have been promulgated governing warnings upon starting an engine, to be for jury.

Cited in note (43 L. R. A. 307, 308, 313, 331, 342) on duties of master and servant as to rules promulgated for safe conduct of business.

Distinguished in *Shepard v. New York C. & H. R. R. Co.* 44 N. Y. S. R. 819, 18 N. Y. Supp. 665 and *Larow v. New York*, L. E. & W. R. Co. 61 Hun, 14, 15 N. Y. Supp. 384, holding it error to permit jury to decide whether specific rule should have been promulgated.

Assumption of risk by employee.

Cited in *Felice v. New York C. & H. R. R. Co.* 14 App. Div. 350, 43 N. Y. Supp. 922, holding employee bound only to look out for dangers not avoidable by

master's exercise of reasonable care; *Albert v. New York C. & H. R. R. Co.* 80 Hun, 155, 29 N. Y. Supp. 1126, and *Witkowski v. George W. Carter & Sons Co.* 60 App. Div. 582, 70 N. Y. Supp. 232, holding master's duty to protect servant from incidental risks avoidable by reasonable care; *McLeod v. Chicago & N. W. R. Co.* 104 Iowa, 146, 73 N. W. 614, holding brakeman bound only to exercise care sufficient to protect him if required warning given of approaching engine; *Phinney v. Illinois C. R. Co.* 122 Iowa, 491, 98 N. W. 358, holding brakeman does not assume risk of train-despatcher's negligence; *Simmons v. Peters*, 85 Hun, 97, 32 N. Y. Supp. 680, holding employee does not assume unknown risks occasioned by defects in elevator; *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 471, 63 N. E. 541, holding burden of proving servant's assumption of risk rests on employer; *Strong v. Rutland R. Co.* 121 App. Div. 394, 106 N. Y. Supp. 85, holding that employee does not assume a risk of which he is ignorant, though he disobey a rule of the employer made for his benefit.

Duty to exercise ordinary care.

Cited in *Dutton v. Greenwood Cemetery Co.* 80 App. Div. 356, 80 N. Y. Supp. 780, holding it cemetery association's duty to persons visiting cemetery to render premises reasonably safe; *Dean v. Kansas City, St. L. & C. R. Co.* 199 Mo. 412, 97 S. W. 910, holding that injury to section man from coal hurled off tender of train running at great speed is not such unforeseen accident as would as a matter of law render railroad not liable; *DiNapoli v. New York, N. H. & H. R. Co.* 136 App. Div. 338, 120 N. Y. Supp. 905 (dissenting opinion), on duty of railroad to use reasonable care and to give warning of approaching trains.

Duty of master as to appliances.

Cited in notes (22 Am. St. Rep. 54) on master's duty to furnish safe machinery and appliances; (13 L.R.A.(N.S.) 387) on liability of railroad to employee for injuries caused by defectively loaded car.

12 L. R. A. 456, *DRESLER v. HARD*, 127 N. Y. 235, 27 N. E. 823.

Comparison of handwriting.

Cited in *Tucker v. Hyatt*, 144 Ind. 644, 41 N. E. 1047, holding comparison of signature in record, with disputed signature, proper; *People v. Molineux*, 168 N. Y. 325, 62 L. R. A. 284, 61 N. E. 286, holding under statute any writing sought to be proved genuine may be compared with any writing proved genuine; *People v. Flechter*, 44 App. Div. 211, 60 N. Y. Supp. 777, holding experts may testify from comparison that two instruments are in same handwriting.

Cited in note (62 L. R. A. 852) on comparison of handwriting.

12 L. R. A. 463, *HAMER v. SIDWAY*, 124 N. Y. 538, 21 Am. St. Rep. 693, 27 N. E. 256.

Sufficiency of consideration.

Cited in *Melville v. Kruse*, 174 N. Y. 309, 66 N. E. 965, holding surrender of right of withdrawal good consideration for modification of copartnership articles; *Gescheidt v. Drier*, 44 N. Y. S. R. 481, 17 N. Y. Supp. 741, upholding agreement by mortgagee to give mortgage to mortgagor or mortgagee's death, in consideration of care of latter in sickness; *Scruggs v. Cotterill*, 67 App. Div. 587, 73 N. Y. Supp. 882, sustaining agreement between stockholders giving each first right to purchase other's stock in event of desire to sell or of death; *Harlan v. Harlan*, 102 Iowa, 705, 72 N. W. 286, holding promise to board third person valid consideration for promise to pay for board; *Stovall v. McCutchen*, 107 Ky. 580, 47 L. R. A. 288, 92 Am. St. Rep. 373, 54 S. W. 969, sustaining

contract by merchants to close stores during evening of summer months; *Babeock v. Chase*, 92 Hun, 267, 36 N. Y. Supp. 879, holding change of name sufficient consideration for promise to leave legacy; *McKay v. Buffalo Bill's Wild West Co.* 17 Misc. 399, 39 N. Y. Supp. 1041, holding undertaking to look after trunk if owner would continue journey based on good consideration; *Sickles v. Herold*, 11 Misc. 584, 32 N. Y. Supp. 1083, holding forbearance of banking department to close insolvent bank good consideration for shareholder's promise to replace capital; *Burke v. Dillin*, 92 Iowa, 564, 61 N. W. 370, holding forbearance of third mortgagee to foreclose valid consideration for second mortgagee's promise to pay interest on first; *Honsinger v. Mulford*, 90 Hun, 591, 35 N. Y. Supp. 986, upholding president's agreement to become personally liable upon corporation notes, if time extended; *Dempsey v. Horner*, 17 Misc. 618, 40 N. Y. Supp. 668, holding agreement to pay tenant's rent if landlord would institute summary proceedings enabling tenant's conditional vendor to sell property, valid; *Groff v. Bliss*, 19 Misc. 18, 42 N. Y. Supp. 843, upholding agreement to credit on debt, proceeds of notes of third persons owned by creditor which debtor procured to be discounted for him; *Grimm v. Taylor*, 96 Mich. 7, 55 N. W. 447, holding minor son's remaining at home to aid divorced mother sufficient consideration for uncle's promise to pay; *Furber v. Fogler*, 97 Me. 589, 55 Atl. 514, holding inadequacy of consideration no defense to note; *Yarwood v. Trusts & Guarantee Co.* 94 App. Div. 52, 87 N. Y. Supp. 947, sustaining recovery on note payable at maker's death, given to payees for securing his admission to their house when nearly frozen; *Kaufman Advertising Agency v. Snellenburgh*, 43 Misc. 324, 88 N. Y. Supp. 199, by *Giegerich, J.*, concurring, who holds prestige to be secured from handling advertising sufficient consideration for contract to procure "write-ups;" *Green-Shrier Co. v. State Realty & Mortg. Co.* 199 N. Y. 70, 92 N. E. 98, holding that when real controversy is submitted to arbitration it is mutual and based on sufficient consideration; *Hall v. Parsons*, 105 Minn. 99, 117 N. W. 240, holding agreement not to sue upon a note and agreement by the other party to make certain improvements upon property held by first party as security, mutually based upon valid consideration; *Bush v. Whitaker*, 45 Misc. 78, 91 N. Y. Supp. 616, holding that furnishing a cane worth \$50 was sufficient consideration to support a promise to leave the person furnishing it \$1,000 by will; *Parsons v. Teller*, 111 App. Div. 643, 97 N. Y. Supp. 808, holding cancellation of an agreement to be sufficient consideration for a new one; *Street v. Galt*, 136 App. Div. 726, 121 N. Y. Supp. 514, holding promise based upon good consideration if promisee does anything legal which he was not bound to do or refrains from doing something he had a right to do; *Waterhouse v. Waterhouse*, 29 R. I. 488, 22 L.R.A.(N.S.) 641, 72 Atl. 642, holding forbearance from making change in beneficiary of insurance policy sufficient consideration for promise by the beneficiary to pay part of proceeds to another; *Buhler v. Trombly*, 139 Mich. 572, 108 N. W. 343 (dissenting opinion), on abstinence from smoking, chewing and drinking as consideration; *Barry v. Smart Set Pub. Co.* 45 Misc. 405, 90 N. Y. Supp. 455, on permission to publish as consideration for promise to pay royalties; *Sarasohn Kamaiky*, 52 Misc. 404, 103 N. Y. Supp. 320, on promise to marry as consideration; *Palmer v. Central Bd. of Education*, 220 Pa. 571, 70 Atl. 433, on preparation of plans by architects at request of school board, to be submitted in competition, as consideration to support agreement to proceed with the competition.

Annotation cited in *Anderson v. Nystrom*, 103 Minn. 173, 13 L.R.A.(N.S.) 1144, 123 Am. St. Rep. 320, 114 N. W. 742, 14 A. & E. Ann. Cas. 54, holding that promise to refrain from doing an act which does not affect the promisee, is not sufficient consideration.

Cited in footnotes to *Wright v. Wright*, 55 L. R. A. 261, which holds marriage sufficient to support promise by groom's father to maintain bride and child if groom fails to; *Lanahan v. Heaver*, 20 L. R. A. 759, which holds reciprocal promise to relinquish right to jury consideration for agreement to submit case to court; *Mutual Reserve Fund Life Assn. v. Hurst*, 20 L. R. A. 761, which holds moral obligation sufficient consideration for promise.

Cited in notes (39 Am. St. Rep. 744) on moral obligation as consideration to uphold express promise; (27 Am. St. Rep. 174; 6 Eng. Rul. Cas. 23) on what may constitute consideration for contract.

Distinguished in *Bosea v. Lent*, 44 Misc. 440, 90 N. Y. Supp. 41, holding promise to deliver a deed held in escrow, if grantor became drunk again, not based on sufficient consideration.

Trust, how created.

Cited in *Lucas v. Coe*, 86 Fed. 973, holding trust may be created without formal action; *Neresheimer v. Smyth*, 167 N. Y. 207, 60 N. E. 449, sustaining trust created by oral promise to apply to specified debts proceeds of property transferred by bill of sale in consideration of payment of debts; *Butler v. Weeks*, 12 Misc. 195, 33 N. Y. Supp. 1090, holding mortgage acknowledged by nominal mortgagee in writing to belong to trust estate impressed with trust; *Central Trust Co. v. Weeks*, 15 App. Div. 600, 44 N. Y. Supp. 828, holding letter stating mortgages of trust estate held in own name impresses mortgage with trust; *Ransdel v. Moore*, 153 Ind. 401, 53 L. R. A. 756, footnote p. 753, 53 N. E. 767, which holds letter from one taking title to land under parol promise to carry out trust sufficient to authorize carrying it out after his death; *Anderson v. Fry*, 116 App. Div. 742, 102 N. Y. Supp. 112, holding that instrument in writing authorizing trustee to receive moneys, and receipt of money thereunder creates a trust.

Distinguished in *Millard v. Clark*, 7 Misc. 370, 27 N. Y. Supp. 631, holding deposit of money in another's name without surrendering control does not create trust.

— Necessity of subject.

Cited in *Hickok v. Bunting*, 67 App. Div. 562, 73 N. Y. Supp. 967, holding no trust created by written statement that sum held "in trust," where no *res* exists.

— Statute of limitations.

Cited in *Davis v. Davis*, 86 Hun, 402, 33 N. Y. Supp. 477, holding statute of limitations does not begin to run against beneficiary until open repudiation of trust.

When statute of frauds must be pleaded.

Cited in *Honsinger v. Mulford*, 90 Hun, 591, 35 N. Y. Supp. 986; *Lupean v. Brainard*, 20 App. Div. 214, 46 N. Y. Supp. 1044; *Smith v. Slosson*, 89 Hun, 568, 35 N. Y. Supp. 547; *Patterson v. Powell*, 31 Misc. 252, 64 N. Y. Supp. 43, 31 Misc. 21, 62 N. Y. Supp. 1035 (*obiter*); *Crane v. Powell*, 139 N. Y. 387, 34 N. E. 911, Affirming 46 N. Y. S. R. 669, 19 N. Y. Supp. 220, — holding defense of statute of frauds must be presented by demurrer or answer; *Post v. Butler Bros.* 11 Misc. 106, 31 N. Y. Supp. 995, holding defense of statute of frauds unavailable unless presented by averments of pleadings; *Dearing v. McKinnon Dash & Hardware Co.* 33 App. Div. 41, 53 N. Y. Supp. 513, holding that statute need not be pleaded to complaint incorporating instrument not complying with statute of frauds; *Griffin v. Condon*, 18 Misc. 238, 41 N. Y. Supp. 380; *Pohl v. Pontier*, 2 Misc. 145, 21 N. Y. Supp. 634; *Doyle v. Beaupre*, 43 N. Y. S. R. 743, 17 N. Y. Supp. 287, — holding that defense of statute of frauds is not

available unless set up in answer; *Bannatyne v. Florence Mill. & Min. Co.* 77 Hun, 295, 28 N. Y. Supp. 334 (dissenting opinion), majority holding that statute of frauds as defense is not available when not presented by averments of complaint or answer.

Cited in note (78 Am. St. Rep. 655) as to when and how statute of frauds must be pleaded.

Distinguished in *Traver v. Purdy*, 30 Abb. N. C. 449, 55 N. Y. S. R. 297, 25 N. Y. Supp. 452, holding statute of frauds need not be pleaded where answer denies existence of contract.

12 L. R. A. 473, *RUDD v. ROBINSON*, 126 N. Y. 113, 22 Am. St. Rep. 816, 26 N. E. 1046.

Imputing knowledge of corporate transactions.

Cited in *Powell v. Conover*, 75 Hun, 13, 26 N. Y. Supp. 1028, holding corporation trustee not chargeable with actual knowledge of entries on its books; *Garden City Sand Co. v. American Refuse Crematory Co.* 105 Ill. App. 347, holding purchaser of stock which certificate states is fully paid not chargeable with knowledge of entries in corporation books showing contrary; *Washburn v. Inter-Mountain Min. Co.* 56 Or. 587, 109 Pac. 382, Ann. Cas. 1912 C, 357, to the point that knowledge of acts of corporation will not be imputed to officers thereof; *Jackson v. Cannon*, 10 B. C. 77, holding that shareholder of corporation taking security from it in the ordinary course of business has a right to assume that proceedings leading up to the giving of the security, have been regular.

Books of account as evidence.

Cited in footnote to *Re Fulton*, 35 L. R. A. 133, which holds book containing charges against one person only inadmissible.

Cited in note (53 L. R. A. 537) on use of person's books of account as evidence upon issues of other parties.

— Books of corporation.

Cited in *Sigua Iron Co. v. Brown*, 171 N. Y. 496, 64 N. E. 194, holding books of corporation admissible, without authentication, to prove corporate acts, in action against transferee of stock for unpaid calls; *St. George Vineyard Co. v. Fritz*, 48 App. Div. 236, 62 N. Y. Supp. 775, holding corporation books admissible to show defendant a director in action to enforce director's liability; *Minor v. Crosby*, 76 App. Div. 563, 78 N. Y. Supp. 594, and *Leonard v. Faber*, 52 App. Div. 499, 65 N. Y. Supp. 391, holding credits on corporation books for goods delivered inadmissible in action to enforce directors' liability; *National Exp. & Transp. Co. v. Morris*, 15 App. D. C. 281, holding, in action on stock subscription, corporate books inadmissible *per se* to show membership; *Carey v. Williams*, 25 C. C. A. 232, 51 U. S. App. 204, 79 Fed. 912, holding corporation books inadmissible to establish person's liability as stockholder; *Hayden v. Williams*, 37 C. C. A. 482, 96 Fed. 282, holding books of bank inadmissible as to dealings between bank and stockholder; *Trainor v. German-American Sav. Loan & Bldg. Asso.* 204, Ill. 623, 68 N. E. 650, holding books of loan association not evidence *per se* of indebtedness in foreclosure proceeding against member; *Re Dittman*, 65 App. Div. 345, 72 N. Y. Supp. 886, holding corporate books of account inadmissible to show profits, in stockholder's action for dissolution; *Stokes v. Stokes*, 91 Hun, 609, 36 N. Y. Supp. 350, raising, without deciding, question whether knowledge of existence of accounts makes corporation books competent to establish officer's liability; *Thayer v. Schley*, 137 App. Div. 171, 121 N. Y. Supp. 1064, holding that books of corporation, which is not party to action against directors for damages for false representation as to condition

of corporation, cannot be received as evidence of knowledge of contents of books, unless knowledge is shown; *Brown v. First Nat. Bank*, 49 Colo. 399, 113 Pac. 483, holding that in action by bank against representatives of former cashier books of bank, kept under direction of cashier, are admissible to show false entries and misappropriation; *People v. Burnham*, 119 App. Div. 313, 104 N. Y. Supp. 725, holding entries in books of corporation not admissible in criminal prosecution of an officer not shown to have had knowledge thereof.

Distinguished in *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 83, 53 Pac. 410, holding corporate books of account kept under his supervision admissible against officer to show incorrect bookkeeping; *Bacon v. United States*, 38 C. C. A. 43, 97 Fed. 41, holding unauthenticated bank books admissible in criminal suit against bank president for making false reports; *Fleming v. Reed*, 77 N. J. L. 566, 72 Atl. 299, holding minutes in books of corporation admissible to show intent of corporation and extent of authority given officers to carry out its intent; *Wesp v. Muckle*, 136 App. Div. 243, 120 N. Y. Supp. 976, holding ledger of corporation admissible to show its financial condition at time a dividend was declared; *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 965, 72 C. C. A. 405, 140 Fed. 402, 5 A. & E. Ann. Cas. 314, holding record book of corporation admissible where introduced as admissions of the party against whom used.

12 L. R. A. 476, *CONSOLIDATED TANK LINE CO. v. HUNT*, 83 Iowa, 6, 32 Am. St. Rep. 285, 48 N. W. 1057.

Exemption from execution.

Cited in *Re Hindman*, 43 C. C. A. 560, 104 Fed. 333, holding horse and wagon of painter and paper-hanger exempt; *Roberts v. Parker*, 117 Iowa, 390, 57 L. R. A. 764, 94 Am. St. Rep. 316, 90 N. W. 744, holding bicycle of painter, paper-hanger, and bill-poster used in business exempt; *Krebs v. Nicholson*, 118 Iowa, 135, 96 Am. St. Rep. 370, 91 N. W. 923, holding harness and cart used as means of conveyance by owner of breeding stallion exempt; *Equitable Life Assur. Soc. v. Goode*, 101 Iowa, 163, 35 L. R. A. 691, footnote p. 690, 63 Am. St. Rep. 378, 70 N. W. 113, which holds law library of attorney occupying part of time in legal business exempt.

Cited in footnotes to *Davidson v. Hannon*, 34 L. R. A. 718, which holds photograph lens used by photographer exempt from attachment; *Re Klemp*, 39 L. R. A. 340, which holds combined harvester of farmer exempt from execution.

Cited in notes (58 Am. St. Rep. 308) on peddlers as laborers within exemption statutes; (102 Am. St. Rep. 85) on exemption of wages, salaries and earnings.

12 L. R. A. 477, *CASS COUNTY BANK v. WEBER*, 83 Iowa, 63, 32 Am. St. Rep. 288, 48 N. W. 1067.

Extent of homestead exemption.

Cited in *Groneweg v. Beck*, 93 Iowa, 719, 62 N. W. 31, holding homestead exemption extends to whole building, though ground floor used for grocery; *Edmonds v. Davis*, 122 Iowa, 564, 98 N. W. 375, holding entire premises exempt where two story building was occupied in part both upstairs and down as a family residence, though part of the lower floor had been in use as a millinery store; *Codville v. Pearce*, 13 Manitoba L. Rep. 473, holding building and two lots on which situated exempt where second floor was occupied as residence and lower floor was a vacant storebuilding used for storing some household goods.

Cited in footnote to *De Ford v. Painter*, 30 L. R. A. 722, which holds, as homestead, building in city partly rented for business and rest occupied as residence;

Ford v. Forsgard, 25 L. R. A. 155, which denies removal of exemption, on ground of abandonment, of rooms in house on homestead lot.

12 L. R. A. 482, *McCLAIN v. GARDEN GROVE*, 83 Iowa, 235, 48 N. W. 1031.

Proximate cause.

Cited in *Walrod v. Webster County*, 110 Iowa, 352, 47 L. R. A. 482, 81 N. W. 598, holding defect in railway proximate cause of accident due to horse breaking through, preventable by sufficient railing; *Parmenter v. Marion*, 113 Iowa, 303, 85 N. W. 90, holding negligence of person dropping bale from platform over sidewalk proximate cause of injury to passer-by; *Walters v. Waterloo*, 126 Iowa, 203, 101 N. W. 871, holding proximate cause sufficiently established if the facts are so far connected in orderly sequence as it can be fairly said that, in absence of the cause alleged, the injury and damage complained of would not have occurred.

Cited in note (18 L.R.A.(N.S.) 1136, 1143) on what injuries may be deemed proximately caused by absence of guard rail in highway.

Distinguished in *Miller v. Boone County*, 95 Iowa, 12, 63 N. W. 352, holding county liable for horse backing off approach to bridge, where injury preventable by ordinary railing; *Harvey v. Clarinda*, 111 Iowa, 532, 82 N. W. 994, holding city liable for accident where frightened horse backed down unrailed embankment; *Faulk v. Iowa County*, 103 Iowa, 446, 72 N. W. 757, holding city liable for horses backing through defective railing to bridge.

12 L. R. A. 483, *GORDON v. ANDERSON*, 83 Iowa, 224, 32 Am. St. Rep. 302, 49 N. W. 86.

Negotiability of commercial paper.

Cited in *Sawyer v. Campbell*, 107 Iowa, 402, 78 N. W. 56, holding negotiable note must be certain as to payor, payee, amount, time, and place of payment; *Culbertson v. Nelson*, 93 Iowa, 197, 27 L. R. A. 228, 57 Am. St. Rep. 266, 61 N. W. 854, holding draft for stated sum "with exchange" not negotiable; *Union Bank v. Spies*, 151 Iowa, 180, 130 N. W. 928, holding that note payable to one of two payees does not fall within provisions of statute providing that when payable to two or more persons it must be indorsed by all to pass title.

Distinguished in *Central State Bank v. Spurlin*, 111 Iowa, 189, 49 L. R. A. 661, 82 Am. St. Rep. 511, 82 N. W. 493, holding describing payee as "trustee" does not destroy negotiability of note.

12 L. R. A. 484, *MUSCH v. BURKHART*, 83 Iowa, 301, 32 Am. St. Rep. 305, 48 N. W. 1025.

Trees on boundary line.

Cited in *Kinney v. Kinney*, 104 Iowa, 706, 40 L. R. A. 627, 74 N. W. 688, denying liability of owner for failure to trim hedge on boundary; *Harndon v. Stultz*, 124 Iowa, 442, 100 N. W. 329, holding "line trees" are considered common property, which neither owner may destroy without consent of the other; *Scarborough v. Woodill*, 7 Cal. App. 42, 93 Pac. 383, holding injunction lies to restrain one owner from cutting down trees growing on boundary and sheltering buildings notwithstanding complainant himself has cut down some trees growing on boundary line.

Cited in notes (21 L.R.A. 729) on property rights in trees on boundary line; (123 Am. St. Rep. 574) on duty and liability of land owners to adjoining proprietors as to trees on boundary line.

Injunction where legal remedy inadequate.

Cited in *Lemmon v. Guthrie Center*, 113 Iowa, 41, 86 Am. St. Rep. 361, 84 N.

W. 986, sustaining injunction against removal of building as alleged violation of fire-limit ordinance; *Camp v. Dixon*, 112 Ga. 881, 52 L. R. A. 759, 38 S. E. 71, sustaining injunction against trespass to cut timber.

Cited in note (22 L. R. A. 235) on injunction against trespass to cut timber.

Distinguished in *Ewing v. Webster City*, 103 Iowa, 230, 72 N. W. 511, denying injunction against enforcing ordinance pending appeal from conviction.

Abatement of nuisance.

Cited in note (124 Am. St. Rep. 606) on abatement of public nuisance by private person without suit.

12 L. R. A. 487, *FT. SMITH & V. B. BRIDGE CO. v. HAWKINS*, 54 Ark. 509, 16 S. W. 565.

Navigable stream as boundary.

Cited in *Western Maryland Tidewater R. Co. v. Baltimore*, 106 Md. 563, 68 Atl. 6, holding same rules of construction will be applied to the boundaries of a municipality, bordering on navigable or non-navigable water, as will be to a description in a grant to an individual for land so situated.

Cited in note (23 L. R. A. 520) on boundary of municipality on navigable stream.

Taxation of bridge.

Cited in *Central R. Co. v. Atlantic Highland*, 75 N. J. L. 81, 66 Atl. 936, holding right of municipality to tax is limited to property within its territory.

Cited in note (29 L. R. A. 70) on jurisdiction as to taxation of bridge over river forming boundary of state or its divisions.

12 L. R. A. 492, *METROPOLITAN NAT. BANK v. JONES*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533.

Effect of certification of checks.

Cited in *Oyster & Fish Co. v. National Lafayette Bank*, 51 Ohio St. 114, 46 Am. St. Rep. 560, 36 N. E. 833; *Voltz v. National Bank*, 158 Ill. 539, 30 L. R. A. 157, 42 N. E. 69, Affirming 57 Ill. App. 364, holding drawer procuring certification of check before delivery primarily liable; *Minot v. Russ*, 156 Mass. 461, 16 L. R. A. 512, 32 Am. St. Rep. 472, 31 N. E. 489, holding certification of check on payee's application releases drawer; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 161, 59 L. R. A. 662, 93 Am. St. Rep. 113, 65 N. E. 136, holding certification of check renders drawee absolutely liable; *Smith v. Field*, 19 Idaho, 563, 114 Pac. 668, Ann. Cas. 1912 C, 354, holding that certification of check by bank is equivalent to acceptance thereof and creates liability in favor of holder of check; *Noble v. Doughten*, 72 Kan. 354, 3 L.R.A.(N.S.) 1177, 83 Pac. 1048, holding certification of check discharges drawer; *First Nat. Bank v. Currie*, 147 Mich. 79, 9 L.R.A.(N.S.) 701, 118 Am. St. Rep. 537, 110 N. W. 499, 11 A. & E. Ann. Cas. 241, holding the certification of a check drawn against funds, if procured by the payee or indorsee, discharges both the maker and indorser.

Cited in notes (16 L.R.A. 511) on effect of certification of check on liability of drawer; (47 Am. St. Rep. 414) on same point; (118 Am. St. Rep. 348) on what amounts to acceptance of check at bank; (128 Am. St. Rep. 693, 696, 698) on certified checks; (9 L.R.A.(N.S.) 698) on certification of check as release of drawer or indorser.

Distinguished in *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 74, upholding right of bank to cancel erroneous certification, where no rights of others intervene and holder's situation unchanged.

Check as assignment of deposit.

Cited in *Staninger v. Tabor*, 103 Ill. App. 336, holding delivery of check assignment of deposit, as between parties; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 535, 39 L. R. A. 481, 63 Am. St. Rep. 270, 49 N. E. 420, Reversing 69 Ill. App. 683, holding bank having sufficient funds at time of presentment liable to bona-fide holder of stopped check; *Wyman v. Ft. Dearborn Nat. Bank*, 181 Ill. 283, 48 L. R. A. 566, 72 Am. St. Rep. 259, 54 N. E. 946; *Merchants' Nat. Bank v. Maple*, 65 Ill. App. 487; *Bank of Antigo v. Union Trust Co.* 149 Ill. 352, 23 L. R. A. 615, 36 N. E. 1029,—holding bank not chargeable in favor of payee of check until presentment.

Distinguished in *First Nat. Bank v. Selden*, 62 L. R. A. 561, 56 C. C. A. 534, 120 Fed. 214, denying right of payee to maintain action on check against insolvent national bank.

12 L. R. A. 496, *SLOAN v. WILLIAMS*, 138 Ill. 43, 27 N. E. 531.

Specific performance of contract denied in *Depuy v. Williams*, 152 Ill. 103, 37 N. E. 48.

Contracts, when assignable.

Cited in *Zetterlund v. Texas Land & Cattle Co.* 55 Neb. 360, 75 N. W. 860, holding contract involving personal services and forbidding transfer of interest, not assignable; *Cleveland, C. C. & St. L. R. Co. v. Wood*, 189 Ill. 354, 59 N. E. 619, holding contract for personal services assignable by consent of other party; *Edison v. Babka*, 111 Mich. 238, 69 N. W. 499, holding contract to plant and care for fruit trees not assignable without other party's consent; *American Bonding & T. Co. v. Baltimore & O. S. W. R. Co.* 60 C. C. A. 59, 124 Fed. 873, holding receiver's contract for betterments assignable to purchaser of railroad; *Linn County Abstract Co. v. Beechley*, 124 Iowa, 149, 99 N. W. 702, holding contract of one whose undertaking exacts special skill and knowledge, and who is employed by reason of the trust and confidence reposed in him personally, is not assignable; *Simmons v. Zimmerman*, 144 Cal. 265, 79 Pac. 451, 1 A. & E. Ann. Cas. 850, holding where contract provides for services of a personal nature, involving the peculiar fitness or ability of contracting party it cannot be assigned without consent.

Cited in footnote to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable right of purchaser as unlawful tax sale to have money refunded.

Delegation of authority of attorney.

Cited in note (132 Am. St. Rep. 160) on delegation of authority by attorney.

12 L. R. A. 498, *CITIZENS STREET R. CO. v. ROBBINS*, 128 Ind. 449, 25 Am. St. Rep. 445, 26 N. E. 116.

Second appeal in 144 Ind. 672, 42 N. E. 916, 43 N. E. 649.

Statute regulating administrator's sales.

Cited in *Orchard v. Wright-Dalton-Bell-Anchor Store Co.* 225 Mo. 460, 125 S. W. 486, 20 Ann. Cas. 1072, to the point that administrator cannot sell personal property at private sale without order of court.

Distinguished in *Jones v. Mayne*, 154 Ind. 409, 55 N. E. 956, holding administrator acting for distributees in compromising litigation need not strictly follow statute.

Duty of corporation permitting transfer of decedent's stock.

Cited in footnote to *Wooten v. Wilmington & W. R. Co.* 56 L. R. A. 615, which holds corporation permitting transfer of stock on books by executor, bound to see that provisions of will carried out.

Liability of decedent's debtor after final settlement.

Cited in *Barnett v. Vanmeter*, 7 Ind. App. 53, 33 N. E. 666, holding final settlement of estate does not extinguish liability of debtor of decedent.

Appellate procedure — Partial reversal.

Cited in *Louisville, N. A. & C. R. Co. v. Treadway*, 142 Ind. 488, 143 Ind. 704, 41 N. E. 794, holding judgment on special verdict may be reversed as to one joint defendant and affirmed as to another.

Common-law powers of executor.

Cited in note (78 Am. St. Rep. 192) on common-law powers of executor.

12 L. R. A. 502, *GIBSON COUNTY v. CINCINNATI STEAM HEATING CO.* 128 Ind. 240, 27 N. E. 612.

Necessity of advertising for proposals, for public contract.

Cited in *Fulton County v. Gibson*, 158 Ind. 480, 63 N. E. 982, holding contract for extra work in constructing courthouse, necessitated by unforeseen emergency, made without advertising for proposals, valid.

— Change in contract without readvertisement.

Cited in *Criswell v. Everett School Dist.* No. 24, 34 Wash. 430, 75 Pac. 984, holding school board may at any time make alterations in the specifications, after time advertisements were published, where such right was reserved by contract.

What contracts within statute of frauds.

Cited in *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 640, 50 N. E. 779, holding guaranty of payment of warrants, proceeds of which went to guarantor, original promise; *Spencer v. McLean*, 20 Ind. App. 629, 67 Am. St. Rep. 271, 50 N. E. 769, holding stockholder's bond to secure directors as sureties of corporation, original promise; *Hyatt v. Bonham*, 19 Ind. App. 260, 49 N. E. 361, holding promise to pay debt of another, where promisee substituted for debtor, not within statute; *Carskaddon v. South Bend*, 141 Ind. 600, 39 N. E. 667, holding contract created by oral acceptance of terms of council resolution directing purchase of land, within statute of frauds; *Dale v. Gaither Lumber Co.* 152 N. C. 654, 28 L.R.A.(N.S.) 409, 68 S. E. 134, holding that promise of owner of timber land who has contracted to have timber removed, to hold back amount which contractor has promised to pay another to do logging is not promise to pay debt of another; *Miller v. State*, 35 Ind. App. 384, 74 N. E. 260, holding where subcontractor was treated as a debtor and sales made to him until after he absconded fact of undertaking of contractor to pay indebtedness does not create an original undertaking without the statute; *Howell v. Harvey*, 65 W. Va. 318, 22 L.R.A. (N.S.) 1087, 64 S. E. 249, holding where owner of building makes oral statement to a subcontractor that if he will go on and finish the job he will pay him there is an original undertaking and not within the statute of frauds; *Breen v. Mayne*, 141 Iowa, 405, 118 N. W. 441, holding acceptance of an option contract for sale of land need not be in writing.

Cited in notes (17 L.R.A. 274) on parol evidence to add to, vary, or alter written contract; (15 L.R.A.(N.S.) 222) on contemporary promise to pay where benefit inures to another as within statute of frauds.

Presumption as to correctness of official action.

Cited in *American Car & Foundry Co. v. Clark*, 32 Ind. App. 654, 70 N. E. 828, holding the presumption that the court correctly stated the law and the jury followed the instructions, is nothing more than an application of the presumption of right action, to the benefit of which every court and officer is entitled.

12 L. R. A. 506, GAMMON THEOLOGICAL SEMINARY v. ROBBINS, 128 Ind. 85, 27 N. E. 341.

Delivery as essential to gift.

Cited in *Martin v. McCollough*, 136 Ind. 339, 34 N. E. 819, holding delivery of personal property to one beneficiary, of gift to be distributed among donees, valid gift; *Slade v. Mutrie*, 156 Mass. 21, 30 N. E. 168, holding delivery of note to maker with intent to transfer title, valid gift; *McCollough v. Martin*, 12 Ind. App. 168, 39 N. E. 905, holding note executed as gift revoked by maker's death; *Jacobs v. Jolley*, 29 Ind. App. 34, 62 N. E. 1028, holding assignment of portion of savings-bank deposit, payable at donor's death, with delivery of bank book, valid gift; *Waite v. Grubbe*, 43 Or. 412, 73 Pac. 206, holding pointing out places where money was buried, with declaration of gift, valid gift; *Smith's Estate*, 23 Lanc. L. Rev. 14, holding that delivery of note for certain sum to erect memorial hall is not executed gift of such sum; *Foley v. Harrison*, 233 Mo. 545, 136 S. W. 354, holding that symbolic delivery of personal property is sufficient, where existing conditions are such that physical delivery would be unreasonable.

Cited in notes (21 L. R. A. 693-695) on undelivered written transfer or assignment of property as gift; (26 L.R.A. 307) on gift by promissory note; (12 Eng. Rul. Cas. 438) on necessity of delivering gift *inter vivos*.

Distinguished in *Barnett v. Franklin College*, 10 Ind. App. 108, 37 N. E. 427, holding delivery of instrument promising to pay money after death, valid gift.

12 L. R. A. 508, DUNSMOOR v. FURSTENFELDT, 38 Cal. 522, 22 Am. St. Rep. 331, 26 Pac. 518.

Garnishment of property in custody of court.

Cited in *Smith v. People*, 93 Ill. App. 137, holding money in receiver's hands subject to garnishment after final order for disbursement; *Re Argonaut Shoe Co.* 109 C. C. A. 632, 187 Fed. 786, to the point that where order is made by court directing payment of funds to claimants, court immediately loses jurisdiction of that particular fund; *People use of Wipfler v. Wipfler*, 167 Mich. 16, 132 N. W. 444, to the point that where there is nothing to do except to pay money on final decree money in hands of receiver is subject to garnishment; *Green v. Robertson*, 80 Ark. 7, 96 S. W. 138, holding in absence of statute a fund in court is not subject to garnishment or attachment until the purpose for which it is held as such has been accomplished; *Robertson v. Detroit Pattern Works*, 152 Mich. 613, 116 N. W. 196, 15 A. & E. Ann. Cas. 131, holding where nothing remains to be done except to pay money upon a final decree it is subject to garnishment in the hands of a receiver.

Cited in footnotes to *Allen v. Gerard*, 49 L. R. A. 351, which denies liability to garnishment of balance in hands of clerk of court of proceeds of sale of perishable property attached; *Jones v. Merchants' Nat. Bank*, 35 L. R. A. 698, which holds money paid into court, exempt from process of litigant unless consent of court obtained; *McAlmond v. Bevington*, 53 L. R. A. 597, which holds money deposited with justice by third person as bail, not subject to garnishment for prisoner's debt; *Holker v. Hennessey*, 39 L. R. A. 165, which holds property unlawfully taken from prisoner under arrest not subject to garnishment.

Cited in note (13 L.R.A.(N.S.) 758) on right to attach or garnish fund in hands of officer of court after order, to pay same to party.

Limited in *Swinerton v. Oregon P. R. Co.* 123 Cal. 424, 56 Pac. 40, holding funds in custody of Federal court not subject to garnishment out of state courts.

Disapproved in *Corbitt v. Farmers' Bank*, 114 Fed. 604, and *Dale v. Brumbly*,

98 Md. 472, 64 L. R. A. 114, footnote p. 112, 56 Atl. 807, holding money in court not subject to attachment after final decree for disbursement.

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Cited in *Wilson v. Harris*, 21 Mont. 396, 54 Pac. 46, holding lien not acquired by service of garnishment on transferee of personal property not taken into custody.

Debt, what is.

Cited in *Melvin v. State*, 121 Cal. 24, 53 Pac. 416, holding liability for negligence "debt" within act exempting state from debts created by agricultural society; *Proctor-Gamble Co. v. Warren Cotton Oil Co.* 180 Fed. 546, holding claim of unliquidated damages for breach of contract was such a corporate obligation as constituted a debt; *State ex rel. Palmer v. Hickman*, 11 Mont. 552, 29 Pac. 92, holding term "public debt" cannot be confined to what is evidenced by one form of indebtedness or liability, but embraces warrants as well as bonds.

Title of voluntary assignee for creditors.

Cited in *Colbert v. Baetjer*, 4 App. D. C. 426, holding unrecorded bill of sale good as against voluntary assignee for benefit of creditors.

12 L. R. A. 511, *CASHMAN v. ROOT*, 89 Cal. 373, 23 Am. St. Rep. 482, 26 Pac. 883.

Constitutional provision relative to sales of stock on margin.

Cited in *Parker v. Otis*, 130 Cal. 326, 92 Am. St. Rep. 56, 62 Pac. 571, holding undisclosed principal may recover money paid by agent upon contract for stock on margin; *Wetmore v. Barrett*, 103 Cal. 248, 37 Pac. 140, holding money paid brokers in consideration of purchases of stock on margins recoverable; *Parker v. Otis*, 130 Cal. 329, 92 Am. St. Rep. 56, 62 Pac. 571, upholding constitutional provision for recovery of money paid for purchase and sale of stocks on margin; *Otis v. Parker*, 187 U. S. 610, 47 L. ed. 328, 23 Sup. Ct. Rep. 168, holding state constitutional provision invalidating margin sales, not in conflict with Constitution; *Sheehy v. Shinn*, 103 Cal. 340, 37 Pac. 393, holding in giving effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated.

Cited in footnote to *Scales v. State*, 66 L.R.A. 730, which holds wagering contract in futures not shown by fact that purchaser intended to sell his contract before time for performance arrived unless noncontemplation of actual performance of obligation by other party is also shown.

Cited in note (11 L.R.A.(N.S.) 576) on right of broker to recover commissions or advances in furthering wagering contract.

What is margin contract.

Cited in *George J. Birkel Co. v. Howze*, 12 Cal. App. 647, 108 Pac. 145, holding fact that contract contains option of repurchase of stock within a specified time does not bring it within constitutional prohibition as sale on margin or to be delivered at future day; *Pallitz v. Wickersham*, 150 Cal. 246, 88 Pac. 911, holding deposit of shares of stock as collateral security had the same effect as payment of portion of purchase price, and afforded the necessary margin; *Kullman v. Simmens*, 104 Cal. 599, 38 Pac. 462, holding where evident intention of parties was that stock was not to be delivered at time of purchase, but at some future time when amount then due should be paid such contract was void; *Richardson v. Shaw*, 209 U. S. 376, 52 L. ed. 841, 28 Sup. Ct. Rep. 512, 14 A. & E. Ann. Cas. 981, holding a stock broker who purchases and carries stock for his customer on margin is not owner of same but is essentially a pledgee.

Distinguished in *Maurer v. King*, 127 Cal. 118, 59 Pac. 290, holding guaranty
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of cash value of, and agreement to take back, stock on request after certain time, valid.

Nature of contract between broker and customer.

Cited in *Conrad v. Lepper*, 13 Wyo. 491, 81 Pac. 307, holding the relation between broker and customer is that of vendor and vendee.

Cited in footnote to *Baxter v. Deneen*, 64 L.R.A. 949, which holds that broker with whom margins have been deposited in a stock gambling transaction will not be enjoined from violating agreement to keep them on deposit in a specified bank until the transaction is closed.

Voting stock involved in margin contracts.

Cited in *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 385, 41 Pac. 308, holding stock held by broker on margin should be voted in purchaser's interest.

12 L. R. A. 514, *SHELTON v. ORR*, 89 Tenn. 82, 16 S. W. 142.

Homestead exemption.

Cited in *Chambers v. Chambers*, 92 Tenn. 713, 23 S. W. 67, holding widow's homestead not assignable out of lands held by entireties; *Loftis v. Loftis*, 94 Tenn. 241, 28 S. W. 1091, holding widow's homestead prevails over husband's mortgage securing loan to pay purchase price; *Howell v. Jones*, 91 Tenn. 404, 19 S. W. 757, holding homestead does not attach to reversionary interest; *J. I. Case Co. v. Joyce*, 89 Tenn. 345, 12 L. R. A. 521, 16 S. W. 147, holding tenant in common has no homestead in joint estate.

Cited in note (23 L. R. A. 240) on effect of divorce on homestead rights.

Exemption of life insurance.

Cited in *Rose v. Wortham*, 95 Tenn. 511 30 L. R. A. 611, 32 S. W. 458, holding life insurance taken before marriage, payable to "legal representatives," goes to widow and children to exclusion of creditors; *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 624, 134 S. W. 311, holding that policy payable to insured's legal representatives and not disposed of by him, goes to widow and next of kin regardless of solvency of his estate.

Tenancy by entirety.

Cited in note (30 L. R. A. 313) on tenancy by entireties.

Distinguished in *Cole Mfg. Co. v. Collier*, 95 Tenn. 120, 30 L. R. A. 318, 49 Am. St. Rep. 921, 31 S. W. 1000, holding purchaser on execution against husband cannot obtain possession of estate by entirety until wife's death nor unless husband survives.

12 L. R. A. 519, *JOYCE v. J. I. CASE THRESHING MACH. CO.* 89 Tenn. 337, 16 S. W. 147.

Homestead rights.

Cited in *Adcock v. Adcock*, 104 Tenn. 155, 56 S. W. 844, holding widow not entitled to homestead out of undivided interest in land; *Meacham v. Meacham*, 91 Tenn. 534, 19 S. W. 757, holding homestead attaches to lands partitioned by parol; *McBroom v. Whitefield*, 108 Tenn. 422, 67 S. W. 794, holding deed joined in by infant wife passes title to vendee subject to homestead right.

Long standing decisions.

Cited in *Wilkins v. Chicago, St. L. & N. O. R. Co.* 110 Tenn. 460, 75 S. W. 1026, holding a decision of the court long acquiesced in and establishing a rule of property will not be disturbed.

12 L. R. A. 524, *WILSON v. WILSON*, 154 Mass. 194, 26 Am. St. Rep. 237, 28 N. E. 167.

Connivance at adultery.

Cited in *Lee v. Hammond*, 114 Wis. 559, 90 N. W. 1073, holding that husband suspecting wife's infidelity is not guilty of connivance in leaving open existing opportunities, without inviting wrong; *Lehman v. Lehman*, 78 N. J. Eq. 318, 77 Atl. 1060; *Inderlied v. Bullen*, 80 N. J. L. 9, 77 Atl. 469,—holding that husband who suspects his wife may properly watch her in order to obtain proof of her guilt; *Woldson v. Larson*, 90 C. C. A. 422, 164 Fed. 552, holding husband's right of action for debauching wife is not barred by fact of knowing of meeting between wife and defendant at night and taking no action to prevent it; *Wellner v. Eckstein*, 105 Minn. 460, 117 N. W. 830, holding connivance will bar the right to a divorce, although not so provided in the statute; *Delaney v. Delaney*, 71 N. J. Eq. 257, 65 Atl. 217, holding a divorce will not be granted where husband sought to give his wife liberty to commit act of adultery for purpose of obtaining divorce applied for; *Noyes v. Noyes*, 194 Mass. 22, 120 Am. St. Rep. 517, 79 N. E. 814, 10 A. & E. Ann. Cas. 818, holding it connivance where husband arranges with another that the house shall be used by his wife without interruption to carry on adulterous intercourse that he may thereby obtain a divorce; *Kohlhoss v. Mobley*, 102 Md. 207, 62 Atl. 236, 5 A. & E. Ann. Cas. 865, holding connivance shown by act of husband in passively permitting and consenting to acts of adultery by his wife.

Cited in notes (25 L.R.A. 565) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong; (120 Am. St. Rep. 521, 522) on what constitutes connivance sufficient to bar divorce.

Distinguished in *Torlotting v. Torlotting*, 82 Mo. App. 203, holding husband permitting adultery of wife with detective hired to furnish proof of infidelity guilty of connivance.

12 L. R. A. 528, *KOSCIUSKO v. SLOMBERG*, 68 Miss. 469, 24 Am. St. Rep. 281, 9 So. 297.

Validity of health regulations.

Cited in *Wilson v. Alabama* G. S. R. Co. 77 Miss. 718, 52 L. R. A. 358, 78 Am. St. Rep. 543, 28 So. 567, holding order prohibiting all persons from getting off trains anywhere in state, because fever exists at certain places, void; *State ex rel. Adams v. Burdge*, 95 Wis. 405, 37 L. R. A. 162, 60 Am. St. Rep. 123, 70 N. W. 347, holding rule of health board excluding unvaccinated children from schools, in absence of smallpox epidemic, void; *Pierce v. Dillingham*, 203 Ill. 164, 62 L. R. A. 894, 67 N. E. 846, holding live stock commissioners' rule authorizing testing and slaughter of diseased imported "dairy and breeding cattle," unreasonable; *Re Smith*, 143 Cal. 373, 77 Pac. 180, holding conditions and circumstances may be considered in determining reasonableness of ordinance.

Cited in notes (47 Am. St. Rep. 542) on quarantine and health laws and regulations; (129 Am. St. Rep. 279; 24 L.R.A.(N.S.) 1169) on power to regulate traffic in rags, secondhand articles and junk.

Reasonableness of ordinances.

Cited in *Fulton v. Norteman*, 60 W. Va. 567, 9 L.R.A.(N.S.) 1200, 55 S. E. 658, holding where power in restraint of trade is not based upon a state of facts from which it can be seen that it works beneficial results to the community, or protects from injury, the restraint is unreasonable; *Re Junqua*, 10 Cal. App. 606, 103 Pac. 159, holding evidence will be admitted to show whether ordinance is unreasonable.

Cited in note (28 Am. St. Rep. 184) on reasonableness of municipal ordinance.

12 L. R. A. 529, *AMERICAN MORTG. CO. v. TENNILLE*, 87 Ga. 28, 13 S. E. 158.

Right to contest corporation's right to hold property.

Cited in *Oregon Mortg. Co. v. Carstens*, 16 Wash. 170, 35 L. R. A. 843, footnote p. 841, 47 Pac. 421, holding state only may question title to land acquired by foreign corporation contrary to constitutional provision; *Brown v. Atlanta R. & Power Co.* 113 Ga. 476, 39 S. E. 71, holding state only can question corporation's title to property acquired in unlawful manner; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 483, 90 Am. St. Rep. 705, 65 Pac. 735, holding legal existence of *de facto* corporation questionable only by state.

Cited in notes (32 L. R. A. 294) on right of private persons to contest power of corporation to take or hold property; (24 L. R. A. 330) on right of foreign corporations to own real estate; (33 L.R.A.(N.S.) 358) as to who may take advantage of statute rendering foreign corporation incapable of taking title.

Right to enforce forfeiture of realty.

Cited in *Jones v. Oemler*, 110 Ga. 213, 35 S. E. 375, holding right to have lease of public domain forfeited for failure to comply with law vests in state alone.

Alien's interest in real estate.

Cited in *Abrams v. State*, 45 Wash. 340, 9 L.R.A.(N.S.) 190, 122 Am. St. Rep. 914, 88 Pac. 327, 13 A. & E. Ann. Cas. 527, holding deed loan alien passed title that could only be attacked by a direct proceeding on the part of the state.

Cited in footnote to *Wunderle v. Wunderle*, 19 L. R. A. 84, which denies right of aliens incapable of inheriting to hold by descent until title assailed.

Cited in notes (31 L. R. A. 177) on alien's right to inherit; (31 L. R. A. 85) on effect of state Constitutions and statutes on question of inheritance by or from alien; (31 L. R. A. 146) on effect of state statutes and constitutions on inheritance through alien; (32 L. R. A. 177) on effect of treaties on alien's right to inherit.

12 L. R. A. 534, *CINCINNATI INCLINED PLANE R. CO. v. CITY & SUBURBAN TELEG. ASSO.* 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890.

Conflicting rights of telephone and street railway companies.

Cited in *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 503, 27 L. R. A. 239, footnote, p. 236, 29 S. W. 104, which holds electric street car company liable to telephone company by charging earth so as to destroy use of latter's ground circuit; *Central Pennsylvania Teleph. & Supply Co. v. Wilkes-Barre & W. S. R. Co.* 11 Pa. Co. Ct. 423, 6 Kulp, 383, 1 Pa. Dist. R. 633, on duty of an electric railway or telephone line in street to adopt construction and emplacement such as will not discommode public use of the way; *Bell Teleph. Co. v. Montreal Street R. Co.* Rap. Jud. Quebec 10 C. S. 174, holding telephone company not entitled, as against later user of electricity for street railway-propulsion, to recover cost of changing return circuit system; *Sanfleet v. Toledo*, 10 Ohio C. C. 471, 8 Ohio C. D. 717, on rights of abutting owner as to injury to his property from constructing electric street railway which interferes with existing electric system.

Cited in footnotes to *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 17 L. R. A. 674, which denies injunction against discharge of electricity by street railroad interfering with operation of telephone; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company

entitled to injunction against erection of wires carrying dangerous current.

Cited in notes (50 L.R.A. 147) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts; (2 Brit. Rul. Cas. 130, 191) on liability of user of electricity for injury to business or property of another from induction or use of earth as return electric circuit.

Rights of electric companies in highways.

Cited in *Daily v. State*, 51 Ohio St. 358, 24 L. R. A. 728, 46 Am. St. Rep. 578, 37 N. E. 710, holding telegraph company cannot trim trees in highway to make place for line without compensating abutting owner; *Callen v. Columbus Edison Electric Light Co.* 66 Ohio St. 178, 58 L. R. A. 786, 64 N. E. 141, holding electric light poles and wires cannot be placed in street without compensating abutting owners; *State ex rel. Spokane & B. C. Teleph. & Teleg. Co. v. Spokane*, 24 Wash. 59, 63 Pac. 1116, holding use of highways for lines subordinate to primary use for travel; *Queen City Teleph. Co. v. Cincinnati*, 73 Ohio St. 81, 76 N. E. 392, holding by no statute is power given any tribunal to authorize permanent structures upon or in, or the use of any street, which will discommode the public; *Daily v. State*, 51 Ohio St. 358, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710, holding rights as to highways granted to telegraph companies by Ohio statutes are secondary and subordinate to those of travelers; *Clyde Teleph. Co. v. Parmenter*, 8 Ohio N. P. N. S. 148, 19 Ohio S. & C. P. Dec. 471, holding neither moving of house nor operation of telephone line is primary purpose of street; *Tannian v. City & Suburban Teleg. Asso.* 1 Ohio N. P. N. S. 82, 13 Ohio S. & C. P. Dec. 734, holding abutting owner entitled to mandatory injunction enjoining erection of telephone poles in street and requiring removal of those already erected.

Cited in notes (13 L.R.A. 454) on telegraph company subject to police powers of municipalities; (50 L.R.A. 147) on privilege of erecting telegraph and telephone lines in streets as a contract, within constitutional provision against impairing obligation.

Rights of street railroads in highways.

Cited in *La Crosse City R. Co. v. Higbee*, 107 Wis. 402, 51 L. R. A. 929, 83 N. W. 701, holding electric street railways, with poles and wires, not additional burden to fee; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 85, 53 Am. St. Rep. 730, 30 S. W. 533, holding electric, have same right as horse, street cars to use of public streets; *Sanfleet v. Toledo*, 10 Ohio C. C. 471, denying right of abutting owner to compensation for interference with electrical appliances by electric railway in street; *Toledo Consol. Street R. Co. v. Toledo Electric Street R. Co.* 6 Ohio C. C. 377, sustaining street railway company's right to use in common tracks of another company, but not to appropriate such tracks absolutely; *State v. Dayton Traction Co.* 18 Ohio C. C. 494, sustaining power of street railroad to transport freight; *Hamilton & L. Electric Transit Co. v. Hamilton*, 1 Ohio N. P. 369, denying street railroad's right to construct transfer house in street; *Dietz v. C. & M. V. Traction Co.* 4 Ohio N. P. 402, upholding law authorizing construction of electric railways on country roads; *Sells v. Columbus Street R. Co.* 28 Ohio L. J. 173, 11 Ohio Dec. Reprint, 645, holding electric street railway in public highway, not an additional burden thereon; *Keefe v. Cleveland City R. Co.* 8 Ohio N. P. 468, 11 Ohio S. & C. P. Dec. 571, holding street railway company not liable to adjoining lot owner for injury to trees in street unless it needlessly interferes with them.

Distinguished in *McMaken v. Cincinnati & H. Electric Street R. Co.* 5 Ohio N. P. 373, denying right of street railroad to construct track not conforming to grade, interfering with abutter's access to highway.

Right of street railway to change motive power.

Cited in *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 342, 47 U. S. App. 36, 76 Fed. 314, sustaining right of Cincinnati Inclined Plane Railroad Company to operate road with electricity.

Cited in footnote to *Hudson River Teleph. Co. v. Watervliet Turnp. Co.* 17 L. R. A. 674, which authorizes substitution of electricity for horses as motive power for street railway.

Statutory construction.

Cited in *State ex rel. Sheets v. Aetna L. Ins. Co.* 69 Ohio St. 325, 69 N. E. 608, construing statute authorizing life insurance companies to insure against accidents as permitting employer's liability insurance, unknown at its enactment; *Cline v. Springfield*, 7 Ohio N. P. 629, 10 Ohio S. & C. P. Dec. 394, holding terms "gas company" as used in statute were comprehensive enough to include natural gas company.

12 L. R. A. 544, *CUMBERLAND TELEPH. & TELEG. CO. v. UNITED ELECTRIC R. CO.* 42 Fed. 273.

Conflicting rights of electric companies.

Cited in *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 135 N. Y. 405, 17 L. R. A. 678 footnote p. 674, 31 Am. St. Rep. 838, 32 N. E. 148, denying injunction against discharge of electricity by street railroad interfering with operation of telephone company; *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.* 119 Ala. 151, 24 So. 731, sustaining injunction against placing trolley poles and wires touching and crossing telephone wires; *Central Pennsylvania Teleph. & Supply Co. v. Wilkes Barre & W. S. R. Co.* 1 Pa. Dist. R. 634, 6 Kulp, 393, 11 Pa. Co. Ct. 425, holding prior occupation by telephone company cannot preclude use of highway by electric railway; *Western U. Teleg. Co. v. Guernsey & S. Electric Light Co.* 46 Mo. App. 153 (dissenting opinion) majority sustaining injunction against transmitting electric currents within certain distance of telegraph wires; *Peoria Waterworks Co. v. Peoria R. Co.* 181 Fed. 1004, holding that injunction does not lie to prevent electric railway company from using particular system of circuit or negative return even though it destroys pipes of water company, by electrolysis but continuance of injury may be enjoined; *Gould v. Winona Gas Co.* 100 Minn. 263, 10 L.R.A.(N.S.) 824, 111 N. W. 254, on doctrine as applied to electricity, of liability for escape of injurious fugitive substances; *Bell Teleph. Co. v. Montreal Street R. Co.* Rap. Jud. Quebec, 10 C. S. 173, holding cost of changing system to avoid induction not recoverable by telephone proprietor from street railway.

Cited in footnote to *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current.

Cited in note (2 Brit. Rul. Cas. 137, 138) on liability of user of electricity for injury to business or property of another from induction or use of earth as return electric circuit.

Disapproved in *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 523, 27 L. R. A. 244, footnote p. 236, 29 S. W. 104, which holds electric street car company liable to telephone company by charging earth so as to destroy use of latter's ground circuit.

Conflicting rights of telephone lines.

Cited in *Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co.* 49 C. C. A. 529, 111 Fed. 668, holding telephone company not entitled to exclusive right in street by prior occupation; *Chicago Teleph. Co. v. Northwestern Teleph.*

Co. 199 Ill. 352, 65 N. E. 329, sustaining right of new telephone company to parallel and overbuild existing lines; *American Teleph. & Teleg. Co. v. Morgan County Teleph. Co.* 138 Ala. 604, 100 Am. St. Rep. 53, 36 So. 178, holding injunctive relief will not be granted a telephone company where line of rival company is erected on same side of street but on poles of sufficient height to cause no interference with line already in operation.

Application to telephone companies of statutes relating to telegraph companies.

Cited in *Central Pennsylvania Teleph. & Supply Co. v. Wilkes Barre & W. S. R. Co.* 11 Pa. Co. Ct. 418, 6 Kulp, 384, 1 Pa. Dist. R. 629, holding telephone regarded as telegraph company within meaning of corporation statutes; *Northwestern Teleph. Exchange Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 345, 79 N. W. 315, and *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* 18 Tex. Civ. App. 501, 45 S. W. 151, holding statute conferring power of eminent domain upon telegraph companies available to telephone companies; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 32, 86 N. W. 657, holding statute authorizing telegraph companies to use highways applies to telephone companies; *Muskogee Nat. Teleph. Co. v. Hall*, 4 Ind. Terr. 23, 64 S. W. 600, on right of company authorized to construct and operate telegraphs to establish telephone lines.

Distinguished in *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 773, 43 L. ed. 1167, 19 Sup. Ct. Rep. 778, Modifying 28 C. C. A. 664, 42 U. S. App. 686, 85 Fed. 24, Affirming 78 Fed. 860, holding act authorizing construction of telegraph lines on post-roads does not apply to telephone lines.

12 L. R. A. 551, *FIELDS v. OSBORNE*, 60 Conn. 544, 21 Atl. 1070.

Validity of ballots.

Cited in *State ex rel. Law v. Saxton*, 30 Fla. 686, 18 L. R. A. 725, 32 Am. St. Rep. 46, 12 So. 218, holding ballots containing words "National Republican Ticket" and "Free Suffrage Ticket," legal; *State ex rel. Phelan v. Walsh*, 62 Conn. 293, 17 L. R. A. 369, 25 Atl. 1, holding word "for" prefixed to name of office does not necessarily invalidate ballot; *Bowers v. Smith*, 111 Mo. 82, 16 L. R. A. 766, 33 Am. St. Rep. 491, 20 S. W. 101 (dissenting opinion) majority holding erroneous printing of names of additional candidates on official ballots will not nullify election.

Distinguished in *State ex rel. Phelan v. Walsh*, 62 Conn. 295, 17 L. R. A. 369, 52 Atl. 1, holding using ballots sent to wrong towns does not vitiate ballot.

— Distinguishing marks.

Cited in *Taylor v. Bleakley*, 55 Kan. 9, 28 L. R. A. 686, 49 Am. St. Rep. 233, 39 Pac. 1045, holding ballots not marked with cross within designated circle or square, void; *People ex rel. Nichols v. County Canvassers*, 129 N. Y. 414, 14 L. R. A. 631, 29 N. E. 327, holding ballots indorsed for polling place other than where cast cannot be counted; *Cross v. Keathley*, 119 Tenn. 580, 105 S. W. 854, holding under uniform ballot law word "for" before name of each office to be filled, and words after certain offices "vote for two" and "vote for three" rendered the ballots void, for only a part of ballots used in the election being so marked; *Gauvreau v. Van Patten*, 83 Neb. 67, 119 N. W. 11, holding the writing in of a name not appearing on ballot will not invalidate ballot where it is not shown marking was done for purpose of distinguishing it.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in notes (13 L.R.A. 762) on marks or devices to distinguish ballots; (49 Am. St. Rep. 246) on distinguishing marks invalidating ballot.

Disapproved in State *ex rel.* Waggoner v. Russell, 34 Neb. 122, 15 L. R. A. 742, 33 Am. St. Rep. 625, 51 N. W. 465, holding election law provision for marking ballots with ink directory.

12 L. R. A. 554, SHINNERS v. LOCKS & CANALS, 154 Mass. 163, 26 Am. St. Rep. 226, 28 N. E. 10.

Exceptions to exclusion of evidence.

Cited in Com. v. Bingham, 158 Mass. 171, 33 N. E. 341, holding exception to exclusion of question not maintainable where evidence expected does not appear; Gunn v. Ohio River R. Co. 36 W. Va. 179, 32 Am. St. Rep. 842, 14 S. E. 465, holding where form of question indicates intention to elicit statement part of *res gestae*, refusal without hearing answer, error; Delmar Oil Co. v. Bartlett, 62 W. Va. 708, 59 S. E. 634, holding rejection of evidence is not error upon which reversal will be made if expected answer was not disclosed to court at time of ruling; Riddle v. Gibson, 29 App. D. C. 248, holding same where offer to show that witness was in a position to know whether statement made was true, was too indefinite and general; Keffer v. State, 12 Wyo. 67, 73 Pac. 556, holding error not available on appeal where nothing in bill of exceptions shows what evidence of witness would have been or its materiality.

Distinguished in Daley v. People's Bldg. Loan & Sav. Asso. 172 Mass. 534, 52 N. E. 1090, holding formal tender of proof unnecessary to make exception to exclusion of evidence available where questions show expectation.

Objection, when not available.

Cited in Cassidy v. Com. 173 Mass. 535, 54 N. E. 249, holding objection to question unavailable where answer does not appear.

Admissibility of evidence.

Distinguished in Stevens v. Boston Elev. R. Co. 184 Mass. 478, 69 N. E. 338, holding evidence of violation of rule as to sounding gong admissible in negligence action against street railway.

— Of precautions subsequent to accident.

Cited in Anson v. Evans, 19 Colo. 279, 35 Pac. 47, holding subsequent precautions cannot be shown to establish antecedent negligence; Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 207, 36 L. ed. 406, 12 Sup. Ct. Rep. 591; Atchison, T. & S. F. R. Co. v. Parker, 5 C. C. A. 222, 12 U. S. App. 132, 55 Fed. 597; Bell v. Washington Cedar Shingle Co. 8 Wash. 29, 35 Pac. 405,—holding evidence of charges in machinery incompetent; McGuerty v. Hale, 161 Mass. 53, 36 N. E. 682, holding evidence of covering gearing subsequent to accident inadmissible; Downey v. Sawyer, 157 Mass. 421, 32 N. E. 654, holding changes in apparatus subsequent to accident not evidence of negligence; Dacey v. New York, N. H. & H. R. Co. 168 Mass. 481, 47 N. E. 418, and Aldrich v. Concord & M. R. Co. 67 N. H. 253, 29 Atl. 408, holding evidence of substitution of different kind of switch inadmissible; Aleorn v. Chicago & A. R. Co. 108 Mo. 108, 18 S. W. 188, holding evidence of replacing worn switch-block incompetent; Anderson v. Chicago, St. P. M. & O. R. Co. 87 Wis. 202, 23 L. R. A. 205, 58 N. W. 79, holding evidence that trains ran at reduced speed after accident inadmissible; Wabash County v. Pearson, 129 Ind. 457, 28 N. E. 1120, holding evidence of subsequent repairs to bridge inadmissible; Illinois C. R. Co. v. Wyatt, 104 Tenn. 434, 78 Am. St. Rep. 926, 58 S. W. 308, holding evidence of subsequent repairs to depot platform inadmissible; Hewitt v. Taunton Street R. Co. 167 Mass. 486, 46 N. E. 106, holding evidence of virtual discharge of motorman after accident inadmissible; Motey v. Pickle Marble &

Granite Co. 20 C. C. A. 371, 36 U. S. App. 682, 74 Fed. 159, holding evidence of change in conduct of business subsequent to accident, inadmissible; Perkins v. Rice, 187 Mass. 30, 72 N. E. 323; Pribbeno v. Chicago, B. & Q. R. Co. 81 Neb. 658, 116 N. W. 494; Plunkett v. Clearwater Bleachery & Mfg. Co. 80 S. C. 318, 61 S. E. 431; Place v. Grand Trunk R. Co. 82 Vt. 48, 71 Atl. 836,—holding repairs made after an accident has occurred are not admissible as evidence to show antecedent negligence.

Cited in footnote to Georgia Southern & F. R. Co. v. Cartledge, 59 L. R. A. 118, which holds incompetent, evidence of additional precautions after injury.

Cited in note (32 L.R.A.(N.S.) 1134, 1145) on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.

12 L. R. A. 561, FREELAND v. RITZ, 154 Mass. 257, 26 Am. St. Rep. 244, 28 N. E. 226.

Sufficiency of memorandum within statute of frauds.

Cited in Hibbard v. Hatch Storage Battery Co. 174 Mass. 298, 54 N. E. 658, holding written offer and acceptance and agreement referring to deed describing lands, sufficient memorandum; White v. Bigelow, 154 Mass. 595, 28 N. E. 904, holding memorandum of contract within statute of frauds not expressing in terms or by reference to other writing essential elements, insufficient; John Fowkes Mfg. Co. v. Metcalf, 169 Mass. 599, 48 N. E. 848, holding series of writings showing contract to loan money on land not definitely described, insufficient memorandum; Hayes v. Jackson, 159 Mass. 457, 34 N. E. 683 (dissenting opinion) majority holding memorandum showing receipt on account of sale of certain property sufficient, though consideration inaccurately stated; Bradley v. Haven, 208 Mass. 304, 94 N. E. 268, to the point separate writings can be resorted to only so far as they appear to have relation to same contract, and that parole evidence is not admissible to connect writings; Nickerson v. Weld, 204 Mass. 355, 90 N. E. 589, holding a copy of agreement sent to plaintiff after a letter, is to be construed to be taken with the letter and constitutes a sufficient memorandum.

Cited in footnote to Charlton v. Columbia Real Estate Co. 69 L.R.A. 394, which holds statute of frauds satisfied by previous memorandum of agreement for lease and a signed but undelivered lease which taken together show a completed agreement upon the terms of a lease.

Parol evidence to identify writings.

Cited in Lee v. Butler, 167 Mass. 429, 57 Am. St. Rep. 466, 46 N. E. 52, holding parol evidence admissible to show connection of different writings constituting contract.

Actions on incomplete contracts.

Cited in Callanan v. Chapin, 158 Mass. 117, 32 N. E. 941, holding action not maintainable upon preliminary agreement showing essential terms still to be agreed upon; Sibley v. Felton, 156 Mass. 277, 31 N. E. 10, holding action not maintainable on preliminary agreement looking to adoption of complete plan; Speirs v. Union Drop Forge Co. 180 Mass. 94, 61 N. E. 825, by Knowlton, J., dissenting, who holds contract to manufacture forgings at price thereafter to be agreed upon, unenforceable.

Cited in note (35 L.R.A.(N.S.) 427) on liability for breach of contract to lease building when completed.

Necessity of pleading waiver of performance.

Cited in Rasmussen v. Levin, 28 Colo. 452, 65 Pac. 94, holding waiver of default in mortgage not appearing in complaint must be pleaded; Sharpe v. New York

L. Ins. Co. 5 Neb. (Unof.) 281, 98 N. W. 66, holding by failure to plead a waiver, that issue was not presented to the trial court and cannot be raised on appeal; Allen v. Burns, 201 Mass. 76, 87 N. E. 194, holding upon an averment of performance, a plaintiff cannot recover by proof of a waiver.

12 L. R. A. 563, GLOUCESTER ISINGLASS & GLUE CO. v. RUSSIA CEMENT CO. 154 Mass. 92, 26 Am. St. Rep. 214, 27 N. E. 1005.

Validity of contracts restricting competition.

Cited in Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 254, 23 Atl. 287, holding agreement by vendor not to engage in business for certain time, nor in certain territory, valid; Knight & J. Co. v. Miller, 172 Ind. 47, 87 N. E. 823, on right of interference with private rights of contract; United Shoe Machinery Co. v. Brunet, Rap. Jud. Quebec, 27 C. S. 217, on injunctive relief in aid of contracts restrictive of trade.

Cited in footnote to Clark v. Needham, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years.

Distinguished in Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 53, 22 L. R. A. 675, 39 Am. St. Rep. 458, 35 N. E. 98, holding agreement by vendor of business and patents not to manufacture fire-alarms for ten years, void.

Validity of combinations to control prices.

Cited in Garst v. Harris, 177 Mass. 74, 58 N. E. 174, holding agreement not to sell proprietary medicine below stipulated price, valid; United States v. Trans-Missouri Freight Asso. 24 L. R. A. 84, 4 Inters. Com. Rep. 454, 7 C. C. A. 76, 19 U. S. App. 36, 58 Fed. 72, Affirming 53 Fed. 450, holding association of railroads to maintain just and reasonable rates, legal; Queen Ins. Co. v. State, 86 Tex. 270, 22 L. R. A. 494, 24 S. W. 397, holding combination of insurance companies to establish uniform rates and agent's commissions, legal; Dr. Miles Medical Co. v. Platt, 142 Fed. 610, holding manufacturers who are exclusive owners of medicines produced under trade secrets may withhold them from sale, may sell to one and withhold from others, and may fix any price in their discretion.

Cited in footnotes to Cummings v. Union Blue Stone Co. 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent and maintain agreed prices; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 62 L. R. A. 632, which holds arrangement for rebates by manufacturers of medicines to dealers maintaining selling price, not unlawful combination; Slaughter v. Thacker Coal & Coke Co. 65 L.R.A. 343, which holds void contract by different coal mining companies giving exclusive right to sell entire output at uniform prices to corporation organized as their regular sales agent.

Cited in note (74 Am. St. Rep. 246, 269) on combinations constituting unlawful trusts.

Disapproved in United States v. Addyston Pipe & Steel Co. 46 L. R. A. 133, 29 C. C. A. 156, 54 U. S. App. 723, 85 Fed. 286, holding combination of cast-iron pipe manufacturers to restrict competition and maintain prices, illegal.

Right to specific performance.

Cited in Butterick Pub. Co. v. Fisher, 203 Mass. 130, 133 Am. St. Rep. 283, 89 N. E. 189, holding specific performance depends upon the question whether the thing contracted for can be purchased by plaintiff, and whether damages are an adequate compensation for a breach.

Cited in note in (6 Eng. Rul. Cas. 646) on refusal to enforce specific performance of contract, performance of which cannot be of importance to plaintiff.

Compromise of void claim.

Cited in note (25 L.R.A.(N.S.) 301) on void, invalid, or unfounded claim as subject of valid compromise.

12 L. R. A. 566, *JAKUES v. SWASEY*, 153 Mass. 596, 27 N. E. 771.

Payment to legatee as advancement.

Distinguished in *Robbins v. Swain*, 7 Ind. App. 491, 34 N. E. 670, holding advancements to expectant legatee converted into absolute gifts where testator's intention clearly appeared.

Ademption of legacies.

Cited in notes in (95 Am. St. Rep. 352) on ademption of legacy; (38 L.R.A. (N.S.) 596) on gift by testator as ademption of general legacy to donee.

Admissibility of evidence to vary terms of will.

Cited in *Sibley v. Maxwell*, 203 Mass. 105, 89 N. E. 232, on a subsequent declaration or admissions as affecting descent of property by will.

12 L. R. A. 571, *BUTTERFIELD v. BYRON*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667.

Recovery for services when complete performance becomes impossible.

Cited in *Dolan v. Rodgers*, 149 N. Y. 494, 44 N. E. 167, holding contractor may recover for work done under contract rendered impossible of performance; *Rhodes v. Hinds*, 79 App. Div. 383, 79 N. Y. Supp. 437, holding one contracting to saw and deliver lumber may recover for services in sawing lumber destroyed before delivery; *Angus v. Scully*, 176 Mass. 358, 49 L. R. A. 563, 79 Am. St. Rep. 318, 57 N. E. 674, permitting recovery for work done under contract to move building rendered impossible to perform by its destruction; *Wolf v. Altmeyer*, 8 Pa. Dist. 409, 30 Pittsb. L. J. N. S. 28, holding architect employed to remodel may recover value of services rendered prior to burning of building; *Hayes v. Gross*, 9 App. Div. 17, 40 N. Y. Supp. 1098, sustaining recovery for work and materials on contract to do inside carpenter work on building destroyed before completion; *Charleston Ice Mfg. Co. v. Joyce*, 11 C. C. A. 502, 25 U. S. App. 89, 63 Fed. 921, sustaining right of conductor to recover for work performed upon rescission of contract; *Hebert v. Dewey*, 191 Mass. 411, 77 N. E. 822, holding reasonable compensation may be had for what has been done in reliance upon contract where failure of an implied condition which was of the essence of the contract, rendered substantial performance impossible; *Eastern Expanded Metal Co. v. Webb Granite & Constr. Co.* 195 Mass. 363, 81 N. E. 251, 11 A. & E. Ann. Cas. 631, holding when labor and materials are furnished and used upon real estate under a special contract, and for reasons not prejudicial to the plaintiff the contract becomes of no effect a recovery upon a quantum meruit may be had for benefits to the real estate; *Vickery v. Ritchie*, 202 Mass. 250, 26 L.R.A.(N.S.) 812, 88 N. E. 835, holding recovery may be had for market value of materials and labor furnished in good faith where there was a mutual mistake as to construction of building; *Keel v. East Carolina Stone & Constr. Co.* 143 N. C. 433, 55 S. E. 826, holding where contract is only to do a part of the work and furnish part of material, the owner or some independent contractor being bound to complete work, a recovery may be had for the part done.

Cited in note (5 L.R.A.(N.S.) 1109) as to who must bear loss caused by destruction of structure during erection.

Distinguished in *Vogt v. Hecker*, 118 Wis. 309, 95 N. W. 90, holding contractor cannot recover for work on building destroyed when partially erected; *Teakle v.*

Moore, 131 Mich. 436, 91 N. W. 636, holding contractor for carpenter work may recover for injury caused by fall of roof through negligence of owner's agent.

Disapproved in King v. Low, 3 Ont. L. Rep. 240, holding where contract is to do entire work for a specific sum and throughout no fault of defendant work is not completed there can be no recovery on a quantum meruit either by original contractor or subcontractor.

Nonperformance of contract excused by intervening impossibility or destruction of subject.

Cited in Marvel v. Phillips, 162 Mass. 401, 26 L. R. A. 417, 44 Am. St. Rep. 370, 38 N. E. 1117, holding undertaking involving personal skill as well as advance of funds, discharged by death; Rowe v. Peabody, 207 Mass. 233, 93 N. E. 604, holding that person who contracts to do certain thing, which is lawful, is not excused from performance, because performance has become impossible; John Soley & Sons v. Jones, 208 Mass. 567, 95 N. E. 94, holding that it is only where unanticipated event happens, which was not in contemplation of parties, and upon which continued existence of contract must depend, that upon happening of event contract is dissolved; Krause v. Crothersville, 162 Ind. 288, 65 L.R.A. 119, 102 Am. St. Rep. 203, 70 N. E. 264, 1 A. & E. Ann. Cas. 460, holding when building in process of construction was damaged by fire so that its completion was impossible according to terms of contract contractor was not liable for failure to perform contract; Hawkes v. Kehoe, 193 Mass. 423, 10 L.R.A.(N.S.) 127, 79 N. E. 766, 9 A. & E. Ann. Cas. 1053, holding where contract contemplates continued existence of some particular thing as foundation of what was to be done, accidental destruction of thing without fault of either party excuses breach of performance; Talbut v. American Ins. Co. 185 Mass. 420, 102 Am. St. Rep. 353, 70 N. E. 430, holding continued existence of subject matter of a contract of conditional sale contemplated by the very nature of such an agreement.

Cited in footnote to Krause v. Crothersville School Trustees, 65 L.R.A. 111, which holds covenant to repair building and construct annex thereto discharged by destruction by lightning of main building when work is practically completed.

Cited in notes (14 L.R.A. 217) on effect of intervening impossibility to perform contract as relief from obligation; (1 Eng. Rul. Cas. 348) on inevitable accident as excuse for nonperformance of express contract; (6 Eng. Rul. Cas. 613) on impossibility as excuse for nonperformance of contract.

Distinguished in Chapman v. J. W. Beltz & Sons Co. 48 W. Va. 16, 35 S. E. 1013, holding destruction of building does not excuse performance of contract to remodel where owner restores to original condition; Darlington v. Missouri P. R. Co. 99 Mo. App. 19, 72 S. W. 122, holding consignee not excused by severity of weather from unloading freight within time stipulated in bill of lading.

Effect of advances to contractor.

Cited in Bartlett v. Bisbey, 27 Tex. Civ. App. 409, 66 S. W. 70, holding payments as stipulated at different stages of work do not affect acceptance *pro tanto*.

Recovery of advance where performance of contract becomes impossible.

Distinguished in Pinkham v. Libbey, 93 Me. 578, 49 L. R. A. 695, 45 Atl. 823, holding money paid for service of stallion not recoverable, though death precludes exercise of privilege of return.

When set-off may be interposed.

Cited in Hall v. Rosenfeld, 177 Mass. 398, 59 N. E. 68, holding set-off may be filed as amendment to answer.

12 L. R. A. 574, *RAND v. HANSON*, 154 Mass. 87, 26 Am. St. Rep. 210, 28 N. E. 6.

Conclusiveness of judgments.

Cited in *Bishop v. Donnell*, 171 Mass. 565, 50 N. E. 170, holding judgment conclusive on defendant not misled by mistake in date of original summons; *Belcher v. Sheehan*, 171 Mass. 514, 68 Am. St. Rep. 445, 51 N. E. 19, holding judgment against nonresident without attachment, service of process, or appearance, void; *Deacon v. Chadwick*, 1 Ont. L. Rep. 352, holding constructive service upon a nonresident is ineffectual where action is to determine personal rights and obligations.

Cited in notes (5 Eng. Rul. Cas. 745, 11 Eng. Rul. Cas. 235) on conclusiveness and enforceability of judgment of foreign court having jurisdiction.

What reviewable on appeal of case submitted.

Cited in *Davis v. Harrington*, 160 Mass. 279, 35 N. E. 771, and *Ingalls v. Hobbs*, 156 Mass. 349, 16 L. R. A. 52, 32 Am. St. Rep. 460, 31 N. E. 286, holding only whether judgment warranted by evidence can be considered on appeal of case submitted on agreed facts; *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 59, 64 N. E. 723, holding appellate court cannot draw inferences of fact from agreed facts, unless necessarily inferable as matter of law; *Haverhill v. Marlborough*, 187 Mass. 153, 72 N. E. 943, holding if court below has made an erroneous ruling upon a question of law not material to the decision, the error furnishes no ground for reversal of judgment; *Webber v. Cambridgeport Sav. Bank*, 186 Mass. 315, 71 N. E. 567, holding where agreed statement of facts provides that "court may draw such inferences of fact as are warranted" the court on appeal cannot draw inferences of fact when appeal presents questions of law only.

12 L. R. A. 577, *COLUMBUS & H. COAL & I. CO. v. TUCKER*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630.

Pollution of waters.

Cited in *Grey ex rel. Simmons v. Paterson*, 58 N. J. Eq. 10, 42 Atl. 749, holding discharge of city sewage into river not natural and reasonable use; *People v. Hulbert*, 131 Mich. 165, 64 L. R. A. 271, 91 N. W. 211, 100 Am. St. Rep. 588, sustaining riparian owner's right to bathe in source of city's water supply; *Strobel v. Kerr Salt Co.* 164 N. Y. 321, 51 L. R. A. 694, footnote p. 687, 79 Am. St. Rep. 643, 58 N. E. 142, which authorizes injunction against diversion of stream for use in salt works and pollution of stream by return of part; *Teel v. Rio Bravo Oil Co.* 47 Tex. Civ. App. 161, 104 S. W. 420, holding right of riparian owner to recover damages for injury to property by reason of pollution of stream is not dependent upon question of negligence; *Long v. Louisville & N. R. Co.* 128 Ky. 31, 13 L.R.A.(N.S.) 106, 107 S. W. 203, 16 A. & E. Ann. Cas. 673, holding in absence of circumstances such as to show person of ordinary prudence would have anticipated results, one is not liable for pollution of waters of a spring as result of burial of dead animal on his own land.

Cited in footnotes to *Price v. Oakfield Highland Creamery Co.* 24 L. R. A. 333, which authorizes injunction against allowing filth to flow from creamery to adjoining premises; *Weston Paper Co. v. Pope*, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works though business skilfully conducted.

Cited in note (13 L. R. A. 117) on pollution of waters.

— By mining operations.

Cited in *Carson v. Hayes*, 39 Or. 106, 65 Pac. 814, denying right of miner to dump *débris* into stream; *Suffolk Gold Min. & Mill. Co. v. San Miguel Consol.*

Min. & Mill. Co. 9 Colo. App. 419, 48 Pac. 828, holding custom does not justify discharge of tailings from stamp mill into stream to prejudice of lower proprietors; Fitzpatrick v. Montgomery, 20 Mont. 188, 63 Am. St. Rep. 622, 50 Pac. 416, holding necessity does not justify discharge of tailings into stream to injury of lower proprietors; Beach v. Sterling Iron & Zinc Co. 54 N. J. Eq. 73, 33 Atl. 286, denying right to pollute stream as natural and necessary result of mining operations; H. B. Bowling Coal Co. v. Ruffner, 117 Tenn. 198, 9 L.R.A.(N.S.) 928, 100 S. W. 116, 10 A. & E. Ann. Cas. 581, holding mining company liable for damages caused by pumping corrosive water from its mine into a stream and rendering water unfit for its accustomed use; Straight v. Hover, 79 Ohio St. 271, 22 L.R.A.(N.S.) 279, 87 N. E. 174, holding an upper owner liable in damages for contamination of stream due to process of bringing petroleum oil to the surface without regard to motive; Day v. Louisville Coal & Coke Co. 60 W. Va. 30, 10 L.R.A.(N.S.) 171, 53 S. E. 776, holding a coal and coke company liable to riparian owners where refuse materials deposited were carried by waters of stream upon the land so as to do damage; Upson Coal & Min. Co. v. Williams, 7 Ohio C. C. 295, 28 Ohio C. C. 390, holding landowner whose land is injured by refuse from mine cast upon land by stream into which such refuse is discharged may recover for such injury from mine owner.

Cited in notes (24 L.R.A. 64) on how far stream may be polluted for mining purposes; (24 L.R.A. 64) on pollution of stream by mining.

Riparian rights.

Cited in Canton v. Shock, 66 Ohio St. 33, 58 L. R. A. 641, 90 Am. St. Rep. 557, 63 N. E. 600, sustaining right of municipality situated on stream to take water for domestic use of inhabitants.

Rights of adjoining owners of oil lands.

Distinguished in Kelley v. Ohio Oil Co. 57 Ohio St. 329, 39 L. R. A. 768, 63 Am. St. Rep. 721, 49 N. E. 399, denying injunction against drilling oil wells near adjoining owner's line.

Liability for injury in course of lawful act.

Cited in Over v. Dehne, 38 Ind. App. 433, 75 N. E. 664, holding when a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful; Perrin v. Crescent City Stockyard & Slaughter-house Co. 119 La. 98, 43 So. 938, 12 A. & E. Ann. Cas. 903, holding the use and enjoyment of one's own property must have reference to the right of others.

Distinguished in Cleveland Terminal & Valley R. Co. v. Marsh, 63 Ohio St. 249, 52 L. R. A. 147, 58 N. E. 821, denying liability of railroad to boy exploding torpedo found on track.

Usage or custom.

Cited in Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 64 L.R.A. 447, 79 S. W. 124, sustaining custom to suspend business on 4th of July as applied to carrier's delivery of perishable freight; Clark v. Allaman, 71 Kan. 235, 70 L.R.A. 974, 80 Pac. 571, holding a usage which is not according to law, though universal, cannot be set up to control the law; Thomas v. Guarantee Title & T. Co. 81 Ohio St. 444, 26 L.R.A.(N.S.) 1212, 91 N. E. 183, holding where there is no contract, proof of usage will not make one.

Cited in notes (30 Am. St. Rep. 557) on custom authorizing deposit of debris in stream; (8 Eng. Rul. Cas. 334, 336) on necessity that custom be limited, certain, reasonable and of lawful origin.

12 L. R. A. 583, BROWN v. CUNNINGHAM, 82 Iowa, 512, 48 N. W. 1042.

Power of court to disregard prior ruling.

Cited in Littleton v. People's Bank, 95 Iowa, 324, 63 N. W. 666, holding court

overruling demurrer may reverse decision by directing verdict; *Van Werden v. Equitable Life Assur. Soc.* 99 Iowa, 623, 68 N. W. 892, holding court may rule on demurrer to amended petition regardless of holdings on demurrer to original.

— **To direct verdict.**

Cited in *Austin Western Co. v. Weaver Twp.* 136 Iowa, 711, 114 N. W. 189, holding where objection to jurisdiction appears on face of petition and could not be cured by any amendment question may be raised by motion to direct a verdict.

Right to cut ice.

Cited in *Gehlen Bros. v. Knorr*, 101 Iowa, 710, 36 L. R. A. 700, 63 Am. St. Rep. 416, 70 N. W. 757, sustaining right of riparian owner on non-navigable stream to build pond and harvest ice; *Marsh v. McNider*, 88 Iowa, 395, 20 L. R. A. 335, footnote p. 333, 45 Am. St. Rep. 240, 55 N. W. 469, which authorizes sale by tenant of right to cut ice on running stream.

Cited in footnotes to *Wright v. Woodcock*, 25 L. R. A. 499, which holds ice on water flowing land condemned by water company belongs to such company; *Eidemiller Ice Co. v. Guthrie*, 28 L. R. A. 581, which holds owner of land under pond in non-navigable stream entitled to ice as against owner of pond; *Mansfield v. Place*, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired; *Allen v. Weber*, 14 L. R. A. 361, which holds boundary by low-water mark not extended because land purchased for building ice-houses.

— **On public waters.**

Cited in *Rossmiller v. State*, 114 Wis. 184, 58 L. R. A. 98, footnote p. 93, 91 Am. St. Rep. 910, 89 N. W. 839, which holds void, exacting money as consideration for right to take ice from public waters of state; *Becker v. Hall*, 116 Iowa, 590, 56 L. R. A. 574, footnote p. 573, 88 N. W. 324, which holds marking, staking, or cleaning ice not thick enough for harvesting, insufficient appropriation; *Sanborn v. People's Ice Co.* 82 Minn. 59, 51 L. R. A. 835, footnote p. 829, 83 Am. St. Rep. 401, 84 N. W. 641 (dissenting opinion), majority holding taking of ice in large quantities from public lake not exercise of common right in its waters; *Barrett v. Rockport Ice Co.* 84 Me. 158, 16 L. R. A. 775, footnote p. 774, 26 Atl. 802, which holds ice on great pond not appropriated by digging ditch for floating, staking out part of pond, and serving notice of claim; *State v. Mallory*, 73 Ark. 243, 67 L.R.A. 775, 83 S. W. 955, 3 A. & E. Ann. Cas. 852, holding title to the beds of lakes is in the state but not for its own use as an entity; *Des Moines Park Comrs. v. Diamond Ice Co.* 130 Iowa, 607, 3 L.R.A.(N.S.) 1105, 105 N. W. 203, 8 A. & E. Ann. Cas. 28, holding where bed of stream is public property, the owners of land bordering on stream have no title to the ice thereon.

Cited in footnote to *Concord Mfg. Co. v. Robertson*, 18 L. R. A. 679, which holds littoral proprietor's right to cut ice on great pond not exclusive.

Cited in note (3 L.R.A.(N.S.) 1103) on right of public authorities to preserve ice for sport.

Riparian rights.

Cited in note (13 L. R. A. 117) on pollution of waters.

Title to submerged land.

Cited in *Dana v. Hurst*, 86 Kan. 951, 122 Pac. 1041, holding that title to bed of Arkansas river within boundaries of Kansas is in state.

Cited in note (42 L. R. A. 174) on title to land under water.

12 L. R. A. 586, *FISHER v. DUDLEY*, 74 Md. 242, 22 Atl. 2.

Right to have name on official ballot more than once.

Cited in *State ex rel. Crawford v. Norris*, 37 Neb. 311, 55 N. W. 1086, sus-

taining right to have name on ballot as candidate of each party nominating; State *ex rel.* Shepard v. Superior Ct. 60 Wash. 379, 140 Am. St. Rep. 925, 111 Pac. 233, to the point that in absence of statute name of candidate may appear more than once on same ballot.

Cited in footnote to State *ex rel.* Blydenburgh v. Burdick, 34 L. R. A. 845, which denies right to have name of candidate for elector of president appear on ballot more than once.

Distinguished in State *ex rel.* Bateman v. Bode, 55 Ohio St. 232, 34 L. R. A. 500, 60 Am. St. Rep. 696, 45 N. E. 195, holding act prohibiting placing candidate's name on ballot more than once, valid; State *ex rel.* Sturdevant v. Allen, 43 Neb. 657, 62 N. W. 35 and State *ex rel.* Runge v. Anderson, 100 Wis. 531, 42 L. R. A. 242, 76 N. W. 482, denying right to have name of nominee of two parties appear on ballot more than once.

Obligation to use official ballot.

Cited in footnote to State *ex rel.* Mize v. McElroy, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

12 L. R. A. 588, HOPPER v. LOVEJOY, 47 N. J. Eq. 573, 21 Atl. 298.

Sufficiency of corporate acknowledgment.

Cited in General Electric Co. v Transit Equipment Co. 57 N. J. Eq. 466, 42 Atl. 101, holding affidavit proving signature of corporation's president and affixing of seal, sufficient acknowledgment; Partridge v. Mechanics' Nat. Bank, 77 N. J. Eq. 209, 77 Atl. 410, holding that deed of corporation may either be acknowledged or proved; American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 727, 16 L.R.A.(N.S.) 708, 127 Am. St. Rep. 822, 68 Atl. 1078, holding the right of a corporation to empower and employ agents or attorneys is identical with that of a natural person—each is governed alike by the law of principal and agent.

Cited in notes (16 L.R.A.(N.S.) 704) as to whether affidavit or verification by officer of corporation may be regarded as made by agent; (56 Am. St. Rep. 802) on interest of officer disqualifying him from taking acknowledgment by corporation; (108 Am. St. Rep. 574) on defects in certificate of acknowledgment by corporation.

Right of receiver to avoid defective chattel mortgage.

Cited in Graham Button Co v. Spielmann, 50 N. J. Eq. 130, 24 Atl. 571, sustaining right of receiver of insolvent corporation to maintain action to set aside defective chattel mortgage; Franklin Nat. Bank v. Whitehead, 149 Ind. 584, 39 L. R. A. 733, 63 Am. St. Rep. 302, 49 N. E. 592, sustaining right of receiver to avoid chattel mortgage not recorded in time limited by law.

Title of assignee for creditors.

Cited in Martin v. Bowen, 51 N. J. Eq. 459, 26 Atl. 823, holding transfer of title deed to creditor as security creates equitable lien enforceable against assignee for creditors.

Equity jurisdiction over suits involving validity of chattel mortgages.

Distinguished in Jersey City Mill. Co. v. Blackwell, 58 N. J. Eq. 124, 44 Atl. 153, holding creditor acquiring title to mortgaged chattels cannot enjoin foreclosure of defective mortgage; Jersey City Mill. Co. v. Blackwell, 58 N. J. Eq. 124, 44 Atl. 153, holding where complainant has the legal title to lands he is not entitled to file a bill in equity for sole purpose of setting aside a mortgage claimed to be void under the recording act.

12 L. R. A. 589, *Ex parte* McCABE, 46 Fed. 363.

Sufficiency of complaint in extradition proceedings.

Cited in *Ex parte* Yordi, 166 Fed. 924, holding complaint on information and belief is not invalidated because records and depositions were not attached where they were before consul at time he issued the warrant based on such sworn complaint.

Cited in note (112 Am. St. Rep. 107, 109) on extradition proceedings.

12 L. R. A. 600, *WHEELER v. SELDEN*, 63 Vt. 429, 25 Am. St. Rep. 771, 21 Atl. 615.

Transactions between husband and wife.

Cited in *Caswell v. Jones*, 65 Vt. 462, 20 L. R. A. 508, 36 Am. St. Rep. 879, 26 Atl. 529, holding husband's cow purchased by wife at invalid sheriff's sale, remaining in his possession, attachable for his debts.

Cited in footnote to *Dempster Mill Mfg. Co. v. Bundy*, 56 L. R. A. 739, which holds void, contract that product of joint labor of husband and wife shall belong to wife.

Cited in note (90 Am. St. Rep. 547) on attacks by creditors on conveyances made by husbands to wives.

Necessity of change of possession.

Cited in *Baldwin v. Thayer*, 71 N. H. 259, 93 Am. St. Rep. 510, 52 Atl. 852, holding sale of lumber loaded upon car by vendor directing issuance of shipping receipt to vendee, invalid as to attaching creditor.

Cited in notes (24 L.R.A.(N.S.) 1138) as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome; (5 Eng. Rul. Cas. 98) on what is necessary to take goods sold out of the vendor's apparent possession.

12 L. R. A. 601, *HARVEY v. CRANE*, 85 Mich. 316, 48 N. W. 582.

Rights and obligations of parties to private ways.

Cited in *Murray v. Dickson*, 57 Tex. Civ. App. 625, 123 S. W. 179, holding that owner of pass-way easement across land has right to repair fences around such land; *Oneida Twp. v. Allen*, 137 Mich. 227, 100 N. W. 441, holding where party and his grantors have used strip of land as a private way for more than statutory period and dedication of land does not appear to exclude such use party will not be enjoined from further use of such way.

Cited in notes (15 L.R.A.(N.S.) 993) on duty of servient owner to maintain and protect easement; (95 Am. St. Rep. 330) on rights and obligations of parties to private ways.

12 L. R. A. 605, *FINNEY v. HARDING*, 136 Ill. 573, 27 N. E. 289.

Liability of purchaser from tenant to landlord having lien.

Cited in *Bowers v. Davis*, 79 Ill. App. 349, and *Faith v. Taylor*, 69 Ill. App. 419, holding purchaser not liable to landlord authorizing tenant to sell crop; *Dawson v. Ellis*, 151 Ill. App. 94, holding bona fide purchaser for valuable consideration, of crops grown on rented land, without notice, is not liable in an action by the landlord to recover value of crops purchased; *Wicks v. Wheeler*, 139 Ill. App. 413, holding in absence of a promise, landlord's cause of action against a purchaser from tenant, rests alone on some fraudulent act affecting landlord's lien for rent.

Distinguished in *Carter v. Andrews*, 56 Ill. App. 648, holding purchaser of grain with constructive notice of lien liable to landlord.

Disapproved in *Shelby v. Moore*, 22 Ind. App. 373, 53 N. E. 842, holding purchaser of grain without notice of landlord's lien, liable for value.

Nature of landlord's lien.

Cited in *Travers v. Cook*, 42 Ill. App. 582, holding landlord having mere lien, without levy of distress warrant, cannot replevy crop; *Chapin v. Miles*, 151 Ill. App. 169, holding landlord's lien on crops vests him with no right in the property itself, and will not enable him to maintain replevin trover or trespass prior to the levy of his distress warrant.

Notice of lien to purchaser.

Cited in *McGlasson v. Hennessy*, 161 Ill. App. 395, holding that lien exists in favor of stablekeeper for board of horse, as against mortgagee, where mortgagee has notice where though possession temporarily passed out of stablekeeper it became restored through no act of his.

12 L. R. A. 609, *SPRINGER v. CHICAGO*, 135 Ill. 552, 26 N. E. 514.

Offer to sell as admission of value.

Cited in *Sanitary District v. Pearce*, 110 Ill. App. 595, holding consideration in deed after overflowing of land prima facie evidence of price paid; *Eutaw v. Botnick*, 150 Ala. 432, 43 So. 739, holding where party had testified property before grading was worth \$3,500 it was competent on cross-examination to ask if he had not offered to sell it for \$3,000 one week before grading commenced.

Distinguished in *Danville v. Mabin*, 57 Ill. App. 26, holding exclusion of evidence of agent to sell, as to asking price, in action for damage to abutting property, proper.

Measure of damages.

Distinguished in *Dady v. Condit*, 209 Ill. 500, 70 N. E. 1088, holding measure of damages for breach of contract to convey, increase of market value on day of breach, over contract price.

— To land by public improvement or in condemnation.

Cited in *Osgood v. Chicago*, 44 Ill. App. 534, denying recovery where benefits to property by construction of public improvements equal damage; *Stewart v. Ohio River R. Co.* 38 W. Va. 449, 18 S. E. 604, denying recovery where fair market value of abutting property is as much immediately after as before construction of railroad; *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 380, 26 L. R. A. 778, 37 N. E. 1098, denying damages for injury to property not taken in condemnation proceedings where value not depreciated; *Chicago, P. & St. L. R. Co. v. Leah*, 41 Ill. App. 590, holding measure of damages by construction of railroad difference between market value of property before and after; *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 252, 38 N. E. 556, holding proof of annoyances from passing trains proper in action for damages from construction of railroad; *Rockford v. Doughty*, 103 Ill. App. 49; *North Alton v. Dorsett*, 59 Ill. 613; *Springfield v. Griffith*, 46 Ill. App. 249, — holding measure of damages depreciation in value occasioned by change of street grade; *Chicago v. Webb*, 102 Ill. App. 237, holding entire improvement must be taken into consideration in determining damage to abutting property; *Detroit v. Detroit United R. Co.* 156 Mich. 113, 120 N. W. 600, holding that abutting property, not taken in proceeding to separate grade of street and of railroad, is not damaged, where it is worth no less after improvement than before; *Hyde v. Minnesota, D. & P. R. Co.* 24 S. D. 395, 123 N. W. 849, to the point that land owner has right to recover in one action for damages to land by railroad all damages suffered by construction and operation; *Bramlett v. Greenville*, 88 S. C. 116,

70 S. E. 450, holding that abutters damaged by having sidewalk lowered is only entitled to difference between damage to his property and benefits accruing to property from improvement; Suehr v. Sanitary Dist. 149 Ill. App. 332, holding evidence tending to show damages up to time of trial was competent as evidence of real depreciation in value of realty; Suehr v. Sanitary Dist. 242 Ill. 497, 90 N. E. 197, holding where drainage canal is a permanent structure, a recovery may be had of all damages, past, present and future, which land has sustained by reason of it; Beidler v. Sanitary Dist. 211 Ill. 640, 67 L.R.A. 843, 71 N. E. 1118, holding measure of damages is the difference in the value of the property before the improvement was constructed and the value of the property after the improvement was completed; Swift & Co. v. Newport News, 105 Va. 122, 3 L.R.A.(N.S.) 410, 52 S. E. 821, holding if no damage has been done, no right has been violated, even though established grade of the streets may be changed.

Cited in notes (9 L.R.A.(N.S.) 838) on right to set off benefits against damages on condemnation; (30 Am. St. Rep. 845) on measure of damages for change of street grade.

Distinguished in *Bloomington v. Pollock*, 141 Ill. 353, 31 N. E. 146, holding measure of damages to abutting property by construction of street improvement depreciation in value plus special tax.

Limited in *Herrmann v. East St. Louis*, 58 Ill. App. 173, holding general benefit received by property in common with neighboring lands by erection of public work cannot be offset against damages.

Value of land taken by eminent domain.

Cited in footnote to *Philadelphia Ball Club v. Philadelphia*, 46 L. R. A. 724, which requires damages from taking of property in eminent domain estimated as of the time when injury done, without considering future profits of business or subsequent change of circumstances.

When view by jury allowable.

Cited in *Osgood v. Chicago*, 154 Ill. 197, 41 N. E. 40, holding jury may view premises in action for damages to abutting property by constructing viaduct; *Atchison, T. & S. F. R. Co. v. Pratt*, 53 Ill. App. 266, and *Savanna v. Loop*, 47 Ill. App. 215, holding view proper in action for damages to abutting property by street improvement; *Sanitary District v. McGuirl*, 86 Ill. App. 399, holding view in action for damages to property by public improvement within court's discretion; *Pike v. Chicago*, 155 Ill. 663, 40 N. E. 567, and *Vane v. Evanston*, 150 Ill. 621, 37 N. E. 901, holding view by jury in proceeding to confirm special assessment for local improvement, within court's discretion; *Petzel v. Chicago & N. W. R. Co.* 103 Ill. App. 210, and *Chicago, P. & St. L. R. Co. v. Leah*, 41 Ill. App. 587, holding view of premises in action for damages by construction of railroad, proper; *Lake Erie & W. R. Co. v. Purcell*, 75 Ill. App. 578, holding view by jury in action for damages occasioned by nuisance, within court's discretion; *Dady v. Condit*, 87 Ill. App. 253, holding location and surroundings of premises viewed may be considered by jury in determining value; *Chicago v. Le Moyne*, 56 C. C. A. 284, 119 Fed. 668, holding exclusion of sketch showing building which might be constructed conforming to change grade, within court's discretion; *Springfield v. McCarthy*, 79 Ill. App. 390, holding view by jury of *locus in quo* in action for injury from falling on sidewalk, discretionary with court; *Lanark v. Dougherty*, 153 Ill. 165, 38 N. E. 892, holding in negligence case examination of injured limb by physician in jury's presence within court's discretion; *Swift & Co. v. O'Neill*, 88 Ill. App. 168, and *Chicago & A. R. Co. v. Clausen*, 70 Ill. App. 556, holding exhibition of injured person to jury within discretion of trial court; *Painter v. People*, 147 Ill. 467, 35 N. E. 64, holding ex-

hibition to jury of clothing in murder case, proper; *Keating v. People*, 160 Ill. 487, 43 N. E. 724, holding roll of paper substituted by thief for money may be exhibited to jury; *Bibb County v. Reese*, 115 Ga. 349, 41 S. E. 636, holding that court has power in real and mixed actions to permit jury to view premises, without consent of parties.

Cited in note (42 L. R. A. 368, 371, 374, 375) on view by jury.

Disapproved in *Payson v. Milan*, 144 Ill. App. 210, holding a view by a jury in a common law action by consent of parties is not evidence.

View by jury as basis for finding.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Trimmell*, 75 Ill. App. 589, and *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb. 325, 83 N. W. 71, holding verdict may be based on view, in connection with other evidence; *Metropolitan West Side Elev. R. Co. v. Goll*, 100 Ill. App. 327, holding view unsupported by evidence will not sustain verdict; *Gauggel v. Ainley*, 83 Ill. App. 587, holding finding as to character of fixture sustained by jury's view.

Reversible error.

Distinguished in *Schultz v. People*, 210 Ill. 203, 71 N. E. 405, holding in an action on a charge of receiving stolen property introduction of stolen property in evidence not claimed to have ever been in defendant's possession, was error.

When party cannot complain of erroneous instruction.

Cited in *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 167; *Keeler v. Herr*, 54 Ill. App. 469, holding party cannot complain of instruction on adversary's behalf like one given at his request; *Connelly v. George A. Fuller Co.* 159 Ill. App. 492; *McIntruff v. Insurance Co. of N. A.* 248 Ill. 99, 140 Am. St. Rep. 153, 93 N. E. 369, 21 Ann. Cas. 176, affirming 155 Ill. App. 228, holding that party cannot complain of error in instruction when same error is found in instruction offered by complaining party; *Woods v. Dailey*, 211 Ill. 498, 71 N. E. 1068; *Central R. Co. v. Schnert*, 115 Ill. App. 564; *Welfelt v. Illinois C. R. Co.* 149 Ill. App. 327,—holding one party cannot induce the court to instruct the jury upon the law in a certain manner, even though erroneously, and then have the case reversed by reason of same error found in instructions of his adversary; *Doyle v. Cavanaugh*, 139 Ill. App. 363; *McKinnie v. Lane*, 230 Ill. 549, 120 Am. St. Rep. 338, 82 N. E. 878,—holding a party cannot complain of an instruction given on behalf of his adversary like one given at his own request.

Affirmance by divided court.

Cited in *Binder v. Langhorst*, 139 Ill. App. 494, holding an affirmance results by operation of law where court is equally divided.

12 L. R. A. 617, *HASTINGS v. GRIMSHAW*, 153 Mass. 497, 27 N. E. 521.

Riparian rights respecting water fronts.

Cited in *Com. v. Boston Terminal Co.* 185 Mass. 284, 70 N. E. 125, holding commonwealth may pass its interest by an act of the legislature in lands that are below extreme low water mark, and which when filled by the grantee will extinguish the right of user by the public; *Bradford v. McQuesten*, 182 Mass. 82, 64 N. E. 688, holding commonwealth could divest itself of any right or title to flats as well by an act of the legislature, as by a more formal instrument.

Cited in footnotes to *Sage v. New York*, 38 L. R. A. 606, which denies riparian owner's right to compensation for cutting off access to water by municipal improvement of water front; *Slingerland v. International Contracting Co.* 56 L. R. A. 494, which denies riparian owner's right to damages for injuries to right

of access by one dredging under government authority; *Lewis v. Portland*, 22 L. R. A. 736, which upholds riparian owner's right to build wharves.

Cited in notes (40 L. R. A. 639) on right to erect wharves; (45 L. R. A. 240) on title to land between high and low water mark; (40 L. R. A. 393) on separation of riparian rights from upland; (23 Eng. Rul. Cas. 187) on ownership of riparian owner to thread of stream; (3 L.R.A.(N.S.) 823) as to what is included in grant of riparian rights.

12 L. R. A. 618, *CLAPP v. PINEGROVE TWP.* 138 Pa. 35, 20 Atl. 836.

When statute of limitations begins to run.

Cited in *Merchants' Nat. Bank v. Spates*, 41 W. Va. 33, 56 Am. St. Rep. 828, 23 S. E. 681, holding in action for breach of implied warranty arising from assignment of county warrant, statute runs from date of assignment.

Cited in note (11 L.R.A.(N.S.) 1192) on beginning of limitations to run against action to recover money paid by mistake.

Recovery of voluntary payment of municipal assessment.

Cited in *Murtland v. Pittsburg*, 189 Pa. 378, 43 W. N. C. 441, 41 Atl. 1113, sustaining right to recover amount of liens deposited to clear title pending appeal from special assessment.

12 L. R. A. 620, *Re HUSS*, 126 N. Y. 537, 27 N. E. 784.

Presumption of continuance.

Cited in *Sowles v. Carr*, 69 Vt. 417, 38 Atl. 77, holding proof of possession at prior date raises presumption of continuance; *Bonham v. Citizens Street R. Co.* 158 Ind. 110, 62 N. E. 996, holding continued existence of proved municipal ordinance presumed; *MacRae v. Chelsea Fibre Mills*, 145 App. Div. 590, 130 N. Y. Supp. 339, holding that where electric lights in storeroom were usually lighted during whole of working day, and it appears they were burning in morning, it will be presumed that they continued to burn until a time in the afternoon when it was shown they were out.

Cited in (113 Am. St. Rep. 881) on presumption of continued existence of law.

Validity of bequests to foreign legatees, how determined.

Cited in *Hope v. Brewer*, 136 N. Y. 142, 18 L. R. A. 464, 48 N. Y. S. R. 842, 32 N. E. 558, Affirming 40 N. Y. S. R. 298, 15 N. Y. Supp. 849, holding bequest to trustees of foreign charity valid under laws of that country, valid, though contravening state laws relating to trusts and perpetuities; *Re Lang*, 9 Misc. 529, 30 N. Y. Supp. 388, sustaining bequest to legatee entitled to take under law of domicile, though illegal where made; *Re Leo-Wolf*, 25 Misc. 470, 55 N. Y. Supp. 650, sustaining bequest to religious society able to administer trust under laws of state where domiciled; *Kurzman v. Lowy*, 23 Misc. 383, 52 N. Y. Supp. 83, sustaining legacy in trust to establish stipendium in school in foreign country; *Re Sturges*, 28 Misc. 111, 59 N. Y. Supp. 783, holding bequest good under law of other state void where no one presently able to receive fund; *Congregational Unitarian Soc. v. Hale*, 27 N. Y. Civ. Proc. Rep. 308, 51 N. Y. Supp. 704, holding the validity of particular bequests depends upon the law of the domicile of the legatee; *St. John v. Andrews Institute*, 117 App. Div. 714, 102 N. Y. Supp. 808, holding the right of the foreign legatee to take will be determined by our courts before directing the executors to turn over the fund, but under the laws of the foreign jurisdiction relating to accumulations and perpetuities; *Re Lang*, 1 Gibbons Sur. Rep. 135, holding the law of the legatee's domicile controls as

to the validity of the bequest, and if made to a legatee here must be held valid if valid under laws of domicile.

Cited in footnote to *Meunier's Succession*, 48 L. R. A. 77, which sustains legacy to commune in foreign country.

Cited in notes (14 L. R. A. 70) on municipal corporation as trustee of a charity; (24 L. R. A. 325) on right of foreign corporations to own real estate; (2 L.R.A.(N.S.) 456) on conflict of laws as to capacity of legatee or devisee.

Distinguished in *Graham v. Canandaigua Lodge No. 236 I. O. O. F.* 24 Ont. Rep. 262, holding a legacy by a testator domiciled in the United States to an unincorporated society in Canada will be dealt with according to the laws of the testator's domicile.

12 L. R. A. 624, *Re WILSON*, 8 Mackey, 341.

Who is peddler.

Cited in *Conway v. Waddell*, 90 Ark. 129, 118 S. W. 398, holding that under licensing statute term "peddler" means one who goes from place to place carrying for sale goods, wares and merchandise which he carries; *Potts v. State*, 45 Tex. Crim. Rep. 50, 74 S. W. 31, 2 A. & E. Ann. Cas. 827, holding one who sells by sample, taking orders for goods for future delivery, is not a peddler.

Cited in footnotes to *State v. Wells*, 48 L. R. A. 99, which holds one soliciting orders for goods and carrying goods to fill previous sales, not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered and taking other orders not a peddler; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler.

Cited in note (12 Eng. Rul. Cas. 504) on who are peddlers.

Peddlers' tax as regulation of interstate commerce.

Cited in *People v. Sawyer*, 106 Mich. 431, 64 N. W. 333, holding license tax on peddler not invalid regulation of interstate commerce in case of resident selling from general stock within state.

Cited in notes (14 L. R. A. 98) on peddlers and drummers as related to interstate commerce; (60 L. R. A. 692) on corporate taxation and the commerce clause; (39 L. ed. U. S. 540; 19 L.R.A.(N.S.) 313) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise as violating the commerce clause; (46 L. ed. U. S. 785) on peddlers and drummers as related to interstate commerce.

12 L. R. A. 632, *EISENBACH v. HATFIELD*, 2 Wash. 236, 26 Pac. 539.

Riparian rights.

Cited in *New Whateom v. Fairhaven Land Co.* 24 Wash. 501, 54 L. R. A. 195, 64 Pac. 735, denying right of municipality to appropriate waters of navigable lake to injury of riparian owner on outlet, whose rights vested before adoption of constitution; *Sage v. New York*, 154 N. Y. 78, 38 L. R. A. 613, footnote p. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, which denies riparian owner's right to compensation for cutting off access to water by municipal improvement of water front; *Northern P. R. Co. v. S. E. Slade Lumber Co.* 61 Wash. 198, 34 L.R.A.(N.S.) 428, 112 Pac. 240, holding that riparian owner may recover damages caused by drawbridge of railroad interfering with his use of wharf, although railroad has Federal and state authority; *Chlopek Fish Co. v. Seattle*, 64 Wash. 328, 117 Pac. 232, to the point that preferential right of owner of abutting lands to purchase tide lands and to lease harbor area in front thereof has:

no analogy to rights in other states; *Cohen v. United States*, 162 Fed. 370, holding riparian owner has no vested right in future accretions.

Cited in footnotes to *Slingerland v. International Contracting Co.* 56 L. R. A. 494, which denies riparian owner's right to damages for injuries to right of access by one dredging under government authority; *Lewis v. Portland*, 22 L. R. A. 736, which upholds riparian owner's right to build wharves; *Prior v. Swartz*, 18 L. R. A. 668, which holds riparian right to build wharves not destroyed by designating land for planting oysters; *Farist Steel Co. v. Bridgeport*, 13 L. R. A. 590, which requires compensation to riparian owner on appropriation of land by city in establishing harbor lines; *Carr v. Carpenter*, 53 L. R. A. 333, which sustains upland owner's right to take seaweed stranded on beach; *Allen v. Allen*, 30 L. R. A. 497, which holds public right of fishery paramount to riparian right to cut grass or sedge.

Cited in notes (14 L. R. A. 498) on establishment of dock lines; (40 L. R. A. 602) on right of owner of upland to access to navigable water; (40 L. R. A. 643) on right to erect wharves; (58 L. R. A. 210) on law of accretion to shore lands; (127 Am. St. Rep. 55) on relative rights of state and riparian owner in navigable waters.

Ownership of lands below high-water mark.

Followed in *Pierce v. Kennedy*, 2 Wash. 325, 26 Pac. 554, and *Harbor Line v. State*, 2 Wash. 533, 27 Pac. 550, holding soil under navigable waters up to high-water mark owned by state; *State ex rel. McKenzie v. Forrest*, 11 Wash. 233, 39 Pac. 684, construing tide lands subject to sale as lands between inner harbor areas and high-tide mark; *Allen v. Forrest*, 8 Wash. 703, 24 L. R. A. 608, 36 Pac. 971, and *Shively v. Bowlby*, 152 U. S. 56, 38 L. ed. 351, 14 Sup. Ct. Rep. 548, Affirming 22 Or. 421, 30 Pac. 154, holding title to tide lands vested in state; *McCue v. Bellingham Bay Water Co.* 5 Wash. 159, 31 Pac. 461, holding land below ordinary high-water mark of lake belongs to state; *Sullivan v. Callvert*, 27 Wash. 605, 68 Pac. 363, holding improver of tide lands acquires no title.

Cited in *Bilger v. State*, 63 Wash. 465, 116 Pac. 19, holding that under constitution state owns beds and shores of navigable streams up to and including line of ordinary highwater mark; *Burrows v. Grays Harbor Boom Co.* 44 Wash. 640, 87 Pac. 937, as to rights of riparian proprietor on shores of sea as against grantee of state to occupancy of shore lands in front of upland; *Gifford v. Horton*, 54 Wash. 600, 103 Pac. 988, holding prior to adoption of state constitution title to lands below ordinary high water mark was in the United States and since the adoption of the state constitution in the state; *Western P. R. Co. v. Southern P. Co.* 80 C. C. A. 606, 151 Fed. 399, holding one who acquires tide lands from state does not acquire vested right to all future accretions; *McGivra v. Ross*, 161 Fed. 400; *Providence v. Comstock*, 27 R. I. 543, 65 Atl. 307; *Gray's Harbor Boom Co. v. Lounsedale*, 54 Wash. 90, 102 Pac. 1041; *Palmer v. Peterson*, 56 Wash. 76, 105 Pac. 179; *Brace & H. Mill Co. v. State*, 49 Wash. 331, 95 Pac. 278,—holding ownership of lands below high water mark is in state; *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 132, 94 Pac. 922, 16 A. & E. Ann. Cas. 196, holding state has authority to invest a private person with tide land and where it leases tide lands to such person the latter is entitled to claims found thereon.

Cited in footnotes to *McBurney v. Young*, 29 L. R. A. 539, which defines low-water mark as ordinary low-water mark; *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in notes (45 L. R. A. 239) on title to land between high and low water mark; (16 L. R. A. 354) on ownership of flats or land below high-water mark;

(35 Am. St. Rep. 310) on accretion and alluvion; (53 Am. St. Rep. 294, 297, 298) on title to land under navigable water; (23 Eng. Rul. Cas. 188) on ownership of riparian owner to thread of stream.

Rights of upland owner to tide lands.

Cited in *West Coast Improv. Co. v. Winsor*, 8 Wash. 492, 36 Pac. 441, holding uplands owner with preference right to purchase tide lands may enjoin interference with possession; *Morse v. O'Connell*, 7 Wash. 119, 34 Pac. 426, denying right of occupying claimant to enjoin occupation of tide lands in front not materially interfering with access to water; *Dearborn v. Moran*, 2 Wash. 406, 27 Pac. 230 (dissenting opinion), and *Kenyon v. Knipe*, 2 Wash. 399, 13 L. R. A. 145, 27 Pac. 227 (dissenting opinion), majority holding purchaser of lots according to plat showing other lots in rear under tide water acquires no riparian rights; *Nassa v. Seaborg*, 64 Wash. 166, 116 Pac. 658, holding that land below government meander line and above line of high tide at time of admission of state to Union, is upland and passes with government patent of meandered upland; *Lownsdale v. Grays Harbor Boom Co.* 54 Wash. 551, 103 Pac. 833, holding owner of upland cannot recover for use of his premises below line of ordinary high tide; *Van Sieten v. Muir*, 46 Wash. 41, 89 Pac. 188; *Muir v. Johnson*, 49 Wash. 68, 94 Pac. 899,—holding owner of uplands bordering on navigable waters as such has no riparian or littoral rights in such waters as would enable him to maintain an injunction from interference therewith.

Cited in note (22 L.R.A.(N.S.) 338) on right of state to grant tide lands.

Distinguished in *Seattle & M. R. Co. v. Carraher*, 21 Wash. 494, 58 Pac. 570, holding purchaser of upland "with appurtenances" has preference right to purchase as against subsequent grantee of tide lands; *Hulet v. Wishkah Boom Co.* 54 Wash. 517, 132 Am. St. Rep. 1127, 103 Pac. 814, holding boom company had no right to obstruct navigation of river so as to prevent passage of owners of upland over it to and from their lands or wash away their lands and make deposits therein.

12 L. R. A. 652, *JAMIESON v. INDIANA NATURAL GAS & OIL CO.* 3 Inters. Com. Rep. 613, 128 Ind. 555, 28 N. E. 76.

Minority stockholder's action to enjoin proceeding with contract in *Benedict v. Columbus Constr. Co.* 49 N. J. Eq. 31, 23 Atl. 485.

Action for breach of warranty of gas pipe in *Crane Co. v. Columbus Constr. Co.* 20 C. C. A. 240, 46 U. S. App. 52, 73 Fed. 990.

Judicial notice or notice which may be taken by jury.

Cited in *Indiana Natural Gas & Oil Co. v. Jones*, 14 Ind. App. 57, 42 N. E. 487, and *Lewisville Natural Gas Co. v. State*, 135 Ind. 52, 21 L. R. A. 735, 34 N. E. 702, holding courts judicially notice dangerous nature of natural gas; *Poor v. Watson*, 92 Mo. App. 99, holding courts will judicially notice that coal mines generate gas; *Racer v. State*, 131 Ind. 402, 31 N. E. 81, holding averment contradicting matter of which judicial notice taken, unavailing; *Grand Trunk Western R. Co. v. South Bend*, 174 Ind. 220, 36 L.R.A.(N.S.) 857, 89 N. E. 885, holding that court will take judicial notice that double tracks will take up more space in street than single track; *Chicago, M. & St. P. R. Co. v. Moore*, 23 L.R.A.(N.S.) 966, 92 C. C. A. 357, 166 Fed. 667, holding jury may take notice of matters of common knowledge and apply them to evidence; *Timson v. Manufacturers Coal & Coke Co.* 220 Mo. 607, 119 S. W. 565 (dissenting opinion); *McGill v. Michigan S. S. Co.* 75 C. C. A. 518, 144 Fed. 793,—as to court taking judicial notice that natural gas is explosive.

Cited in note (124 Am. St. Rep. 30) on facts of which courts will take judicial notice.

Natural gas as property.

Cited in *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 563, holding one who lawfully reduces natural gas to possession cannot be deprived thereof without compensation; *Crystal Ice & Cold Storage Co. v. Marion Gas Co.* 35 Ind. App. 296, 74 N. E. 15, holding natural gas when extracted from the earth and put into a pipe line becomes personal property and is the subject of conversion.

Pumping gas.

Cited in *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 156 Ind. 680, 59 N. E. 165, and *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 568, 58 N. E. 851, holding plaintiff not suffering special injury cannot enjoin pumping gas at unlawful pressure; *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 475, 50 L. R. A. 774, 57 N. E. 912, upholding right of landowners to enjoin increase of natural flow of gas by pumping; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.* 31 Ind. App. 230, 66 N. E. 782, sustaining right to use pumps in transporting natural gas.

Natural gas as dangerous agency.

Cited in *Mississinewa Min. Co. v. Patton*, 129 Ind. 474, 28 Am. St. Rep. 203, 28 N. E. 1113, holding gas company liable for failure to use reasonable care to prevent escape of gas from main; *Richmond Gas Co. v. Baker*, 146 Ind. 606, 36 L. R. A. 688, 45 N. E. 1049, holding company liable for explosion of gas from defective pipe.

Cited in note (10 L.R.A.(N.S.) 372) on liability for injury by servant to third person in use of dangerous agency.

Police power.

Cited in *Townsend v. State*, 147 Ind. 628, 37 L. R. A. 298, 62 Am. St. Rep. 477, 47 N. E. 19, sustaining statute forbidding wasteful use of natural gas in flambeau lights; *Ohio Oil Co. v. Indiana*, 177 U. S. 206, 44 L. ed. 738, 20 Sup. Ct. Rep. 576, sustaining statute forbidding escape of gas or oil from well into open air longer than two days after striking; *State ex rel. Duensing v. Roby*, 142 Ind. 192, 33 L. R. A. 221, 51 Am. St. Rep. 174, 41 N. E. 145, sustaining statute regulating horse racing; *State v. Lewis*, 134 Ind. 254, 20 L. R. A. 54, 33 N. E. 1024, sustaining statute making possession of gill net or seine misdemeanor; *Williams v. Citizens' R. Co.* 130 Ind. 73, 15 L. R. A. 67, 30 Am. St. Rep. 201, 29 N. E. 408, holding contract rights subordinate to police power; *Noblesville v. Lake Erie & W. R. Co.* 130 Ind. 4, 29 N. E. 484, holding, *obiter*, condition attached to dedication of street impairing police power, void; *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 546, 53 L. R. A. 135, footnote p. 134, 58 N. E. 706, which holds void, prohibition of transportation of natural gas out of state; *West v. Kansas Natural Gas Co.* 221 U. S. 257, 55 L. ed. 727, 35 L.R.A.(N.S.) 1207, 31 Sup. Ct. Rep. 564, holding that statute prohibiting construction of pipe lines for transportation of gas beyond state is unconstitutional, as interfering with interstate commerce, and not within police power; *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 355, 33 L.R.A.(N.S.) 714, 108 N. W. 902, holding statute declaring invalid any contract limiting the liability of a railway company for negligence of fellow servant valid exercise of police power.

Cited in notes (16 L. R. A. 444) on natural gas; (35 L.R.A.(N.S.) 1194) on right of state to forbid exportation of natural resources; (27 Am. St. Rep. 567) on state regulation of interstate commerce.

Impossibility of performance as affecting contracts.

Cited in *Krause v. Crothersville*, 162 Ind. 287, 65 L.R.A. 117, 102 Am. St.

Rep. 203, 70 N. E. 264, 1 A. & E. Ann. Cas. 460, holding destruction of main building discharged contract to build an addition thereto; *Heart v. East Tennessee Brewing Co.* 121 Tenn. 74, 19 L.R.A.(N.S.) 966, 130 Am. St. Rep. 753, 113 S. W. 364, holding law making liquor selling illegal discharged lease of building for saloon.

Cited in notes (14 L. R. A. 215) on effect of intervening impossibility to perform contracts as relief from obligation; (10 L.R.A.(N.S.) 415) on effect of passage of statute rendering performance of contract impossible; (120 Am. St. Rep. 469, 474) on effect of statutes making pre-existing contracts illegal.

Special legislation.

Cited in *State v. Loomis*, opinion not given in 115 Mo. 307, 21 L. R. A. 795, 22 S. W. 350, holding unconstitutional law regulating mode of paying employees by mining and manufacturing concerns.

Burden of showing statute unconstitutional.

Cited in *State ex rel. Smith v. McClelland*, 138 Ind. 401, 37 N. E. 799, and *State ex rel. Harrison v. Menaugh*, 151 Ind. 267, 43 L. R. A. 411, 51 N. E. 117, holding burden of showing unconstitutionality rests on party asserting invalidity of statute; *Carr v. State*, 175 Ind. 247, 32 L.R.A.(N.S.) 1193, 93 N. E. 1071, holding same.

Scope of legislative functions.

Cited in *Townsend v. State*, 147 Ind. 634, 37 L. R. A. 299, 62 Am. St. Rep. 477, 47 N. E. 19, holding courts cannot pronounce statute invalid because encroaching upon natural rights; *Townsend v. State*, 147 Ind. 635, 37 L. R. A. 300, 62 Am. St. Rep. 477, 47 N. E. 19, holding legislative determination of what constitutes waste of gas not usurpation of judicial power; *State ex rel. Geake v. Fox*, 158 Ind. 129, 56 L. R. A. 895, 63 N. E. 19, holding policy, expediency, necessity, or wisdom, question for legislature.

12 L. R. A. 664, *DOWNING v. INDIANA STATE BD. OF AGRICULTURE*, 129 Ind. 443, 28 N. E. 123, 614.

What corporations private.

Cited in *State ex rel. White v. Neff*, 52 Ohio St. 404, 28 L. R. A. 413, 40 N. E. 720, holding eleemosynary corporation charged with maintenance of college, private.

Cited in note (29 L. R. A. 381) on nature of incorporated institutions belonging to state.

Distinguished in *People ex rel. Post v. San Joaquin Valley Agri. Asso.* 151 Cal. 805, 91 Pac. 740, holding under statute district agricultural association a public corporation.

Public purpose.

Cited in *McGlone v. Womack*, 129 Ky. 288, 17 L.R.A.(N.S.) 860, 111 S. W. 688, holding tax on dogs to create fund to reimburse owners of sheep killed by dogs was for a public purpose; *Kentucky Live Stock Breeders' Asso. v. Hager*, 120 Ky. 133, 85 S. W. 738, 9 A. & E. Ann. Cas. 50, holding appropriation for premiums for state fair an appropriation for a public purpose.

12 L. R. A. 667, *McARTHUR v. GORDON*, 126 N. Y. 597, 27 N. E. 1033.

Trust unaffected by trustee's acts.

Cited in *Nelson v. Ratliff*, 72 Miss. 664, 18 So. 407, holding trustee cannot by act or default determine trust.

Trusts, how established.

Cited in *Hutchins v. Van Vechten*, 140 N. Y. 119, 35 N. E. 446, holding letters and informal memoranda sufficient to prove trust; *Locke v. Rings*, 66 Hun, 440, 50 N. Y. S. R. 296, 21 N. Y. Supp. 524 (dissenting opinion), majority holding no trust created by testamentary direction to carry out provisions of unauthenticated trust deed.

Place of support of beneficiary of trust or contract.

Cited in *Sherman v. Skuse*, 166 N. Y. 351, 59 N. E. 990, Affirming 45 App. Div. 338, 60 N. Y. Supp. 1030, sustaining right of beneficiary of trust to claim support at any reasonable place; *Empie v. Empie*, 35 App. Div. 55, 54 N. Y. Supp. 402, holding grantor of farm in consideration of agreement to support may choose place of residence; *Tuttle v. Burgett*, 53 Ohio St. 503, 30 L. R. A. 216, footnote p. 214, 53 Am. St. Rep. 649, 42 N. E. 427, which upholds mortgagee's right to claim support under mortgage at any reasonable place; *Stuart v. Abbey*, 62 Misc. 86, 116 N. Y. Supp. 259, holding where no place is specified where grantor is to be maintained and supported he may live where he pleases, provided his choice does not involve needless expense.

Agreement for support as basis for lien.

Cited in note (28 L.R.A.(N.S.) 607) on agreement for support in consideration of conveyance, as basis for equitable lien.

12 L. R. A. 673, *MILLS v. UNITED STATES*, 46 Fed. 738.

Riparian owner's right to compensation for damages resulting from public improvement.

Cited in *Salliotte v. King Bridge Co.* 65 L. R. A. 636, 58 C. C. A. 470, 122 Fed. 382, holding riparian owner cannot recover damages resulting from lawfully erected bridge turning current against his land; *Manigault v. Springs*, 199 U. S. 484, 50 L. ed. 280, 26 Sup. Ct. Rep. 127, holding the interruption of access to lands, and the impairment of the rights of navigation, consequent upon the private construction of a dam across a navigable stream, under authority of legislation enacted in exercise of the police power to subserve the drainage of low lands is not a "taking" which requires compensation to be made; *Home for Aged Women v. Com.* 202 Mass. 432, 24 L.R.A.(N.S.) 84, 89 N. E. 124, holding owner of land on navigable stream not entitled to damages by reason of his right of passage up and down stream being interfered with by erection of public improvement.

Cited in notes (59 L. R. A. 827) on liability for damming back water of stream; (67 L.R.A. 845) on injury from flooding from improving navigability of stream.

Distinguished in *United States v. Lynah*, 188 U. S. 473, 47 L. ed. 550, 23 Sup. Ct. Rep. 349, holding flooding lands so as to totally destroy value, by improvements in navigable river, a taking requiring compensation; *Cohen v. United States*, 162 Fed. 367, holding diversion of water of a non-navigable stream by United States, thus depriving the landowner of his natural flow of water, for purpose of aiding navigation in another stream is such a "taking" as requires compensation.

Low-water mark defined.

Cited in footnote to *McBurney v. Young*, 29 L. R. A. 539, which defines low-water mark as ordinary low-water mark.

Taking private property for public use.

Cited in *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 584, 50 L. ed. 606, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175, holding imposition upon railway

company of entire cost of removing and rebuilding a railway bridge and culvert made necessary by proposed widening and deepening of channel of creek under drainage act does not amount to taking of private property for a public use which requires compensation.

Liability of United States for consequential damages.

Cited in *Coleman v. United States*, 181 Fed. 602, holding that Tucker Act does not authorize suits against United States for recovery of damages for consequential injury to property not amounting to taking and recoverable only in action of tort; *Heyward v. United States*, 46 Ct. Cl. 496, to the point that recovery for consequential injury to land cannot be had against United States.

12 L. R. A. 681, *AMERICAN FREEHOLD LAND & MORTG. CO. v. THOMAS*, 47 Fed. 550.

Denial of motion to set aside decree against mortgage company held erroneous in 18 C. C. A. 327, 30 U. S. App. 690, 71 Fed. 782.

Powers of court derived from statute.

Cited in *Long v. Superior Court*, 102 Cal. 453, 36 Pac. 807, holding court's powers in statutory proceeding limited by statute.

Cited in note (18 L. R. A. 269) on adoption by Federal courts of remedies created by state statutes.

When judgment collaterally assailable.

Cited in *Alexander v. Mortgage Co.* 47 Fed. 134, holding judgment beyond court's powers subject to collateral attack at any time.

Cited in footnote to *Wonderly v. Lafayette County*, 45 L. R. A. 386, which sustains suit in state court to set aside Federal judgment obtained by fraudulent pretense of diverse citizenship.

Trusts, statute of limitations.

Cited in *Jones v. Henderson*, 149 Ind. 463, 49 N. E. 443, holding continuing trust not within statute of limitations.

Vacation of void judgment.

Cited in *Brown v. Allebach*, 182 Fed. 266, to the point that judgment void for want of jurisdiction may be stricken from records even after term at which it was entered; *Nicoll v. Midlands Sav. & Loan Co.* 21 Okla. 593, 96 Pac. 744, holding a void judgment may be vacated and set aside at any time on motion of defendant.

Cited in note (60 Am. St. Rep. 644) on vacation of judgments on motion when not specially authorized by statute.

12 L. R. A. 690, *SALENTINE v. MUTUAL BEN. L. INS. CO.* 79 Wis. 580, 48 N. W. 855.

12 L. R. A. 693, *HOBART v. YOUNG*, 63 Vt. 363, 21 Atl. 612.

Restrictions on cross-examination.

Cited in footnote to *Kolb v. Union R. Co.* 54 L. R. A. 646, which denies right to cross-examine plaintiff in suit for husband's death as to birth of illegitimate child since his death.

Prior agreement as part of contract.

Cited in *Beverwick Brewing Co. v. Oliver*, 69 Vt. 324, 37 Atl. 1110, holding orders given pursuant to previous understanding governed thereby; *Griffith v. Marsh*, 85 Kan. 695, 118 Pac. 879, holding that bank check, given in payment for property, containing recital of consideration for which it was given, is not written contract which cannot be varied by parol evidence.

Oral warranty accompanying written contract.

Cited in *Worland v. Secrest*, 106 Ky. 715, 51 S. W. 445, holding oral warranty cannot be grafted on written transfer of territorial right to handle article; *Grout Bros. v. Moulton*, 79 Vt. 137, 64 Atl. 453, holding it not necessary that statements made should have been simultaneous with conclusion of contract, but only that they were made during the negotiations that led to the contract influenced party in making it, and entered into it as a part thereof.

Cited in footnote to *Diebold Safe & Lock Co. v. Huston*, 28 L. R. A. 53, which holds inadmissible oral evidence of warranty at time of written order for a No. 4 fire-proof safe.

Warranty.

Cited in *Reese v. Bates*, 94 Va. 331, 26 S. E. 865, holding affirmation of quality by seller relied on by buyer, warranty; *Crossman v. Johnson*, 63 Vt. 335, 13 L. R. A. 679, 22 Atl. 608, holding private representations prior to public sale of horse, warranty; *Norris v. Parker*, 15 Tex. Civ. App. 121, 38 S. W. 259, holding special warranty of animal covers obvious defects, where purchaser relies thereon; *Grout Bros. v. Moulton*, 79 Vt. 137, 64 Atl. 453, holding that to make seller liable for false representations in respect to article sold, it is not necessary that they be made simultaneous with conclusion of contract, but only that they be made during negotiations; *Union Bank v. Oxford & C. L. R. Co.* 74 C. C. A. 323, 143 Fed. 197, holding statement that bonds were "valid" was express warranty that they had a valid legal existence as securities; *Rosenthal v. Rambo*, 165 Ind. 592, 3 L.R.A.(N.S.) 682, 76 N. E. 404, holding buyer entitled to return horse though defects had developed into different disease than he had when sold; *Larson v. Calder*, 16 N. D. 256, 113 N. W. 103, holding evidence justified trial court in finding a warranty.

Cited in footnotes to *Holmes v. Tyson*, 15 L. R. A. 209, which holds statement, horse kind, sound, and gentle not a warranty; *Olson v. Port Huron Live-Stock Assn.* 33 L. R. A. 557, which holds pregnancy of ewes in October not breach of contract to deliver in "healthy condition."

Cited in notes (13 L. R. A. 678) on warranty before or after sale; (15 L. R. A. 795) on effect of representing things sold to be "good;" (32 L.R.A.(N.S.) 187) on what amounts to breach of warranty of soundness of horse; (35 L.R.A.(N.S.) 275) on effect of sale with particular description of kind or quality; (6 Eng. *Rul. Cas.* 502) on warranties.

12 L. R. A. 698, *SPAULDING v. PENNSYLVANIA CO.* 142 Pa. 503, 21 Atl. 979.

Measure of damages for pain and suffering.

Followed in *Goodhart v. Pennsylvania R. Co.* 177 Pa. 14, 38 W. N. C. 548, 55 Am. St. Rep. 705, 35 Atl. 191, and *Schenkel v. Pittsburg & B. Traction Co.* 194 Pa. 185, 44 Atl. 1072, holding price for which one would voluntarily submit to similar personal injury, not proper measure of damages.

Cited in *Dooner v. Delaware & H. Canal Co.* 164 Pa. 34, 30 Atl. 269, holding judge's charge that no sane man would lose leg for any compensation, "but you are not to be guided by such consideration in fixing damages," improper; *Closser v. Washington Twp.* 11 Pa. Super. Ct. 122, holding statement of injured person that he "would not take any money to go through it again," improper; *Smith v. Chester Traction Co.* 11 Del. Co. Rep. 393; *McLane v. Pittsburg R. Co.* 230 Pa. 35, 79 Atl. 237,—holding that court should not suggest the idea of price or sum of money as equivalent for pain and suffering, an accident case, as measure of damages; *Whitehead v. Pittsburg R. Co.* 230 Pa. 85, 79 Atl. 240, holding that it is error to charge that, "pain and suffering cannot be bought and sold like

merchandise. No man would take any amount of money to subject himself to pain and suffering of character suggested in many cases."

Measure of recovery for death.

Cited in note (17 L. R. A. 72) on measure of recovery for death caused by negligence.

12 L. R. A. 700, WEINSTEIN v. FREYER, 93 Ala. 257, 9 So. 285.

Extra-territorial application of statutes regulating conditional sales.

Cited in Public Parks Amusement Co. v. Embree-McLean Carriage Co. 64 Ark. 33, 40 S. W. 582, holding statute requiring record of conditional sale as against bona fide purchasers has no application, where property resold in another state.

Cited in notes (13 L. R. A. 741) on lien of chattel mortgage; removal of property to another state; (64 L. R. A. 836) on conflict of laws as to sales of personal property.

Conditional sales, vendor's rights.

Cited in Adams Mach. Co. v. Interstate Bldg. & L. Asso. 119 Ala. 98, 24 So. 857, holding conditional vendor of chattels to be annexed to freehold can assert title against subsequent bona fide mortgagee; Ensley Lumber Co. v. Lewis, 121 Ala. 97, 25 So. 729, and Warren v. Liddell, 110 Ala. 245, 20 So. 89, holding bona fide purchaser from conditional vendee cannot defeat recovery by original vendor; Thomason v. Lewis, 103 Ala. 429, 15 So. 830, holding trover maintainable by conditional vendor against purchaser under vendee's mortgage.

Cited in footnote to Chafey v. Mathews, 27 L. R. A. 558, which holds vendee's interest in goods by conditional sale passes under mortgage of all his stock.

— Election of remedies.

Cited in Montgomery Iron Works v. Smith, 98 Ala. 645, 13 So. 525, holding foreclosure of mortgage on other property securing purchase price of article conditionally sold does not estop vendor asserting title.

Cited in footnote to Crompton v. Beach, 18 L. R. A. 187, which holds conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

— Bona fide purchaser.

Cited in Goodgame v. Sanders, 140 Ala. 248, 37 So. 200, holding if statute does require conditional sale contract for sale of personalty to be recorded, one also claims under purchaser in such contract cannot claim as a bona fide purchaser but his title depends on title of vendor.

12 L. R. A. 705, BOWLER v. EISENHOOB, 1 S. D. 577, 48 N. W. 136.

Election contests.

Cited in Batterton v. Fuller, 6 S. D. 267, 60 N. W. 1071, holding amendment changing grounds of contest not allowable after time limited by statute for filing notice.

Cited in footnote to Gillespie v. Dion, 33 L. R. A. 703, which holds failure to allege election contestant's qualification to maintain proceeding, fatal.

Distinguished in Smith v. Lawrence, 2 S. D. 198, 49 N. W. 7, holding mandamus proper to compel recanvass of votes where notice of contest not served within twenty days after canvass.

Assumption of office before declaration of result.

Cited in *Re Moore*, 4 Wyo. 114, 31 Pac. 980, holding assumption of duties of office prior to canvass of vote, invalid.

Decision of tie vote.

Cited in *McGregor v. Burlingame*, 159 Cal. 444, 114 Pac. 566, holding that power to determine "contested elections" covers case of attack upon correctness of finding that there was a tie vote.

Cited in note (47 L. R. A. 560) on decision of tie vote at election.

12 L. R. A. 712, *BLAKE v. SAWYER*, 83 Me. 129, 23 Am. St. Rep. 762, 21 Atl. 834.

Revival of barred debt by general payment.

Cited in *Wilden v. McAllister*, 91 Mo. App. 453, holding part payment not appropriated by debtor will not remove bar of statute; *McBride v. Noble*, 40 Colo. 375, 90 Pac. 1037, 13 A. & E. Ann. Cas. 1202, holding application by creditor of a general undirected payment does not take unpaid portion out of bar of statute; *Anderson v. Nystrom*, 103 Minn. 171, 13 L.R.A.(N.S.) 1143, 123 Am. St. Rep. 320, 114 N. W. 742, 14 A. & E. Ann. Cas. 54, holding where creditor holds several separate claims, and the debtor makes a general payment upon his indebtedness without directing or authorizing the application thereof upon any one of the claims, the bar of the statute is not removed as to any of them.

Cited in notes (14 L. R. A. 208) on revival of barred debt by application of general payment; (16 Eng. Rul. Cas. 205) on same point.

Appropriation of payments.

Cited in footnote to *First National Bank v. National Surety Co.* 66 L.R.A. 777, which holds last surety on bond of bank clerk serving during series of years covered by defendant binds guaranteeing bank against "loss" through his acts not liable for any amount because of falsifying accounts of customer so as to give him fictitious credit where on appropriating deposits of customer made during his term to checks during same term drafts do not exceed deposits.

Cited in note (3 Eng. Rul. Cas. 355) on appropriation of payments.

12 L. R. A. 714, *SPARKS v. DESPATCH TRANSFER CO.* 104 Mo. 531, 24 Am. St. Rep. 351, 15 S. W. 417.

When corporation bound by officer's acts.

Cited in *Roe v. Bank of Versailles*, 167 Mo. 424, 67 S. W. 303, holding bank president may agree to loan its money; *Jones v. Williams*, 139 Mo. 26, 37 L. R. A. 688, 61 Am. St. Rep. 436, 39 S. W. 486, holding management of corporation business may be intrusted to president; *G. V. B. Min. Co. v. First Nat. Bank*, 36 C. C. A. 640, 95 Fed. 30, holding corporation bound by contract of president managing its business; *Meating v. Tigerton Lumber Co.* 113 Wis. 387, 89 N. W. 152, holding president may bind corporation by contract when expressly authorized or when impliedly authorized by usage; *Smith v. Richardson*, 77 Mo. App. 432, holding president's contract unauthorized by directors voidable only; *Ferguson v. Venice Transp. Co.* 79 Mo. App. 358, denying inherent authority of president to assign corporate asset in payment of debt; *Degnan v. Thoroughman*, 88 Mo. App. 65, denying power of president without authority from directors to make assignment for creditors; *Cox v. Robinson*, 27 C. C. A. 127, 48 U. S. App. 388, 82 Fed. 284, holding bank bound by assignment of judgment by vice president in general control; *State v. Silva*, 130 Mo. 460, 32 S. W. 1007, holding evidence of custom admissible to show corporation secretary's duties; *Moore v. H. Gaus & Sons Mfg. Co.* 113 Mo. 107, 20 S. W. 975, sustaining assignment of claim by managing officer of corporation without formal action of directors; *Kaes v. St. Louis Lime Co.* 71 Mo. App. 109, holding manager of company presumptively authorized to buy wood required in business; *Hill v. Bank of Seneca*, 87 Mo. App. 601, holding cashier's contract warranted by usage to effect

collection of notes, binding on bank; *Parsons v. Guarantee Invest. Co.* 64 Mo. App. 35, holding note ratified by corporation binding though executed by officer contrary to by-laws; *Jones v. Williams*, 139 Mo. 23, 37 L. R. A. 688, 61 Am. St. Rep. 436, 39 S. W. 486, holding corporation may be bound by agent without reciting authority, signing corporate name, or adding official designation to signature; *Tyler Estate v. Hoffman*, 146 Mo. App. 522, 124 S. W. 535, holding that evidence that unusual power has been given officer of corporation may be inferred where he has been allowed to pursue particular line of acts, beyond those belonging to him by virtue of his office; *Stripling v. Maguire*, 108 Mo. App. 601, 84 S. W. 164, holding president of a business corporation may bind corporation by contracts on its behalf, in matters presented in ordinary course of business, without express authority from board of directors.

Distinguished in *Trent v. Sherlock*, 24 Mont. 264, 61 Pac. 650, denying authority of superintendent to pledge company's property for corporate debt; *Mathias v. White Sulphur Springs Asso.* 19 Mont. 362, 48 Pac. 624, holding contract of president not in active control of business and without actual authority, not binding on corporation; *Manhattan Liquor Co. v. Magnus*, 43 Tex. Civ. App. 468, 94 S. W. 1117, holding managing director had no implied authority to buy and establish another and distinct business; *Tres Palacios R. & Irrig. Co. v. Eidman*, 41 Tex. Civ. App. 545, 93 S. W. 698, holding evidence that general manager of corporation who executed contract had no authority improperly excluded; *Taylor v. Sutherlin-Meade Tobacco Co.* 107 Va. 793, 14 L.R.A. (N. S.) 1138, 60 S. E. 132, holding under code requiring affidavit in attachment to be made by "plaintiff, his agent or attorney" an affidavit signed by "secretary and treasurer of a corporation," does not show on its face that it was made by an agent of the corporation.

When principal bound by acts of agent.

Cited in *Butler County v. Boatmen's Bank*, 143 Mo. 30, 44 S. W. 1047, holding that acts of financial agent of county within apparent scope of authority bind county; *Meier v. Proctor & G. Co.* 81 Mo. App. 418, holding salesman's contract within scope of apparent authority binding on principal; *Clack v. Southern Electrical Supply Co.* 72 Mo. App. 512, holding employer liable for act of salesman in taking customer down dangerous stairway.

Cited in note in (21 L.R.A.(N.S.) 1067, 1082) on liability of principal on negotiable paper executed by agent.

Who liable on note.

Cited in *Duncan v. Kirtley*, 54 Mo. App. 658, holding maker of note cannot shift liability to corporation not mentioned therein; *Sharp v. Garnet*, 54 Mo. App. 415, holding maker of note not discharged from liability by third person's agreement to assume.

Cited in note (20 L. R. A. 707) on admissibility of extrinsic evidence to show who is liable as maker of note.

Appeal, reversal in part.

Cited in *Reichenbach v. United Masonic Ben. Asso.* 112 Mo. 24, 20 S. W. 317, holding findings on distinct causes of action severable on appeal; *Stotler v. Chicago & A. R. Co.* 200 Mo. 150, 98 S. W. 509, holding a judgment for personal injuries against a railroad company and its conductor and engineer may be reversed as to the conductor, on the ground that there was no evidence tending to show that he was guilty of the negligence which caused the injury and affirmed as to the company and engineer.

Cited in note (128 Am. St. Rep. 701) on checks payable to one under fictitious name.

Action in assumed or trade name.

Cited in *Clark Bros. v. Wyche*, 126 Ga. 26, 54 S. E. 909, holding where a person by an assumed or trade name sues another, and the judgment of the court is in favor of defendant, the judgment will be binding on the person suing and such person will afterwards in his real name, be estopped from denying the validity of the judgment.

Cited in note (132 Am. St. Rep. 571) on proceedings against persons by less or other than full Christian names.

12 L. R. A. 721, *PROCTOR v. CLARK*, 154 Mass. 45, 27 N. E. 673.

Construction of executory devises.

Cited in *Bigelow v. Clap*, 166 Mass. 91, 43 N. E. 1037, holding executory devise to persons "then living" refers to persons living at time of distribution; *Eager v. Whitney*, 163 Mass. 466, 40 N. E. 1046, holding will providing for payment at future date to testator's then legal representatives creates contingent remainder; *Hale v. Hobson*, 167 Mass. 401, 45 N. E. 913, holding provision for distribution of trust fund to grandchildren upon termination of trust creates contingent interests; *Welch v. Brimmer*, 169 Mass. 212, 47 N. E. 699, holding devise if son die without issue "then" to heirs goes to heirs living at son's death; *Codman v. Brooks*, 167 Mass. 504, 46 N. E. 102, holding "next of kin" to be determined as of date of act of Congress appropriating money for French spoliation claims; *Taylor v. Taylor*, 118 Iowa, 413, 92 N. W. 71, holding under executory devise to children "or their heirs as the law directs," heirs take by substitution, and not by descent; *International Trust Co. v. Williams*, 183 Mass. 174, 66 N. E. 798, holding husband takes statutory proportion under devise to heirs of wife.

Cited in note (25 Eng. Rul. Cas. 612) on time of vesting of gift by will to such of a class as fulfill a certain condition.

Who are heirs.

Cited in *Butrick v. Tilton*, 155 Mass. 463, 29 N. E. 1088, and *Brownell v. Briggs*, 173 Mass. 531, 54 N. E. 251, holding widow of intestate leaving no issue takes fee of realty up to \$5,000; *Peabody v. Cook*, 201 Mass. 220, 87 N. E. 466, 16 A. & E. Ann. Cas. 296; *Holmes v. Holmes*, 194 Mass. 557, 80 N. E. 614,—holding same; *Gray v. Whittemore*, 192 Mass. 379, 10 L.R.A.(N.S.) 1150, 116 Am. St. Rep. 246, 78 N. E. 422, holding husband surviving wife took her real estate in fee up to \$5,000.

Cited in footnotes to *Mullen v. Reed*, 24 L. R. A. 664, which holds widow not an heir at law; *Hindry v. Holt*, 39 L. R. A. 351, which holds right of action for death limited to lineal descendants by words "heir or heirs" in statute; *Wool v. Fleetwood*, 67 L.R.A. 445, which holds that meaning of words "lawful heirs" cannot be restricted as including children only.

— Meaning as used in wills or deeds of trust.

Cited in *Re Smith*, 156 Mass. 411, 31 N. E. 387, holding husband of woman leaving no issue entitled to \$5,000 in trust property divisible among her heirs; *Olney v. Lovering*, 167 Mass. 448, 45 N. E. 766, holding widow of intestate takes \$5,000 out of devise to heirs; *Holmes v. Hancock*, 158 Mass. 399, 33 N. E. 608, holding widow entitled to remainder of trust fund devised to beneficiary's heirs; *Lawrence v. Crane*, 158 Mass. 393, 33 N. E. 605, holding wife entitled to share in residue of estate directed to be turned into personality and divided among heirs; *Gardner v. Skinner*, 195 Mass. 167, 80 N. E. 825; *Holmes v. Holmes*, 194 Mass. 557, 80 N. E. 614,—holding heirs are to be determined as of death of testator; *Gray v. Whittemore*, 192 Mass. 379, 10 L.R.A.(N.S.) 1143, 116 Am. St.

Rep. 246, 78 N. E. 422, holding "heirs at law" of deceased children determined at death of particular child in question.

Cited in footnotes to Grainger v. Grainger, 36 L. R. A. 186, which holds rule in *Shelley's Case* not applicable to devise to one for life and after his death to heirs of his body, if any survive him, with devise over otherwise; MacLean v. Williams, 59 L. R. A. 125, which requires distribution *per stirpes* under will giving two thirds of estate in equal shares to heirs at law of deceased husband living at testatrix's death and the other third to her heirs at law then living.

Conflict of laws as to descent and distribution.

Cited in *Brandies v. Atkins*, 204 Mass. 475, 26 L.R.A.(N.S.) 231, 90 N. E. 861, as to what law governs; *Re Riesenbergs*, 116 Mo. App. 315, 90 S. W. 1170, holding law of place where will is made and testator is domiciled determine who are capable of taking under will.

Cited in notes (2 L.R.A.(N.S.) 448) on conflict of laws as to wills; (2 Brit. Rul. Cas. 557, on law governing ascertainment of members of class taking under will.

12 L. R. A. 725, *COPP v. LOUISVILLE & N. R. CO.* 43 La. Ann. 511, 26 Am. St. Rep. 198, 9 So. 441.

Administration of Federal laws in state courts.

Cited in *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 58, 40 L.R.A.(N.S.) 689, 128 N. W. 1, holding that state courts may take jurisdiction of actions under federal employer's liability act; *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 306, 83 S. W. 362, 4 A. & E. Ann. Cas. 770; *Banner v. Wabash R. Co.* 131 Iowa, 406, 108 N. W. 759,—as to state courts having no jurisdiction of actions brought under provisions of interstate commerce act.

Cited in note (48 L. R. A. 37) on administration of Federal laws in state courts.

Restriction of remedy for violation of Interstate Commerce Law.

Cited in *State ex rel. Crow v. Atchison, T. & S. F. R. Co.* 176 Mo. 715, 63 L. R. A. 777, 75 S. W. 776, holding state cannot deprive railroad of franchise for making unlawful charges upon interstate traffic.

12 L. R. A. 727, *ROSSON v. CARROL*, 90 Tenn. 90, 16 S. W. 66.

Necessity and sufficiency of demand on negotiable instruments.

Cited in footnotes to *Hutchison v. Crutcher*, 37 L. R. A. 89, which requires presentation of note payable at insolvent bank to bank receiver administering at other place in same city; *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.

Distinguished in *Bank of Jamaica v. Jefferson*, 92 Tenn. 539, 36 Am. St. Rep. 100, 22 S. W. 211, holding accommodation indorsers of note before delivery liable without demand, protest, or notice.

Sufficiency of notice of dishonor.

Cited in footnotes to *Oakley v. Carr*, 60 L. R. A. 431, which holds notice of dishonor sufficient if sent to last indorser, who is agent for collection only, by first mail of day following dishonor; *Aebi v. Bank of Evansville*, 68 L.R.A. 964, which holds that bank accepting check on deposit with depositor's indorsement discharges indorser from liability by failing to notify him of nonpayment for nearly a month though bank waited in hope that check sent by mail would reach destination.

Liability for failure to protest.

Cited in footnote to *Williams v. Parks*, 56 L. R. A. 759, which sustains notary's liability on bond for neglecting to give notice of dishonor.

Waiver of failure to present or protest note.

Cited in footnote to Greeley v. Whitehead, 28 L. R. A. 286, which holds failure to properly present note for payment waived by paying interest after maturity.

Cited in note (29 L. R. A. 311) on necessity of new consideration to support waiver of failure to give notice of dishonor or subsequent promise by indorser.

Rights of transferees of negotiable paper after maturity.

Cited in note (46 L. R. A. 753, 760, 803-805) on rights of holder of negotiable paper transferred after maturity.

Notary's certificate as evidence.

Cited in Douglas v. Bank of Commerce, 97 Tenn. 149, 36 S. W. 874, holding certificate of foreign notary under seal prima facie evidence of facts stated.

12 L. R. A. 741, ATWATER v. MANCHESTER SAV. BANK, 45 Minn. 341, 48 N. W. 187.

Interest of insolvent after assignments for creditors.

Cited in Northwestern Mut. L. Ins. Co. v. Murphy, 103 Minn. 108, 114 N. W. 360, holding there was a reversionary interest in estate after assignment for creditors, subject to be defeated by a sale thereof by assignee pending proceedings; Joswich v. Faber, 93 Minn. 393, 101 N. W. 614, holding on discharge of a receiver under state insolvent law, that unsold shares of a stock reverted to insolvent by operation of law.

Lien of judgment on equitable estate.

Cited in Fryberger v. Berven, 88 Minn. 318, 92 N. W. 1125, holding judgment a lien on interest of vendor reserving lien for payment of certain sum when stated quantity of ore should be mined; Northwestern Mut. L. Ins. Co. v. Murphy, 103 Minn. 104, 114 N. W. 360, holding reversionary interest under assignment for creditors was subject to lien of judgment entered and docketed before insolvency proceedings closed.

Execution sales of equitable interests.

Cited in Hook v. Northwest Thresher Co. 91 Minn. 484, 98 N. W. 463, holding vendee's interest in an executory contract for sale of land may be sold under execution before forfeiture.

Right of lien creditors to redeem real estate.

Cited in North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 481, 29 L.R.A.(N.S.) 516, 138 Am. St. Rep. 717, 117 N. W. 453, holding that holder of mortgage, given after act of sale under prior mortgage and before expiration of redemption period, is redemptioner; Bartleson v. Munson, 105 Minn. 354, 117 N. W. 512, holding it is a strict legal right and must be exercised according to statute unless waived or extended.

Who are creditors.

Cited in Kalkhoff v. Nelson, 60 Minn. 290, 62 N. W. 332, holding lessor having cause of action for breach of lease entitled as creditor to share assets of lessee corporation; Summit Silk Co. v. Kingston Spinning Co. 154 N. C. 428, 70 S. E. 820, Ann. Cas. 1912 A, 897, holding that anyone who has debt on demand against insolvent corporation comes within meaning of word "creditor" used in statute.

Sufficiency of statement on which judgment confessed.

Cited in J. H. Teasdale Commission Co. v. Van Hardenberg, 53 Mo. App. 330, holding statement on which judgment confessed enabling creditors to investigate transaction, sufficient.

12 L. R. A. 746, *RODDY v. MISSOURI P. R. CO.* 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 1112.

Liability to third persons for negligence in performing contract.

Cited in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 532, 60 L. R. A. 120, 53 Atl. 807, holding action in form for tort not maintainable on breach of contract between defendant and third person; *Buckley v. Gray*, 110 Cal. 343, 31 L. R. A. 862, 52 Am. St. Rep. 88, 42 Pac. 900, denying liability, to legatee, of attorney negligently drawing will; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 611, 15 L. R. A. 823, 33 Am. St. Rep. 482, 19 S. W. 630, holding manufacturer not liable for injury to vendee's employee from defective machine.

Cited in notes (92 Am. St. Rep. 550) on liability to third persons of lessors of real or personal property; (100 Am. St. Rep. 193, 202) on right to recover for negligence in absence of privity.

Distinguished in effect in *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 308, 57 C. C. A. 243, 120 Fed. 865, holding vendor supplying machine knowing it imminently dangerous, liable to person injured while using.

Liability for breach of duty assumed in contract with third person.

Cited in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 532, 60 L. R. A. 120, 53 Atl. 807, holding action maintainable for negligent performance of contract with third person to operate heating plant; *McCall v. Pacific Mail S. S. Co.* 123 Cal. 44, 55 Pac. 706, holding principal agreeing to furnish appliances liable for injury to contractor's servant for negligent performance; *Green v. Sansom*, 41 Fla. 103, 25 So. 332, holding principal liable to contractor's servant for defective appliance furnished; *Sheltrawn v. Michigan C. R. Co.* 128 Mich. 671, 87 N. W. 893; *Savannah F. & W. R. Co. v. Booth*, 98 Ga. 24, 25 S. E. 928, holding railroad furnishing car liable to shipper's servant injured by defect; *Feeback v. Missouri P. R. Co.* 167 Mo. 215, 66 S. W. 965, denying liability of railroad for death of trespasser on train wrecked by negligence of engineer of another; *Kiser v. Suppe*, 133 Mo. App. 28, 112 S. W. 1005, holding defendants who furnished contractor with cable to do certain work with knowledge that it would be used by servants of contractor liable for injuries to servant by reason of cable being defective; *Young v. Waters-Pierce Oil Co.* 185 Mo. 655, 84 S. W. 929, holding oil company liable where pursuant to contract with railway company it erected a pipe so near railroad track that servant of railway company was killed by it; *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 62, 89 S. W. 330, holding contractor after an acceptance of the work by the owner, is not liable to third parties, who have no contractual relations with him for damages subsequently sustained by reason of his negligence in the performance of his contract duties.

Cited in note (46 L. R. A. 35, 105, 118) on right of servant to recover damages from persons other than his master for injuries received in performance of his duties.

Distinguished in *Fowles v. Briggs*, 116 Mich. 428, 40 L. R. A. 530, 72 Am. St. Rep. 537, 74 N. W. 1046, denying liability of shipper for injury to brakeman from negligent loading of lumber, which railroad fails to inspect; *O'Brien v. American Bridge Co.* 110 Minn. 374, 32 L.R.A. (N.S.) 986, 136 Am. St. Rep. 503, 125 N. W. 1012, holding builder of bridge piers of a dangerously defective quality liable to person hurt by fall of bridge.

Duty of railroad toward contractor's servant employed on or about cars.

Cited in *Louisville & N. R. Co. v. Freppon*, 134 Ky. 659, 121 S. W. 454; *Chicago, I. & L. R. Co. v. Pritchard*, 168 Ind. 406, 9 L.R.A. (N.S.) 862, 79 N. E. 508,—holding railway company liable for injury to or death of servant of

shipper engaged in unloading car by reason of car being defective; *Logan v. Cincinnati, N. O. & T. P. R. Co.* 139 Ky. 214, 129 S. W. 575, holding that manufacturing company's servants were negligent in using car with defective brake, placed on switch of such company by railroad, where such servants had knowledge of defect; *Fassbinder v. Missouri P. R. Co.* 126 Mo. App. 569, 104 S. W. 1154, holding railway company furnishing defective cars to gravel company to be loaded by servants of latter liable for injuries to such servants in the absence of contributory negligence on their part; *Tinkle v. St. Louis & S. F. R. Co.* 212 Mo. 469, 110 S. W. 1086, holding cook employed by servants of railroad and working on cars was neither servant, passenger nor bare licensee; *Kesterson v. Southern R. Co.* 146 N. C. 280, 59 S. E. 871, holding railroad liable to servant of shipper loading cars by reason of negligence of servants of company in leaving cars with brakes off in violation of usual custom.

Cited in note (9 L.R.A.(N.S.) 857) on liability of carrier for injuries to consignor or consignee or their employees by unsafe car.

Rights in contract of person not party.

Cited in *St. Louis v. G. H. Wright Contracting Co.* 202 Mo. 460, 119 Am. St. Rep. 810, 101 S. W. 6; *Ninneman v. Fox*, 43 Wash. 46, 86 Pac. 213; *Whitecotton v. St. Louis & H. R. Co.* 104 Mo. App. 72, 78 S. W. 318,—holding no one but party to contract or one for whose benefit it was made can sue on it.

Distinguished in *Rothwell v. Skinker*, 84 Mo. App. 177, sustaining right of subcontractor to sue on original contract.

Who an independent contractor.

Cited in *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 93, 24 L. R. A. 52, 19 S. E. 571, holding right to control conduct of person negligently performing work determines whether such person independent contractor; *Pottorff v. Fidelity Coal Min. Co.* 86 Kan. 782, 122 Pac. 120, holding that independent contractor is one, who exercising independent employment contracts to do piece of work according to his own methods.

Cited in notes (54 Am. St. Rep. 91; 76 Am. St. Rep. 386, 397, 406, 407) on liability for negligence and torts of independent contractors.

Master's duty in furnishing appliances.

Cited in *Watts v. Hart*, 7 Wash. 185, 34 Pac. 423, holding employer furnishing reasonably safe and adequate appliances, not liable to accident to servant.

Cited in note (98 Am. St. Rep. 309) on liability to servant for injuries due to defective machinery and appliances.

Distinguished in *Sykes v. St. Louis & S. F. R. Co.* 88 Mo. App. 201, holding instruction that railroad and consignee liable to consignee's servant injured in unloading defective car, erroneous.

Joint enterprises.

Cited in *Richard v. Detroit, R. R. & L. O. R. Co.* 129 Mich. 464, 89 N. W. 52, holding street railroad company operating car and company having control thereof while on its track, jointly and severally liable for negligence; *Rice v. Smith*, 171 Mo. 335, 71 S. W. 123, holding licensee of mine entering into contract with third person for their mutual benefit liable for injury to servant of latter by reason of defective condition of mine.

Distinguished in *Sykes v. St. Louis & S. F. R. Co.* 178 Mo. 698, 77 S. W. 723, holding instruction in action against railroad by consignee's employee injured while unloading car, based upon theory of mutual interest of railroad and employer, improper where railroad was an intermediate carrier.

Imminently dangerous objects.

Cited in *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 586, 11 C. C. A.

257, 24 U. S. App. 7, 63 Fed. 404, holding shipper providing suitable vehicle not liable for fire resulting from leaving car of petroleum on track; Missouri, K. & T. R. Co. v. Merrill, 65 Kan. 450, 59 L. R. A. 716, 93 Am. St. Rep. 287, 70 Pac. 358, holding railroad delivering defective car to connecting line liable to latter's employee after inspection; Flint & W. Mfg. Co. v. Beckett, 167 Ind. 501, 12 L.R.A.(N.S.) 934, 79 N. E. 503, holding one erecting windmill on barn of another liable for damages to cattle by reason of its defective construction.

Cited in footnotes to *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street after loosening brake; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Cited in note (13 L. R. A. 765) on trespass and unwarrantable interference in its relation to negligence.

Assumption that duty performed.

Cited in *Brannock v. Elmore*, 114 Mo. 65, 21 S. W. 451, holding exclusion of evidence showing plaintiff knew blasting negligently done, error.

Cited in note (17 Eng. Rul. Cas. 239) on assumption of risks by employee on promise or expectation of repair.

When jury question arises on facts.

Cited in *Huth v. Dohle*, 76 Mo. App. 675; *Berry v. Missouri P. R. Co.* 124 Mo. 245, 25 S. W. 229, holding facts admitting of different constructions and inferences present question for jury; *Kreis v. Missouri P. R. Co.* 131 Mo. 545, 30 S. W. 310; *Church v. Chicago & A. R. Co.* 119 Mo. 214, 23 S. W. 1056, holding contributory negligence, where undisputed facts admit of different inferences, question for jury; *Zellars v. Missouri Water & Light Co.* 92 Mo. App. 120, holding negligence question for jury where different conclusions deducible from disputed facts; *Powers v. St. Louis Transit Co.* 202 Mo. 280, 100 S. W. 655; *Eckhard v. St. Louis Transit Co.* 190 Mo. 611, 89 S. W. 602,—holding when the facts bearing on the issue are disputed, or when they are undisputed but admit of different constructions and inferences, the jury must determine the question of negligence.

12 L. R. A. 751, *PHILADELPHIA v. BAXTER*, 142 Pa. 357, 21 Atl. 976.

Tax as lien.

Cited in *Wetzel v. Goodyear*, 2 Lack. L. News, 189, 13 Lanc. L. Rev. 220, 310, 5 Pa. Dist. R. 12, 17 Pa. Co. Ct. 111, holding taxes against occupied lands not lien in absence of statute.

Mistake of tax officers as affecting validity of sales.

Cited in *Rankin v. New York*, 145 App. Div. 844, 130 N. Y. Supp. 427, holding that city cannot assert lien on property for water rates where owner was assured by city that rates had been paid by tenant, and upon such assurance released surety for their payment.

Cited in note (20 L. R. A. 487) on validity of tax sales where nonpayment is due to mistake or negligence of tax officers.

12 L. R. A. 753, *UNITED STATES v. JELICO MOUNTAIN COKE & COAL CO.* 3 Inters. Com. Rep. 626, 46 Fed. 432.

Combinations in restraint of interstate commerce.

Cited in *Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 825, holding complaint

alleging combination with intent to monopolize commerce in regard to tiles, etc., between states, and arbitrarily fix prices, sufficient; *United States v. Coal Dealers' Asso.* 85 Fed. 267, holding combination of importers of coal from other states with local dealer's association, regulating price arbitrarily, illegal; *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 694, 60 C. C. A. 294, 125 Fed. 458, holding refusal to sell to dealers handling competitors' goods except at unprofitably high price, no violation of Federal anti-trust act; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 141, footnote p. 122, 29 C. C. A. 170, 54 U. S. App. 723, 85 Fed. 300, which holds void, combination of manufacturers to control sales and prices in large number of states.

Cited in footnote to *Gibbs v. McNeeley*, 60 L. R. A. 152, which holds anti-trust act violated by combination of manufacturers of product of state, market for four fifths of which in other states, to limit production and raise price.

Cited in note (64 L. R. A. 709) on illegal trusts under modern anti-trust laws.

Distinguished in *United States v. E. C. Knight Co.* 60 Fed. 310, holding combination to buy up competing sugar refineries not within anti-trust act of 1890; *Anderson v. United States*, 171 U. S. 617, 43 L. ed. 306, 19 Sup. Ct. Rep. 50, holding association of live-stock dealers to regulate transaction of business, not recognizing nonmembers, not combination in restraint of trade.

Combination to control prices and prevent competition.

Cited in *Walsh v. Association of Master Plumbers*, 97 Mo. App. 294, 71 S. W. 455, holding agreement between plumbers' association and manufacturers, restricting sales to members only, unlawful; *John D. Park & Sons Co. v. National Wholesale Druggists Asso.* 175 N. Y. 36, 62 L. R. A. 647, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion), majority holding arrangement for rebates by manufacturers of medicines to dealers maintaining selling price, not unlawful combination; *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 443, 73 N. E. 770, holding combination between producers of coal to prevent competition unlawful; *Cleland v. Anderson*, 66 Neb. 264, 5 L.R.A.(N.S.) 143, 92 N. W. 306, holding association of retail lumber dealers organized to prevent its members from being subjected by competition of wholesalers, which requires a fixed amount of stock, continuously carried to entitle dealer to membership, and levies and collects from wholesale dealers a penalty if they sell to consumers directly or to retail dealers not members of association, unlawful.

Cited in footnotes to *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price, not within statute for suppression of conspiracies; *State ex rel. Crow v. Armour Packing Co.* 61 L. R. A. 464, which holds unlawful combination to fix prices, shown by acts of competing dealers; *Hawarden v. Youghiogheny & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right of action against wholesalers and favored retailers combining to drive other retailers out of business; *Montague v. Lowry*, 63 L.R.A. 58, which holds unlawful combination created by association to unite all acceptable dealers engaged in certain business within 200 miles of designated city.

Distinguished in *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 83, 4 Inters. Com. Rep. 453, 7 C. C. A. 27, 19 U. S. App. 36, 58 Fed. 70, holding association of railroad companies to maintain reasonable rates not illegal combination; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 319, denying injunction against association of insurance companies to regulate rates and shut out nonmembers.

Application of anti-trust laws.

Cited in footnote to *Fuqua v. Pabst Brewing Co.* 35 L. R. A. 241, which holds beer brought from other state under invalid trust agreement subject to anti-trust law of state on arrival.

Cited in notes (5 L.R.A.(N.S.) 137) on legality, under modern anti-trust acts, of combinations or agreements which restrict class of persons to whom commodities shall be sold, or from whom bought; (52 L. ed. U. S. 489; 10 L.R.A. (N.S.) 270) on relation of contract or combination to interstate commerce to bring it within Federal anti-trust act.

Injunction against unlawful combinations.

Cited in *Walsh v. Association of Master Plumbers*, 97 Mo. App. 295, 71 S. W. 455, holding injunction lies to dissolve agreement whereby manufacturers agree to sell to members only, and association agrees to boycott manufacturers selling to nonmembers.

Injunction against nuisance.

Cited in footnote to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden.

Cited in note (15 L.R.A.(N.S.) 748) on right of state to enjoin public nuisance which is also a crime.

12 L. R. A. 760, *ROSS v. HIXON*, 46 Kan. 550, 26 Am. St. Rep. 123, 26 Pac. 955.

Malicious prosecution; probable cause.

Cited in *Bechel v. Pacific Exp. Co.* 65 Neb. 828, 91 N. W. 853; *Darnell v. Sallee*, 7 Ind. App. 583, 34 N. E. 1020; *Louisville, N. A. & C. R. Co. v. Hendricks*, 13 Ind. App. 12, 40 N. E. 82, holding finding of examining court only prima facie evidence of probable cause; *Root v. Rose*, 6 N. D. 581, 72 N. W. 1022, holding decision of lower court though reversed on appeal, conclusive on question of probable cause; *Blackman v. West Jersey & S. S. R. Co.* 126 Fed. 253, holding unimpeached conviction conclusive as to probable cause for prosecution; *Tavener v. Morehead*, 41 W. Va. 124, 23 S. E. 673, holding dismissal of rule for contempt because made in wrong court no foundation for action for malicious prosecution; *Marks v. Hastings*, 101 Ala. 178, 13 So. 297 (dissenting opinion), majority holding advice of justice issuing warrant, though practising attorney, no defense to action for malicious prosecution; *Skeffington v. Eylward*, 97 Minn. 246, 114 Am. St. Rep. 711, 105 N. W. 638, holding that conviction, reversed, is not conclusive but prima facie, evidence of probable cause, which may be rebutted; *Lindsey v. Couch*, 22 Okla. 13, 98 Pac. 973, 18 Ann. Cas. 60, holding that in action for malicious prosecution proof of acquittal of accused does not tend to show want of probable cause; *Missouri, K. & T. R. Co. v. Groseclose*, 50 Tex. Civ. App. 528, 110 S. W. 477, holding that one making to prosecuting officer fair and full disclosure of facts is protected by his advice that they showed probable cause; *Eckerle v. Higgins*, 159 Mo. App. 183, 140 S. W. 616, holding that burden is on plaintiff in malicious prosecution to prove that he was prosecuted and that it was malicious and without probable cause; *Stainer v. San Luis Valley Land & Min. Co.* 92 C. C. A. 128, 166 Fed. 224; *Lindsay v. West*, 6 Ga. App. 285, 64 S. E. 1005; *Beal v. Dadirrian*, 62 Misc. 128, 115 N. Y. Supp. 196; *Wells v. Parker*, 76 Ark. 43, 88 S. W. 602, 6 A. & E. Ann. Cas. 259,—holding binding over to await the grand jury by committing magistrate merely prima facie evidence of probable cause; *Florida East Coast R. Co. v. Groves*, 55 Fla. 446, 46 So. 294, holding where agent of corporation believing that a crime had been committed states all material facts bearing on the transaction so far as he was informed of them to prosecuting officer of county and furnishes names of wit-

nesses who can give more detailed information, and leaves it to officer to act upon his own judgment and responsibility, the corporation is not liable for mistake of prosecuting officer in instituting proceedings; *Gilmore v. Mastin*, 115 Ill. App. 54; *Carpenter v. Sibley*, 153 Cal. 218, 15 L.R.A.(N.S.) 1147, 126 Am. St. Rep. 77, 94 Pac. 879, 15 A. & E. Ann. Cas. 484,—holding if conviction was procured by fraud, perjury, subordination of perjury, or other unfair conduct on part of defendant, the presumption of probable cause arising from a conviction of plaintiff is rebutted; *Cooper v. Flemming*, 114 Tenn. 46, 68 L.R.A. 850, 84 S. W. 801, holding where advice of counsel is honestly sought and prosecution is commenced pursuant to such advice the party instituting prosecution not liable.

Annotation cited in *Smith v. Clark*, 37 Utah, 129, 26 L.R.A.(N.S.) 959, 106 Pac. 653, Ann. Cas. 1912B, 1366, holding that mere dismissal of prosecution because prosecuting officer fails to appear is not prima facie evidence of want of probable cause; *Saunders v. Baldwin*, 112 Va. 434, 34 L.R.A.(N.S.) 960, 71 S. E. 620, holding that conviction by justice of peace though reversed, is conclusive proof of probable cause.

Cited in notes (15 L.R.A.(N.S.) 1144) on effect on presumption of probable cause for prosecution of procurement of conviction by fraud, perjury, etc.; (26 Am. St. Rep. 143, 158) on malicious prosecution of criminal charge; (28 Am. St. Rep. 881) on exemplary or punitive damages for malicious prosecution; (30 Am. St. Rep. 758) on malicious prosecution.

12 L. R. A. 762, *PEOPLE ex rel. UNION TRUST CO. v. COLEMAN*, 126 N. Y. 433, 27 N. E. 818.

Taxation of "capital stock."

Cited in *People ex rel. Railway Advertising Co. v. Roberts*, 4 App. Div. 289, 39 N. Y. Supp. 448, holding assessment of capital stock cannot exceed amount authorized by charter; *People ex rel. German Looking Glass Plate Co. v. Barker*, 75 Hun, 8, 26 N. Y. Supp. 971, holding statement that capital worth par justifies assessment equal to amount paid in; *People ex rel. Consolidated Teleg. & Elec. Sub. Co. v. Barker*, 16 Misc. 259, 39 N. Y. Supp. 106, holding assessed value of realty not conclusive in estimating corporate assets taxable as personalty; *Allen v. Com.* 98 Va. 84, 34 S. E. 981; *Durham County v. Blackwell Durham Tobacco Co.* 116 N. C. 446, 21 S. E. 423, holding simultaneous tax leviable on capital stock and on shares.

— Basis of assessment.

Cited in *People ex rel. New York Clearing House Bldg. Co. v. Barker*, 31 App. Div. 317, 53 N. Y. Supp. 1111, Affirming 23 Misc. 194, 51 N. Y. Supp. 1102; *People ex rel. Wiebusch & H. Co. v. Roberts*, 19 App. Div. 577, 46 N. Y. Supp. 570; *People ex rel. Delaware & H. Canal Co. v. Feitner*, 32 Misc. 34, 66 N. Y. Supp. 91; *People ex rel. Equitable Gaslight Co. v. Barker*, 144 N. Y. 100, 39 N. E. 13,—holding basis of assessment valuation of real and personal property less assessed value of realty, debts, and exemptions; *People ex rel. Brooklyn Union Gas Co. v. Feitner*, 82 App. Div. 372, 81 N. Y. Supp. 898; *People ex rel. Equitable Gaslight Co. v. Barker*, 66 Hun, 23, 20 N. Y. Supp. 797; *People ex rel. Manhattan R. Co. v. Barker*, 28 Misc. 17, 59 N. Y. Supp. 926; *People ex rel. National Surety Co. v. Feitner*, 31 Misc. 434, 65 N. Y. Supp. 523,—holding capital, not value of shares, basis of taxation; *People ex rel. Edison Electric Illuminating Co. v. Barker*, 139 N. Y. 61, 34 N. E. 722; *Re L. Adler Bros. & Co.* 76 App. Div. 576, 78 N. Y. Supp. 690, holding actual value of capital and surplus basis of corporate taxation; *People ex rel. Bleecker Street & F. Ferry R. Co. v.*

Barker, 85 Hun, 212, 32 N. Y. Supp. 990; *People ex rel. New York Mut. Gaslight Co. v. Wells*, 42 Misc. 608, 87 N. Y. Supp. 595; *People ex rel. Twenty-Third Street R. Co. v. Feitner*, 92 App. Div. 521, 87 N. Y. Supp. 304; *People ex rel. Equitable Gaslight Co. v. Barker*, 66 Hun, 23, 20 N. Y. Supp. 797,—holding market value of shares erroneous basis for assessing capital stock; *People ex rel. Consolidated Gas Co. v. Feitner*, 38 Misc. 180, 77 N. Y. Supp. 745, holding assessment based on market value of stock, without evidence, erroneous; *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 312, 40 N. E. 996, holding actual value of capital not market value of share stock, assessable; *People ex rel. Manhattan R. Co. v. Barker*, 165 N. Y. 324, 59 N. E. 151, by O'Brien, J., dissenting, holding basis of assessment valuation of real and personal property, less assessed value of realty, debts, and exemptions; *People ex rel. Weber Piano Co. v. Wells*, 180 N. Y. 64, 72 N. E. 626, as to how amount of personalty upon which corporation is liable to taxation ascertained.

Distinguished in *People ex rel. Colonial Trust Co. v. Morgan*, 47 App. Div. 129, 62 N. Y. Supp. 191, sustaining assessment of capital stock on basis of average selling price of shares.

— **Deduction of debts.**

Cited in *People ex rel. Second Ave. R. Co. v. Barker*, 141 N. Y. 197, 56 N. Y. S. R. 834, 36 N. E. 184; *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 204, 55 N. E. 927; *People ex rel. Second Ave. R. Co. v. Barker*, 72 Hun, 129, 25 N. Y. Supp. 340; *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 588, 34 N. E. 386; *People ex rel. Rochester R. Co. v. Pond*, 37 App. Div. 337, 57 N. Y. Supp. 490,—holding corporate debts should be deducted from assets in assessing capital stock; *People ex rel. Keppler & Schwarzmunn v. Barker*, 22 App. Div. 123, 47 N. Y. Supp. 958, holding domestic corporation entitled to deduct from assessed capital debt incurred in purchase of stock of taxable corporation; *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 210, 55 N. E. 927, holding debts contracted in purchase of good will not deductible from personal property in assessing local tax; *People ex rel. National Surety Co. v. Feitner*, 166 N. Y. 137, 59 N. E. 731, holding in assessing surety company outstanding contingent liabilities on contracts of suretyship not deductible from assets.

— **Exclusion of foreign real estate.**

Cited in *People ex rel. Delaware & H. Canal Co. v. Barker*, 23 Misc. 191, 51 N. Y. Supp. 1105, holding foreign real estate must be excluded in assessing corporate capital.

— **Exclusion of franchise.**

Cited in *People ex rel. Brooklyn City R. Co. v. Neff*, 19 App. Div. 591, 46 N. Y. Supp. 385; *People ex rel. Coney Island & B. R. Co. v. Neff*, 15 App. Div. 587, 44 N. Y. Supp. 810; *People ex rel. Consolidated Teleg. & Electrical Subway Co. v. Barker*, 16 Misc. 262, 39 N. Y. Supp. 106,—holding franchise not assessable as capital stock; *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 439, 46 N. E. 875, holding cost of leases of railroads operated by corporation without deducting value of franchises, erroneous basis of assessment.

— **Taxation of capital of foreign corporations.**

Cited in *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 328, 31 N. E. 238, holding basis of taxation of foreign corporation portion of capital employed within state; *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 50, 44 N. E. 787, holding surplus invested in real estate not used in business not taxable as capital stock; *People ex rel. North American Co. v. Miller*, 90 App. Div. 562, 86 N. Y. Supp. 386, holding franchise tax imposable upon foreign investment company transacting entire business, and having bank balances and se-

curities in state; *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 76, 45 L. R. A. 131, 53 N. E. 685 (dissenting opinion), majority holding good will of corporation carrying on business wholly in state, taxable as capital; *People ex rel. Chicago Junction R. & Union Stockyards Co. v. Roberts*, 154 N. Y. 13, 47 N. E. 974 (dissenting opinion), majority holding capital of foreign corporation having headquarters in state wholly invested in stock of corporation doing business outside of state not taxable.

"Capital stock" defined.

Cited in *People ex rel. Wiebusch & H. Co. v. Roberts*, 154 N. Y. 105, 47 N. E. 980, holding capital stock of corporation value of assets, less liabilities; *People ex rel. Trust & D. Co. v. Norton*, 53 App. Div. 559, 65 N. Y. Supp. 992; *People ex rel. National Surety Co. v. Feitner*, 31 Misc. 434, 65 N. Y. Supp. 523, holding "capital stock" synonymous with "capital;" *Hamor v. Taylor-Rice Engineering Co.* 84 Fed. 396, holding capital stock distinguishable from aggregate shares; *Wells v. Green Bay & M. Canal Co.* 90 Wis. 452, 64 N. W. 69, defining capital stock as interests of stockholders; *Henderson Bridge Co. v. Com.* 99 Ky. 635, 29 L. R. A. 76, 31 S. W. 486, defining "capital stock" as used in franchise tax law as including assets and franchise.

"Capital" of corporation.

Cited in *Smith v. Dana*, 77 Conn. 553, 69 L.R.A. 81, 107 Am. St. Rep. 51, 60 Atl. 117, as to what "capital" of corporation consists of; *First Nat. Bank v. Board of Assessors*, 182 N. Y. 464, 75 N. E. 306, holding capital of corporation includes every asset, or investment; *Kavanaugh v. Satterlee*, 34 N. Y. Civ. Proc. Rep. 198; *Kavanaugh v. Commonwealth Trust Co.* 181 N. Y. 124, 73 N. E. 562,—as to distinction between share stock in hands of holders and capital of corporation.

Property of corporation.

Cited in *Southern R. Co. v. Greene*, 160 Ala. 406, 49 So. 404, as to property of corporation consisting of capital stock, surplus and franchises.

Good will as property of corporation.

Cited in *Colby v. Equitable Trust Co.* 55 Misc. 362, 106 N. Y. Supp. 801, holding good will is an asset and a piece of property of corporation.

"Gross assets" of corporation.

Cited in *New York v. Barker*, 179 U. S. 280, 45 L. ed. 192, 21 Sup. Ct. Rep. 121, defining "gross assets" assessed as actual value of corporate capital and surplus, excluding franchise.

Taxation of franchises.

Cited in *Buffalo Gas Co. v. Volz*, 31 Misc. 163, 64 N. Y. Supp. 534, holding franchises not taxable except under special law.

Cited in note (57 L. R. A. 42, 100) on taxation of corporate franchise in the United States.

Franchise as corporate property.

Cited in *Home Sav. Bank v. Des Moines*, 205 U. S. 512, 51 L. ed. 907, 27 Sup. Ct. Rep. 571, as to franchise and good will being essential factors in value of shares of corporation; *Re Stevens*, 46 Misc. 649, 95 N. Y. Supp. 297, holding corporate franchise is the right or privilege to exist and do business as a corporation and is an asset of corporation.

Distinguished in effect in *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 698, 53 L. R. A. 927, 43 S. W. 115, holding exemption of certain corporate property does not include privilege tax.

Value of corporate shares.

Cited in *Re Jones*, 172 N. Y. 586, 60 L. R. A. 480, 65 N. E. 570, holding value

of corporate shares ascertainable from assets of corporation; *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 326, holding stockholders receiving part of proceeds and additional stock upon contributing *pro rata* to stock bonus to purchaser of bonds, not liable as for assets withdrawn.

Assessment of bank stock.

Cited in *People ex rel. Jenkins v. Neff*, 29 Misc. 62, 60 N. Y. Supp. 582, holding in assessing bank stock, assessed, not actual, value deductible from total value of capital.

Recovery of taxes erroneously assessed.

Distinguished in *United States Trust Co. v. New York*, 144 N. Y. 491, 39 N. E. 383, Affirming 77 Hun, 185, 28 N. Y. Supp. 344, holding action not maintainable to recover taxes erroneously assessed by commissioners with jurisdiction of person and subject-matter.

Conclusiveness of information furnished assessors.

Cited in *People ex rel. Edison Electric Illuminating Co. v. Barker*, 139 N. Y. 62, 34 N. E. 722, holding information given to tax commissioners should be taken as true, unless otherwise established by competent evidence; *People v. Consolidated Gas Co. v. Feitner*, 78 App. Div. 315, 79 N. Y. Supp. 975, holding assessors bound to accept verified statement and testimony regarding corporation's finances in absence of contrary evidence; *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 314, 40 N. E. 996, holding tax commissioners not bound by contradicted statements where good reasons exist for disbelief.

Cited in footnote to *State, Singer Mfg. Co., Prosecutor, v. Heppenheimer*, 32 L. R. A. 643, which holds company exempt from taxation under exemption of its shares.

Cited in notes (58 L. R. A. 518, 528, 545, 565, 567, 574, 575, 589, 597) on taxation of capital stock of corporations in the United States; (13 L. R. A. 515) on taxation of shares of capital stock.

Distinguished in *People ex rel. Trowbridge v. McNamara*, 18 App. Div. 21, 79 S. R. 458, 45 N. Y. Supp. 456, holding assessors may fix value of realty according to own judgment against owner's evidence.

Situs, for taxation, of corporate property.

Cited in note (69 L.R.A. 439) on situs, for taxing purposes, of tangible personality of domestic corporations.

12 L. R. A. 770, *GUARANTY TRUST & S. D. CO. v. BUDDINGTON*, 27 Fla. 215, 9 So. 246.

Calendar month defined.

Cited in *Simmons v. Hanne*, 50 Fla. 272, 39 So. 77, 7 A. & E. Ann. Cas. 322, holding term "months" when used in statute means calendar months, not lunar months, unless there is something in statute which indicates that a contrary meaning was intended; *Maxwell v. Jacksonville Loan & Improv. Co.* 45 Fla. 454, 34 So. 255, holding word "months" in equity rule as to time of taking testimony must be understood as calendar months.

Cited in footnote to *McGinn v. State*, 30 L. R. A. 450, which defines calendar month as period terminating with day of succeeding month corresponding to day of beginning less one.

Cited in note (78 Am. St. Rep. 384) on computation of time.

12 L. R. A. 776, *BUMGARDNER v. LEAVITT*, 35 W. Va. 194, 13 S. E. 67.

Specific performance as respects intangible property.

Cited in *Manton v. Ray*, 18 R. I. 674, 49 Am. St. Rep. 811, 29 Atl. 998, holding

equity will decree specific performance of contract to convey stock not obtainable elsewhere; *McKay v. Ripley & M. C. Valley R. Co.* 42 W. Va. 27, 24 S. E. 685, sustaining right of vendor of right of way to railroad company to specific performance; *Turley v. Thomas*, 31 Nev. 197, 135 Am. St. Rep. 667, 101 Pac. 568, holding that contract for sale of corporate stock will be specifically enforced where stock has no market value, and action for damages inadequate; *Kipp v. Laun*, 146 Wis. 603, 131 N. W. 418, to the point that vendor may by equitable action enforce undertaking of vendee, although substantial part of his relief is recovery of money; *Armstrong v. Maryland Coal Co.* 67 W. Va. 598, 69 S. E. 195, holding that contract for sale of land, signed by vendee only, may be specifically enforced at suit of vendor; *Hogg v. McGuffin*, 67 W. Va. 462, 31 L.R.A.(N.S.) 502, 68 S. E. 41, holding that specific performance of contract to exchange stock will be decreed, when legal remedy inadequate because stock sought is of peculiar value; *Schmidt v. Pritchard*, 135 Iowa, 248, 112 N. W. 801; *Sherman v. Herr*, 220 Pa. 423, 69 Atl. 899,—holding where stock was not procurable in market and was of a peculiar value to plaintiff in order that he might gain proper and legitimate control of corporation equity would enforce specific performance of contract of sale of stock.

Cited in notes (50 L.R.A. 503, 506) on specific performance of contract for sale of stock in corporation; (31 L.R.A.(N.S.) 491) on specific performance of contract for sale of stock; (135 Am. St. Rep. 693) on specific performance of contracts for sale of corporate stock; (6 Eng. Rul. Cas. 646) on refusal to enforce specific performance of contract, performance of which cannot be of importance to plaintiff.

Distinguished in *Gage v. Fisher*, 5 N. D. 304, 31 L. R. A. 562, 65 N. W. 809, holding contract to give minority stockholder right to control stock not specifically enforceable.

12 L. R. A. 781, *Re ARGUS PRINTING CO.* 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. 347.

Pledge of stock.

Cited in *Just v. State Sav. Bank*, 132 Mich. 606, 94 N. W. 200, holding a bona fide pledgee of stock protected against subsequent claims against the stock in favor of the corporation, the latter having notice of pledge.

Cited in footnotes to *May v. Cleland*, 44 L. R. A. 163, which holds purchaser of stock at execution sale takes subject to pledge of which he knows, though not entered on corporate books; *Spreckels v. Nevada Bank*, 33 L. R. A. 459, which sustains pledgee's right to have entry made on corporate books to protect his rights.

Cited in note (121 Am. St. Rep. 196) on rights, remedies and liabilities of pledgees of corporate stock.

Rights of transferees of stock.

Cited in footnote to *Doty v. First Nat. Bank*, 17 L. R. A. 259, which holds right of transferee of national bank stock under unrecorded transfer superior to subsequent attachment.

Cited in note (57 Am. St. Rep. 390) on extent to which transfers of stock may be restricted.

Who are stockholders.

Cited in *McMullan v. Dickinson Co.* 63 Minn. 410, 65 N. W. 661, holding pledgee of stock not stockholder; *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 594, 35 L. R. A. 312, 56 Am. St. Rep. 119, 47 Pac. 582, holding person holding stock as dummy for real owner not bona fide stockholder.

Election of directors.

Approved in *Haynes v. Griffith*, 16 Idaho, 290, 101 Pac. 728, holding under statute every bona fide stockholder "having stock in his own name on the stock books of the corporation at least ten days prior to election" of directors is entitled to vote at such election.

Cited in *Re George Ringler & Co.* 145 App. Div. 365, 130 N. Y. Supp. 62, holding that statutory provision that directors must be stockholders is satisfied if they are stockholders of record, although they have endorsed certificates to owners.

Cited in footnote to *Maynard ex rel. Dusenbury v. Looker*, 56 L. R. A. 947, which denies vested right of majority of stockholders to elect directors.

Stockholders' meetings.

Cited in *Canadian Improv. Co. v. Lea*, 74 N. J. Eq. 250, 69 Atl. 455; *Royal Consol. Min. Co. v. Royal Consol. Mines Co.* 157 Cal. 757, 137 Am. St. Rep. 165, 110 Pac. 123,—holding that test to right to vote at corporate meeting is ownership of shares as disclosed by record book of corporation ten days before vote.

Cited in notes (21 L. R. A. 175) on what constitutes quorum for meeting of stockholders; (29 L.R.A. 849) on right to vote by proxy in private corporations; (36 L.R.A.(N.S.) 45) on withdrawal of stockholders to break quorum.

Interference by court with corporate elections.

Cited in *Com. v. Vandegrift*, 232 Pa. 63, 36 L.R.A.(N.S.) 50, 81 Atl. 153, Ann. Cas. 1912C, 1267, holding that stockholders who withdraw from stockholder's meeting for purpose of breaking quorum cannot obtain relief from courts against business transacted at meeting; *Bridgers v. Staton*, 150 N. C. 220, 63 S. E. 892, as to court declaring true result of election when vote has been illegally announced by reason of illegal admission or rejection of certain votes.

Transfer on stock books as evidence of right.

Cited in *Herrick v. Humphrey Hardware Co.* 73 Neb. 815, 119 Am. St. Rep. 917, 103 N. W. 685, 11 A. & E. Ann. Cas. 201, holding where under its by-laws or under a statute it is necessary that the transfer of the stock be made on its books, and the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock.

12 L. R. A. 791, *SHIPMAN v. BANK OF THE STATE*, 126 N. Y. 318, 22 Am. St. Rep. 821, 27 N. E. 371.

Liability of drawee paying on forged signature.

Cited in *Janin v. London & S. F. Bank*, 92 Cal. 23, 14 L. R. A. 322, 27 Am. St. Rep. 82, 27 Pac. 1100, holding bank paying forged check liable; *J. M. Houston Grocer Co. v. Farmers Bank*, 71 Mo. App. 139 (*obiter*); *Adler v. Broadway Bank*, 30 Misc. 383, 62 N. Y. Supp. 402, holding bank paying check with indorsement forged by payee's collector, liable to drawer; *Fifth Nat. Bank v. Central Nat. Bank*, 82 Hun, 561, 31 N. Y. Supp. 541, holding bank cashing check with forged indorsement liable to bank of deposit; *Harter v. Mechanics Nat. Bank*, 63 N. J. L. 580, 76 Am. St. Rep. 224, 44 Atl. 715, holding bank liable to depositor for check paid on forged indorsement; *Kress v. East Side Sav. Bank*, 50 N. Y. S. R. 274, 21 N. Y. Supp. 652, holding savings bank liable for deposit paid out upon presentation of stolen pass book and forged check; *Bloomingtondale v. National Butchers & Drovers' Bank*, 33 Misc. 595, 68 N. Y. Supp. 35, holding bank cashing stolen checks, payee's indorsement being forged, not protected; *Rossi v. National Bank of Commerce*, 71 Mo. App. 161, holding drawee bank liable for draft paid on forged indorsement; *Western U. Teleg. Co. v. Bi-Metallic Bank*, 17 Colo. App. 233, 68 Pac. 115, holding bank liable for check payable to W. H. Daily, erroneously deliv-

ered by drawer's agent to W. H. Daley; *Chism v. First Nat. Bank*, 96 Tenn. 644, 32 L. R. A. 780, footnote p. 778, 54 Am. St. Rep. 863, 36 S. W. 387, which holds drawee bank liable to payee notwithstanding forged indorsement of fictitious person's name; *Gallo v. Brooklyn Sav. Bank*, 199 N. Y. 227, 32 L.R.A.(N.S.) 69, 92 N. E. 633, holding that drawee of bill is bound to ascertain that person to whom he makes payment is authorized to receive it; *Morgan v. United States Mortg. & T. Co.* 125 App. Div. 28, 109 N. Y. Supp. 274, holding where drawer of check has been guilty of negligence the bank is ordinarily relieved; *Union Biscuit Co. v. Springfield Grocer Co.* 143 Mo. App. 307, 126 S. W. 996; *Kearny v. Metropolitan Trust Co.* 110 App. Div. 238, 97 N. Y. Supp. 274; *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 598, 130 Am. St. Rep. 158, 69 Atl. 607; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 163, 114 Am. St. Rep. 595, 77 N. E. 693,—holding bank liable unless depositor is guilty of negligence; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 408, 22 L.R.A.(N.S.) 250, 87 N. E. 740, holding negligence of maker is immaterial unless it is of a kind that directly and proximately affects the conduct of the banker in the performance of his duties.

Cited in footnotes to *First Nat. Bank v. Northwestern Nat. Bank*, 26 L. R. A. 289, which holds genuineness of indorsement not admitted by drawee accepting or paying check; *Ramsey County v. Nelson*, 51 Minn. 85, 38 Am. St. Rep. 492, 52 N. W. 991, holding county treasurer paying warrants with forged indorsement not protected; *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 23 L. R. A. 615, which denies right of recovery by payer of forged checks; *La Fayette v. Merchants' Bank*, 68 L.R.A. 231, which sustains right of drawee paying draft on forged indorsement in ignorance of forgery on presentation bearing indorsement of collecting bank to recover back amount so paid.

Cited in note (25 L.R.A.(N.S.) 996) on forger's application of proceeds of check to indebtedness to depositors, as affecting bank's right to charge against depositor's account.

Distinguished in *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 561, 23 L. R. A. 587, footnote p. 584, 37 Am. St. Rep. 596, 35 N. E. 892, Affirming 67 Hun, 382, 22 N. Y. Supp. 254, holding payment by drawee of cashier's checks on forged indorsements by cashier of payees' names good as against his bank; *Central Nat. Bank v. National Metropolitan Bank*, 31 App. D. C. 398, 17 L.R.A.(N.S.) 520, holding one who cashed a check on indorsement by payee of the assumed name in which he had fraudulently obtained it from the maker, and who received the amount from the drawee cannot upon discovery of the fraud and return of amount by drawee to drawer's account, be compelled to return to the drawee what he received from it on the ground that he guaranteed the indorsement.

Negotiable paper innocently made payable to fictitious payee.

Cited in *Anderson v. Dundee State Bank*, 47 N. Y. S. R. 450, 20 N. Y. Supp. 511, denying liability of drawer of draft not knowing payee fictitious person to bona fide holder for value; *Keenan v. Blue*, 240 Ill. 190, 88 N. E. 553 (dissenting opinion), as to when paper made payable to fictitious person is treated as if payable to bearer; *Boles v. Harding*, 201 Mass. 107, 87 N. E. 481; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 79, 17 L.R.A.(N.S.) 519, 126 Am. St. Rep. 467, 116 N. W. 617; *Seaboard Nat. Bank v. Bank of America*, 51 Misc. 107, 100 N. Y. Supp. 740; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 34, 22 L.R.A.(N.S.) 508, 85 N. E. 829,—holding under statute it is only where a person making an instrument makes it payable to a fictitious or nonexistent person that it can be treated as payable to bearer; *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 608, 128 Am. St. Rep. 780, 70 Atl. 876, holding where drawer of check

intended to and did use name of payee as that of a person who should never receive check or have any right to it such person was a fictitious one within meaning of negotiable instruments act making a check payable to bearer if payable to order of "fictitious or nonexistent person.

Cited in note (22 L.R.A.(N.S.) 500, 501, 503) as to when negotiable instrument is deemed payable to order of fictitious person within rule which regards such instrument as payable to bearer.

Distinguished in *Trust Co. of America v. Hamilton Bank*, 127 App. Div. 521, 112 N. Y. Supp. 84, holding forgery of check in administrator's name to a distributee for an amount known to be within his share was a making of check to a fictitious person and consequently to bearer and drawee bears loss.

Liability for payment to wrong person.

Cited in *Egner v. Corn Exchange Bank*, 42 Misc. 554, 86 N. Y. Supp. 107, denying liability of drawer of check obtained by one fraudulently representing named payee's right thereto.

Cited in notes (26 L. R. A. 570) on negotiability of check; (39 L. R. A. 426) on use of fictitious name as affecting validity of instrument; (50 L. R. A. 83) on who must bear loss on check or bill issued or indorsed to impostor.

Depositor's duty as to checks returned.

Cited in *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* 10 Misc. 682, 31 N. Y. Supp. 790, holding depositor may assume genuineness of indorsements of returned checks ascertained by bank; *Critten v. Chemical Nat. Bank*, 171 N. Y. 228, 57 L. R. A. 533, 63 N. E. 969, Modifying 60 App. Div. 245, 70 N. Y. Supp. 246, holding it depositor's duty to compare returned vouchers with record of checks issued, to detect forgeries or alterations; *Clark v. National Shoe & Leather Bank*, 32 App. Div. 319, 52 N. Y. Supp. 1064, holding depositor not negligent in intrusting examination of paid checks and bank statements to employee; *First Nat. Bank v. Allen*, 100 Ala. 481, 27 L. R. A. 430, 46 Am. St. Rep. 80, 14 So. 335, denying right of depositor intrusting duty of examining vouchers to clerk who forged checks to recover from bank; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 408, 22 L.R.A.(N.S.) 254, 87 N. E. 740, holding it not duty of depositor to examine signature of payee of check.

Cited in notes (27 L.R.A. 429) on duty of depositor as to forged checks charged to him by bank; (7 L.R.A.(N.S.) 744) on depositor's right to recover amount of forged or raised checks paid by bank as affected by his intrusting examination of vouchers to guilty employee.

When agent's knowledge imputable to principal.

Cited in *Henry v. Allen*, 151 N. Y. 11, 36 L. R. A. 662, footnote p. 658, 45 N. E. 355, which holds notice of agreement by bank with person depositing another's money, that cashier's checks given shall be returned without delivery, not imputable to principal.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

Account stated.

Cited in *Wachsmann v. Columbia Bank*, 6 Misc. 63 26 N. Y. Supp. 885, holding account stated impeachable by evidence of fraud or mistake; *National Bd. Marine Underwriters v. National Bank*, 9 Misc. 365, 29 N. Y. Supp. 698, holding possession of vouchers and accounts from bank by clerk committing forgeries overcomes presumption of acquiescence; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 135, 70 S. W. 173, holding depositor's acquiescence for unreasonable time after return of balanced bank book and canceled checks has effect to account stated.

Cited in notes (27 L.R.A. 820) on what constitutes an account stated; North-

western Nat. Bank v. Bank of Commerce, 15 L. R. A. 102, which holds bank crediting forged draft to payee and forwarding for collection a bona fide holder; (29 L.R.A.(N.S.) 339, 348) on effect of retaining statement of account to render it an account stated.

Distinguished in *Comer v. Mackey*, 73 Hun, 242, 25 N. Y. Supp. 1023, holding party acquiescing in account stated by old firm cannot charge new firm with subsequently discovered error.

Estoppel by acquiescence in mistake.

Cited in *Devine v. Bank of Baldwin*, 91 Wis. 73, 64 N. W. 589, holding retention of certificate by illiterate depositor for less amount than due does not preclude recovery of payment made on forged indorsement; *Todd v. Meding*, 56 N. J. Eq. 101, 38 Atl. 349, holding receiver not protected in paying dividend on whole claim to owner of half, by failure of other owner to inquire on receiving dividend on individual claim.

Payment benefiting depositor as equitable defense.

Cited in *La Montagne v. Bank of New York, Nat. Bkg. Asso.* 94 App. Div. 233, 88 N. Y. Supp. 21, holding bank not liable to special partnership, succeeding to assets of general partnership for funds checked out by general partner to pay old firm's debts.

Relation of bank to depositor.

Cited in *People v. Gillette*, 126 App. Div. 673, 111 N. Y. Supp. 133, holding relation of debtor and creditor existed as fact between bank and depositor though money was due to another.

Cited in notes (33 Am. St. Rep. 226) on relation of bank to depositor; (86 Am. St. Rep. 777) on title of bank to money deposited with or collected by it.

12 L. R. A. 799, *PACIFIC EXP. CO. v. FOLEY*, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665.

Limitation of carrier's liability by contract.

Cited in *St. Louis & S. F. R. Co. v. Sherlock*, 59 Kan. 28, 51 Pac. 899, holding contract limiting railroad's common-law liability without permission of railroad commissioners, invalid; *Atchison, T. & S. F. R. Co. v. Mason*, 4 Kan. App. 402, 46 Pac. 24, and *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 213, 29 Pac. 148, holding railroad may limit common-law liability by special contract with shipper, if freely made; *Ft. Scott, W. & W. R. Co. v. Sparks*, 55 Kan. 295, 39 Pac. 1032, holding contract providing that person traveling with stock shall remain in caboose, valid; *Hanson v. Great Northern R. Co.* 18 N. D. 333, 138 Am. St. Rep. 768, 121 N. W. 78, to the point that stipulations as to value of property shipped are valid if fairly and honestly made as basis for carrier's charges and responsibility.

Cited in notes (63 L.R.A. 529) on conflict of laws as to carrier's contracts; (2 L.R.A.(N.S.) 773) on amount of carrier's liability for loss of goods; (61 Am. St. Rep. 363, 364, 368) on limitation of express companies' liability by contract; (62 Am. St. Rep. 524) on right of express companies to contract for exemption from liability for loss from negligence; (5 Eng. Rul. Cas. 347, 348) on special limitations of liability of carrier.

Distinguished *v. Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for failure to correctly transmit message, notwithstanding agreement on blanks.

Bill of lading as contract.

Cited in *Smith v. American Exp. Co.* 108 Mich. 577, 66 N. W. 479, holding carrier's receipt taken by shipper without objection, valid contract.

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Cited in note (88 Am. St. Rep. 82, 96, 107, 126) on limitation of carrier's liability in bills of lading.

12 L. R. A. 808, *BERGER v. VARRELMANN*, 127 N. Y. 281, 27 N. E. 1065.

When conclusions of law regarded as findings of fact.

Cited in *Wright v. Loud*, 39 App. Div. 275, 56 N. Y. Supp. 959; *Christopher & T. Street R. Co. v. Twenty-third Street R. Co.* 149 N. Y. 58, 43 N. E. 538, holding findings improperly designated conclusions of law regarded as findings of fact; *Buffalo v. Delaware L. & W. R. Co.* 190 N. Y. 94, 16 L.R.A. (N.S.) 509, 82 N. E. 513, holding same; *Whalen v. Stuart*, 194 N. Y. 504, 87 N. E. 819, holding conclusion of law may be treated as finding of fact for purpose of reversing as well as affirming a judgment.

Absence of finding to support judgment.

Cited in *Haffey v. Lynch*, 68 Hun, 509, 23 N. Y. Supp. 59, holding in absence of finding court may examine evidence to support judgment.

Presumption as to findings.

Cited in *Bell v. James*, 128 App. Div. 244, 112 N. Y. Supp. 750, holding where evidence given on trial is not contained in case on appeal it must be assumed that the facts proved were sufficient to sustain the findings and also to sustain any additional findings required to support the conclusions of law not in conflict with the affirmative facts found.

General assignments — Preferences.

Cited in *Re Dauchy*, 59 App. Div. 388, 69 N. Y. Supp. 827, holding assignor creating preferences to statutory limit may provide for *pro rata* payment of individual and firm debts out of residue; *Spelman v. Freedman*, 130 N. Y. 429, 29 N. E. 765, holding complaint in action to set aside preferential judgments alleging executions and levies in contemplation of assignment, sufficient.

Distinguished in *Central Nat. Bank v. Seligman*, 138 N. Y. 442, 34 N. E. 196, Reversing 64 Hun, 620, 19 N. Y. Supp. 362, holding assignment invalidated by excessive preferences in instruments forming part of same transaction.

What constitutes unlawful preference.

Cited in *Mack v. Prince*, 40 W. Va. 330, 21 S. E. 1012, holding judgment confessed by insolvent void as preference.

Cited in footnotes to *Re Fixen*, 50 L.R.A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business, an unlawful preference; *Tatman v. Humphrey*, 63 L.R.A. 738, which holds insolvent mortgagor's permitting mortgagee to take possession of mortgaged chattels under unrecorded mortgage an act of bankruptcy; *Re George M. Hill Co.* 66 L.R.A. 68, which holds forbidden transfer not effected by bank's appropriation of balance of bankrupt's deposit account in payment of his indebtedness to it after knowledge of bankruptcy.

Cited in note (34 Am. St. Rep. 857) on preferences in assignments for creditors.

Transfer prior to general assignment as preference.

Cited in *White v. Benjamin*, 3 Misc. 499, 23 N. Y. Supp. 981, holding judgment suffered immediately prior to general assignment, one transaction; *Thalheimer v. Klapetsky*, 36 N. Y. S. R. 118, 12 N. Y. Supp. 941, holding general assignment not invalidated by judgments previously confessed without intent to unlawfully prefer; *Clapp v. Clark*, 49 Fed. 124, holding (*obiter*), judgment creating excessive preference void as part of general assignment; *Ottenberg v. Corner*, 34 L. R. A. 623, 22 C. C. A. 168, 40 U. S. App. 320, 76 Fed. 269 (dissenting opinion), majority upholding validity of mortgage immediately preceding general assignment, where mortgagee acted in good faith; *Johnson v. Rapalyea*, 1 App. Div. 476, 37

N. Y. Supp. 540 (dissenting opinion), majority holding mortgage not given or taken in contemplation of assignment, valid.

Distinguished in *Benham v. Ham*, 5 Wash. 132, 34 Am. St. Rep. 851, 31 Pac. 459, holding mortgage by insolvent shortly before assignment valid, where mortgagee acted in good faith; *Abegg v. Bishop*, 66 Hun, 9, 20 N. Y. Supp. 810, holding transfer to creditor with intent to give unlawful preference, void, irrespective of transferee's knowledge; *Shotwell v. Dixon*, 163 N. Y. 48, 57 N. E. 178, Affirming 22 App. Div. 261, 48 N. Y. Supp. 984, sustaining transfer to creditor without knowledge that assignment contemplated.

Distinguished and limited in *Manning v. Beck*, 129 N. Y. 7, 14 L. R. A. 200, footnote p. 198, 29 N. E. 90, which holds bona fide transferee not affected by debtor's intention to make general assignment for creditors.

Not followed in *Waggoner-Gates Milling Co. v. Ziegler-Zaiss Commission Co.* 128 Mo. 486, 31 S. W. 28, holding mortgage to creditor not invalidated by general assignment immediately thereafter.

Preferential transfer to creditors not followed by assignment.

Cited in *Maass v. Falk*, 146 N. Y. 44, 40 N. E. 504, Same case in court below, 54 N. Y. S. R. 163, 24 N. Y. Supp. 448, holding transfer of property to creditor unconnected with subsequent transfers of remaining property to other creditors, not invalid preference.

Cited in notes (37 L. R. A. 354) on whether preference by mortgage or sale is an assignment for creditors; (37 L. R. A. 482) on effect of insolvency statutes on mortgage or sale preferring creditors.

Distinguished in *Cutter v. Pollock*, 4 N. D. 214, 25 L. R. A. 381, 50 Am. St. Rep. 644, 59 N. W. 1062, sustaining transfer of entire property to creditors, where no general assignment made.

Limited in *Tompkins v. Hunter*, 149 N. Y. 124, 43 N. E. 532, Same case in court below, 24 N. Y. Supp. 12, upholding insolvent's sale of entire assets to creditor in payment of debt without making general assignment.

12 L. R. A. 815, *HALEY v. EUREKA COUNTY BANK*, 21 Nev. 127, 26 Pac. 64.

Power to require proof after default.

Approved in *Sibley v. Weinberg*, 116 Wis. 6, 92 N. W. 427, sustaining court's discretionary power to require evidence of unlawful detention upon default in replevin action.

Cited in note (20 L.R.A.(N.S.) 20) on necessity of jury to compute damages on default judgment.

Privileged communication to attorney.

Cited in footnotes to *Stone v. Minter*, 50 L. R. A. 356, which holds communication by client to attorney in presence of other party to contract not privileged; *Koeber v. Somers* 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged; *Bruley v. Garvin*, 48 L. R. A. 839, which holds conversation with attorney receiving no fee, regarding contemplated lawsuit, privileged.

Cited in note (66 Am. St. Rep. 225) on attorneys as witnesses.

Collusive litigation.

Cited in *Ward v. Alsup*, 100 Tenn. 739, 46 S. W. 573, holding suit brought solely to affect third parties' rights collusive; *State ex rel. Chandler v. McQuillin*, 229 Mo. 556, 130 S. W. 9 (dissenting opinion), on duty of court to guard its proceedings from being used by parties collusively.

Dismissal of collusive litigation.

Cited in *Ward v. Alsup*, 100 Tenn. 739, 46 N. W. 573, and *Judson v. Flushing*

Jockey Club, 14 Misc. 563, 36 N. Y. Supp. 128, holding attorney, as *amicus curiae*, may, and should, move to dismiss fictitious action; Fesler v. Brayton, 145 Ind. 73, 32 L. R. A. 579, 44 N. E. 37, holding (*obiter*), that collusive action may be dismissed on motion of *amicus curiae*; Carlson v. Helena, 38 Mont. 585, 101 Pac. 163, holding it must appear with reasonable certainty that action is collusive before it will be dismissed.

Dismissal of futile litigation.

Cited in Williams v. Williams, 117 Wis. 127, 94 N. W. 25, holding court may summarily dismiss action upon payment into court of amount claimed; Wedekind v. Bell, 26 Nev. 413, 99 Am. St. Rep. 704, 69 Pac. 612, dismissing appeal where conflicting claims had been transferred to one person; Pennington v. Douglas Augusta & G. R. Co. 6 Ga. App. 857, 65 S. E. 1084, holding court may dismiss action against defunct corporation upon the matter being brought to its attention by an *amicus curiae*.

Waiver of counsel of right to try cause with or without jury.

Cited in Costello v. Scott, 30 Nev. 63, 93 Pac. 1, holding counsel who were present when order that case should be tried by jury was entered, not objecting to the same are deemed to have consented.

12 L. R. A. 821, LILIENTHAL v. SUFFOLK BREWING CO. 154 Mass. 185, 26 Am. St. Rep. 234, 28 N. E. 151.

Parol evidence varying writing.

Cited in Will M. Kinnard Co. v. Cutter Tower Co. 159 Mass. 393, 34 N. E. 460, holding evidence of agreement that written contract should not be binding if goods unsuitable, inadmissible; Clapp v. Wilder, 176 Mass. 346, 50 L. R. A. 126, 57 N. E. 692, by Morton, J., dissenting, who holds declarations of grantor as to purpose in inserting condition in deed, made after delivery, inadmissible.

Fraudulent inducements as ground for rescinding contract.

Cited in note (37 L. R. A. 594) on right to rely on representations made to effect contract as basis for charge of fraud.

Distinguished in effect in Kilgore v. Bruce, 166 Mass. 138, 44 N. E. 108, holding misrepresentations by seller of stock as to price another was paying entitle purchaser to recoup difference.

12 L. R. A. 823, PEABODY v. OREGON R. & NAV. CO. 21 Or. 121, 26 Pac. 1053.

Ejection of passenger without required ticket.

Cited in Hot Springs R. Co. v. Deloney, 65 Ark. 181, 67 Am. St. Rep. 913, 45 S. W. 351, holding carrier liable for ejecting passenger presenting ticket improperly made out; Kiley v. Chicago City R. Co. 189 Ill. 390, 52 L. R. A. 628, 82 Am. St. Rep. 460, 59 N. E. 794, denying liability of carrier for ejecting passenger to whom wrong transfer given; Callaway v. Mellett, 15 Ind. App. 369, 57 Am. St. Rep. 238, 44 N. E. 198, holding as between passenger and conductor, face of ticket conclusive as to passenger's rights; Indianapolis Street R. Co. v. Wilson, 161 Ind. 182, 100 Am. St. Rep. 261, 66 N. E. 950 (dissenting opinion), majority holding street railway liable for expulsion of passenger to whom wrong transfer given; Mahoney v. Detroit Street R. Co. 93 Mich. 616, 18 L. R. A. 337, footnote, p. 335, 32 Am. St. Rep. 528, 53 N. W. 793, which authorizes ejection of one refusing to pay fare without having previously obtained transfer; Virginia & S. W. R. Co. v. Hill, 105 Va. 743, 6 L.R.A.(N.S.) 904, 54 S. E. 872, holding where plaintiff was ejected from train for refusing to pay fare after presenting a wrong ticket which was sold him through mistake of ticket agent, his remedy

was an action for breach of contract and not for the eviction unless unnecessary force had been used.

Cited in footnotes to *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, which holds face of ticket conclusive evidence to conductor as to terms of contract; *Trezona v. Chicago G. W. R. Co.* 43 L. R. A. 136, which denies carrier's liability for ejecting one attempting to ride on ticket which he knows does not on its face entitle him to a ride; *Illinois C. R. Co. v. Harper*, 64 L. R. A. 283, which holds carrier liable for ejection of passenger whose ticket, apparently correct, does not entitle holder to transportation by desired route; *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round trip ticket unstamped from inability to find agent; *Kansas City, M. & B. R. Co. v. Riley*, 13 L. R. A. 38, which holds carrier liable for conductor's refusal to accept return coupon; *Ellsworth v. Chicago, B. & Q. R. Co.* 29 L. R. A. 173, which holds failure, from haste, to pay for ticket, does not defeat recovery for ejection because ticket bears prior date; *United R. & Electric Co. v. Hardesty*, 57 L. R. A. 275, which denies carrier's duty to accept coupon detached from commutation book; *Texas & Pacific R. Co. v. Payne*, 70 L.R.A. 946, which holds refusal of agent at intermediate terminal to make necessary indorsement on return trip ticket "because his instructions were different" not final breach of contract by carrier so as to preclude recovery by passenger for damages from subsequent ejection.

Cited in note (2 L.R.A.(N.S.) 697) on validity of regulation requiring passenger to pay disputed fare.

Disapproved in *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 174, 41 N. E. 712, holding railroad liable for ejecting passenger given ticket to wrong station where mistake explained to conductor; *Morrill v. Minneapolis Street R. Co.* 103 Minn. 372, 123 Am. St. Rep. 341, 115 N. W. 395, holding passenger entering a car and tendering conductor improperly punched transfer slip due to negligence of former conductor may maintain action of tort for damages resulting from her expulsion from car.

Burden of proof as to fact within party's peculiar knowledge.

Cited in *Shmit v. Day*, 27 Or. 115, 39 Pac. 870, holding burden of proof on defendant alleging assignment of contract as defense to negligence action by employee.

Questions for jury.

Cited in *Jackson v. Sumpter Valley R. Co.* 50 Or. 464, 93 Pac. 356, holding if different minds may honestly draw different conclusions from facts, though undisputed, the question is for the jury.

Presumption of operation of railroad by owner.

Cited in *Gulf, C. & S. F. R. Co. v. Miller*, 98 Tex. 273, 83 S. W. 182; *Johnson v. Southern P. R. Co.* 154 Cal. 289, 97 Pac. 520,—holding where it is admitted by pleadings that corporation was the owner of railroad, in the operation of which a wrong was committed, the presumption is that the road was in its possession and operated by it at that time.

12 L. R. A. 830, *BIRMINGHAM MINERAL R. CO. v. JACOBS*, 92 Ala. 187, 9 So. 320.

What are "railroads" within meaning of law.

Cited in *Ensley R. Co. v. Chewning*, 93 Ala. 29, 9 So. 458, holding dummy railroad subject to railroad law requiring signals at stopping places; *Birmingham R. & Electric Co. v. Baylor*, 101 Ala. 498, 13 So. 793, holding dummy railroads bound to adopt same safeguards and appliances as ordinary railroads; *Louisville & N. R. Co. v. Anchors*, 114 Ala. 501, 62 Am. St. Rep. 116, 22 So. 279, holding electric line

running beyond corporate limits railroad within statute requiring stop of intersection; Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 418, 61 L.R.A. 251, 43 S. E. 751, holding act imposing on railroads liability to employees for fellow-servant's negligence applicable to street railways; Selma Street & Suburban R. Co. v. Martin, 2 Ala. App. 542, 56 So. 601, to the point that electric street railways are "railroads" within meaning of section 5474 of code; Dean v. State, 149 Ala. 35, 43 So. 24, holding statute making it an offense for conductor to run a train without sufficient quantity of drinking water on board does not apply to street railroads.

Cited in note (67 L.R.A. 638) on interurban railroad as controlled by general law in regard to operation of railroads as carriers of passengers.

Presumption of compliance with statute requiring stop at crossing.

Cited in second appeal in Birmingham Mineral R. Co. v. Jacobs, 101 Ala. 156, 13 So. 408, holding engineer approaching crossing may presume compliance by employees of intersecting road with statute requiring stop; Richmond & D. R. Co. v. Greenwood, 99 Ala. 515, 14 So. 495, holding trainmen complying with statute on approaching crossing may assume compliance by employees of intersecting road; Southern R. Co. v. Bryan, 125 Ala. 306, 28 So. 445, holding presumption of observance of statute by employees of other road will not excuse negligence of engineer having right of way.

Sufficiency of averment of wilful injury.

Cited in Louisville & N. R. Co. v. Anchors 114 Ala. 501, 62 Am. St. Rep. 116, 22 So. 279, holding allegation that defendant "wilfully caused" collision avers wilful injury; Georgia P. R. Co. v. Ross, 100 Ala. 492, 14 So. 282, holding wanton and wilful negligence sufficiently averred by charge that injury resulted from "wanton and reckless negligence."

Variance between pleading and proof.

Cited in Kansas City; M. & B. R. Co. v. Crocker, 95 Ala. 432, 11 So. 262, Harold Bros. v. Jones Bros. 97 Ala. 638, 98 Ala. 349, 11 So. 747; Stringer v. Alabama Mineral R. Co. 99 Ala. 407, 13 So. 75; Lee v. DeBardeleben Coal & I. Co. 102 Ala. 630, 15 So. 270; Louisville & N. R. Co. v. Markee, 103 Ala. 169, 49 Am. St. Rep. 21, 15 So. 511; Levin v. Memphis & C. R. Co. 109 Ala. 334, 19 So. 395; Highland Ave. & Belt R. Co. v. Winn, 93 Ala. 308, 9 So. 509,—holding proof of negligence will not sustain allegation of wilful misconduct.

Cited in note (69 L.R.A. 603) on right to recover for ordinary negligence under allegation of gross, wilful, or wanton negligence, or vice versa.

Negligence in failure to stop at crossing as question for jury.

Cited in Alabama G. S. R. Co. v. Hanbury, 161 Ala. 372, 49 So. 467, holding under facts whether conductor was negligent in running train over crossing without stopping was question for jury.

12 L. R. A. 836, EISENLORD v. CLUM, 126 N. Y. 552, 27 N. E. 1024.

Effect of death on competency of witness.

Cited in Chace v. Lamphere, 148 N. Y. 213, 42 N. E. 580, holding wife of plaintiff in ejectment against decedent's devisees competent to testify to transactions with decedent; Albany County Sav. Bank v. McCarty, 149 N. Y. 84, 43 N. E. 427, holding tenant by curtesy initiate competent to testify for wife's heirs in mortgage foreclosure, though joining in bond and mortgage; Bouton v. Welch, 59 App. Div. 290, 69 N. Y. Supp. 407, holding mortgagor in default on foreclosure may testify to deceased mortgagee's agreement to bequeath mortgage to wife; Healy v. Healy, 55 App. Div. 320, 66 N. Y. Supp. 927, holding mother competent to testify to decedent's agreement to make testamentary provision for child; Rosseau v. Rouss,

91 App. Div. 237, 86 N. Y. Supp. 497, holding that wife may testify in action against husband's executors to enforce promise to settle certain sum on illegitimate child; *Baxter v. Baxter*, 13 App. Div. 67, 43 N. Y. Supp. 94, holding heir joined as defendant in action by other heirs to set aside fraudulent deed may testify to conversations with decedent in codefendant's behalf; *Adams v. Internal Improv. Fund*, 37 Fla. 289, 20 So. 266, holding in action involving ownership of coupons, that treasurer may testify to delivery to decedent as committee to settle accounts; *Hixson v. Rodbourn*, 36 Misc. 22, 72 N. Y. Supp. 42, holding survivor of firm in action against deceased member's estate may testify to decedent's acquiescence in payment on firm note; *Lecour v. Importers & T. Nat. Bank*, 61 App. Div. 166, 70 N. Y. Supp. 419, holding in action by decedent's administrator to recover proceeds of check, decedent's attorney may testify to personal transactions showing authority to indorse; *Putnam v. Lincoln Safe Deposit Co.* 87 App. Div. 18, 83 N. Y. Supp. 1091, Affirming 39 Misc. 745, 80 N. Y. Supp. 961, holding evidence of executors as to funds turned over to deceased testamentary trustee admissible to show ownership of securities; *Crampton v. Foster*, 29 App. Div. 223, 51 N. Y. Supp. 883, holding maker of note competent to testify in payee's behalf as to transaction with deceased indorsee; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 721, 85 N. W. 949, holding that one cannot testify to transactions with decedent tending to disprove loan to firm of which former is a member; *Sorensen v. Sorensen*, 56 Neb. 735, 77 N. W. 68, holding alleged widow incompetent to testify to conversation with decedent constituting common-law marriage, in contesting administrator's appointment; *Hoffmann v. Union Dime Sav. Inst.* 95 App. Div. 334, 88 N. Y. Supp. 686, holding in action by administrator of a bank depositor to recover deposit paid to depositor's attorney after depositor's death without his knowledge where attorney was not party to the action and could not be affected by judgment rendered therein, he was competent to testify to declarations by depositor; *Doty v. Doty*, 118 Ky. 212, 2 L.R.A.(N.S.) 715, 80 S. W. 803, 4 A. & E. Ann. Cas. 1064, holding that a guardian is entitled to compensation for services as such, and liable out of assets in his hands for costs of actions brought by him on behalf of his ward, do not prevent his being a competent witness for the ward in such actions, as to transactions with persons since deceased, whose contracts are sought to be enforced for ward's benefit.

Cited in note (15 L.R.A.(N.S.) 191) on admissibility of declarations of person since deceased against his or her own marriage.

Distinguished in *Johnson v. Cochrane*, 91 Hun, 168, 36 N. Y. Supp. 283, holding wife, who is party to action, cannot testify to conversation with testator, to sustain devise of realty to husband.

Judgments or pleadings in other actions as evidence.

Cited in *Millard v. Adams*, 1 Misc. 432, 21 N. Y. Supp. 424, holding judgment by default in third person's action against firm admissible to prove partnership.

Distinguished in *Roscoe Lumber Co. v. Standard Silica Cement Co.* 62 App. Div. 424, 70 N. Y. Supp. 1130, holding defendant's counsel asking on cross-examination if bill of particulars true does not render it admissible against defendant.

Evidence as to pedigree.

Cited in *Re Seabury*, 1 App. Div. 233, 37 N. Y. Supp. 308, holding declarations of deceased relations as to person's birth and parentage admissible; *Alston v. Alston*, 114 Iowa, 38, 86 N. W. 55, holding declarations of foster parents as to child's paternity admissible; *Arents v. Long Island R. Co.* 156 N. Y. 7, 50 N. E. 422, holding testimony as to death of children on information derived from deceased mother and general report, competent; *Washington v. Bank for Savings*, 171 N. Y. 175, 89 Am. St. Rep. 800, 63 N. E. 831, Affirming 65 App. Div. 341, 72

N. Y. Supp. 752, holding decedent's declarations that she never had children, admissible; *Re Rawson*, 29 Misc. 542, 61 N. Y. Supp. 1078, holding evidence of declarations of deceased members of family admissible to prove marriage; *Young v. Shulenberg*, 165 N. Y. 388, 80 Am. St. Rep. 730, 59 N. E. 135, holding on proof that deceased grantor member of family, recitals in deed admissible on question of pedigree; *State v. Marshall*, 137 Mo. 478, 36 S. W. 619 (dissenting opinion), majority holding prosecution in seduction action may testify as to age; *Layton v. Kraft*, 111 App. Div. 845, 98 N. Y. Supp. 72, holding evidence as to pedigree of declaration of persons who from their situation were likely to know, is admissible when the person making the declaration is dead; *Re Fail*, 56 Misc. 218, 107 N. Y. Supp. 224, holding on a proceeding for the probate of a will proof of declarations of the deceased, his wife and a deceased brother of the contestant that contestant was the son of a brother of decedent's wife is competent upon question of contestant's relationship to the deceased; *Young v. Shulenberg*, 31 N. Y. Civ. Proc. Rep. 370, holding declarations of deceased members of a family made ante litem motem are admissible to prove family relationship, including marriages, births and deaths, and facts necessarily resulting from those events; *Harvick v. Modern Woodmen*, 158 Ill. App. 577, holding that age of deceased person may be established by proof of declarations of deceased.

Cited in footnotes to *Young v. State*, 47 L. R. A. 548, which holds man's declarations as to own history and pedigree provable after his death for purpose of identification; *Re Pickens*, 25 L. R. A. 477, which holds admissible common reputation in family as to who are members of same; *Re Hurlburt*, 35 L. R. A. 794, which holds general reputation in family as to death of member not derived from deceased members of family inadmissible.

Cited in notes (41 L.R.A. 449) on entries in family Bible or other religious book as evidence; (36 L.R.A.(N.S.) 534) on admissibility of declarations of relatives upon issue of relationship or heirship; (11 Eng. Rul. Cas. 334) on admissibility of declarations of deceased persons on question of pedigree.

— When inadmissible.

Cited in *People v. Mayne*, 118 Cal. 520, 62 Am. St. Rep. 256, 50 Pac. 654, holding entry in Bible not admissible to show age of prosecutrix in rape case; *Bowen v. Preferred Acci. Ins. Co.* 68 App. Div. 344, 74 N. Y. Supp. 101, holding letter written to insured by deceased brother inadmissible to prove age, in action on accident policy; *People v. Miller*, 30 Misc. 358, 63 N. Y. Supp. 949, holding hearsay evidence as to death of first husband inadmissible on issue of validity of second marriage; *Wallace v. Syracuse Rapid Transit R. Co.* 42 App. Div. 538, 59 N. Y. Supp. 651, holding evidence of mare's reputed pedigree inadmissible in action for negligent-killing; *Rowan v. State*, 57 Tex. Crim. Rep. 629, 124 S. W. 668, holding when only issue in prosecution for rape was age of prosecutrix court erred in admitting a Bible entry made by her mother at date of her birth in corroboration of mother's testimony.

Distinguished in *Flora v. Anderson*, 75 Fed. 223, holding declarations of servant inadmissible on question of pedigree.

Hearsay evidence — Declarations against interest.

Cited in *Reed v. McCord*, 160 N. Y. 341, 54 N. E. 737, holding defendant's statements of facts attending accident, not based on personal knowledge, admissible against him; *Putnam v. Lincoln Safe Deposit Co.* 87 App. Div. 18, 83 N. Y. Supp. 1091, holding written declaration of trustee that securities in individual name of beneficiary belonged to trust estate, inadmissible against beneficiary's executor; *Maher v. Empire L. Ins. Co.* 110 App. Div. 726, 96 N. Y. Supp. 496, holding an admission which, on its face, purports to be mere hearsay and not a

matter of personal knowledge, is inadmissible as a declaration against interest.

Incompetency of witness under section 829 of Code.

Cited in *Re Blaine*, 143 App. Div. 691, 128 N. Y. Supp. 186, holding that wife of one who, if will be rejected, will become vested with fee title to one-third of decedent's land subject to widow's dower, is "person interested" under section 829 of code of civil procedure; *Re Herrington*, 73 Misc. 186, 132 N. Y. Supp. 486, holding that person claiming property by gift from testatrix prior to her death is not disqualified by section 829 of code as witness for executor in judicial settlement where he is charged with not including such property in account.

12 L. R. A. 843, *PEIL v. REINHART*, 127 N. Y. 381, 27 N. E. 1077.

Landlord's liability for defective premises.

Cited in footnote to *Fellows v. Gillhuber*, 17 L. R. A. 577, which holds lessor of hotel not liable for injury to guest by defective awning.

Cited in note (9 Eng. Rul. Cas. 458) on implied obligation of landlord to repair, and implied warranty of fitness of premises for purposes for which they are let.

Distinguished in *O'Dwyer v. O'Brien*, 13 App. Div. 573, 43 N. Y. Supp. 815, holding landlord of tenement not liable for defect in alley used by only one tenant; *Reissman v. Jacobowitz*, 22 Misc. 553, 49 N. Y. Supp. 1006, and *Miller v. Rinaldo*, 21 Misc. 471, 47 N. Y. Supp. 636, denying liability of landlord for fall of ceiling in tenant's apartment upon child; *Sanders v. Smith*, 5 Misc. 4, 25 N. Y. Supp. 125, holding landlord not liable to tenant for personal injuries resulting from failure to repair; *Leonard v. Gunther*, 47 App. Div. 195, 62 N. Y. Supp. 99, denying landlord's liability where one tenant lets water pipes freeze, flooding premises of another.

— Portions under landlord's control.

Cited in *Harris v. Boardman*, 68 App. Div. 440, 73 N. Y. Supp. 963, holding landlord liable for injury to tenant's goods from overflow of closet under his control; *Barman v. Spencer (Ind.)* 44 L. R. A. 819, 49 N. E. 9, holding landlord negligently leaving well uncovered liable to tenant's guest; *Indianapolis Abattoir Co. v. Temperly* 159 Ind. 654, 95 Am. St. Rep. 330, 64 N. E. 906, holding landlord, with knowledge of leak, liable for injury to tenant from explosion of gas piped to landlord's office; *Bryant v. Carr*, 52 Misc. 156, 101 N. Y. Supp. 646, holding a landlord, having control of the heating apparatus of demised premises, is liable for injuries to tenant's goods caused by negligent manner in which person employer by him does his work, whether such person employed is his servant or independent contractor.

Cited in note (14 L. R. A. 239) on responsibility of landlord for injuries resulting from defects in portions of building remaining in his possession.

— Portions used in common by several tenants.

Cited in *Dollard v. Roberts*, 130 N. Y. 273, 14 L. R. A. 242, 29 N. E. 104, holding landlord liable for injuries to occupant by plaster falling in tenement hallway; *Mahon v. Burns*, 13 Misc. 19, 68 N. Y. S. R. 162, 34 N. Y. Supp. 91, holding landlord's duty to keep hallway of tenement in condition for safe passage; *Wilber v. Follansbee*, 97 Wis. 581, 72 N. W. 741, holding landlord liable to tenant in apartment house for defect in hallway; *Wessel v. Gerken*, 36 Misc. 222, 73 N. Y. Supp. 192, holding landlord liable for fall of child caused by projecting screws in tenement stairway; *Lewin v. Pauli*, 19 Pa. Super. Ct. 450, holding landlord liable for failure to keep tenants' common stairway in repair; *Flood v. Huff*, 29 Misc. 353, 60 N. Y. Supp. 517, denying liability of landlord of tenement using reason-

able care to keep staircase safe; *Brady v. Valentine*, 3 Misc. 21, 21 N. Y. Supp. 776, holding landlord liable to visitor for defective tenement stairs; *Blake v. Fox*, 43 N. Y. S. R. 528, 17 N. Y. Supp. 508, holding landlord's duty to keep dumb-waiter in common use of tenants in repair; *Gallagher v. Button*, 73 Conn. 177, 46 Atl. 819, holding (*obiter*), landlord liable for defective fire-escape in common use of tenants; *Collier v. Collins*, 58 App. Div. 553, 69 N. Y. Supp. 94, holding landlord's liability to tenant for tilting of grating under entrance to common yard, for jury; *Canavan v. Stuyvesant*, 7 Misc. 118, 27 N. Y. Supp. 413, holding landlord liable for fall of child down uncovered airshaft in tenement yard; *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799, holding landlord liable for fall of rock in tenement back yard; *Burner v. Higman & S. Co.* 127 Iowa, 590, 103 N. W. 802; *Marcheck v. Klute*, 133 Mo. App. 287, 113 S. W. 654,—holding where a landlord leases separate portions of the same building to different tenants and reserves under his control those parts of the building used in common by all tenants, he is under an implied obligation to keep in safe condition the parts over which he reserves control.

Cited in notes (23 L.R.A. 156) on landlord's liability as to condition of part of premises not controlled by tenant; (3 L.R.A.(N.S.) 316) on liability of landlord for injury in common passageway.

Distinguished in *Muller v. Minken*, 5 Misc. 445, 26 N. Y. Supp. 801, denying liability of landlord of tenement for failure to light hallway; *Harkin v. Crumie*, 20 Misc. 571, 46 N. Y. Supp. 453, denying landlord's liability to tenant's visitor falling on ice in courtyard of apartment house; *Walsh v. Frey*, 116 App. Div. 528, 101 N. Y. Supp. 774, holding landlord not liable for injuries received by tenant from use of balcony otherwise than intended by landlord.

Contributory negligence, when question for jury.

Cited in *Walton v. Kane*, 4 Misc. 297, 23 N. Y. Supp. 1029, holding contributory negligence, of tenant falling on tenement stairway, for jury; *Karlson v. Healy*, 38 App. Div. 487, 56 N. Y. Supp. 361, holding contributory negligence of tenant of apartment house going upon roof to hang out clothes, for jury; *Schwartz v. Apple*, 21 Misc. 515, 48 N. Y. Supp. 253, holding tenant, knowing ceiling of room unsafe, negligent in continuing to occupy; *Goff v. Little Falls*, 47 N. Y. S. R. 731, 20 N. Y. Supp. 175, holding contributory negligence of person falling on icy sidewalk, for jury; *Richardson v. Syracuse*, 41 App. Div. 122, 58 N. Y. Supp. 487, holding contributory negligence of person stepping through hole in walk, for jury; *Simmons v. Peters*, 85 Hun, 97, 32 N. Y. Supp. 680, holding contributory negligence of employee walking into elevator shaft, for jury; *Wesener v. Smith*, 89 App. Div. 213, 85 N. Y. Supp. 837, holding negligence of one not looking out though knowing yard littered with rubbish, for jury; *Rashkoff v. Erie R. Co.* 141 App. Div. 629, 126 N. Y. Supp. 489, holding that cartman injured by fall of bags of merchandise piled in store house was not guilty of contributory negligence because he did not examine to discover danger, he not having been warned by warehouseman; *Lee v. Ingraham*, 106 App. Div. 169, 94 N. Y. Supp. 284, holding failure of tenant to light gas in hall before she attempted to descend stairs did not render her guilty of contributory negligence as matter of law; *Schell v. German Flats*, 54 Misc. 453, 104 N. Y. Supp. 116, holding under facts question of contributory negligence was for jury.

Evidence of condition of locality subsequent to accident.

Cited in *Tompert v. Hastings Pavement Co.* 35 App. Div. 581, 55 N. Y. Supp. 177, holding evidence of condition of street on morning after accident, competent.

Cited in note (32 L.R.A.(N.S.) 1121) on admissibility of evidence of con-

dition before and after accident of property whose defects alleged to have caused injury.

Distinguished in *Roe v. Crimmins*, 10 Misc. 717, 31 N. Y. Supp. 807, holding evidence of condition of trench in street on morning after accident, inadmissible.

When facts reviewable on appeal.

Cited in *Boyle v. Williams*, 1 Misc. 113, 48 N. Y. S. R. 652, 20 N. Y. Supp. 727; *Chaimson v. Menshing*, 12 Misc. 651, 33 N. Y. Supp. 271; *Bishop v. Hendrickson*, 42 N. Y. S. R. 37, 16 N. Y. Supp. 799,—holding facts not reviewable on appeal from judgment only.

Order granting new trial, when reviewable by court of appeals.

Cited in *Caponigri v. Altieri*, 164 N. Y. 479, 58 N. E. 667; *Bank of China v. Morse*, 168 N. Y. 471, 56 L. R. A. 144, 85 Am. St. Rep. 676, 61 N. E. 774; *Chapman v. Comstock*, 134 N. Y. 512, 31 N. E. 876,—holding general-term order granting new trial not reviewable by court of appeals unless order affirmed as to facts or appeal therefrom dismissed.

12 L. R. A. 845, *CARNWRIGHT v. GRAY*, 127 N. Y. 92, 24 Am. St. Rep. 424, 27 N. E. 835.

Agreements to pay money after promisor's death.

Cited in *Hegeman v. Moon*, 131 N. Y. 466, 30 N. E. 487, sustaining promissory note payable after maker's death; *Beatty v. Western College*, 177 Ill. 291, 42 L. R. A. 802, 69 Am. St. Rep. 242, 52 N. E. 432, sustaining validity of note to become due in event of maker's death before maturity; *Hopkins v. Marlette*, 47 N. Y. S. R. 916, 20 N. Y. Supp. 576, holding instrument promising to pay certain person or bearer, certain sum at death, valid note; *Hatch v. Gillette*, 8 App. Div. 607, 40 N. Y. Supp. 1016, sustaining claim founded on instrument requesting payment of sum at death to person named; *Durland v. Durland*, 83 Hun. 176, 31 N. Y. Supp. 596, holding assignment by husband to wife of bonds to be delivered after his decease, not testamentary disposition; *Edie v. Horn*, 42 Misc. 30, 85 N. Y. Supp. 535, raising, without deciding, question whether agreement to pay wife weekly sum for support during her life is effective after promisor's death; *Putnam v. Lincoln Safe Deposit Co.* 191 N. Y. 185, 83 N. E. 789, holding note containing provision to pay it "on day following my decease" a valid note and impliedly bound representatives to acknowledge the trust; *Augsbury v. Shurtliff*, 180 N. Y. 147, 72 N. E. 927, holding order executed by husband and wife directing individual deposits to be paid to survivor, absolute gift which took effect at death of either; *Re King*, 51 Misc. 379, 101 N. Y. Supp. 279, holding fact that money was to go to beneficiary only at death of maker of trust does not make it a testamentary disposition, the interest being vested at time of deposit for donee.

Cited in note (14 L. R. A. 860) on agreement to pay money or give property after death of promisor.

What instruments deemed promissory notes.

Cited in *Hickok v. Bunting*, 67 App. Div. 562, 73 N. Y. Supp. 967, same case of subsequent appeal, 92 App. Div. 169, 86 N. Y. Supp. 1059, holding instrument promising to pay certain sum with interest on or after certain date to order of payee, valid note; *Rice v. Rice*, 43 App. Div. 463, 60 N. Y. Supp. 97, holding instrument promising to pay certain sum when payee is twenty-one, not promissory note; *Equitable Trust Co. v. Newman*, 69 Misc. 500, 127 N. Y. Supp. 243, holding that instrument worded as follows "I promise to pay you or your order, first annual premium amounting to \$600 as follows etc." is promissory note.

Distinguished in *Bradt v. Krank*, 164 N. Y. 520, 79 Am. St. Rep. 662, 58 N. E.

657, holding written agreement to pay third party's debt on or before day named, not promissory note importing consideration.

When consideration presumed.

Cited in *Root v. Strang*, 77 Hun, 16, 28 N. Y. Supp. 273, and *Sprague v. Sprague*, 80 Hun, 286, 30 N. Y. Supp. 162, holding burden on defendant to prove want of consideration for promissory note; *Wells v. Monihan*, 35 N. Y. S. R. 496, 13 N. Y. Supp. 156, holding consideration of promissory note need not be expressed or proved; *Wilson v. Wilson*, 26 Or. 319, 38 Pac. 189, holding consideration for promissory note presumed though none expressed; *Yarwood v. Trusts & Guarantee Co.* 94 App. Div. 51, 87 N. Y. Supp. 947, raising, without deciding, question whether burden on defendant to show want of consideration for note promising to pay certain sum at death; *Ryan v. Sullivan*, 143 App. Div. 474, 128 N. Y. Supp. 632, to the point that recital in notes that they were given for value raises presumption of good consideration; *McGuire v. Murphy*, 107 App. Div. 106, 94 N. Y. Supp. 1005, holding delivery of savings bank pass book and an order for deposit "on producing my deposit book" imported a consideration; *Re Simmons*, 48 Misc. 486, 96 N. Y. Supp. 1103, holding where note recites a consideration upon its face the burden of showing want of consideration is upon party alleging it; *Taylor v. Taylor*, 138 Mich. 662, 101 N. W. 832; *Gilpin v. Savage*, 60 Misc. 610, 112 N. Y. Supp. 802; *Pfister v. Heins*, 136 App. Div. 461, 121 N. Y. Supp. 173,—holding it is presumed that a negotiable instrument was delivered for a valuable consideration; *Hamilton v. Hamilton*, 127 App. Div. 874, 112 N. Y. Supp. 10, holding "for value received" in instrument imported a consideration.

Distinguished in *Deyo v. Thompson*, 53 App. Div. 12, 65 N. Y. Supp. 459, holding non-negotiable note does not import consideration; *Johannessen v. Munroe*, 84 Hun, 599, 32 N. Y. Supp. 863, holding in action on special letter of credit consideration must be proved; *Barondess v. Kaminsky*, 38 Misc. 763, 78 N. Y. Supp. 1108, holding words "value received" in note sufficiently prove consideration.

What instruments negotiable.

Cited in *D'Esterre v. Brooklyn*, 90 Fed. 589, holding municipal bonds payable in blank negotiable.

Cited in note (27 L.R.A.(N.S.) 1019, 1020) on negotiability of note payment of which depends on termination of life.

Presumption of delivery of promissory note from possession.

Cited in *Moak v. Stevens*, 45 Misc. 149, 91 N. Y. Supp. 903, holding ordinarily the possession and production of a promissory note will raise a presumption of delivery.

12 L. R. A. 848, *COLVILLE v. MILES*, 127 N. Y. 159, 24 Am. St. Rep. 433, 27 N. E. 809.

Lessor's rights as against lessee's creditors.

Cited in *Marshall v. Luiz*, 115 Cal. 625, 47 Pac. 597, holding lease containing stipulation against removal of hay, quantity remaining to be purchased by lessor, creates no lien against bona fide mortgagee.

Distinguished in *Osmun v. Barker*, 92 Hun, 609, 38 N. Y. Supp. 43, by Ward, J., dissenting, who holds landlord entitled to wheat straw under farm lease may replevy from tenant's mortgagee; *Neubauer v. Gabriel*, 86 Wis. 206, 56 N. W. 733, holding chattel mortgage by lessee of property leased, invalid.

Right of tenant to crops grown on leased premises.

Cited in *Munier v. Zachary*, 138 Iowa, 223, 18 L.R.A.(N.S.) 574, 114 N. W.

525, 16 A. & E. Ann. Cas. 526, holding tenant owner of crops produced on leased premises and landlord has no right or title thereto nor interest therein, save as he may have a lien.

Cited in note (18 L.R.A.(N.S.) 572) on right of tenant to remove straw or manure.

12 L. R. A. 852, ATLANTA v. FIRST PRESBY. CHURCH, 86 Ga. 730, 13 S. E. 252.

Exemption from assessment for local improvements.

Cited in *Erie v. School District*, 17 Pa. Super. Ct. 39, holding school district not liable for paving assessment; *Board of Improvement v. Little Rock School District*, 56 Ark. 357, 16 L. R. A. 420, 35 Am. St. Rep. 109, 19 S. W. 969, holding public schoolhouses not liable to assessment for local improvements; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 379, 94 Am. St. Rep. 301, 90 N. W. 1006, holding public square containing county buildings liable to special paving assessment; *City Street Improv. Co. v. University*, 153 Cal. 781, 18 L.R.A. (N.S.) 455, 96 Pac. 801, holding an assessment for a street improvement by which lands held in trust for state university, which are not in actual use for school purposes, are benefited in value, may be enforced against such lands, the same as against the property of a private owner; *Lagrange v. Troup Co.* 132 Ga. 385, 64 S. E. 267, 16 A. & E. Ann. Cas. 885, holding city cannot assess public property without authority thereto; *Wey v. Salt Lake City*, 35 Utah, 507, 101 Pac. 381, holding constitutional provision declaring property not exempted under laws of United States or state constitution shall be taxed does not apply to special assessments.

Cited in footnote to *Zabel v. Louisville Baptist Orphans' Home*, 13 L. R. A. 668, which holds street assessment not within exemption of charitable institution from "all taxation."

Cited in notes (35 L.R.A. 34, 36) on liability to local assessments for benefits of property exempt from general taxation; 3 L.R.A.(N.S.) 837) on special assessment as tax; (33 Am. St. Rep. 411, 412; 132 Am. St. Rep. 302) on exemption from local assessments of lands owned by governmental bodies, or in which they have an interest.

Church property, private property.

Cited in *Macon & A. R. Co. v. Riggs*, 87 Ga. 159, 13 S. E. 312, holding church property subject to condemnation for railway.

12 L. R. A. 856, FARRIOR v. NEW ENGLAND MORTG. SECUR. CO. 92 Ala. 176, 9 So. 532.

Effect of change in judicial construction of statute.

Cited in *Jones v. Woodstock Iron Co.* 95 Ala. 563, 10 So. 635, holding proceedings to acquire legal title governed by former decision under which instituted, since overruled; *St. Louis, O. H. & C. R. Co. v. Fowler*, 142 Mo. 687, 44 S. W. 771, holding change in judicial construction does not affect rights acquired under former decision; *State v. O'Neil*, 147 Iowa, 527, 33 L.R.A.(N.S.) 796, 126 N. W. 454, Ann. Cas. 1912B, 691, holding that person cannot be punished for selling liquor at time when prohibitory law is decided to be unconstitutional, although court changes its opinion subsequently; *Norwood v. L. & N. R. Co.* 149 Ala. 163, 42 So. 683; *Crigler v. Shepler*, 79 Kan. 837, 23 L.R.A.(N.S.) 504, 101 Pac. 619; *Hill v. Atlantic & N. C. R. Co.* 143 N. C. 580, 9 L.R.A.(N.S.) 625, 55 S. E. 854,—holding after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself.

Cited in notes (16 L.R.A. 647) on change of decision of state court as un-

constitutional impairment of contract; (5 L.R.A.(N.S.) 862; 44 L. ed. U. S. 886) on same point.

Distinguished in *Yazoo & M. Valley R. Co. v. Adams*, 81 Miss. 120, 32 So. 937, holding erroneous decisions as to constitutionality of exemption, rendered after purchase of railroad, do not prevent assertion of claim for back taxes; *Gross v. Whitley County*, 158 Ind. 536, 58 L. R. A. 396, 64 N. E. 25, holding public officer cannot collect salary under earlier act for time during which later act held unconstitutional.

Disapproved in *Storrie v. Cortes*, 90 Tex. 289, 35 L. R. A. 669, 38 S. W. 154, holding rights acquired on faith of earlier, may be invalidated by later, decision.
Separate estate of wife.

Cited in note (69 L.R.A. 374) on creation of separate estate by conveyance from husband to wife.

12 L. R. A. 859, *KILGORE v. RICH*, 83 Me. 305, 23 Am. St. Rep. 780, 22 Atl. 176.

What are necessities.

Cited in footnotes to *Fisher v. Shea*, 61 L. R. A. 567, which holds defense of suit against policeman for assault while acting in line of duty, within exception of claims for necessities in statute prohibiting garnishment of wages; *Peacock v. Linton*, 53 L. R. A. 192, which denies liability for tutoring minor son during vacation; *Crafts v. Carr*, 60 L. R. A. 128, which holds services of attorney in prosecuting for infant action for damages for indecent assault on her, necessities.

Infant's liability for necessities.

Cited in footnotes to *Gregory v. Lee*, 25 L. R. A. 618, which holds minor leasing rooms while attending college bound to pay for same as necessary *only* while occupying same; *Goodman v. Alexander*, 55 L. R. A. 781, which authorizes recovery against infant for food and lodging without alleging that defendant an orphan; *Burton v. Anthony*, 68 L.R.A. 826, which holds that no lien will be imposed on property of minor in favor of one advancing money at his request to redeem from mortgage sale, notwithstanding his agreement for such lien.

Cited in note (15 L. R. A. 211) on infant's right to repudiate contract for services and sue on *quantum meruit*.

12 L. R. A. 862, *PHILLIPS v. MADRID*, 83 Me. 205, 23 Am. St. Rep. 770, 22 Atl. 114.

Extraterritorial effect of prohibition against remarriage of divorced persons.

Cited in *Frame v. Thormann*, 102 Wis. 673, 79 N. W. 39, holding state statute prohibiting marriage of guilty party divorced does not affect validity of marriage elsewhere; *State v. Yoder*, 113 Minn. 505, — L.R.A.(N.S.) —, 130 N. W. 10, to the point that statute prohibiting divorced person from remarrying is effective only in state enacting it.

Cited in notes (24 L. R. A. 831, 832) on effect of statutes forbidding remarriage of guilty party after divorce; (57 L. R. A. 170) on conflict of laws as to validity of marriage; (19 L. R. A. 816) on validity of decree of divorce obtained on publication or service out of state, where defendant did not appear; (60 Am. St. Rep. 941, 944) on validity of foreign marriage in violation of laws of place where parties reside; (79 Am. St. Rep. 368) on extraterritorial force of law against remarriage of divorced persons.

Conflict of laws.

Cited in note (17 L. R. A. 85) on supremacy of state or nation over devolution.

12 L. R. A. 864, *STOWERS v. POSTAL TELEG. CABLE CO.* 68 Miss. 559, 24 Am. St. Rep. 290, 9 So. 356.

Additional burdens on highway entitling abutter to compensation.

Cited in *East Tennessee Teleph. Co. v. Russellville*, 106 Ky. 670, 51 S. W. 308; *Bronson v. Albion Teleph. Co.* 67 Neb. 115, 60 L. R. A. 428, 93 N. W. 201; *Donovan v. Allert*, 11 N. D. 296, 58 L.R.A. 780, 91 N. W. 441; *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 108, 50 L.R.A. 304, 81 N. W. 1041,—holding telephone line in street additional servitude; *Alabama & V. R. Co. v. Bloom*, 71 Miss. 252, 15 So. 72, upholding abutting owner's right to compensation for construction of railroad in street, though fee in public; *Hazlehurst v. Mayes*, 84 Miss. 11, 64 L.R.A. 806, 36 So. 33, denying abutter's right of action for necessary trimming of trees in highway in installing municipal electric lighting system; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 550, 28 L.R.A. 315, 51 Am. St. Rep. 543, 63 N. W. 111 (dissenting opinion), majority holding telephone line on rural highway not additional servitude; *Slaughter v. Meridan Light & R. Co.* 95 Miss. 273, 25 L.R.A.(N.S.) 1272, 48 So. 6, holding that railway track leaving only room for wagon between car and curb is additional servitude entitling abutter to damages; *McCann v. Johnson County Teleph. Co.* 69 Kan. 225, 66 L.R.A. 180, 76 Pac. 870, 2 A. & E. Ann. Cas. 156 (dissenting opinion), as to telephone line being an additional burden; *Yazoo & M. Valley R. Co. v. Lefoldt*, 87 Miss. 320, 39 So. 459, holding municipality cannot authorize a railroad company to raise grade of a street to the damage of abutting lots freed from liability to owners of such lots; *Brown v. Asheville Electric Co.* 138 N. C. 542, 69 L.R.A. 636, 107 Am. St. Rep. 554, 51 S. E. 62, holding authority granted by a city to defendant electric company to remove a shade tree in front of plaintiff's home in order to put up its poles and wires does not justify the act of defendant in removing tree, the city having no power to deprive plaintiff of his property without compensation.

Cited in notes (17 L. R. A. 480) on what use of street or highway constitutes an additional burden; (24 L. R. A. 721) on telegraph or telephone poles as additional burden on highway; (28 Am. St. Rep. 233) on telegraph and telephone wires in streets and highways across private property; (106 Am. St. Rep. 262, 263) on what are additional servitudes in highways.

Not followed in *Magee v. Overshiner*, 150 Ind. 138, 40 L. R. A. 374, 65 Am. St. Rep. 358, 49 N. E. 951, denying abutting owner's right to compensation for telephone line in street; *Frazier v. East Tennessee Teleph. Co.* 115 Tenn. 419, 3 L.R.A.(N.S.) 325, 112 Am. St. Rep. 856, 90 S. W. 620, 5 A. & E. Ann. Cas. 838, holding same.

Right to flow of stream as easement.

Cited in *Richardson v. Mississippi Levee Comrs.* 77 Miss. 536, 26 So. 963, raising, without deciding, question whether right to have waters of stream flow in accustomed channel easement for taking which compensation must be made.

Injunction against obstruction of highway.

Cited in *Louisville & N. R. Co. v. Mobile J. & K. C. R. Co.* 124 Ala. 166, 26 So. 895, holding unauthorized construction of railroad in street may be enjoined.

Power of municipality to grant right to use streets.

Distinguished in *Southern Bell Teleph. & Teleg. Co. v. Mobile*, 162 Fed. 530, holding a city having by its charter power to regulate sidewalks, streets and avenues and appurtenances thereto has implied power to authorize telephone company to use streets.

the first of these was the establishment of a new government, which was to be based on the principles of liberty and justice for all.

The second was the establishment of a new system of education, which was to be based on the principles of reason and science. This was to be done by the establishment of a new system of schools, which were to be open to all children, regardless of their social class or religious beliefs.

The third was the establishment of a new system of justice, which was to be based on the principles of fairness and equality. This was to be done by the establishment of a new system of courts, which were to be open to all citizens, regardless of their social class or religious beliefs.

The fourth was the establishment of a new system of economy, which was to be based on the principles of free trade and competition. This was to be done by the establishment of a new system of laws, which were to be open to all citizens, regardless of their social class or religious beliefs.

The fifth was the establishment of a new system of culture, which was to be based on the principles of art and literature. This was to be done by the establishment of a new system of schools, which were to be open to all children, regardless of their social class or religious beliefs.

L. R. A. CASES AS AUTHORITIES.

CASES IN 13 L. R. A.

13 L. R. A. 33, BENNETT v. AMERICAN EXP. CO. 83 Me. 236, 23 Am. St. Rep. 774, 22 Atl. 159.

Duty of carrier as to transportation.

Cited in *State v. J. W. Kelly & Co.* 123 Tenn. 564, 36 L.R.A.(N.S.) 173, 133 S. W. 1011, holding sale in response to mail order completed at time goods are delivered for transportation to carrier which then owes duty of transporting them.

Excuse for nondelivery by carriers.

Cited in *Swiney v. American Exp. Co.* 144 Iowa, 345, 115 N. W. 212, holding that carrier is insurer of goods accepted for transportation, except as to loss as result of act of God or public enemy.

Cited in notes (24 Am. St. Rep. 816) on conversion by carrier; (34 Am. St. Rep. 736) on common carriers and adverse claimants; (21 L.R.A.(N.S.) 731) on action of authorities under police power as defense to carrier for delay or nondelivery of freight; (33 L.R.A.(N.S.) 692) on right to assert against bailor, hostile, adverse, paramount title of third person.

Illegal possession of game.

Cited in *State v. Swett*, 87 Me. 113, 29 L. R. A. 717, 47 Am. St. Rep. 306, 32 Atl. 806, holding common carrier not liable to statutory penalty for having in his possession "short lobsters," without knowledge of fact; *State v. Bucknam*, 88 Me. 393, 34 Atl. 170, holding person collecting by purchase or otherwise, and having in his possession, carcasses of 89 deer in open season, not within statute imposing penalty upon person who "shall take, kill, destroy, or have in possession" more than three deer.

Construction of statutes.

Cited in *Gray v. Cumberland County*, 83 Me. 437, 22 Atl. 376, holding amendment to statute carries with it by implication reference to and adoption of provisions to which it is amendatory.

Cited in notes (14 Eng. Rul. Cas. 832) on rules for interpretation of statute; (78 Am. St. Rep. 249) on acts which legislature may declare criminal.

Interstate commerce.

Cited in *People v. Fargo*, 137 App. Div. 730, 122 N. Y. Supp. 553, to the point that game may be subject of interstate commerce.

Cited in notes (13 L.R.A. 804) on game laws as affecting interstate commerce; (27 Am. St. Rep. 558) on state regulation of interstate commerce; (26 Am. St. Rep. 579) on jurisdiction of Congress over interstate commerce.

13 L. R. A. 37, *ELLIOT v. FESSENDEN*, 83 Me. 197, 22 Atl. 115.

Construction of term "relatives."

Cited in *Lavigne v. Ligue des Patriotes*, 178 Mass. 29, 54 L. R. A. 816, 86 Am. St. Rep. 460, 59 N. E. 674, holding illegitimate daughter not within statute permitting payment of mortuary benefit to "children, relatives of, or persons dependent" upon, member; *Wapello County v. Eikelberg*, 140 Iowa, 738, 117 N. W. 978, on the technical construction of the words "relations" and "relatives" as meaning those connected by ties of blood.

Cited in note (14 L. R. A. 342) on who are relatives and relations.

Disposition of lapsed legacy.

Cited in *Merrill v. Hayden*, 86 Me. 136, 29 Atl. 949, holding proceeds of lapsed legacy descends to heirs as undivided estate.

13 L. R. A. 38, *KANSAS CITY, M. & B. R. CO. v. RILEY*, 68 Miss. 765, 24 Am. St. Rep. 309, 9 So. 443.

Liability for ejection of passenger.

Followed in *Illinois C. R. Co. v. Reid*, 93 Miss. 471, 17 L.R.A.(N.S.) 348, 46 So. 146, holding that pre-emptory refusal of conductor to listen to passenger's explanations constitutes wilfulness which warrants punitive damages for subsequent wrongful ejection.

Cited in *Alabama & V. R. Co. v. Holmes*, 75 Miss. 389, 23 So. 187, holding railroad liable for ejection of passenger receiving wrong ticket from connecting carrier, where passenger's explanation to conductor confirmed by baggage check and waybill; *Cleveland, C. C. & St. L. R. Co. v. Beckett*, 11 Ind. App. 550, 39 N. E. 429, holding ejection of passenger for refusal to pay additional fare required of one without ticket, not justified by fact that conductor acted within rules; *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 174, 41 N. E. 712, holding where mistake in ticket is fault of railroad, and situation explained to conductor, passenger entitled to damages for ejection from train; *Illinois C. R. Co. v. Harper*, 83 Miss. 569, 64 L. R. A. 286, footnote p. 283, 35 So. 764, holding conductor bound to listen to explanation of passenger with ticket not specifying route, as to ticket seller's directions; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351, holding railroad issuing defective ticket, liable for expulsion of passenger, although conductor acted according to rule of company; *Muckle v. Rochester R. Co.* 79 Hun, 37, 29 N. Y. Supp. 732, holding street railway liable for ejection of passenger without fault presenting transfer past time, and refusing to pay fare; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 159, 100 Am. St. Rep. 261, 66 N. E. 950, holding street railroad liable for ejection of passenger receiving wrong transfer; *Appleby v. St. Paul City R. Co.* 54 Minn. 171, 40 Am. St. Rep. 308, 55 N. W. 1117, holding where street car taken off before reaching passenger's destination, and he took next passing car as directed, railway company liable for ejection for refusal to pay fare; *Alabama & V. R. Co. v. Drummond*, 73 Miss. 819, 20 So. 7, holding passenger receiving second-class ticket by mistake of agent, and submitting to change of cars without explanation to conductor, or offer to pay difference in fare, entitled to nominal damages only; *Morrill v. Minneapolis Street R. Co.* 103 Minn. 380, 123 Am. St. Rep. 341, 115 N. W. 395, holding that fact that conductor acted within company's rule does not excuse carrier for wrongful objection of passenger holding defective ticket; *Illinois C. R. Co. v. Gortikov*, 90 Miss. 805, 14 L.R.A.(N.S.) 467, 122 Am. St. Rep. 324, 45 So. 365, holding it the duty of conductor to listen to explanation of passenger as to mistake in date made by ticket agent.

Cited in footnotes to *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds

carrier liable for ejection of passenger whose round-trip ticket unstamped from inability to find agent; *Mahoney v. Detroit Street R. Co.* 18 L. R. A. 335, which authorizes ejection of one refusing to pay fare, without having previously obtained transfer; *United R. & Electric Co. v. Hardesty*, 57 L. R. A. 275, which denies carrier's duty to accept coupon detached from commutation book; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, which holds face of ticket conclusive evidence to conductor as to terms of contract; *Illinois C. R. Co. v. Harper*, 64 L.R.A. 283, which holds right to eject passenger from train on route which ticket agent directed her to take because of regulations unknown to her requiring taking of another route; *Texas & Pacific R. Co. v. Payne*, 70 L.R.A. 946, which holds refusal of agent at intermediate terminal to make necessary indorsement on return trip ticket "because his instructions were different" not final breach of contract by carrier so as to preclude recovery by passenger for damages from subsequent ejection.

Cited in note (61 Am. St. Rep. 102) on who are passengers and when they become such.

Distinguished in *Mitchell v. Southern R. Co.* 77 Miss. 925, 27 So. 834, holding conductor not required to accept uncorroborated explanation of passenger presenting expired ticket, that delay due to action of railroad.

Punitive damages.

Cited in *Yazoo & M. Valley R. Co. v. Hardie*, — Miss. —, 34 L.R.A.(N.S.) 749, 55 So. 967, to the point that where there is any testimony upon which punitive damages can be based jury should determine.

Reasonable railway regulations.

Cited in footnote to *Watson v. Louisville & N. R. Co.* 49 L. R. A. 454, which holds condition requiring return coupon of round-trip ticket to be stamped, reasonable.

13 L. R. A. 40, *ENGLISH v. DICKEY*, 128 Ind. 174, 27 N. E. 495.

Election contests; statutes of limitation.

Cited in *Falltrick v. Sullivan*, 119 Cal. 614, 51 Pac. 947, holding under statute permitting adjournments of election contest "from day to day," jurisdiction not lost by court's adjournment, on own motion, for six days.

Cited in footnote to *Gillespie v. Dion*, 33 L. R. A. 703, which holds statement in election contest cannot be amended after statutory period for commencing proceeding, by alleging qualification of contestant.

Computations of time.

Cited in *Backer v. Pyne*, 130 Ind. 295, 30 Am. St. Rep. 231, 30 N. E. 21, holding day of sale excluded from computation of time for redemption from sheriff's sale; *Yocum v. First Nat. Bank*, 144 Ind. 276, 43 N. E. 231, holding intervening Sundays included in computation of time for sessions of county board of review; *Van Laer v. Kansas Triphammer Brick Works*, 56 Kan. 548, 43 Pac. 1134, holding intervening Sundays included in computation of time for filing motion for new trial.

Cited in footnote to *Occumpaugh v. Norton*, 68 L.R.A. 272, which holds that aggregate of half holidays shall be added in computing time for taking appeals under statute excluding holidays from number of days specified.

Dismissal.

Cited in *Lyon v. Barnes*, 133 Iowa, 720, 111 N. W. 9, holding dismissal imports the same as discontinuance on sending the case out of court and while disposing of the case does not necessarily terminate the controversy; *Hadwin v. Southern R. Co.* 67 S. C. 466, 45 S. E. 1019, holding that a dismissal of com-

plaint is the same as a nonsuit or involuntary discontinuance within the per-view of the statute on payment of costs.

13 L. R. A. 43, CARROLL v. SWEET, 128 N. Y. 19, 27 N. E. 763.

Negotiable paper; when operates as payment.

Cited in *Williams v. Brown*, 53 App. Div. 487, 65 N. Y. Supp. 1049, and *Greenwich Ins. Co. v. Oregon Improv. Co.* 76 Hun, 199, 27 N. Y. Supp. 794, holding check conditional payment only, in absence of agreement to take in absolute satisfaction; *Sage v. Burton*, 84 Hun, 270, 32 N. Y. Supp. 338, holding check accepted in settlement of account, and subsequently paid, is release of liability; *Morris v. Hefferberth*, 81 App. Div. 523, 81 N. Y. Supp. 403 (dissenting opinon), majority holding check given agent in settlement of account, and indorsed and collected by agent, releases debtor; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun, 323, 33 N. Y. Supp. 482, raising, without deciding, whether antecedent debt paid by taking notes.

Cited in note (35 L.R.A.(N.S.) 30) on payment by commercial paper.

Distinguished in *Carter, R. & Co. v. Howard*, 17 Misc. 384, 39 N. Y. Supp. 1060, holding simultaneous judgments upon original debt and against maker of indorsed note, accepted in payment, not merger of note as to indorser.

Duty to make due presentment for payment.

Cited in *Schmidt v. Hoffman*, 18 Misc. 226, 41 N. Y. Supp. 477, holding party accepting indorsed note as payment conditionally assumes duty of presenting it for payment at maturity.

Cited in footnote to *Edminsten v. Herpolsheimer*, 59 L. R. A. 934, which requires check to be presented not later than day after receipt, to hold drawer liable.

Effect of delay in presenting for payment.

Reaffirmed on subsequent trial in 9 Misc. 383, 30 N. Y. Supp. 204, holding indorser discharged from original liability as well as on check, by delay in its presentation.

Cited in *Martin v. Home Bank*, 160 N. Y. 196, 54 N. E. 717, Affirming 30 App. Div. 502, 52 N. Y. Supp. 464, holding failure of bank, receiving check from depositor, to present it for payment within reasonable time, operates to discharge drawer and indorser; *Kirkpatrick v. Puryear*, 93 Tenn. 418, 22 L. R. A. 789, 24 S. W. 1130, holding failure to make due presentment of check of third party, accepted as absolute payment, releases debtor as to both check and original indebtedness; *Morris v. Eufaula Nat. Bank*, 122 Ala. 587, 82 Am. St. Rep. 95, 25 So. 499, holding as between holder and drawer of check, delay in presentment does not discharge drawer, unless loss to him has resulted; *Travers v. T. M. Sinclair & Co.* 122 Ill. App. 207, holding endorser discharged from liability on check by unreasonable delay though he suffered no actual damage thereby; *Kramer v. Grant*, 60 Misc. 111, 111 N. Y. Supp. 709, holding failure to deposit for collection or present for payment within 24 hours after receipt discharges maker of check where he is injured by delay; *Hayward v. Empire State Sugar Co.* 105 App. Div. 24, 93 N. Y. Supp. 449, holding failure to present renewal note to maker for payment at maturity discharges accommodation endorser from liability on both note and interest assuming that note would have been paid if properly presented; *Start v. Tupper*, 81 Vt. 21, 15 L.R.A.(N.S.) 214, 130 Am. St. Rep. 1015, 69 Atl. 151, holding that failure of due presentment and notice will discharge endorser on check in all cases except where he passes check with knowledge that there will be no funds to meet it on due presentment.

Cited in note (22 L. R. A. 785) on release of indorser of check by delay in presenting it.

Necessity of demand for payment in cases of insolvency.

Cited in *O'Neill v. Meighan*, 32 Misc. 516, 66 N. Y. Supp. 313, holding mere insolvency of maker of note not sufficient reason for failure to present for payment within reasonable time; *Kelly v. Theiss*, 65 App. Div. 148, 72 N. Y. Supp. 467, holding failure to present note, and give notice of dishonor, until five days after due, discharges indorsers, although maker insolvent.

Due presentment.

Cited in *Gordon v. Levine*, 194 Mass. 421, 10 L.R.A.(N.S.) 1155, 120 Am. St. Rep. 565, 80 N. E. 505, 10 A. & E. Ann. Cas. 1119, holding six days are unreasonable delay in presentment of check drawn in a city on a bank thereof and then delivered, causing loss to fall on the holder; *Dehoust v. Lewis*, 128 App. Div. 132, 112 N. Y. Supp. 559, holding failure to present check before close of business hours of day following its receipt an unreasonable delay discharging drawer to extent of his loss; *Zaloom v. Ganin*, 72 Misc. 40, 129 N. Y. Supp. 85, holding that presentation of check the second day after date is within reasonable time where it was made after banking hours of day it is dated; *Dehoust v. Lewis*, 128 App. Div. 133, 112 N. Y. Supp. 559, holding that the fact that check is indorsed to third person does not extend period of reasonable time as between drawer and payee.

13 L. R. A. 46, *HEATH v. HEWITT*, 127 N. Y. 166, 24 Am. St. Rep. 438, 27 N. E. 959.

Construction of term "heirs."

Cited in *Wood v. Taylor*, 9 Misc. 643, 30 N. Y. Supp. 433, construing word "heirs" to mean "children" in conveyance to grantee named, and at his decease to go "to his own lawful heirs;" *Walsh v. Walsh*, 66 Hun, 301, 20 N. Y. Supp. 935, holding under by-law of benefit association making certificate payable to "legal heirs," proceeds to go to persons entitled to property of deceased in case of intestacy; *Canfield v. Fallon*, 43 App. Div. 565, 57 N. Y. Supp. 149, Affirming 26 Misc. 348, 57 N. Y. Supp. 149, holding in devise of life estate to one, with remainder to his heirs, word "heirs" to be construed to mean children of life tenant; *Seymour v. Bowles*, 172 Ill. 526, 50 N. E. 122, construing deed to specified person and her "minor heirs" as giving estate in remainder to grantee's "minor children;" *Tinder v. Tinder*, 131 Ind. 386, 30 N. E. 1077, construing deed to living grantee and "heirs" by husband named as vesting present estate in grantee and her children; *Gilliam v. Guaranty Trust Co.* 111 App. Div. 660, 97 N. Y. Supp. 758, holding that a deed of trust for life then to life tenants "heirs at law" gives the remainder to heirs at law at time of death and not to those who would be heirs had donee died at time of deed; *Roberson v. Wampler*, 104 Va. 383, 1 L.R.A.(N.S.) 320, 51 S. E. 835, construing the word "heirs" in a deed to heirs of a living person to mean "children" if supporting intent can be found from circumstances or other language; *Griffin v. Fairmont Coal Co.* 59 W. Va. 533, 2 L.R.A.(N.S.) 1140, 53 S. E. 24 (dissenting opinion) on construction of "heirs" in deed to heirs of living person as meaning "children;" *Fullagar v. Stockdale*, 138 Mich. 367, 101 N. W. 576, holding in a deed to remarried "daughter, her husband, her heirs and the heirs and assigns of party of second part" the words "her heirs" to mean her two "children" then living; *Wallace v. Diehl*, 202 N. Y. 159, 33 L.R.A.(N.S.) 14, 95 N. E. 646, holding that devise of life estate, with power to bequeath property upon death of life tenant to such of testator's

heirs as life tenant may prefer, confines selection to testator's legal or actual heirs, at time of death of life tenant.

Cited in footnotes to *Gannon v. Peterson*, 55 L. R. A. 701, which authorizes court to read interchangeably words "heirs," "issue," and "children," used indiscriminately by testator; *Hindry v. Holt*, 39 L. R. A. 351, which holds right of action for death limited to lineal descendants by words "heir or heirs" in statute; *Drake v. Drake*, 17 L. R. A. 664, which construes words "lawful issue" as embracing grandchild; *Mullen v. Reed*, 24 L. R. A. 664, which holds widow not an heir at law.

Cited in note (14 Eng. Rul. Cas. 802) on construing deed so as to take effect if possible.

Construction of deed to "children."

Cited in *Yarbrough v. Whitman*, 50 Tex. Civ. App. 395, 110 S. W. 471, holding that deed to married woman "and to her children jointly" is conveyance to woman and to each of her children, share and share alike.

Distinguished in *Blackburn v. Blackburn*, 109 Tenn. 679, 73 S. W. 109, construing deed to daughter "and her children, forever," as giving after-born children shares in remainder, grantor's intention so appearing.

Construction favoring vesting of estate.

Cited in *Shaw v. English*, 40 Misc. 39, 81 N. Y. Supp. 169, construing devise of remainder to children of life tenant living at his death as vesting fee in child dying before life tenant.

Interpretation of ambiguous instruments.

Cited in *Blumer v. Dyer*, 84 Hun, 93, 32 N. Y. Supp. 78, and *Dexter v. Beard*, 130 N. Y. 556, 29 N. E. 983, holding when contract or deed ambiguous, intention of parties to be ascertained by considering instrument with reference to circumstances surrounding execution, situation of parties, and subject-matter.

13 L. R. A. 50, *NALLE v. PAGGI*, 81 Tex. 201, 16 S. W. 932.

Liability for cost of party wall.

Cited in footnotes to *Lincoln v. Burrage*, 52 L. R. A. 110, which holds grantee's promise to pay part of cost of party wall when used does not run with land; *Swift v. Calnan*, 37 L. R. A. 462, which sustains right to recover on agreement to pay half of expense of party wall on using same; *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall expressly declared to run with land; *Clemens v. Speed*, 19 L. R. A. 240, which denies to party-wall owners reciprocal easement from support of buildings.

Cited in notes (66 L.R.A. 692, 705) on enforcement of obligation to contribute to cost of party walls, by or against grantees or successors in title; (89 Am. St. Rep. 940, 943) on party walls.

Distinguished in *Arnold v. Chamberlain*, 14 Tex. Civ. App. 640, 39 S. W. 201, holding contract in writing fixing cost of party wall, and creating lien on lot for one-half of cost, when duly recorded, is binding as against subsequent grantee; *Hurford v. Smith*, 24 Okla. 453, 103 Pac. 851, holding that under agreement by owners of adjoining lot that one would pay for one-half interest in wall on line, when such person or his successors joined to such wall, payment was due when he or his successors used wall.

Party-wall — use.

Cited in *Bellenot v. Laube*, 104 Va. 847, 52 S. E. 698, holding a party wall to be a dividing wall between two houses and subject to use and extension upward by either party.

13 L. R. A. 52, *BAXTER NAT. BANK v. TALBOT*, 154 Mass. 213, 28 N. E. 163.

Conflict of laws as to contracts.

Cited in *Cooke v. Addicks*, 6 Pa. Super. Ct. 118, holding rule of state where note is made, that irregular indorsement may be shown by parol to be contract of suretyship, will be enforced in state where action brought; *Atwood v. Walker*, 179 Mass. 519, 61 N. E. 58, holding damages for breach of contract made in New York, for conveyance of real estate in Massachusetts, delivery of deed and payment of money to be made in former state, governed by law of New York; *Limerick Nat. Bank v. Howard*, 71 N. H. 17, 93 Am. St. Rep. 489, 51 Atl. 641, holding sufficiency of indorsee's knowledge of fraud of payee in obtaining note to constitute defense, determined by law of place of contract; *Nashua Sav. Bank v. Sayles*, 184 Mass. 522, 100 Am. St. Rep. 573, 69 N. E. 309, holding liability of indorser of renewal note sent with check to take up prior note, governed by law of creditor's state; *Seely v. Manhattan L. Ins. Co.* 72 N. H. 56, 55 Atl. 425, raising, without deciding, question whether affidavit of mailing notice required to forfeit policy, admissible under law of state where policy issued, is admissible in state where action brought.

Cited in footnote to *Gipps Brewing Co. v. De France*, 28 L. R. A. 386, which holds sale of beer shipped into Iowa, an Iowa contract, where agreement fixing terms of sale was forwarded to, and signed in, that state.

Cited in notes (19 L. R. A. 792) on conflict of laws as to statute of frauds; (61 L. R. A. 213, 225) on conflict of laws as to negotiable paper.

Parol evidence as to notes.

Cited in footnote to *Gregg v. Groesbeck*, 32 L. R. A. 266, which holds parol evidence inadmissible that indorser had given instruction to destroy indorsement before note transferred.

Cited in note (13 L. R. A. 650) on parol evidence as between immediate parties to promissory note.

13 L. R. A. 56, *BANK OF NORTH AMERICA v. RINDGE*, 154 Mass. 203, 26 Am. St. Rep. 240, 27 N. E. 1015.

Actions to enforce liability under foreign statute.

Cited in *Higgins v. Central New England & W. R. Co.* 155 Mass. 180, 31 Am. St. Rep. 544, 29 N. E. 534, upholding right to sue in Massachusetts on cause of action given by statute of other state for negligently causing death therein of citizen of former state; *Hancock Nat. Bank v. Ellis*, 172 Mass. 46, 42 L. R. A. 401, 170 Am. St. Rep. 232, 51 N. E. 207, holding that action to enforce liability of stockholders under Kansas statute maintainable in any state where service may be properly made; *Coffing v. Dodge*, 167 Mass. 233, 45 N. E. 928, holding penal liability of stockholder to creditors under foreign statute not enforceable; *Abbott v. Goodall*, 100 Me. 235, 60 Atl. 1030, denying jurisdiction of local courts over the settling of creditor's claims against rights and liabilities of stockholders in foreign corporation of which foreign courts have jurisdiction including non-resident stockholders.

Cited in notes (34 L.R.A. 748, 757; 37 Am. St. Rep. 174) on right to enforce stockholder's liability outside of state of incorporation; (16 L.R.A. 647) on change of decision of state court as unconstitutional impairment of contract; (70 L.R.A. 540) on right of nonresidents to sue foreign corporations.

— Contractual liability.

Distinguished in *Hancock Nat. Bank v. Ellis*, 166 Mass. 418, 55 Am. St. Rep. 414, 44 N. E. 349, holding where individual liability of stockholder is contractual, arising upon contract of subscription, and suable anywhere, it may be en-

forced in foreign state; *Ferguson v. Sherman*, 116 Cal. 175, 37 L. R. A. 625, 47 Pac. 1023, and *Bell v. Farwell*, 176 Ill. 498, 42 L. R. A. 808, 68 Am. St. Rep. 194, 54 N. E. 346, holding contractual liability of resident stockholder to judgment creditor of Kansas corporation, as provided by statute of that state, enforceable; *Latimer v. Citizens State Bank*, 102 Iowa, 165, 71 N. W. 225, holding contractual liability of stockholder for unpaid balance of stock subscription, under statute of foreign state, enforceable.

Disapproved in *Schertz v. First Nat. Bank*, 47 Ill. App. 134, holding contractual liability of stockholder to creditors of corporation, under statute of another state, enforceable; *Pfaff v. Gruen*, 92 Mo. App. 571, and *Guernsey v. Moore*, 131 Mo. 674, 32 S. W. 1132, holding contractual liability of resident stockholder to creditors of corporation, under statute of Kansas, enforceable in Missouri.

— **Special statutory remedy.**

Cited in *Marshall v. Sherman*, 148 N. Y. 26, 34 L. R. A. 766, 51 Am. St. Rep. 654, 42 N. E. 419, holding special statutory remedy to enforce individual liability of stockholder of insolvent foreign corporation, under laws of Kansas, not enforceable in New York against resident of that state; *Hancock Nat. Bank v. Farnum*, 20 R. I. 472, 40 Atl. 341; *Crippen v. Loughton*, 69 N. H. 553, 46 L. R. A. 472, 76 Am. St. Rep. 192, 44 Atl. 538; *Finney v. Guy*, 106 Wis. 266, 49 L. R. A. 491, 82 N. W. 595,—holding statutory remedy of creditors against stockholders under laws of another state, will not be enforced, when in contravention of policy of local laws; *Russell v. Pacific R. Co.* 113 Cal. 262, 34 L. R. A. 749, 45 Pac. 323, and *Tuttle v. National Bank*, 161 Ill. 505, 34 L. R. A. 754, 44 N. E. 984, holding special statutory remedy given to creditors of insolvent corporation against shareholders, cannot be enforced outside jurisdiction of corporation; *Fowler v. Lamson*, 146 Ill. 480, 34 N. E. 932, Affirming 44 Ill. App. 188, holding creditor's bill to enforce individual liability of stockholder of foreign corporation, under statute of another state, not maintainable, when other special statutory remedy prescribed; *Howarth v. Lombard*, 175 Mass. 573, 49 L. R. A. 305, 56 N. E. 888, holding assessment upon shares of nonresident stockholder, by courts of state where corporation organized, may be collected by receiver's action in state where shareholder resides; *National Teleph. Mfg. Co. v. Du Bois*, 165 Mass. 118, 30 L. R. A. 630, 52 Am. St. Rep. 503, 42 N. E. 510, holding creditor's bill by foreign corporation, against nonresident, cannot be maintained, when amount small, and to assume jurisdiction would be inequitable to defendant; *Eingartner v. Illinois Steel Co.* 94 Wis. 85, 34 L. R. A. 508, 59 Am. St. Rep. 859, 68 N. W. 664 (dissenting opinion) majority holding error to dismiss action because parties are residents of another state, and cause of action arose there.

Distinguished in *Hancock Nat. Bank v. Ellis*, 172 Mass. 46, 42 L. R. A. 401, 70 Am. St. Rep. 232, 51 N. E. 207, holding individual liability of stockholder under foreign statute may be enforced against person residing within jurisdiction, when liability several, and action transitory; *Miller v. Aldrich*, 202 Mass. 114, 132 Am. St. Rep. 480, 88 N. E. 441, holding Colorado creditors of a Colorado corporation cannot enforce a Colorado statutory liability of stockholder against a Massachusetts stockholder in this court where such statute provides no available remedy for extra territorial enforcement.

Disapproved in *Whitman v. National Bank*, 28 C. C. A. 410, 51 U. S. App. 536, 83 Fed. 294, Affirming 76 Fed. 698, holding action to enforce statutory liability of stockholder to creditor of insolvent corporation is transitory, and maintainable outside state; *Dexter v. Edmands*, 89 Fed. 470, holding that Federal courts will enforce liability of stockholder under state statute, if not repugnant to public policy of United States, though courts of state where Federal court sitting, have declared remedy contrary to state policy; *Love v. Pusey & J. Co.* 3 Penn.

(Del.) 578, 52 Atl. 542, holding a Delaware stockholder in a Kansas corporation to his Kansas statutory liability for corporation's debt.

13 L. R. A. 59, SMITH v. BURRUS, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881.

Malicious prosecution; right of action.

Cited in *Lipsecomb v. Shofner*, 96 Tenn. 117, 33 S. W. 818, holding action lies for malicious prosecution of civil suit, without probable cause, and resulting in actual damage; *Kolka v. Jones*, 6 N. D. 465, 66 Am. St. Rep. 615, 71 N. W. 558, holding action lies for malicious prosecution of civil suit, without probable cause, although person not arrested, nor property seized; *Mitchell v. Silver Lake Lodge*, 29 Or. 298, 45 Pac. 798, holding action lies, where civil suit, wherein defendant arrested, or property attached, is instituted through malice, and prosecuted without probable cause; *Bosch v. Miller*, 136 Mo. App. 489, 118 S. W. 506, holding that malicious prosecution will lie though defendant is not arrested nor his property attached; *Wilkinson v. Goodfellow-Brooks Shoe Co.* 141 Fed. 219, holding suit to lie for malicious institution of bankruptcy proceedings without probable cause though bankrupt's property is not attached.

Cited in footnotes to *McCormick Harvesting Mach. Co. v. Willan*, 56 L.R.A. 338, which authorizes suit for malicious prosecution of civil action without restraint of person or seizure of property; *Abbott v. Thorn*, 65 L.R.A. 826, which denies right of action for malicious prosecution of civil action in which there was no arrest or attachment of property and no special injuries inflicted.

Cited in notes (30 Am. St. Rep. 758) on malicious prosecution; (93 Am. St. Rep. 461, 463, 467) on liability for malicious prosecution of civil action.

Want of probable cause.

Cited in *Cohn v. Saidel*, 71 N. H. 570, 53 Atl. 800, and *Kolka v. Jones*, 6 N. D. 477, 66 Am. St. Rep. 615, 71 N. W. 558, holding voluntary dismissal of civil suit prima facie evidence of want of probable cause; *Eagleton v. Kabrich*, 66 Mo. App. 237, holding where discharge of prisoner would be necessary result of hearing, and prosecution not reviewed, voluntary dismissal, is evidence of want of probable cause; *Eckerle v. Higgins*, 159 Mo. App. 185, 140 S. W. 616, holding that production of verdict of acquittal is not per se sufficient to originate inference of want of probable cause.

Cited in footnote to *Le Clear v. Perkins*, 26 L. R. A. 627, which holds advice of counsel admissible as defense to malicious prosecution of civil suit.

Cited in note (64 L. R. A. 488) on acquittal or discharge on a criminal charge as evidence of want of probable cause.

Evidence; degree of proof required.

Cited in *Chaney v. Phoenix Ins. Co.* 62 Mo. App. 50, holding in action on parol contract of insurance, plaintiff not required to establish contract beyond reasonable doubt; *McFarland v. La Force*, 119 Mo. 591, 27 S. W. 1100, holding evidence to establish resulting trust need not be so strong and unequivocal as to leave no room for doubt.

— Prima facie.

Cited in *Gilpin v. Missouri, K. & T. R. Co.* 197 Mo. 325, 94 S. W. 869, as defining prima facie evidence.

Libel and slander; privileged publications.

Cited in *Jarman v. Rea*, 137 Cal. 352, 70 Pac. 216, holding false charge of bribery against candidate for public office not privileged; *Post Pub. Co. v. Hallam*, 8 C. C. A. 212, 16 U. S. App. 613, 59 Fed. 541, holding false allegations of fact in newspaper, attributing disgraceful acts to candidate for public office, not

privileged, though made in good faith; *Yager v. Bruce*, 116 Mo. App. 486, 93 S. W. 307, holding the privilege of political discussion not to warrant the calling of a candidate for office a thief and liability in damage follows on failure of proof of truth of the assertion; *Morris v. Sailer*, 154 Mo. App. 312, 134 S. W. 98, holding that publisher of newspaper is not protected in defaming character of candidate for office.

Cited in footnote to *Hemmens v. Nelson*, 20 L. R. A. 441, which holds statement by principal of deaf-mute institute to executive committee as to improper acts of department superintendent privileged.

Cited in note (104 Am. St. Rep. 136) on what libelous statements are privileged.

Appeal; questions first raised in appellate court.

Cited in *Lilly v. Menke*, 126 Mo. 214, 28 S. W. 643, holding supreme court may reverse for material error affecting merits, when apparent on record, although not raised in court below; *Clough v. Holden*, 115 Mo. 366, 37 Am. St. Rep. 393, 21 S. W. 1071; *Childs v. Kansas City, St. J. & C. B. R. Co.* 117 Mo. 427, 23 S. W. 373; *McPeak v. Missouri P. R. Co.* 128 Mo. 636, 30 S. W. 170; *Bridges v. Stephens*, 132 Mo. 558, 34 S. W. 555, by Burgess, J., dissenting; *Fuchs v. St. Louis*, 133 Mo. 194, 34 L. R. A. 124, 34 S. W. 508, by Sherwood, J., dissenting; *State ex rel. Ziegenhein v. Thompson*, 149 Mo. 445, 51 S. W. 98; *Worthington v. Lindell R. Co.* 72 Mo. App. 169; *Shaver v. Mercantile Town Mut. Ins. Co.* 79 Mo. App. 425; *Chicago, R. I. & P. R. Co. v. Woodworth*, 1 Ind. Terr. 25, 35 S. W. 238,—holding cause may be reversed on appeal for failure of complaint to state cause of action, although question not raised below, unless defect cured by statute of joefails.

13 L. R. A. 64, *PORTER v. WOODHOUSE*, 59 Conn. 568, 21 Am. St. Rep. 131, 22 Atl. 299.

Deeds; what sufficient delivery.

Cited in *White v. White*, 34 Or. 150, 55 Pac. 645, holding intent of grantor to transfer dominion over premises, as well as deed, not necessary to valid delivery; *Williams v. Daubner*, 103 Wis. 523, 74 Am. St. Rep. 902, 79 N. W. 748, holding delivery to third party, with understanding that deed be returned to grantor if she recovers from sickness; if not, grantee to receive it, insufficient; *Copeland v. Copeland*, 60 S. C. 142, 38 S. E. 269, holding delivery to agent of grantor, with instructions to file for record after her death, and have deed forwarded to grantee, not valid delivery; *Grilley v. Atkins*, 78 Conn. 385, 4 L.R.A.(N.S.) 819, 112 Am. St. Rep. 152, 62 Atl. 337, holding an irrevocable delivery in praesenti to take place where grantor executes deed puts it in envelope indorsed for delivery on his death and places it in hands of third person; *Johnson v. Johnson*, 24 R. I. 573, 54 Atl. 378, holding a parting with manual possession of deed, but not with control thereof not to constitute delivery; *Jackson v. Lamar*, 58 Wash. 394, 108 Pac. 946, to the point that in order to constitute delivery of deed there must be a parting with possession and with all control and dominion over it; *Gaylord v. Gaylord*, 150 N. C. 233, 63 S. E. 1028, holding that where deed is deposited with grantee with intent that title should not pass and that it should be subject to recall by grantor, title remains in grantor.

Cited in footnotes to *Martin v. Flaharty*, 19 L. R. A. 243, which holds manual delivery of deed not essential; *Parrot v. Avery*, 22 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery.

Cited in notes (54 L.R.A. 872, 873, 883) on delivery of deed to third person; or record, or delivery for record, by grantor; (53 Am. St. Rep. 538, 541, 542,

543, 544, 551, 554) on what is delivery of a deed; (8 Eng. Rul. Cas. 598) on taking effect of deed from date of execution.

13 L. R. A. 66, *Re CLAYTON*, 59 Conn. 510, 21 Am. St. Rep. 128, 21 Atl. 1005.

Witnesses; imprisonment for refusal to answer.

Cited in *Re Clark*, 65 Conn. 35, 28 L. R. A. 245, 31 Atl. 522, holding commitment of witness, by justice of peace, upon complaint of grand jury, for refusal to answer, not imprisonment without due process of law; *Re Sims*, 54 Kan. 9, 25 L. R. A. 113, 45 Am. St. Rep. 261, 37 Pac. 135, by Horton, Ch. J., concurring; specially, who holds statute giving county attorney power to commit for contempt witness summoned to appear for examination respecting violations of prohibitory liquor law, unconstitutional.

Cited in footnote to *Re Clark*, 28 L. R. A. 242, which upholds right to summarily enforce answer by imprisoning witness.

Cited in notes (1 L.R.A.(N.S.) 1138) on power of magistrate to punish witness for contempt; (25 Am. St. Rep. 890) on 14th amendment as to special privileges, burdens and restrictions.

Procedure in criminal cases.

Cited in note (39 L. R. A. 451) on denial of due process of law or other constitutional right of procedure.

13 L. R. A. 70, *FITZGERALD v. GRAND TRUNK R. CO.* 63 Vt. 169, 3 Inters. Com. Rep. 633, 22 Atl. 76.

Carriers; discrimination in rates.

Cited in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 66, 92 Fed. 872, holding unjust discrimination by carrier in freight charges, and their payment by shipper, constitute good cause of action, regardless of fraud and deceit, and independent of statute.

Cited in footnote to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* 36 L.R.A. 453, which holds milling in transit agreement between manufacturer and carrier by which former is to be credited, on freight bills for manufactured goods shipped freight paid on raw materials shipped, to mill not prohibited rebate.

Cited in notes (18 L.R.A. 105) on right of carrier at common law to discriminate between passengers or shippers; (5 Eng. Rul. Cas. 378) on carrier's duty as to accepting and carrying goods.

Effect of legislation upon rate contracts.

Cited in *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 463, 59 N. W. 838, holding previously existing contract of railroad with shipper for special freight rate abrogated upon enactment of interstate commerce act; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 484, 55 L. ed. 304, 34 L.R.A.(N.S.) 677, 31 Sup. Ct. Rep. 265, holding that act of Congress which rendered unenforceable prior contract by which interstate carrier agreed to issue annual passes for life in consideration of claim for damages, is not unconstitutional.

Cited in notes (52 L. ed. U. S. 681) on effect of statutory provisions against rebates upon contracts for transportation at less than regular rate; (14 L.R.A.(N.S.) 403) on effect of statutory provisions against rebates upon contracts prescribing less than established rates; (12 L.R.A.(N.S.) 609, 622) on validity of contracts in business which it is misdemeanor to transact.

Distinguished in *Louisville & N. R. Co. v. Mottley*, 133 Ky. 662, 118 S. W. 982, holding special carriage contract not annulled by Federal statute where consideration has entirely passed on side of passenger and it no where appears that contract is discriminatory.

13 L. R. A. 72, PETERSON v. MAYER, 46 Minn. 468, 49 N. W. 245.

Forfeiture of compensation of servant or agent by his misconduct.

Cited in Von Heyne v. Tompkins, 89 Minn. 81, 93 N. W. 901; Paul v. Minneapolis Threshing Machine Co. 87 Mo. App. 654, holding employee wilfully failing to perform terms of contract, and discharged by reason thereof, not entitled to recover upon contract for services rendered; McGrath v. Cannon, 55 Minn. 460, 57 N. W. 150, holding rule that party refusing to fully perform contract, cannot recover upon contract for services rendered; McGrath v. Cannon, 55 Minn. 460, 57 cover for part performance, not applicable where contract is severable; Steele v. Crabtree, 130 Iowa, 317, 106 N. W. 753, holding that fraud and misconduct of the agent is available as a defense in an action by the latter to recover his wages, though not pleaded as a counterclaim; Spaulding v. Pepper, 73 Kan. 646, 85 Pac. 754, on the conduct of the agent as forfeiting his right to compensation; Hahl v. Kellogg, 42 Tex. Civ. App. 639, 94 S. W. 389, holding that where an agent has been guilty of such conduct as amounts to treachery or has wholly failed to recognize the duties imposed upon him, he is not entitled to compensation; Wood v. Barker, 2 Sask. L. R. 403, holding that no recovery could be had by servant under monthly wage contract where he seduced employer's daughter and was guilty of offense each month that he worked.

Distinguished in Person v. McCargar, 92 Minn. 296, 99 N. W. 885, holding where the master had continued to accept the services of the agent after notice of his misconduct, he waived his right to insist upon a forfeiture of wages of agent.

Burden of proof of misconduct.

Cited in Lahr v. Kraemer, 91 Minn. 28, 97 N. W. 418, holding that the burden of proof of misconduct of agent was on the principal.

13 L. R. A. 74, FATH v. TOWER GROVE & L. R. CO. 105 Mo. 537, 16 S. W. 913.

Municipal corporations; legislative power.

Cited in Bluedorn v. Missouri P. R. Co. 121 Mo. 271, 24 S. W. 57, holding city ordinance prohibiting running of railroad trains at greater speed than 6 miles an hour, valid; Glenville v. St. Louis R. Co. 51 Mo. App. 634, holding city has power to limit speed of all street cars, regardless of motive power employed; State, Cape May D. B. & S. P. R. Co. Prosecutor, v. Cape May, 59 N. J. L. 401, 36 L. R. A. 655, 36 Atl. 696, holding ordinance making operation of trolley or electric cars without fenders unlawful, within powers of city; State *ex rel.* Reid v. Walbridge, 119 Mo. 394, 41 Am. St. Rep. 663, 24 S. W. 457, holding ordinance giving mayor power of removing officer for cause, within general-welfare clause of charter, when not inconsistent with general law; State *ex rel.* Kansas City v. East Fifth Street R. Co. 140 Mo. 551, 38 L. R. A. 221, 62 Am. St. Rep. 742, 41 S. W. 955, holding power of state to proceed against street railway by quo warranto for forfeiture of franchise, not abridged by franchise ordinance of city providing for forfeiture, by proceedings in name of city; J. F. Conrad Grocer Co. v. St. Louis & Suburban R. Co. 89 Mo. App. 541, holding ordinance requiring vigilance of employee in charge of car to discover peril threatening individual, valid.

Cited in notes (13 L. R. A. 588) on municipal ordinance unconstitutional and void; (36 L. R. A. 33) on municipal power to impose conditions when giving consent to railway in street; (104 Am. St. Rep. 649) on municipal regulations of street railways for protection of public.

Distinguished in Carpenter v. Reliance Realty Co. 103 Mo. App. 498, 77 S. W. 1004, denying validity of ordinance requiring persons excavating below certain

depth to protect contiguous buildings; *Senn v. Southern R. Co.* 108 Mo. 152, 18 S. W. 1007, raising without deciding question as to validity of city ordinance requiring street car driver to stop in quickest time possible on appearance of danger to children, in absence of contractual relation between city and company.

Violation of city ordinance as basis of civil liability.

Cited in *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 246, 50 L. R. A. 859, 57 S. W. 770, holding city ordinance cannot enlarge common-law liability of railroad or citizen, except by contract; *Murphy v. Lindell R. Co.* 153 Mo. 259, 54 S. W. 442, holding ordinance creating standard for measuring liability of citizens different from common law, enforceable against those only accepting provisions for consideration; *Cooney v. Southern Electric R. Co.* 80 Mo. App. 231, holding contractual relation shown as to general ordinance requiring motoneers upon "first appearance of danger" to stop cars "within shortest time and space possible," when railway bonded to observe "all general ordinances;" *Chouquette v. Southern Electric R. Co.* 152 Mo. 265, 53 S. W. 897, holding operation of railway under city ordinance sufficient acceptance, and binds company to observance of provisions as to speed; *Gebharatt v. St. Louis Transit Co.* 97 Mo. App. 379, 71 S. W. 448, holding person injured through street car company's violation of "vigilant-watch" ordinance need not allege or prove its acceptance by company; *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 246, 50 L. R. A. 859, footnote p. 850, 57 S. W. 770, distinguishing liability by reason of burdens imposed by ordinance granting franchise, from effect of ordinance of general application; *Senn v. Southern R. Co.* 108 Mo. 152, 18 S. W. 1007; *Sanders v. Southern Electric R. Co.* 147 Mo. 425, 48 S. W. 855; *Sheehan v. Citizens' R. Co.* 72 Mo. App. 528,—holding violation of ordinance requiring motorman to keep vigilant watch, and to stop car on first appearance of danger, not evidence of negligence, unless railway company accepted provisions; *Byington v. St. Louis R. Co.* 147 Mo. 678, 49 S. W. 876, holding violation of ordinance regulating stoppage of street cars for passengers cannot be made basis of civil liability, unless railway agreed to be bound thereby; *Moran v. Pullman Palace Car Co.* 134 Mo. 651, 33 L. R. A. 758, 56 Am. St. Rep. 543, 36 S. W. 659, holding ordinance requiring owners of property having dangerous places to fence same, does not create civil liability in favor of person injured by violation; *J. F. Conrad Grocer Co. v. St. Louis & M. River R. Co.* 89 Mo. App. 400, holding violation of ordinance requiring vigilant lookout by motorman and conductor of street car is negligence, when degree of care same as required at common law; *Moore v. St. Louis Transit Co.* 95 Mo. App. 745, holding excessive speed of street car, in violation of ordinance regulating speed of cars generally, such negligence as will support action for personal injury; *Skinner v. Stifel*, 55 Mo. App. 15, holding violation of ordinance requiring display of lights at excavations on public highway negligence, without regard to ordinary care exercised; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 115, 88 N. E. 1073, holding that running railroad train in violation of city ordinance constitutes negligence per se.

Cited in footnotes to *Fielders v. North Jersey Street R. Co.* 59 L.R.A. 455, which denies liability of street railway company for injury by defect in pavement between tracks; *Frontier Steam Laundry Co. v. Connolly*, 68 L.R.A. 425, which holds owner's failure to comply with ordinance requiring fireproof shutters on brick buildings not such negligence as to render him liable for destruction by fire communicated through unprotected windows of goods in his possession as bailee; *Duval v. Atlantic Coast Line R. Co.* 65 L.R.A. 722, which holds railroad company's valuation of contract with municipality as to speed of train evidence of negligence.

Cited in notes (25 L.R.A. 663) on duty imposed on street railroad companies to avoid injuring children on track; (5 L.R.A.(N.S.) 248, 266, 267) on violation of police ordinance as ground for private action.

Distinguished in *Becker v. Schutte*, 85 Mo. App. 63, holding ordinance prohibiting leaving horse in street unfastened and unattended, cannot be made basis of civil action between citizens, save as declaratory of common law.

Held *obiter* and overruled in effect in *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 637, 80 Am. St. Rep. 650, 58 S. W. 32, holding violation of ordinance prohibiting railroad running at speed exceeding 6 miles an hour, such negligence as may form basis of action for damages by party injured; *Sluder v. St. Louis Transit Co.* 189 Mo. 133, 5 L.R.A.(N.S.) 202, 88 S. W. 648, holding that a cause of action can arise to a person injured from the violation by a railway company of a speed ordinance.

13 L. R. A. 79, *STATE ex rel. YANCEY v. HYDE*, 129 Ind. 296, 28 N. E. 186.

Officers; legislative control.

Cited in *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 184, 37 L. R. A. 194, 46 N. E. 77, holding power to name persons or functionaries who shall make appointment of city commissioners is legislative function; *Goodwin v. State*, 142 Ind. 121, 41 N. E. 359, holding under statute authorizing city council to create office of city attorney, council may abolish office before expiration of term; *Downey v. State*, 160 Ind. 581, 67 N. E. 450, holding common council may abolish office of city attorney before expiration of term, though such officer may be removed only for cause; *Hawkins v. Roberts & Son*, 122 Ala. 146, 27 So. 327, holding statute abolishing office of county commissioner, not violation of constitutional provision providing for impeachment and removal of state and county officers; *French v. State*, 141 Ind. 634, 29 L. R. A. 118, 41 N. E. 2, holding statute constituting governor and other state officers board for selection of prison inspectors, not unconstitutional; *Scott v. State*, 151 Ind. 568, 52 N. E. 163 (dissenting opinion), majority holding statute postponing date, from September to January, for commencement of term of county treasurer, not unconstitutional as extending term of incumbent; *State ex rel. Taylor v. Mount*, 151 Ind. 700, 51 N. E. 417 (dissenting opinion), majority holding statute extending period of existence of appellate court, and continuing in office judges beyond terms for which they were elected, invalid.

Cited in footnotes to *People ex rel. Burby v. Howland*, 41 L. R. A. 838, which holds void, statute depriving justices of the peace of single town of criminal jurisdiction; *Harmon v. State*, 58 L. R. A. 618, which holds void, act making various distinct examiners exclusive judges as to competency of applicants for license as steam engineers.

Review of legislative action.

Cited in *Vigo County v. Davis*, 136 Ind. 508, 22 L. R. A. 517, 36 N. E. 141, holding under statute authorizing county commissioners, upon petition, to increase salaries of judges, and making action "final and conclusive," no appeal lies from refusal to increase salaries.

Selection of officers.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 659, 33 N. E. 432, and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 548, 18 L. R. A. 744, 33 N. E. 421, holding members of state board of tax commissioners not administrative state officers required by Constitution to be elected by people; *French v. State*, 141 Ind. 632, 29 L. R. A. 118, 41 N. E. 2, holding constitutional provision that officers not otherwise provided for shall be chosen in such "manner" as is

now prescribed by law, refers to person or functionary to make appointments: *Southern P. Co. v. Bartine*, 170 Fed. 747, sustaining an act delegating the appointment of railroad commissioners to the governor, the lieutenant governor and the attorney general.

Cited in footnote to *Fox v. McDonald*, 21 L. R. A. 529, which holds power to appoint to fill vacancy not inherent in governor.

Effect of erroneous reasoning on validity of conclusion.

Cited in *Terre Haute & I. R. Co. v. State*, 159 Ind. 472, 65 N. E. 401, holding expression of opinion on merits, where action dismissed for prematurity, not *res judicata*.

Title of an act.

Cited in *Southern P. Co. v. Bartine*, 170 Fed. 737, on the purpose of constitutional requirements as to title of act.

Cited in notes (64 Am. St. Rep. 103) on sufficiency of title of statute; (28 Am. St. Rep. 387) on statutes embracing only one subject.

13 L. R. A. 83, *PENNY v. CROUL*, 87 Mich. 15, 49 N. W. 311.

Witnesses; competency as to transactions with deceased persons.

Cited in *O'Neil v. Greenwood*, 106 Mich. 582, 64 N. W. 511, holding heir, though not party to record, disqualified as witness as to matters equally within knowledge of deceased; *Re Lambie*, 97 Mich. 58, 56 N. W. 223, holding contestant of will may testify to conversations with testatrix concerning revocation of former will, and contents of lost will subsequently made; *Lorimer v. Lorimer*, 124 Mich. 637, 83 N. W. 609, holding in ejectment against heirs, brought by alleged wife of deceased, plaintiff not competent witness as to matters equally within knowledge of decedent; *Great Camp K. O. T. M. v. Savage*, 135 Mich. 463, 98 N. W. 26 (dissenting opinion), on competency of witnesses to testify as to matters equally within the knowledge of deceased person in a suit concerning decedent's estate; *Doty v. Doty*, 118 Ky. 214, 2 L.R.A.(N.S.) 718, 80 S. W. 803, 4 A. & E. Ann. Cas. 1064, holding that a guardian may in an action for his ward brought against an administrator, testify as to an agreement in favor of ward made between administrators intestate and such guardian.

— Party interested.

Cited in *People's Nat. Bank v. Wilcox*, 136 Mich. 571, 100 N. W. 24, 4 A. & E. Ann. Cas. 465, holding testimony of debtor and another as to conversation had with deceased president of party to suit to be used against that party in favor of creditors, inadmissible, the persons testifying not being parties in interest but nevertheless interested.

13 L. R. A. 91, *CROSSMAN v. UNIVERSAL RUBBER CO.* 127 N. Y. 34, 27 N. E. 400.

Second appeal in 131 N. Y. 636, 30 N. E. 225, reversing 28 Jones & S. 70, 16 N. Y. Supp. 609.

Election of remedies.

Followed in *Pratt v. Tailer*, 53 Misc. 83, 103 N. Y. Supp. 1094, holding that where plaintiff may use both of two remedies the use of one will not preclude the use of the other.

Cited in *Heilbronn v. Herzog*, 165 N. Y. 103, 58 N. E. 759, Reversing 33 App. Div. 317, 53 N. Y. Supp. 841, holding vendor extending credit on false representation of vendee, does not, by affirming sale, waive right to sue for purchase price before credit expired; *Rochester Distilling Co. v. Devendorf*, 72 Hun, 431, 25 N. Y. Supp. 200, holding judgment for purchase price does not preclude replevin

by seller, on ground of false representations, when fraud not discovered until after judgment; *Hess v. Smith*, 16 Misc. 55, 37 N. Y. Supp. 635, holding suit on contract precludes action of conversion for same property; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 52 Mo. App. 414, holding attachment for purchase price precludes subsequent replevin for property, after voluntary dismissal of attachment; *Kolsky v. Loveman*, 97 Ala. 545, 12 So. 720, holding attachment for purchase price, precludes vendor from subsequently claiming that goods were merely consigned to defendant for sale; *Crockett v. Miller*, 50 C. C. A. 453, 112 Fed. 736, holding action for malicious trespass in seizing plaintiff's goods not inconsistent with replevin suit; *Crook v. First Nat. Bank*, 83 Wis. 43, 35 Am. St. Rep. 17, 52 N. W. 1131, holding action to recover money paid by bank to another to plaintiff's use precludes action against bank for unauthorized payment; *Frey v. Torrey*, 70 App. Div. 170, 75 N. Y. Supp. 40, holding that proof in bankruptcy of indebtedness arising in fraudulent transaction does not preclude subsequent action to recover money; *Re Linforth*, 87 Fed. 391, holding permission in bankruptcy to collect claim by foreclosure of mortgage, on condition that no judgment for deficiency be obtained, and subsequent voluntary dismissal, not waiver of right to prove claim against bankrupt estate; *Re C. Moench & Sons Co.* 123 Fed. 979, holding lender instituting action in fraud has standing as creditor to contest bankruptcy proceedings against borrower; *Kansas City Live Stock Commission Co. v. Bank of Hamlin*, 79 Kan. 766, 24 L.R.A.(N.S.) 492, 101 Pac. 617, 17 A. & E. Ann. Cas. 956, holding no inconsistency to exist between remedy by attachment and by chattel mortgage when both are used by same creditor against same debtor for collection of same debt; *Wood v. Claiborne*, 82 Ark. 521, 11 L.R.A.(N.S.) 916, 118 Am. St. Rep. 89, 102 S. W. 219, holding suit against person wrongfully receiving money no bar to action against persons wrongfully giving the money where satisfaction not obtained on former judgment; *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.* 208 Mass. 596, 95 N. E. 103, to the point that plea in abatement, founded on pendency of former action, for same cause, may be avoided by discontinuance or other termination of former action after plea is filed; *Citizens' Nat. Bank v. Wetsel*, 96 App. Div. 89, 88 N. Y. Supp. 1079, on rule that election to be binding must be of inconsistent remedies.

Annotation cited in *Swinney v. Chicago, R. I. & P. R. Co.* 123 Iowa, 223, 98 N. W. 635, holding that a common law remedy is not precluded by a statutory remedy where the language of the statute cannot be so construed.

Cited in footnotes to *Miller v. Hyde*, 25 L. R. A. 42, which holds replevin of horse not defeated by prior attachment suit for trover; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 26 L. R. A. 840, which holds mere commencement of attachment suit not binding election of remedy; *Crompton v. Beach*, 18 L. R. A. 187, which holds conditional vendor's exercise of option to enforce payment of note, defeats right to retake property; *Barchard v. Kohn*, 29 L. R. A. 803, which holds enforcement of chattel mortgage on exempt property not defeated by prior judgment and attempted levy on exempt property.

Cited in notes (13 L. R. A. 473) on election of remedies; (15 L. R. A. 90) on effect of election of remedies in case of fraudulent purchase; (34 L.R.A. (N.S.) 310) on bringing suit not prosecuted to judgment as election of remedies; (1 Eng. Rul. Cas. 545) on right of action in favor of subject for cause arising in other country notwithstanding alleged proceedings in such country.

Distinguished in *Roberge v. Winne*, 144 N. Y. 712, 39 N. E. 631, holding bill in equity to rescind sale for fraud, and to compel reconveyance, does not preclude specific performance of agreement of vendee to execute and deliver mortgage, when no process in first action ever served; *Colvin v. Shaw*, 79 Hun, 60, 29 N.

Y. Supp. 644, holding claim, in excess of amount due in action on account after refusal of debtor to convey pursuant to contract, in partial satisfaction of indebtedness, not election to abandon such contract.

13 L. R. A. 95, *HIGHLAND AVE. & B. R. CO. v. BURT*, 92 Ala. 291, 9 So. 410.
Carriers; degree of care required as to passengers.

Cited in *Sweet v. Birmingham R. & Electric Co.* 136 Ala. 169, 33 So. 886, holding conductor of dummy train stopping at crossing bound to ascertain before starting whether passenger is alighting; *Anderson v. Citizens' Street R. Co.* 12 Ind. App. 197, 38 N. E. 1109, holding that it is duty of conductor of street car to know that no passenger is in act of alighting, or in dangerous position, before starting; *Gadsden & A. Union R. Co. v. Causler*, 97 Ala. 237, 12 So. 439, holding invitation to alight from train may be inferred from stoppage of car near passenger's destination, without warning; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 111, 64 S. W. 202, holding obligation of carrier as to safety of transportation of passenger extends to proper construction and maintenance of roadbed and tracks; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 127, 64 S. W. 202, holding carrier of passengers bound to exercise "utmost degree of care and prudence;" *Shealey v. South Carolina & G. R. Co.* 67 S. C. 67, 45 S. E. 119, denying railroad's duty to ascertain whether passenger is about to alight after stopping reasonable time at regular station; *Birmingham R. Light & Power Co. v. Hawkins*, 153 Ala. 89, 16 L.R.A.(N.S.) 1078, 44 So. 983, holding that ordinarily a motorman may start the car as soon as the passenger has gotten thereon and before he has reached a seat; *Birmingham R. Light & Power Co. v. Jung*, 161 Ala. 470, 49 So. 434, holding that servants of carrier must use due care to determine before moving car that no passenger is in the act of alighting or entering car at place of regular stoppage and same rule applies where passenger is permitted to alight temporarily at place not a regular stop but defendant is not liable for injury of one attempting to board car at such stop who is not already a passenger unless servants have actual knowledge of dangerous position when car is put in motion; *Montgomery v. Colorado Springs & I. R. Co.* 50 Colo. 216, 114 Pac. 659, holding that street car conductor must exercise ordinary care to see that no passenger is in act of alighting before car is set in motion; *Memphis Street R. Co. v. Shaw*, 110 Tenn. 475, 75 S. W. 713, holding that conductor is under duty to see and know that no one is in the act of alighting when he starts the car; *Crump v. Davis*, 33 Ind. App. 90, 70 N. E. 886, holding that it is duty of person in charge of street car to ascertain that no passenger is in act of alighting before putting car in motion; *Indianapolis Traction & Terminal Co. v. Miller*, 43 Ind. App. 722, 88 N. E. 526, on duty of conductor as not executed by stopping for reasonable time but requiring that he know that no person is in act of alighting or in dangerous position at time of starting car; *Nashville, C. & St. L. R. Co. v. Casey*, 1 Ala. App. 347, 56 So. 28, holding that railroad was not guilty of negligence in starting train before passenger alighted where it stopped for usual and reasonable length of time, and infirmity of passenger was not known to servants.

Cited in footnote to *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 18 L. R. A. 599, which holds time to leave train need not be given person entering merely to assist passengers.

Cited in note (11 L.R.A.(N.S.) 140) on duty of street-car conductor to see passenger is off before starting car.

Contributory negligence.

Cited in *Citizens' Street R. Co. v. Spahr*, 7 Ind. App. 27, 33 N. E. 446, holding averment in complaint of want of negligence contributing to injury, not over-

come by admission that plaintiff boarded electric car while in motion; Birmingham R. L. & P. Co. v. Lee, 153 Ala. 85, 45 So. 292, holding the boarding of a moving car not negligence as a matter of law, but is for the jury under all the evidence.

13 L. R. A. 97, BURT v. ADVERTISER NEWSPAPER CO. 154 Mass. 238, 23 N. E. 1.

Privileged communications.

Cited in Hagnes v. Clinton Printing Co. 169 Mass. 515, 48 N. E. 275, holding that newspaper privilege of comment and criticism on matters of public interest does not extend to false statements; Post Pub. Co. v. Hallam, 8 C. C. A. 212, 16 U. S. App. 613, 59 Fed. 541, holding false allegations of fact concerning candidate for public office, though made in good faith, and with probable cause, not privileged; Howland v. Flood, 160 Mass. 516, 36 N. E. 482, holding report of town committee upon matter of public interest not absolutely privileged, and whether same contained anything in excess of privilege is question for jury; Fay v. Harrington, 176 Mass. 273, 57 N. E. 369, raising without deciding question as to whether publication of articles was justified as a reasonable criticism on matter of public interest; Donahoe v. Star Pub. Co. 4 Penn. (Del.) 183, 55 Atl. 337, holding that the charging of a candidate for office with a specific criminal offense is not privileged and that good faith and probable cause may not be pleaded in defense if charge is false; Dow v. Long, 190 Mass. 142, 76 N. E. 667, holding a publication concerning election to a city office charging plaintiff with supporting candidate by bribery and low politics and that such candidate would facilitate plaintiff's robbery of the city to be unprivileged statements; Com. v. Pratt, 208 Mass. 559, 95 N. E. 105, holding that newspaper publisher is not protected in defaming character of candidate for office; Merrey v. Guardian Printing & Pub. Co. 79 N. J. L. 184, 74 Atl. 464, holding that fair and bona fide comment and criticism upon matters of public concern is privileged; Pfister v. Milwaukee Free Press Co. 139 Wis. 640, 121 N. W. 938, holding false and defamatory publication concerning private citizen not privileged by public interest; Hubbard v. Allyn, 200 Mass. 170, 86 N. E. 356, holding false statements of fact not privileged because of public interest, such privilege being extended only to discussion and criticism of actual acts, which may be done by ridicule, sarcasm and invective; Mertens v. Bee Pub. Co. 5 Neb. (Unof.) 598, 99 N. W. 847, holding a privilege to extend its protection in the absence of express malice to publisher who expresses his opinion however severe or uncomplimentary on certain facts proved or admitted; Russell v. Washington Post Co. 31 App. D. C. 285, 14 A. & E. Ann. Cas. 820, holding a publication not giving source of information and stating positively that the plaintiff a minister was guilty of unmoral conduct which if true would bring him into contempt and ridicule is not privileged but libelous per se.

Cited in footnote to Hemmens v. Nelson, 20 L. R. A. 441, which holds statement by principal of deaf-mute institute to executive committee as to improper acts of department superintendent privileged.

Cited in note (28 L. R. A. 667) on libel or slander by expressing opinions, or comments without misstating facts.

Belief in truth of publication.

Cited in Squires v. Wason Mfg. Co. 182 Mass. 141, 65 N. E. 32, holding malice not shown where there was reasonable ground for privileged statement, and it did not appear that defendant did not believe it, or that it was made for other than business reasons; Faxon v. Jones, 176 Mass. 208, 57 N. E. 359, holding previous or subsequent declarations or conduct of defendant in slander, as well as conduct

and language at time, may be shown in proof of express malice in aggravation of damage; *Hanson v. Globe Newspaper Co.* 159 Mass. 303, 20 L. R. A. 860, 34 N. E. 462 (dissenting opinion) majority holding person named by mistake in libelous publication not entitled to maintain action.

Distinguished in *Conner v. Standard Pub. Co.* 183 Mass. 480, 67 N. E. 596, holding evidence in libel action showing defendant's sources of information admissible where no malice charged; *O'Connell v. Boston Herald Co.* 129 Fed. 840, holding judge's opinion from whence statements taken admissible in action for libel in publishing inaccurate report of judicial proceedings.

Malice.

Cited in *Hubbard v. Allyn*, 200 Mass. 173, 86 N. E. 356, holding question of actual ill will and malice immaterial where statements made are untrue.

Liability for independent acts of others.

Cited in *American Bridge Co. v. Seeds*, 11 L.R.A.(N.S.) 1045, 75 C. C. A. 407, 144 Fed. 610, holding defendant not liable for wrongful act when the act of a third person independently intervenes not relied upon by defendant; *Pierson v. Chicago, R. I. & P. R. Co.* 95 C. C. A. 467, 170 Fed. 274, holding master not bound to anticipate wrongful act of his independent contractor causing unsafe the place of servants' work; *Canadian Northern R. Co. v. Walker*, 24 L.R.A.(N.S.) 1023, 97 C. C. A. 44, 172 Fed. 351, holding the negligence of shippers in loading causing injury to company servants not the natural consequence of their use of the road for which company can be held liable; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 302, 32 L.R.A.(N.S.) 1212, 69 S. E. 238, to the point that wrongful acts of independent third person, not intended by defendant, are not regarded by law as natural consequences of his wrong; *Tobler v. Pioneer Min. & Mfg. Co.* 166 Ala. 509, 52 So. 86, holding that wrongful act of third person not actually intended or reasonably to be expected by master, causing injury to servant is not result of master's wrong, and master is not liable.

Cited in note (36 Am. St. Rep. 843, 844) on proximate and remote cause.

Measure of damages for tort.

Cited in *Cole v. German Sav. & L. Soc.* 63 L. R. A. 421, 59 C. C. A. 599, 124 Fed. 119, denying liability of owner of building to visitor falling down elevator shaft, the unfastened door of which was thrown open by stranger; *Morrison v. Lawrence*, 186 Mass. 462, 72 N. E. 91, holding that intent may be an element on which a statutory tort rests where at the common-law intent affected only measure of damages.

Cited in note (27 Am. St. Rep. 758) on liability for torts.

— For libel.

Cited in *Bishop v. Journal Newspaper Co.* 168 Mass. 332, 47 N. E. 119, holding defendant in libel responsible for natural consequences of tort, and question of damages is for jury; *Turner v. Hearst*, 115 Cal. 400, 47 Pac. 129, holding injury to feelings from repetition of publication by others not element of damage; *Parker v. Republican Co.* 181 Mass. 397, 63 N. E. 931, holding proof of professional income as physician before and after libel, conduct of patients and acquaintances, and of feelings of plaintiff, admissible on question of damage; *Howland v. Flood*, 160 Mass. 517, 36 N. E. 482, holding fact that libel shows on its face that statements of third persons are relied on, may be shown in mitigation of damage; *Times Pub. Co. v. Carlisle Journal Co.* 36 C. C. A. 489, 94 Fed. 776, holding proof of matter in mitigation of damages not admissible, if not pleaded; *Ellis v. Brockton Pub. Co.* 198 Mass. 543, 126 Am. St. Rep. 454, 84 N. E. 1018, 15 A. & E. Ann. Cas. 83, holding that damages may be recovered including compensation for wounded feelings and loss of reputation in action for slander;

Ellis v. Brocton Pub. Co. 198 Mass. 542, 126 Am. St. Rep. 454, 84 N. E. 1018, 15 Ann. Cas. 83, holding that publication of a proper retraction may have the effect of lessening mischief caused by libel and is admissible in reduction of damages even where punitive damages are not allowed.

Cited in footnote to *Press Pub. Co. v. McDonald*, 26 L. R. A. 531, which authorizes punitive damages for failure of effort to verify truth of libelous despatch before printing in newspaper.

13 L. R. A. 102, *LAWRENCE v. METROPOLITAN ELEV. R. CO.* 126 N. Y. 483, 27 N. E. 765.

Independent wrong as affecting right to relief.

Cited in *Miller v. Enterprise Canal & Land Co.* 142 Cal. 214, 100 Am. St. Rep. 115, 75 Pac. 770, holding fact that dam obstructs navigable stream will not defeat right to enjoin trespasser from interfering therewith.

Damage to real property; evidence of use.

Cited in *Woolsey v. New York Elev. R. Co.* 134 N. Y. 327, 47 N. Y. S. R. 634, 31 N. E. 891, holding in estimating damage to rental value of premises, from operation of elevated railway, evidence as to use of premises immaterial.

Cited in footnote to *Edwards v. American Express Co.* 63 L.R.A. 467, which holds owner's property right in machine not destroyed by mere fact that it was so constructed that it could be used for gambling.

Measure of damages.

Cited in *Kernochan v. New York Elev. R. Co.* 128 N. Y. 567, 29 N. E. 65, and *Mortimer v. Manhattan R. Co.* 129 N. Y. 85, 29 N. E. 5, holding lessor of abutting property entitled to recover diminution in rental value of premises, occasioned by construction and operation of elevated railway, without acquiring easement in street; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 11 App. Div. 563, 42 N. Y. Supp. 590, holding in action for damage from railway in street and to enjoin same, measure of damage is diminution in rental or usable value of premises, without regard to depreciation in value of land; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 11, 55 N. Y. Supp. 192, holding measure of damage from injury continuing only while nuisance lasts, is diminution in rental value; *Covert v. Valentine*, 50 N. Y. S. R. 518, 21 N. Y. Supp. 219, holding that measure of damage for temporarily diminishing flow of water into pond is diminution in rental value or value of use of pond, caused by wrongful act, to time of commencement of suit.

Distinguished in *Pappenheim v. Metropolitan Elev. R. Co.* 128 N. Y. 453, 13 L. R. A. 407, 26 Am. St. Rep. 486, 28 N. E. 518, holding that vendor's right to recover for permanent injury to freehold from construction and operation of elevated railway ceases upon transfer of property.

13 L. R. A. 104, *Re PROUT*, 128 N. Y. 70, 27 N. E. 948.

Administrators; collection of estate.

Cited in *Maas v. German Sav. Bank*, 176 N. Y. 380, 98 Am. St. Rep. 689, 68 N. E. 658, Affirming 73 App. Div. 527, 77 N. Y. Supp. 256, holding foreign administrator cannot maintain action to recover property or collect debt of resident; *Steele v. Connecticut General L. Ins. Co.* 31 App. Div. 397, 53 N. Y. Supp. 373, holding administrator appointed in New York, where intestate died, may maintain action in that state, against Connecticut insurance company, upon policy payable in latter state.

13 L. R. A. 107, *NORFOLK & W. R. CO. v. COM.* 88 Va. 95.

Legislative powers of state.

Cited in *Isaacs v. Richmond*, 90 Va. 32, 17 S. E. 760, holding any act which tends to impair supremacy of Constitution, void, whatever purpose of legislature in enactment.

Cited in note (78 Am. St. Rep. 266) on acts which legislature may declare criminal.

— State statutes affecting interstate commerce.

Cited in *Western U. Teleg. Co. v. Tyler*, 90 Va. 300, 4 Inters. Com. Rep. 482, 44 Am. St. Rep. 910, 18 S. E. 280, holding state statute imposing penalty for failure to promptly deliver telegraph message, not interference with interstate commerce; *Norfolk & W. R. Co. v. Com.* 93 Va. 751, 34 L. R. A. 106, 57 Am. St. Rep. 827, 24 S. E. 837, holding transportation of empty coal cars from one state to another, for use in carrying coal outside latter state, not interstate commerce, and exempt from state regulation; *People v. Lake Shore & M. S. R. Co.* 2 Ill. C. C. 378, holding state legislation providing for manner of weighing and transferring grain shipped, invalid insofar as it applies to interstate shipments.

Cited in footnotes to *Lafarier v. Grand Trunk R. Co.* 17 L.R.A. 111, which holds state statute giving ticket holder stop-over rights not applicable outside of state; *Central Stockyards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, which holds that state cannot require delivery of interstate freight by one carrier to another within its borders in order that it may reach a particular depot.

Disapproved in *Hennington v. State*, 90 Ga. 402, 4 Inters. Com. Rep. 415, 17 S. E. 1009, sustaining statute prohibiting running of freight trains on Sunday, as applied to interstate traffic.

Overruled in *Norfolk & W. R. Co. v. Com.* 93 Va. 751, 34 L. R. A. 106, 57 Am. St. Rep. 827, 24 S. E. 837, holding statute prohibiting running of freight trains on Sunday, except when containing perishable freight or live stock, valid exercise of police power.

Sunday laws.

Cited in note (14 L. R. A. 194) on Sunday labor.

13 L. R. A. 114, *DOZIER v. FIDELITY & C. CO.* 46 Fed. 446.

What deemed accidental death, within accident policy.

Cited in *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 656, 29 C. C. A. 226, 56 U. S. App. 393, 85 Fed. 404, holding that death from blood poisoning due to abrasion of skin of toe from friction of shoe is from accidental means; *Schmid v. Indiana Travelers Acci. Asso.* 42 Ind. App. 497, 85 N. E. 1032, holding death by violent physical exertion in a rarified atmosphere not accidental within policy meaning; *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 172, 78 S. W. 320, holding acute dropsy caused by infection from material given plaintiff to work on to be within indemnity policy for bodily injuries accidentally suffered; *Herdie v. Maryland Casualty Co.* 146 Fed. 398, on the rule that bodily injury by sun-stroke is not accidental; *Sullivan v. Modern Brotherhood*, 167 Mich. 531, — L.R.A.(N.S.) —, 133 N. W. 486, holding that insurer against accident is liable, where death or injury is caused by disease not resulting from any bodily infirmity or disease, existing at time of accident, but is itself caused by accident.

Cited in notes (30 L.R.A. 206, 209) on what constitutes an accident within meaning of accident insurance policy; (14 Eng. Rul. Cas. 25) on rules for construing insurance policies.

Distinguished in *North West Commercial Travellers' Asso. v. London Guar-*

antee & Acci. Co. 10 Manitoba L. Rep. 563, holding that death by exposure to an extraordinary period of cold weather, through breaking of wagon en route, is accidental within meaning of policy.

Exemption from liability in accident policy.

Distinguished in Thornton v. Travelers Ins. Co. 116 Ga. 127, 94 Am. St. Rep. 99, 42 S. E. 287, holding insurer liable under policy excepting accident from hernia, for injury rendered more serious by existing hernia; (13 L. R. A. 264) on death by external, violent, and accidental means.

Proximate cause of death.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

13 L. R. A. 117, HELFRICH v. CATONSVILLE WATER CO. 74 Md. 269, 28 Am. St. Rep. 245, 22 Atl. 72.

Pollution of waters.

Cited in West Arlington Improv. Co. v. Mt. Hope Retreat, 97 Md. 203, 54 Atl. 982, holding pollution of water by hog pen will not defeat riparian owner's right to enjoin upper proprietor from emptying sewage in stream; McEvey v. Taylor, 56 Wash. 359, 26 L.R.A.(N.S.) 225, 105 Pac. 851, holding use of stream and pond to water cattle and keep geese on is not unreasonable, nor an unlawful pollution; Fahnestock v. Feldner, 98 Md. 343, 56 Atl. 785, holding that under some circumstances the emptying of kitchen drainage into a stream is not an unlawful pollution; Aberdeen v. Lytle Logging & Mercantile Co. 58 Wash. 370, 108 Pac. 945, holding that equity may restrain logging company from polluting stream constituting city water supply, by use of bridge which had settled into water, where bridge could be raised and injury obviated.

Cited in footnotes to Barrett v. Mt. Greenwood Cemetery Asso. 31 L. R. A. 109, which authorizes injunction against connecting city drain with spring brook; Barnard v. Shirley, 24 L. R. A. 568, which refuses to enjoin flow of water from artesian well into natural water course; Weston Paper Co. v. Pope, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works, though business skilfully conducted; Strobel v. Kerr Salt Co. 51 L. R. A. 687, which authorizes injunction against diversion of stream for use in salt works, and pollution of stream by return of part of water.

Cited in notes (41 L.R.A. 740) on correlative rights of upper and lower proprietors as to use and flow of water in stream; (11 L.R.A.(N.S.) 1164) on protection from pollution of source of municipal water supply; (10 Eng. Rul. Cas. 244) on right of riparian owner to purity of water.

13 L. R. A. 120, *Ex parte* HURN, 92 Ala. 102, 25 Am. St. Rep. 23, 9 So. 515.

When mandamus will lie.

Cited in *People ex rel. Denison v. Butler*, 24 Colo. 409, 51 Pac. 510, denying application for writ of mandamus to compel inferior court to entertain and determine motion for temporary injunction; *Taylor v. Kolb*, 100 Ala. 606, 13 So. 779, holding appointment of inspectors of election, under statute requiring that two "shall be members of opposing political parties, if practicable," cannot be controlled by mandamus; *State ex rel. Atty. Gen. v. District Ct.* 13 N. D. 219, 100 N. W. 248, holding court cannot be compelled by mandamus to reverse an erroneous decision within jurisdiction also citing annotation on this point.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which authorizes mandamus to compel canvassing board to disregard illegal turn;

Jackson v. State, 42 L. R. A. 792, which sustains right to mandamus to compel reinstatement of pupil whose admission arbitrarily or capriciously refused.

Liability to search.

Cited in **Cunningham v. Baker**, 104 Ala. 169, 53 Am. St. Rep. 27, 16 So. 68, holding search of person unlawfully arrested in attachment suit, illegal; **State v. Edwards**, 51 W. Va. 230, 59 L. R. A. 476, 41 S. E. 429, holding that person in custody under criminal charge may be subjected to search to discover evidence of crime; **French v. State**, 94 Ala. 94, 10 So. 553, holding that weapons may be taken from person under arrest, although use thereof not attempted, nor other resistance made; **Newberry v. Carpenter**, 107 Mich. 570, 31 L. R. A. 164, 61 Am. St. Rep. 346, 65 N. W. 530, holding court without power to authorize officers of law to take exploded boiler from private premises, for use as evidence on trial of engineer for manslaughter; **Bessemer v. Eidge**, 162 Ala. 206, 50 So. 270, on the taking of property from the person of one lawfully arrested.

Cited in note (18 L.R.A.(N.S.) 254, 255) on right of officer, in executing criminal process, to take possession of evidentiary articles.

Garnishment of property in custody of law.

Cited in **Coffee v. Haynes**, 124 Cal. 567, 71 Am. St. Rep. 99, 57 Pac. 482, holding property of person charged with murder, taken possession of by chief of police, with consent of accused, but not connected with crime, subject to garnishment; **Holker v. Hennessey**, 141 Mo. 539, 39 L. R. A. 168, 64 Am. St. Rep. 524, 42 S. W. 1090, holding property taken from prisoner, with or without authority of law and in custody of sheriff, not subject to garnishment unless after conviction.

Cited in footnotes to **McAlmond v. Bevington**, 53 L. R. A. 597, which holds money deposited with justice by third person as bail, not subject to garnishment for prisoner's debt; **Allen v. Gerard**, 49 L. R. A. 351, which denies liability to garnishment of balance in hands of clerk of court, of proceeds of sale of perishable property attached; **Dale v. Brumbly**, 64 L. R. A. 112, which holds money in court not subject to attachment after final decree for disbursement.

Liability of officer taking property.

Cited in **Thorn v. Kemp**, 98 Ala. 425, 13 So. 749, holding constable liable for replevied property upon plaintiff's failure to execute bond, though claiming under mortgage.

13 L. R. A. 126, **O'BRIEN v. BALTIMORE BELT R. CO.** 74 Md. 363, 22 Atl. 141.

Injunction; ex parte application.

Cited in **Chesapeake & P. Teleph. Co. v. Baltimore**, 89 Md. 709, 43 Atl. 784, holding appeal lies from refusal of injunction on *ex parte* application on bill, before answer filed.

What constitutes taking of private property.

Cited in **Garrett v. Lake Roland Elev. R. Co.** 79 Md. 284, 24 L. R. A. 398, 29 Atl. 830, holding constitutional right to compensation for private property taken for public use, does not extend to consequential damages to abutting property from erection in street of abutment for elevated railway; **Poole v. Falls Road Electric R. Co.** 88 Md. 536, 41 Atl. 1069, holding construction of electric railway in street, not such taking of property of abutting proprietor owning bed of street as entitles him to compensation; **De Lauder v. Baltimore County**, 94 Md. 7, 50 Atl. 427, holding destruction of private way by construction of culvert in public road such taking of property as entitles owner to compensation.

Cited in note (36 L.R.A.(N.S.) 696) on abutter's right to compensation for railroads in streets.

Liability for damage from lawful acts.

Cited in *Guest v. Church Hill*, 90 Md. 693, 45 Atl. 882, holding city changing grade of street, liable in damages for diverting surface water from natural channel, and throwing it upon land; *New York, P. & N. R. Co. v. Jones*, 94 Md. 37, 50 Atl. 423, holding railroad liable for damage from discharge of surface water upon land, through construction of embankment and ditches, in making necessary and proper for drainage of its right of way; *Lake Roland Elev. R. Co. v. Webster*, 81 Md. 535, 32 Atl. 186, holding elevated railway in street liable to lessee of near-by property for depreciation in rental value; *Kent County v. Godwin*, 98 Md. 90, 56 Atl. 478, on nonrecovery for injury to property caused by lawful public use of adjacent streets.

Cited in note (1 L.R.A.(N.S.) 56, 70) on effect of legislative authority upon liability for private nuisance.

Implied grants.

Cited in footnotes to *Cummings v. Perry*, 38 L. R. A. 149, which holds right to use elevator to convey goods to basement not appurtenant to lease of basement; *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor.

13 L. R. A. 131, *ELECTRIC IMPROV. CO. v. SAN FRANCISCO*, 45 Fed. 593.

Followed, without discussion, in *Electric Improv. Co. v. Scannell*, 45 Fed. 596.

Police regulation of electric companies.

Cited in footnotes to *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 22 L. R. A. 759, which holds right to compel guard wires for uninsulated trolley wires crossing telephone wires; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flag-staff on other building by telephone wire renders company liable for loss of barn by lightning striking flag-staff.

Cited in notes (31 L. R. A. 799) on police regulation of electric companies; (32 L. R. A. 401) on negligence as to electric wires on or in buildings; (39 L. R. A. 620) on municipal control over public nuisances upon public streets and highways created by street railroads and other electric companies; (38 L. R. A. 306) on municipal power over nuisances affecting health, safety, and personal comfort; (36 L. R. A. 601, 612) on power of municipalities to define, prevent, and abate nuisances; (36 L.R.A.(N.S.) 79) on municipal power to regulate installation of electrical work.

13 L. R. A. 134, *FANNING v. CHACE*, 17 R. I. 388, 33 Am. St. Rep. 878, 22 Atl. 275.

Libel and slander; words not actionable.

Cited in *Reid v. Providence Journal Co.* 20 R. I. 123, 37 Atl. 637, holding words not in themselves actionable, and not made so by innuendo, do not become so upon proof of special damage; *Mitchell v. Sharon*, 8 C. C. A. 432, 15 U. S. App. 353, 59 Fed. 983, Affirming 51 Fed. 427, holding charge that proposition to surrender certain letters for money is blackmailing scheme, without charging making of threats, not actionable; *Mitchell v. Donanski*, 28 R. I. 96, 9 L.R.A. (N.S.) 172, 125 Am. St. Rep. 717, 65 Atl. 611, 12 A. & E. Ann. Cas. 1019, holding a statement that a certain person threatened to assault and kill another is not slanderous per se; *Browning v. Com.* 116 Ky. 285, 76 S. W. 19, holding a writing stating that a certain person would purloin a printing outfit if given

a chance is actionable per se when calculated to bring person charged into contempt; *Curtis v. Iseman*, 137 Ky. 801, 127 S. W. 150, holding that to say that person was trying or attempting to steal does not constitute slander; *Whitley v. Newman*, 9 Ga. App. 97, 70 S. E. 686, holding that spoken words charging intention to commit crime in future are not actionable.

Cited in note (116 Am. St. Rep. 809) on what words are libelous per se.

What constitutes criminal intent.

Cited in footnote to *State v. Zichfeld*, 34 L. R. A. 784, which holds man may be guilty of bigamy notwithstanding belief that former marriage annulled.

13 L. R. A. 137, *SPECT v. SPECT*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203.

Findings of fact.

Cited in *Reese v. Bald Mountain Consol. Gold Min. Co.* 133 Cal. 288, 65 Pac. 578, holding that failure of trial judge in finding of facts to find upon material issue is reversible error.

Right to recover mortgaged property.

Cited in *Kelso v. Norton*, 65 Kan. 789, 93 Am. St. Rep. 308, 70 Pac. 896, holding ejectment will not lie against mortgagee in possession while debt is unpaid; *Boyce v. Fisk*, 110 Cal. 113, 42 Pac. 473, holding debtor's title cannot be quieted as against deed given as security, after debt is barred, until debt is paid; *Zellerbach v. Allenberg*, 99 Cal. 69, 33 Pac. 786, holding debtor cannot recover pledged property after debt has become barred, without first paying debt; *Bradley v. Norris*, 63 Minn. 166, 65 N. W. 357, holding time within which action to redeem from mortgage must be begun commences to run from time mortgagee goes into possession; *Barbour v. Flick*, 126 Cal. 634, 59 Pac. 122, holding cancellation of mortgage may be awarded as damages, in action for fraud and deceit in exchange of properties; *McClory v. Ricks*, 11 N. D. 43, 88 N. W. 1042, holding that possession with consent of mortgagor or after valid foreclosure are the only kinds of possession by mortgagee that will preclude ejectment without payment of mortgage debt; *Peshine v. Ord*, 119 Cal. 314, 63 Am. St. Rep. 131, 51 Pac. 536, holding that mortgagor may not obtain recovery of mortgaged property in any event unless he satisfy the mortgage; *Burns v. Hiatt*, 149 Cal. 621, 117 Am. St. Rep. 157, 87 Pac. 196, holding that purchaser of equity of redemption not included in foreclosure process must pay mortgage debt before he may have cloud of foreclosure removed; *Green v. Thornton*, 8 Cal. App. 163, 96 Pac. 382, holding ejection not maintainable against mortgagee in possession except in payment of mortgage debt; *Hooper v. Young*, 140 Cal. 280, 98 Am. St. Rep. 56, 74 Pac. 140, holding that where mortgagee is in possession after condition broken by consent of mortgagor such mortgagee is entitled to possession until debt secured thereby is paid; *Brandt v. Thompson*, 91 Cal. 462, 27 Pac. 763, holding that title can only be quieted as against one holding as a mortgagee in possession by payment of the mortgage; *Investment Securities Co. v. Adams*, 37 Wash. 215, 79 Pac. 625, on possession of mortgagee as entitling him to payment of debt secured though debt is outlawed; *Finlayson v. Peterson*, 11 N. D. 55, 89 N. W. 855, holding that a mortgagee in possession under agreement expressed in mortgage cannot be dispossessed under any circumstances without payment of mortgaged debt though mortgage is a mere lien; *Raggio v. Palmtag*, 155 Cal. 802, 103 Pac. 312, holding that purchaser of equity of redemption cannot quiet title against mortgagee holding premises under purchase at void foreclosure sale unless he pay mortgage debt and this is true though the debt be outlawed; *Burnes v. Hiatt*, 149 Cal. 623, 117 Am. St. Rep. 157, 87 Pac. 196, holding that possession under invalid foreclosure sale by mortgagee will support the rule

that ejectment may not be had against him unless mortgage debt be paid though it be barred by limitation; *Gage v. Riverside Trust Co.* 86 Fed. 998, holding that complainant cannot compel surrender of pledged or mortgaged property held as security for debt without full payment of debt though statute of limitation has completely run out in his favor; *Cameron v. Ah Quong*, 8 Cal. App. 313, 96 Pac. 1025, holding intervener in ejectment states no defense by showing that he is an outlawed mortgagee of the premises where he fails to connect the possession of defendant with himself.

Distinguished in *Sechrist v. Rialto Irrig. Dist.* 129 Cal. 646, 62 Pac. 261, holding action by taxpayer for cancelation of illegal bonds of irrigation district maintainable, without offer to return consideration.

Rights in pledged property.

Cited in *Commercial Sav. Bank v. Hornberger*, 140 Cal. 20, 73 Pac. 625, holding that pledgee may retain pledge until the debt is paid, though such debt be barred by limitation; *Puckhaber v. Henry*, 152 Cal. 423, 125 Am. St. Rep. 75, 93 Pac. 114, 14 A. & E. Ann. Cas. 844, holding that a creditor may sue on a life insurance policy given as security on a debt which is at time of suit unpaid and outlawed, he having rights similar to mortgagee in possession.

Statute of limitations as affecting equitable claim.

Cited in *Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 593, 126 Fed. 52, holding statute of limitations will not prevent assertion of equitable claim by lender of money to pay purchase-money mortgage against mortgagor claiming lien on after-acquired property; *Tracy v. Wheeler*, 15 N. D. 250, 6 L.R.A.(N.S.) 519, 107 N. W. 68, holding that cancellation of outlawed mortgage cannot be had at suit of mortgagor or his successor where debt secured is unpaid.

Cited in note (34 L.R.A.(N.S.) 357) as to whether limitation runs against mortgagee in possession.

— As affecting affirmative proceedings.

Cited in *Marshutz v. Seltzor*, 5 Cal. App. 143, 89 Pac. 877, holding that foreclosure of mortgage securing debt barred by limitation cannot be decreed in cross-complaint in action to quiet title, such proceeding being affirmative; *Cassell v. Lowry*, 164 Ind. 5, 72 N. E. 640, holding that title cannot be quieted where plaintiff shows in his pleadings that the debt secured by the lien is unpaid, though the lien holder is barred from affirmative action thereon by limitation.

Equitable prerequisites to recovery.

Cited in *Trippet v. State*, 149 Cal. 521, 8 L.R.A.(N.S.) 1215, 86 Pac. 1084, holding that title may not be quieted unless plaintiff pays outstanding claim against same, though such claim be unenforceable at law; *Payne v. Neuval*, 155 Cal. 51, 99 Pac. 476, holding contract calling for yearly royalty for use of mine whether operated or not, not enforceable on part of user unless he tender or pay royalties accrued though mine not used; *Fitch v. Miller*, 200 Ill. 179, 65 N. E. 650, holding that partition may not be had of an equity of redemption lost by laches of mortgagor where there are no equitable considerations requiring such partition.

Possession of mortgagee by parol agreement with mortgagor.

Approved in *Bullion & Exch. Bank v. Otto*, 59 Fed. 257, holding that an executed parol agreement whereby mortgagor gives possession of mortgaged premises to mortgagee is not within statute of frauds and is binding between the parties.

13 L. R. A. 140, *VOLLAND v. BAKER*, 32 Neb. 391, 49 N. W. 381.

Appeals from county court; pleadings.

Cited in *People's Nat. Bank v. Geisthardt*, 55 Neb. 234, 75 N. W. 582, holding claim of increased amount in petition in district court on appeal from county court, immaterial, if sum within county court's jurisdiction.

Independence of warranty and agreement to pay price.

Cited in *Saunders v. Hammond*, 28 Pa. Co. Ct. 409, holding that suit may be had on a warranty given in sale of chattel even though vendee has paid note given as part payment after notice of breach of warranty.

13 L. R. A. 142, *KENYON v. KNIPE*, 2 Wash. 394, 27 Pac. 227.

Followed, without discussion, in *Kenyon v. Squire*, 2 Wash. 404, 28 Pac. 1025, and *Dearborn v. Moran*, 2 Wash. 406, 27 Pac. 230.

Interest of riparian owner in tide lands.

Cited in *State ex rel. Bartlett v. Forrest*, 12 Wash. 486, 41 Pac. 194, holding purchaser of upland lots according to plat estopped from claiming tide lands beyond line of lots purchased; *Grant v. Oregon R. & Nav. Co.* 49 Or. 330, 90 Pac. 178, holding plaintiff to take without riparian rights by a grant to him of upper part of a tide lot as per city plot according to which there were other lots between grantor's and low water; *Oliver v. Klamath Lake Nav. Co.* 54 Or. 99, 102 Pac. 786, holding that where land is granted as to plat and grantee purchases lots north of a certain street he takes no rights south of the street though the street and south end of his lots are under water; *Chlopeck Fish Co. v. Seattle*, 64 Wash. 333, 117 Pac. 232, holding that abutters on "slip" dedicated to public use cannot claim compensation from city because of erection of wharf thereon.

Distinguished in *Seattle & M. R. Co. v. Carraher*, 21 Wash. 494, 58 Pac. 570, holding under statute giving purchaser of upland preference in right to purchase tide lands, owner conveying upland transfers whatever interest he may have in tide lands.

Certainty of description in deed.

Cited in *League v. Scott*, 25 Tex. Civ. App. 320, 61 S. W. 521, holding deed referring to certain land patent for description, not void for uncertainty.

13 L. R. A. 147, *INDIANAPOLIS v. STATE*, 129 Ind. 14, 28 N. E. 61.

13 L. R. A. 157, *EASTHAMPTON v. HAMPSHIRE COUNTY*, 154 Mass. 424, 28 N. E. 298.

Eminent domain; taking land already devoted to public use.

Cited in *Boston v. Brookline*, 156 Mass. 175, 30 N. E. 611, holding that authority by special act to condemn land for laying water pipes through neighboring town to reservoir does not preclude town from laying out highway over same land under general statute; *Folsom v. Middlesex County*, 173 Mass. 49, 53 N. E. 155, holding under petition for laying out new highway, commissioners may lay out way so as to include portion of old way; *Re Certain Land*, 119 Fed. 455, holding municipality may contest right of Federal government, under authority delegated by state, to condemn for postoffice land dedicated to town for public park; *Re Condemnation of Land*, 128 Fed. 186, holding town entitled to compensation for taking of easement of aqueduct through private land condemned by United States; *United States v. Certain Land*, 165 Fed. 789, on the taking of property already dedicated to public use.

Cited in note (37 L.R.A.(N.S.) 103) on power to take property already devoted to public use.

13 L. R. A. 158, *HAHN v. BAKER LODGE NO. 47*, A. F. & A. M. 21 Or. 30, 28 Am. St. Rep. 723, 27 Pac. 166.

Grants creating easements.

Cited in footnotes to *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor; *Cummings v. Perry*, 38 L. R. A. 149, which holds right to use elevator to convey goods to basement not appurtenant to lease of basement; *Barr v. Lamaster*, 32 L. R. A. 451, which denies right to compel partition of reciprocal easements created by agreement in use of stores, hallways, etc.

Cited in note (10 Eng. Rul. Cas. 60) as to when grant of an easement will be implied.

Extinguishment of easement.

Cited in *Dennis Long & Co. v. Louisville*, 98 Ky. 89, 32 S. W. 271, holding easement terminates when purpose for which it was granted ceases; *Southern R. Co. v. Memphis*, 38 C. C. A. 501, 97 Fed. 822, holding when right to operate street railway is lost, right to maintain track ceases; *Shirley v. Crabb*, 138 Ind. 205, 46 Am. St. Rep. 376, 37 N. E. 130, holding right reserved in deed to use of stairways and hall for ingress and egress to upper part of building extinguished by destruction of building; *Badger Lumber Co. v. Stepp*, 157 Mo. 385, 57 S. W. 1059, holding where ownership of lot and that of part of building thereon in different persons, parties are adjoining tenants, not tenants in common.

Cited in note (10 Eng. Rul. Cas. 306) on extinguishment of easement by change in dominant tenement.

Distinguished in *Townsend v. Michigan C. R. Co.* 42 C. C. A. 574, 101 Fed. 761, holding railroad acquiring land for right of way by deed does not forfeit its interest therein by nonuse, so as to entitle another railroad to cross same without compensation.

Grant of rooms.

Cited in *Holzhausen v. Hoskins*, 115 Mo. App. 267, 91 S. W. 410, holding that lease of rooms in a building does not take possession of an outer wall not included in purpose of lease away from possession of lessor to the extent that he cannot sue for forcible entry committed on the wall.

Cited in note (3 L.R.A.(N.S.) 512) on relationship of owners of different floors in building.

13 L. R. A. 161, *YALE v. WEST MIDDLE SCHOOL DIST.* 59 Conn. 489, 22 Atl. 295.

Domicil of children.

Cited in *Board of Education v. Lease*, 64 Ill. App. 61, holding child residing with temporary guardian, by appointment of parent, entitled to admission to public school of district where domiciled; *Board of Education v. Hobbs*, 8 Okla. 296, 56 Pac. 1052, holding right of child to admission to public school in district where he has resided for number of years not destroyed by separation of parents; *Kelsey v. Green*, 69 Conn. 301, 38 L. R. A. 474, 37 Atl. 679, holding probate court of district in which minor has dwelling place has jurisdiction to appoint guardian; *McNish v. State*, 74 Neb. 264, 104 N. W. 186, 12 A. & E. Ann. Cas. 896, sustaining mandamus to compel school board to allow child living in district to attend school free though parents are non-resident and child is living with foster mother, though not legally adopted; *People ex rel.*

Brooklyn Children's Aid Soc. v. Hendrickson, 54 Misc. 343, 104 N. Y. Supp. 122, holding orphan child placed in private home for parental care entitled to free "common school" education in district in which his new home is located; Stanford Graded Common School Dist. v. Powell, 145 Ky. 94, 36 L.R.A.(N.S.) 342, 140 S. W. 67, holding residence for school purposes of child whose father, on mother's death, is without home or means, to be with his aunt, with whom he lives.

Cited in notes (26 L. R. A. 581) on what constitutes residence entitling children to privileges of public schools; (36 L.R.A.(N.S.) 342) on residence entitling child to school privileges; (9 Eng. Rul. Cas. 714) on domicile as a permanent home.

Common-school privileges.

Cited in note (41 L. R. A. 605) on right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent.

13 L. R. A. 163, PEOPLE v. JOHNSON, 86 Mich. 175, 24 Am. St. Rep. 116, 48 N. W. 870.

Due process of law.

Cited in Burroughs v. Eastman, 101 Mich. 420, 24 L. R. A. 861, 45 Am. St. Rep. 419, 59 N. W. 817, holding city charter giving police officers power to arrest, without process, for violation of any ordinance of common council in their presence, not unconstitutional.

Validity of arrest without warrant.

Cited in McCullough v. Greenfield, 133 Mich. 467, 62 L. R. A. 908, footnote p. 906, 95 N. W. 532, holding arrest under telephonic instructions from officer holding warrant illegal.

Cited in footnote to McCullough v. Greenfield, 62 L.R.A. 906, which holds that possession of warrant by officer will not justify arrest of accused by police department of another town under direction by telephone by such officer.

Cited in note (84 Am. St. Rep. 687) on right of policeman to make arrest.

Breach of peace.

Cited in People v. Burman, 154 Mich. 157, 25 L.R.A.(N.S.) 256, 117 N. W. 589, holding that a display of red flags known by persons displaying, to be highly incentive to violence, causing others to break the peace is itself a breach of peace.

Cited in note (32 L.R.A.(N.S.) 507) on disorderly language as disturbance of peace.

13 L. R. A. 166, FOSTER v. STEVENS, 63 Vt. 175, 22 Atl. 78.

Taxation of corporations.

Cited in footnote to State, Singer Mfg. Co., Prosecutor, v. Heppenheimer, 32 L. R. A. 643, which holds company exempt from taxation under exemption of its shares.

Cited in notes (58 L. R. A. 578, 592, 605) on taxation of capital stock of corporations in the United States; (60 L. R. A. 367) on constitutional equality in the United States in relation to corporate taxation.

Assessment for tax in part illegal.

Cited in Meacham v. Newport, 70 Vt. 268, 40 Atl. 729, holding in trespass for taking property to satisfy tax in part illegal, damages not reduced to extent tax valid.

13 L. R. A. 169, *HENDERSON v. STATE SOLDIERS & SAILORS MONUMENT*, 129 Ind. 92, 28 N. E. 127.

State revenues; implied appropriation.

Cited in State *ex rel.* Noonan v. King, 108 Tenn. 277, 67 S. W. 812, and State *ex rel.* Henderson v. Burdick, 4 Wyo. 282, 24 L. R. A. 269, footnote p. 266, 33 Pac. 125, holding statute providing that fixed salary of specified officer shall be paid in "same manner as other salaries and expenses of state officers are paid," operates as appropriation; Johnson v. Cameron, 2 Okla. 276, 37 Pac. 1055, holding statute making expenses of sheriff, in care of insane, payable out of territorial treasury, not modified by annual appropriation for commitment and care of insane.

Cited in footnote to Carter v. Thorson, 24 L. R. A. 734, which upholds legislative power to incur indebtedness for public printing without prior appropriation.

Cited in notes (13 L. R. A. 223) on preliminaries necessary to withdrawal of public funds; (16 L.R.A.(N.S.) 632) on requisites of appropriation for official salary or expenses.

Distinguished in State Soldiers' & S. Monument v. Daily, 150 Ind. 677, 50 N. E. 814, holding expenses essential to construction of soldiers and sailors monument must be paid out of fund created for monument, and not out of general state fund.

Impairment of vested rights.

Cited in footnote to Allen v. Forrest, 24 L. R. A. 606, which holds statutory privilege of acquiring tide lands not vested right.

13 L. R. A. 173, *SUMNER v. DARNELL*, 128 Ind. 38, 27 N. E. 162.

Conditions subsequent.

Cited in Higbee v. Rodeman, 129 Ind. 247, 28 N. E. 442, holding deed to township for nominal consideration, "for common-school purposes," does not create condition subsequent, preventing sale by township, after maintaining school for thirty years; Newpoint Lodge v. Newpoint, 138 Ind. 145, 37 N. E. 650, holding statement that property is conveyed "for the use of the common schools," not condition causing reversion to grantor upon abandonment for use for school; Hunter v. Murfee, 126 Ala. 132, 28 So. 7, holding recitals, "for use of" county, and "in consideration of the seat of justice having been permanently established," not condition subsequent, causing reversion on removal of county seat; Adams v. First Baptist Church, 148 Mich. 145, 11 L.R.A.(N.S.) 523, 111 N. W. 757, 12 A. & E. Ann. Cas. 224, construing language in a deed specifying use to which property would be put not to create a condition subsequent; Hanby v. Bailey, 11 Del. Co. Rep. 374, holding that grant to trustees, their heirs and assigns for religious use conveys fee.

Cited in notes (19 L. R. A. 265) on condition in deed that land is to be used for a specified charitable public or quasi-public purpose; (79 Am. St. Rep. 756) on what words create condition subsequent; (35 L.R.A.(N.S.) 603) on reverter of land dedicated or conveyed for courthouse, upon failure to use or removal of county seat.

13 L. R. A. 177, *STATE ex rel. WORRELL v. CARR*, 129 Ind. 44, 28 Am. St. Rep. 163, 28 N. E. 88.

Officers.

Cited in notes (17 L. R. A. 250) on who are public officers; (13 L. R. A. 670)

on tenure of public office; incompatibility of office; (140 Am. St. Rep. 192) on defacto officers.

Right of officer de jure to salary.

Cited in *Warden v. Bayfield County*, 87 Wis. 185, 58 N. W. 248, holding payment of salary to one usurping county office, no defense to claim of *de jure* officer for salary for same period; *Chicago v. Luthardt*, 191 Ill. 523, 61 N. E. 410, Affirming 91 Ill. App. 331, holding exhaustion of appropriation no defense to claim for salary by *de jure* officer during time office unlawfully held by another; *Rasmussen v. Carbon County*, 8 Wyo. 301, 45 L. R. A. 302, 56 Pac. 1098, holding payment of salary to incumbent of county office, pending election contest, no defense to claim for salary by successful contestant, although duties of office not performed by him; *Stephens v. Campbell*, 67 Ark. 492, 55 S. W. 856, holding officer *de facto*, without legal title to office, not entitled to fees of office during time duties performed by him; *Bullis v. Chicago*, 235 Ill. 480, 85 N. E. 614, holding officer wrongfully kept from office entitled to salary connected therewith for the period of time kept therefrom where it has not been paid to another; *State v. Fabrick*, 16 N. D. 99, 112 N. W. 74, holding that a duly elected school superintendent holding over after term expires pending election and qualification of successor and performing duties of such office is entitled to compensation provided by law for the incumbent of the office; *Gibbs v. Manchester*, 73 N. H. 270, 61 Atl. 128, on non-recovery of salary during time prevented from serving by *de jure* officer, where such salary has been paid in good faith to defacto officer acting in his place; *Stearns v. Sims*, 24 Okla. 632, 24 L.R.A. (N.S.) 479, 104 Pac. 44, holding *de jure* chief of police not entitled to salary for term of wrongful suspension pending suit on charges against him where city has paid salary provided by law to defacto chief; *Tanner v. Edwards*, 31 Utah, 86, 120 Am. St. Rep. 919, 86 Pac. 765, 10 A. & E. Ann. Cas. 1091, holding *de jure* officer entitled to salary connected with office though he does not personally assume the duties thereof and compensation for such period of non-assumption is paid the *de facto* incumbent; *State ex rel. Tolerton v. Gordon*, 236 Mo. 167, 139 S. W. 403, holding that proviso in appropriation bill declaring that money appropriated shall not be available so long as present incumbent retains office is indirect way of removing him from office and invalid.

Cited in notes (19 L. R. A. 690) on right of officer *de jure* to salary for period during which *de facto* officer has acted and received pay; (16 L.R.A.(N.S.) 635) on requisites of appropriation for official salary or expenses.

Legislative usurpation of judicial functions.

Cited in *McSurely v. McGrew*, 140 Iowa, 167, 132 Am. St. Rep. 248, 118 N. W. 415, holding an act declaring certain actions void and without jurisdiction going into effect after commencement of such an action, unconstitutional.

13 L. R. A. 183, *COOK v. STATE*, 90 Tenn. 407, 16 S. W. 471.

Followed, without discussion, in *Swafford v. Tempelton*, 108 Fed. 310.

Constitutional law; class legislation.

Followed in *Turner v. State*, 111 Tenn. 608, 69 S. W. 774, holding that act made applicable only to counties over a certain population is not class legislation; *Murphy v. State*, 114 Tenn. 533, 86 S. W. 711, holding same regarding law made applicable to counties within fixed limits of population.

Cited in *Peterson v. State*, 104 Tenn. 129, 56 S. W. 834, holding statute requiring lands to be fenced in counties of stated population not class legislation; *Condon v. Maloney*, 108 Tenn. 83, 65 S. W. 871, holding statute regulating laying out and working of public roads in counties of stated population, not unconstitu-

tional because applicable to only one county; *Smith v. State*, 54 Tex. Crim. Rep. 308, 113 S. W. 289, sustaining law specifically made applicable only to counties over a certain population; *Burks v. Walker*, 25 Okla. 368, 109 Pac. 544, holding that act creating and establishing county superior court for each county having population of 30,000, is not void as class legislation; *Turner v. State*, 111 Tenn. 602, 69 S. W. 774, holding that jury act applicable only to counties containing certain number of inhabitants is not class legislation; *Russell v. Esmeralda County*, 32 Nev. 315, 107 Pac. 890, holding that statute regulating fees of officers and providing that statute shall not apply to fees of officers of any county wherein total vote of last election did not exceed 800, is constitutional.

Cited in footnotes to *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void; *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *State, H. Alexander, Prosecutor, v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating between municipalities already having and those not having race course; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; *Longview v. Crawfordsville*, 68 L.R.A. 623, which holds void classification of cities for purposes of legislation so as to make particular law conferring power to annex territory applicable to those having population between six and seven thousand.

Equality of immunities and privileges.

Cited in *State v. Old*, 95 Tenn. 731, 31 L. R. A. 839, 34 S. W. 690, holding statute prescribing what may be deemed "satisfactory evidence" of payment of poll tax, within constitutional provision prescribing qualification of voters, not unconstitutional; *Atwater v. Hassett*, 27 Okla. 306, — L.R.A.(N.S.) —, 111 Pac. 802, holding that statute regulating preparation of ballot and voting for constitutional amendments is constitutional.

Cited in note (14 L. R. A. 580) on constitutional equality of privileges, immunities, and protection.

Elections; marking ballot.

Cited in *Moore v. Sharp*, 98 Tenn. 506, 41 S. W. 587, holding marking ballot for illiterate, if physically disabled, not illegal.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (47 L. R. A. 806) on marking official ballot.

13 L. R. A. 185, *KATZENBERGER v. LAWO*, 90 Tenn. 235, 25 Am. St. Rep. 681, 16 S. W. 611.

Applicability of railroad statutes to street railways.

Cited in *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 422, 58 S. W. 737, holding statute regulating railroads applicable to dummy lines, whether in or out of city; *Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 50, 59 U. S. App. 403, 88 Fed. 592, holding statute fixing priority of judgment lien "against any railway corporation" for personal injury not applicable to street railways; *Savannah, T. & I. of H. R. Co. v. Williams*, 117 Ga. 418, 61 L.R.A. 251, footnote, p. 249, 43 S. E. 751, holding chartered street railroad a railroad company within statute as to liability for negligence of fellow servant; *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 203, 12 L. R. A. 832, 9 So. 320, holding dummy line a rail-

road within statute requiring trains to stop before crossing another railroad; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 698, 9 C. C. A. 672, 22 U. S. App. 220, 61 Fed. 611, holding horse railway not a railroad within statute requiring trains to stop before crossing intersecting railroad.

Cited in footnote to *Diebold v. Kentucky Traction Co.* 63 L.R.A. 637, which holds an electric railway for carrying of passengers and freight between cities in different states a trunk railway within exception of such railways from constitutional prohibition against granting franchises to other than the highest bidder.

Conflict of city ordinance with state statute.

Cited in *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 274, 13 L. R. A. 365, 25 Am. St. Rep. 693, 16 S. W. 613, holding railroad required to observe state statute regulating operation, though running in city having ordinance in conflict therewith.

Cited in notes (25 L. R. A. 292) on duty to maintain lookout on railroad train; (33 L. R. A. 33) on how far proceedings for violation of ordinances are to be regarded as prosecutions for crime.

13 L. R. A. 187, *GESSNER v. PALMATER*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789.

Vendor's lien.

Followed in *Willman v. Friedman*, 3 Idaho, 738, 35 Pac. 37, holding vendor retaining title until payment of purchase price has security barring resort to attachment; *National Bank v. Lock*, 17 Wash. 531, 61 Am. St. Rep. 923, 50 Pac. 478, holding that where payee of a note executed a bond for deed to maker calling for deed on payment of note an assignee of the note acquires lien on property bonded for sale.

Cited in *Longmaid v. Coulter*, 123 Cal. 212, 55 Pac. 791, holding action at law upon notes for purchase money of real estate not waiver of vendor's lien; *Lewis v. Shearer*, 189 Ill. 186, 59 N. E. 580, holding assignment of notes given by vendee under bond for deed to real estate carries with it vendor's lien; *First Nat. Bank v. Edgar*, 65 Neb. 344, 91 N. W. 404, holding lien created by reservation of title in vendor is assignable; *Woolley v. Wickerd*, 97 Cal. 71, 31 Pac. 733, to the point that lien of vendor of land is not assignable; *Claiborne v. Castle*, 98 Cal. 34, 32 Pac. 807, holding that acts and conduct of vendor which indicate a waiver of the lien may be shown by parol.

Cited in footnotes to *Frame v. Sliter*, 34 L. R. A. 690, which denies implied equitable lien to grantor of land for unpaid purchase money; *Doty v. Deposit Bldg. & L. Asso.* 43 L. R. A. 551, which holds vendor's lien enforceable against real estate for entire consideration of sale of real and personal property in gross.

Cited in notes (37 L. ed. U. S. 110) on existence, enforcement and waiver of vendor's lien; (137 Am. St. Rep. 186, 187, 188) on waiver of vendor's lien.

Distinguished in *Vance Redwood Lumber Co. v. Durphy*; 8 Cal. App. 671, 97 Pac. 702, holding that purchaser's agreement to pay taxes on the land is not obnoxious to constitution forbidding contracts by debtor to pay tax on mortgage or lien.

13 L. R. A. 190, *PENNSYLVANIA CO. v. LANGENDORF*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172.

Followed without discussion in *Railway Co. v. Moyer*, 53 Ohio St. 664, 44 N. E. 1145.

Risks assumed in performance of duty.

Cited in *Belleville Stone Co. v. Mooney*, 60 N. J. L. 336, 38 Atl. 835, holding
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it question for jury whether employee was performing duty to employer before heeding blast signal; *Warren v. Mendenhall*, 77 Minn. 153, 79 N. W. 661, holding it question for jury whether driver of fire-department truck, injured in collision with street car, negligent in fast driving; *Phelon v. Westfield*, 154 Mass. 465, 28 N. E. 899, holding it not contributory negligence *per se* to drive over road known to be dangerous, in effort to get home; *Corbin v. Philadelphia*, 195 Pa. 472, 49 L. R. A. 724, 78 Am. St. Rep. 825, 45 Atl. 1070, holding whether one voluntarily risking life in attempting rescue of another from great and imminent danger, guilty of contributory negligence, is mixed question of law and fact; *Maryland Steel Co. v. Marney*, 88 Md. 498, 42 L. R. A. 842, 71 Am. St. Rep. 441, 42 Atl. 60, holding interposition of servant to avert consequence of negligence of fellow servant not contributory negligence; *Illinois C. R. Co. v. Atwell*, 100 Ill. App. 518, holding section hand attempting to remove hand car from track, before approaching train, in obedience to order of foreman, not negligent; *Fort Worth & D. C. Ry. v. Gilstrap*, 25 Tex. Civ. App. 308, 61 S. W. 351, holding error in charge authorizing recovery not immaterial on ground that plaintiff was injured in removing push-car and timber from before approaching train, where such issue was not submitted to jury; *Chicago Terminal Transfer Ry. v. Kotoski*, 101 Ill. App. 306, holding negligence of person delaying his own escape in attempt to aid another from trestle in front of railroad train, question for jury; *Saylor v. Parsons*, 122 Iowa, 681, 64 L. R. A. 542, 101 Am. St. Rep. 284, 98 N. W. 500, holding contributory negligence of one seeking to rescue another from imminent danger, question for jury; *Pittsburg, C. C. & St. L. Ry. v. Lynch*, 69 O. S. 133, 63 L. R. A. 504, 100 Am. St. Rep. 658, 68 N. E. 703, holding railroad liable to watchman at crossing injured while rescuing negligent woman from car negligently switched; *Whitworth v. Shreveport Belt Ry.* 112 La. 373, 65 L. R. A. 129, 36 So. 414, holding lineman grasping charged wire in attempt to save fellow servant not guilty of contributory negligence; *Seymour v. Winnipeg Electric Ry.* 19 Manitoba L. Rep. 418, holding person who rushed in front of rapidly approaching street car to save life of child and was injured had cause of action for negligence against street car company; *Dixon v. New York, N. H. & H. Ry.* 207 Mass. 130, 92 N. E. 1030, declaring it was not negligence as a matter of law for one to attempt to rescue another from a dangerous position at the risk of injury to himself; *Michaels v. Chicago, B. & Q. Ry.* 146 Wis. 476, 131 N. W. 892, holding it could not be said that a person was guilty of contributory negligence as a matter of law, when becoming suddenly aware of the close approach of a train he is killed while attempting to get his team off of the track; *Mobile & O. Ry. v. Ridley*, 114 Tenn. 734, 86 S. W. 606, 4 Ann. Cas. 925, sustaining liability where employee of railroad in attempting to rescue boy from track was himself killed where railroad failed to give statutory signal; *Norris v. Atlantic Coast Line Ry.* 152 N. C. 514, 27 L.R.A.(N.S.) 1068, 67 S. E. 1017, holding it not negligence for one to jump across a railroad track in front of a moving train to rescue one in danger on track because of negligence of railroad company; *Citizens' Motor Car Co. v. Hamilton*, 12 C. C. N. S. 382, 32 C. C. 121, holding that person crossing in front of street car and confronted by automobile running fast is not negligent in attempting to pass beyond it; *Seymour v. Winnipeg Electric R. Co.* 19 Manitoba L. Rep. 418, holding that person injured while rescuing child from railroad track, may recover where injury was caused by motorman's negligence in not slowing up; *Dixon v. New York, N. H. & H. R. Co.* 207 Mass. 130, 92 N. E. 1030, holding that question of negligence is for jury where person exposes himself to danger for purpose of rescuing another from peril; *Bracey v. Northwestern Improv. Co.* 41 Mont. 344, 137 Am. St. Rep. 738, 109 Pac. 706, holding that person exposing himself to save another's life

may recover for injury from person whose negligence brought peril about, if exposure is not made under such circumstances as to constitute rashness.

Cited in notes (49 L. R. A. 716, 717, 720; 36 Am. St. Rep. 849) on voluntarily incurring danger to save life of another as contributory negligence.

Distinguished in *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 336, 60 L. R. A. 459, 97 Am. St. Rep. 844, 70 S. W. 616, denying employer's liability for death of employee re-entering burning building to telephone alarm of fire; *Bracey v. Northwestern Improv. Co.* 41 Mont. 344, 137 Am. St. Rep. 738, 109 Pac. 706, where question was whether miner's death who sought to rescue other miners from death by inhalation of poisonous gases, was due to alleged cause; *White v. Chicago (City)* 120 Ill. App. 610, holding where perilous situation of party is brought about by contributory negligence of one injured that one attempting to save life cannot recover.

13 L. R. A. 193, *HILL v. C. F. JEWETT PUB. CO.* 154 Mass. 172, 26 Am. St. Rep. 230, 28 N. E. 142.

Corporations; liability for fraud of officers.

Cited in *Farmers' Bank v. Diebold Safe & Lock Co.* 66 Ohio St. 377, 58 L. R. A. 624, 90 Am. St. Rep. 586, 64 N. E. 518, holding where secretary of corporation obtains stock certificate assigned to company, from possession of president, without his knowledge and pledges same to another, pledgee acquires no title as against first assignee.

Cited in notes (19 L. R. A. 332) on liability of corporation for fraud or forgery of its officers in issue of stock; (87 Am. St. Rep. 853, 858) on fraudulent and over-issued corporate stock.

Negligence resulting in forgery.

Cited in *Dollar Sav. Fund & T. Co. v. Pittsburg Plate Glass Co.* 213 Pa. 313, 62 Atl. 916, 5 A. & E. Ann. Cas. 248, holding one not negligent in leaving a stock certificate where his clerk had access to it and forges a transfer on it.

13 L. R. A. 195, *COM. v. BROWN*, 154 Mass. 55, 27 N. E. 776.

Intoxicating liquors; aiding and abetting illegal sale.

Cited in *Com. v. Moore*, 157 Mass. 330, 31 N. E. 1070, holding all persons engaged in violating liquor law are principals; *Com. v. Currier*, 164 Mass. 546, 42 N. E. 96, holding expressman receiving bottled beer at railroad depot for delivery to hotel guilty of bringing intoxicating liquors into town; *Com. v. Ryan*, 160 Mass. 174, 35 N. E. 673, holding one having intoxicating liquors about his person with intent to unlawfully sell same, guilty of unlawfully keeping liquors for sale.

Cited in notes (46 L. R. A. 421) on liability of carrier for transporting intoxicating liquors; (18 L.R.A.(N.S.) 1182) on ignorance of contents of package as defense in prosecution for unlawfully transporting liquor.

13 L. R. A. 198, *MT. ZION BAPTIST CHURCH v. WHITMORE*, 83 Iowa, 138, 49 N. W. 81.

Religious societies; rights as to trust property.

Cited in *Park v. Chaplin*, 96 Iowa, 65, 31 L. R. A. 144, 59 Am. St. Rep. 353, 64 N. W. 674, holding property deeded to Free Baptist Church, without declaration of trust, cannot, by vote of less than whole body, be diverted to uses of Baptist Church; *Christian Church v. Carpenter*, 108 Iowa, 650, 79 N. W. 375, holding persons imposing test of fellowship not in accord with previously accepted doctrines of denomination may be enjoined from controlling or interfering with use.

of church property; *Smith v. Pedigo*, 145 Ind. 385, 19 L. R. A. 439, 33 N. E. 777, holding that title to church property cannot be diverted by majority of members to uses not in accord with doctrines and practices of denomination; *Franke v. Mann*, 106 Wis. 132, 48 L. R. A. 861, footnote, p. 856, 81 N. W. 1014, holding faction of church, however large, can neither withdraw and claim part of church property, nor remain and divert its use to objects foreign to purposes of corporation; *Cape v. Plymouth Cong. Church*, 117 Wis. 155, 93 N. W. 449, holding majority organizing church of different denomination not entitled to use church property; *Rodgers v. Burnett*, 108 Tenn. 183, 65 S. W. 408, holding church organization uniting with another synod forfeits control to property deeded "for use as church and controlled by the E. L. Church of H. Synod;" *Ramsey v. Hicks*, 44 Ind. App. 512, 87 N. E. 1091, holding that property conveyed to trustees for use of certain church must be held in trust for promulgation of tenets and doctrines of such church; *Monongahela City Baptist Church v. Shawger*, 36 Pa. Co. Ct. 524, holding that individual church of Baptist denomination cannot by majority vote depart from its doctrines and carry property as against minority continuing in faith; *Immaculate Conception v. Murphy*, 89 Neb. 531, 35 L.R.A. (N.S.) 929, 131 N. W. 946, holding that trustees of Roman Catholic church have no authority to permit excommunicated priest to occupy church edifice.

Cited in footnote to *Schlichter v. Keiter*, 22 L. R. A. 161, which holds two thirds majority of those voting on proposition to change constitution of church sufficient.

Cited in notes (32 L. R. A. 92) on power of local-church society to withdraw from general body of church; (24 L.R.A.(N.S.) 701, 703, 704) on litigation growing out of schism in religious society; (3 L.R.A.(N.S.) 875) on enjoining control, use of, or interference with, church property; (5 Eng. Rul. Cas. 702) on property rights on division in religious society; (68 Am. St. Rep. 866) on jurisdiction of equity over voluntary unincorporated associations.

Disapproved in *First Baptist Church v. Fort*, 93 Tex. 225, 49 L. R. A. 621, 54 S. W. 892, holding minority separating from church organization, on ground majority have abandoned faith, not entitled to control of church property.

Right to membership.

Cited in *Smith v. Pedigo*, 145 Ind. 411, 32 L. R. A. 844, 44 N. E. 363, holding that minority faction of church congregation do not cease to be members of church upon expulsion by act of majority, which has departed from original faith; *Marien v. Evangelical Creed Congregation*, 132 Wis. 653, 113 N. W. 66, holding that any member has right to resist diversion of property of religious association to other antagonistic uses; *Yanthis v. Kemp*, 43 Ind. App. 205, 85 N. E. 4976, holding that a majority cannot ratify and confirm acts violative of the adopted faith and teachings of a church; *Cape v. Plymouth Congregational Church*, 130 Wis. 182, 109 N. W. 928, on what constitutes a departure from purpose of organization.

Distinguished in *Mack v. Kime*, 129 Ga. 20, 24 L.R.A.(N.S.) 687, 58 S. E. 184, sustaining authority of the highest governing body of the Cumberland Presbyterian Church to unite with another organization having like doctrines and forms of government.

Construction of ecclesiastical law.

Cited in *Smith v. Pedigo*, 145 Ind. 411, 32 L. R. A. 844, 44 N. E. 363, holding construction by ecclesiastical body of its own laws binding upon courts; *Smith v. Pedigo*, 145 Ind. 403, 32 L. R. A. 842, 44 N. E. 363, holding decision of majority faction of church that it adheres to doctrine and practices of denomination, not binding on courts; *Landrith v. Hudgins*, 121 Tenn. 657, 120 S. W. 783, holding that court can determine whether acts of a faction of a church violate the

adopted faith and teachings of church; *Bethany Cong. Church v. Morse*, 151 Iowa, 533, 132 N. W. 14, holding that final determination by church organization of questions of discipline, faith, ecclesiastical rule or custom is binding upon courts; *Ramsey v. Hicks*, 174 Ind. 444, 30 L.R.A.(N.S.) 673, 91 N. E. 344, holding that civil courts have no jurisdiction to examine into validity of church laws and to restrain proceedings in accordance therewith, in matter concerning only spiritual or ecclesiastical rights.

Cited in footnotes to *Lamb v. Cain*, 14 L. R. A. 518, which holds decision of ecclesiastical tribunal as to adoption of revised confession of faith binding on courts; *Bear v. Heasley*, 24 L. R. A. 615, which holds decision of highest church tribunal as to validity of new constitution not binding on courts.

Cited in notes (49 L. R. A. 384, 400) on conclusiveness of decisions of tribunals of association or corporation; (100 Am. St. Rep. 746, 747) on jurisdiction of civil courts over church controversies.

13 L. R. A. 206, *GREENE v. COUSE*, 127 N. Y. 386, 24 Am. St. Rep. 458, 28 N. E. 15.

Estoppel to dispute title of grantor.

Cited in *Rhodes v. Freeman*, 9 App. Div. 24, 41 N. Y. Supp. 135, holding purchaser in possession under contract, if in default, cannot defend against ejectment that vendor is without title, or that he has acquired title by adverse possession; *Zapf v. Carter*, 70 App. Div. 400, 75 N. Y. Supp. 197, holding person buying peace by procuring quitclaim deed from heir not estopped from disputing title derived from heirs; *Barnes v. Barnes*, 113 Iowa, 438, 85 N. W. 629, holding owner of real estate purchasing outstanding titles may repudiate one, and base his claim solely on other; *Coal Creek Consol Coal Co. v. East Tennessee Iron & Coal Co.* 105 Tenn. 574, 59 S. W. 634, holding title by adverse possession may be as effectual for remedies and defenses as title acquired in any other manner; *Berkowitz v. Brown*, 3 Misc. 7, 23 N. Y. Supp. 792, holding, to effect title by adverse possession, dispossessor of him who has legal title must not have recognized legal title within twenty years; *Schmitt v. Traphagen*, 73 N. J. Eq. 401, 69 Atl. 189, 133 Am. St. Rep. 739, holding that grantee is not estopped to deny title of grantor though chain of title be identical with that of grantor; *Knapp v. New York*, 140 App. Div. 296, 125 N. Y. Supp. 201, to the point that rule in relation to estoppel to dispute grantor's title does not apply, where at time of purchase, vendee is in as owner claiming title and his entry was not under grantor; *Nashville, C. & St. L. R. Co. v. Proctor*, 160 Ala. 453, 49 So. 377, holding that a person who is in possession of land may purchase any outstanding claim.

Cited in notes (16 L. R. A. 813) on estoppel in pais upon defendant as basis for action to recover real estate; (95 Am. St. Rep. 675) on effect of bar of statute of limitations.

13 L. R. A. 210, *DAVIS v. SEYMOUR*, 59 Conn. 531, 21 Atl. 1004.

Jurisdiction; amount in controversy.

Cited in *Hannon v. Bramley*, 65 Conn. 200, 32 Atl. 336, holding when highest sum plaintiff entitled to upon face of complaint insufficient to give jurisdiction, case should be dismissed.

Implied contracts; consideration.

Cited in *Masonic Mut. Ben. Asso. v. Tolles*, 70 Conn. 544, 40 Atl. 448, holding consideration essential to implied contract.

13 L. R. A. 212, *DAY v. SLAUGHTER*, 87 Va. 758, 24 Am. St. Rep. 682, 13 S. E. 478.

Report of later appeal in *Garland v. Garland*, 2 Va. Dec. 352, 24 S. E. 505.

Liability of spendthrift trust to claims of creditors.

Cited in *Guernsey v. Lazear*, 51 W. Va. 338, 41 S. E. 405, holding property devised in trust for support of beneficiary, with provision same shall not be bound for debts, not subject to judgment against beneficiary; *Seymour v. McAvoy*, 121 Cal. 442, 41 L. R. A. 547, 53 Pac. 946, holding trust fund for comfortable support and education of beneficiary, with payment of principal contingent upon marriage and surviving mother, not subject to claims of creditors; *Patten v. Herring*, 9 Tex. Civ. App. 646, 29 S. W. 388, holding trust for support of insolvent beneficiary cannot be diverted by creditors, although exemption not expressly declared by testator; *Leigh v. Harrison*, 69 Miss. 933, 18 L. R. A. 51, footnote, p. 49, 11 So. 604, holding that where property to devised in trust, with directions to pay income to insolvent son, interest of latter not subject to claims of creditor; *Re Luscombe*, 109 Wis. 199, 85 N. W. 341, holding trust for support of beneficiary named terminated, under provision of will, upon decree obtained by creditor subjecting income to payment of his claim; *Mattison v. Mattison*, 53 Or. 259, 133 Am. St. Rep. 829, 100 Pac. 4; *Mason v. Rhode Island Hospital Trust Co.* 78 Conn. 85, 61 Atl. 57, 3 A. & E. Ann. Cas. 586,—holding that an equitable life estate may be created by one for the benefit of another which will be inalienable and beyond creditors.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary; *Requa v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest accepted by husband, not trust beyond reach of creditors; *Brown v. McGill*, 39 L. R. A. 806, which denies power to create trust placing one's property beyond reach of creditors while retaining full enjoyment of revenues.

Distinguished in *Young v. Easley*, 94 Va. 194, 26 S. E. 401, holding income from money and personal property deposited with executors for "support" of beneficiary; subject to claims of latter's creditors.

Held obiter and overruled in effect in *Hutchinson v. Maxwell*, 100 Va. 173, 57 L. R. A. 387, 93 Am. St. Rep. 944, 40 S. E. 655, holding property deeded to trustee for maintenance of grantor's husband, with provision that same shall not be liable for debts, may be subjected in equity to claims of creditors.

13 L. R. A. 215, *PULLMAN PALACE CAR CO. v. SMITH*, 79 Tex. 468, 23 Am. St. Rep. 356, 14 S. W. 993.

Carriers; liability to passengers.

Cited in *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 483, 35 L. R. A. 257, 59 Am. St. Rep. 909, 69 N. W. 175, holding railroad liable for failure to awaken passengers in sleeper in time to dress before change of cars, though duty not expressed in contract; *Pullman Co. v. Lutz*, 154 Ala. 521, 14 L.R.A.(N.S.) 909, 129 Am. St. Rep. 67, 45 So. 675, holding it duty of sleeping car company to notify a passenger of arrival at destination; *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 540, 115 S. W. 315, holding that sleeping car company is liable to same degree of care as railroad, with respect to negligence of its servants causing injury to passengers.

Cited in notes (21 L. R. A. 296) on liability as to passengers on sleeping cars;

(14 L.R.A.(N.S.) 907) on duty to notify sleeping car passenger of arrival; (26 Am. St. Rep. 335) on obligations and liabilities of sleeping car companies.

Evidence; expert testimony.

Cited in *St. Louis S. W. R. Co. v. Freedman*, 18 Tex. Civ. App. 560, 46 S. W. 101, holding testimony of physician as to history of patient's case, in support of opinion, not objectionable as emphasizing hearsay evidence of other witness as to patient's condition.

Cited in footnote to *Tullis v. Rankin*, 35 L. R. A. 449, which holds opinion of surgeon as to cause of fully described condition of limb admissible.

Proof of damage.

Cited in *Knittel v. Schmidt*, 16 Tex. Civ. App. 9, 40 S. W. 507, holding general allegation of damage sufficient to admit evidence of damage from loss of time, though value of time not averred; *Missouri, K. & T. R. Co. v. Davis*, 53 Tex. Civ. App. 553, 116 S. W. 423, holding that testimony, that there was no cause known to witness, other than injuries for which recovery was sought, to account for change of health of plaintiff was admissible over objection that it was conclusive.

13 L. R. A. 217, *SMITH v. WESCOTT*, 17 R. I. 366, 22 Atl. 280.

Municipal corporation as trustee.

Cited in *Ware v. Fitchburg*, 200 Mass. 72, 85 N. E. 951, holding that legislature may prescribe who shall be the officers for the administration of public charities.

Cited in note (16 L. R. A. 695) on authority of legislature to remove municipality from trusteeship.

13 L. R. A. 219, *DEMPSEY v. CHAMBERS*, 154 Mass. 330, 26 Am. St. Rep. 249, 28 N. E. 279.

Ratification of unauthorized acts.

Cited in *Bullard v. Moor*, 158 Mass. 425, 33 N. E. 928, holding ratification of agreement of insane person by his administrator binding upon his heirs; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 182, 22 L. R. A. 367, 39 Am. St. Rep. 467, 35 N. E. 776, holding educational institution ratifying unauthorized act of agents, assuming to operate ferry, liable to personal injury to passenger caused by negligence of ferryman; *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 439, 31 L. R. A. 461, 37 N. E. 444, holding stockholders' ratification of acts of directors of gas-light company, preliminary to sale of plant to municipality, equivalent to original authority; *Beacon Trust Co. v. Souther*, 183 Mass. 418, 67 N. E. 345, holding director's ratification of corporation note executed by president equivalent to original authorization; *Paquete Habana*, 189 U. S. 465, 47 L. ed. 903, 23 Sup. Ct. Rep. 593, authorizing entry of decree against United States for proceeds of vessels not legally liable to capture; *Ferris v. Snow*, 130 Mich. 258, 90 N. W. 850, holding third person making payments on land contract not liable for purchase price where vendee did not act for him in buying; *Hall v. Concord*, 71 N. H. 373, 58 L. R. A. 460, 52 Atl. 864 (dissenting opinion) majority holding city not liable for injuries from horse being frightened by steam roller, used by agents in improvement of highway under unauthorized contract, although contract ratified by acceptance of work; *O'Reilly de Camara v. Brooke*, 209 U. S. 52, 52 L. ed. 678, 28 Sup. Ct. Rep. 439; *American Banana Co. v. United Fruit Co.* 213 U. S. 359, 53 L. ed. 833, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047; *Stuart v. Chapman*, 104 Me. 25, 70 Atl. 1069,—holding that one may become liable in tort by ratifying acts done in his name and for his benefit; *White v. Apsley Rubber Co.* 194 Mass. 100, 8 L.R.A.(N.S.) 485, 80 N. E. 500, holding a corporation liable

for act of bookkeeper who in the discharge of his duties caused a wrongful arrest; *Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A.(N.S.) 678, 85 C. C. A. 393, 158 Fed. 65, on retaining proceeds of an illegal act with knowledge of facts as a ratification.

Distinguished in *Russo v. Maresca*, 72 Conn. 56, 43 Atl. 552, holding libelous article written for social organization not ratified by president signing order on treasurer for money to pay for publication thereof, with knowledge of contents.

— **Scope of employment.**

Cited in *Kwiechen v. Holmes & H. Co.* 106 Minn. 153, 19 L.R.A.(N.S.) 257, 118 N. W. 668, holding master not liable where servant tied a horse used in private business behind master's wagon and horse kicked a bystander.

Cited in note (25 Eng. Rul. Cas. 143) on master's liability for tort committed by servant.

13 L. R. A. 222, *HENDERSON v. HOVEY*, 46 Kan. 691, 27 Pac. 177.

Withdrawal of public moneys.

Cited in footnote to *State ex rel. Henderson v. Burdick*, 24 L. R. A. 266, which holds continuing appropriation of amounts of salary made by statute.

Demands against state.

Cited in *Boyd v. Dunbar*, 44 Or. 385, 75 Pac. 695, holding where an appropriation is made for a certain amount for a particular purpose the amount is limit of authority for incurring expense.

Cited in note (42 L. R. A. 37, 38, 49) on what claims constitute valid demands against a state.

13 L. R. A. 224, *MORSE v. MOORE*, 83 Me. 473, 23 Am. St. Rep. 783, 22 Atl. 362.

Sales; what constitutes warranty.

Cited in *Northwestern Cordage Co. v. Rice*, 5 N. D. 434, 57 Am. St. Rep. 563, 67 N. W. 298, holding sale of article by particular description constitutes warranty that article corresponds.

Cited in note (35 L.R.A.(N.S.) 267, 268, 270, 272, 283, 284, 285) on effect of sale with particular description of kind or quality.

Acceptance of goods not waiver of warranty.

Cited in *Noble v. Buswell*, 96 Me. 76, 51 Atl. 244, holding buyer sued for purchase price, entitled to show by way of recoupment, goods were of inferior quality; *White v. Harvey*, 85 Me. 215, 27 Atl. 106, holding notwithstanding buyer's acceptance he may avail himself of any defense to action for price that goes to reduction of damages; *Miamisburg Twine & Cordage Co. v. Wohlhuter*, 71 Minn. 485, 74 N. W. 175, holding where goods sold by sample and by description, if corresponding to sample only, vendee may rely on warranty as to description, while retaining goods; *English v. Spokane Commission Co.* 48 Fed. 197, holding buyer accepting goods in fulfillment of executory contract with warranty may recover on warranty, if goods are inferior; *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 57 C. C. A. 501, 120 Wend. 909, holding vendor's warranty that linseed oil would be like that previously furnished survives acceptance; *Ponce v. Smith*, 84 Me. 270, 24 Atl. 854, holding caterer failing to furnish dinner of quality agreed, may recover contract price, less cost to make dinners as agreed; *Northwestern Cordage Co. v. Rice*, 5 N. D. 434, 57 Am. St. Rep. 563, 67 N. W. 298, holding whether breach of warranty of quality waived by buyer's acceptance, question of fact to be determined by evidence; *Ward Furniture Mfg. Co. v. Isbell*, 81 Ark. 561, 99 S. W. 845, holding that vendee may accept goods and use breach of warranty by way of recoupment to action for purchase price; *Atkins Bros. Co.*

v. Southern Grain Co. 119 Mo. App. 125, 95 S. W. 949, holding that party may accept goods and rely on his warranty when sued for contract price; Pratt v. Johnson, 100 Me. 445, 62 Atl. 242, allowing breach of warranty to be set up in defense to notes given for warranted goods; Campion v. Marston, 99 Me. 412, 59 Atl. 548, holding an exceptance of ice sold under warranty is only evidence of a waiver of warranty, and not conclusive thereof; Wurzburg v. Andrews, 28 N. S. 402, holding a warranty of inside condition of canned meats survived failure to object to conditions visible on outside at time prior to that had in view.

Evidence disproving acceptance.

Cited in Murchie v. Cornell, 155 Mass. 63, 14 L. R. A. 495, 31 Am. St. Rep. 526, 29 N. E. 207, holding protest sworn to on day of arrival of ice inadmissible to disprove acceptance; Eaton v. Blackburn, 52 Or. 308, 20 L.R.A.(N.S.) 57, 132 Am. St. Rep. 705, 96 Pac. 870, 16 A. & E. Ann. Cas. 1198, holding a mere receipt by consignee of goods and an offer to sell them not an acceptance as a matter of law if a reasonable time to reject has not elapsed; Elliott v. Howison, 146 Ala. 583, 40 So. 1018, holding where goods of a particular description are to be sent by carrier, buyer may receive for purpose of inspection as to their conformity to contract; Watson v. Bigelow Co. 77 Conn. 130, 58 Atl. 741, holding question of acceptance of an article may be a question of fact.

Implied warranties.

Cited in Springfield Shingle Co. v. Edgecomb Mill Co. 52 Wash. 626, 35 L.R.A.(N.S.) 266, 101 Pac. 233, holding where shingles were sold as "Star A Star" shingles there is an implied warranty that they are such; Henry Kupfer & Co. v. Pellman, 67 Misc. 151, 121 N. Y. Supp. 1081, holding that a sale by sample is a sale by description.

Cited in note (102 Am. St. Rep. 614) on implied warranty of quality.

Right to cut ice.

Cited in footnotes to Marsh v. McNiver, 20 L. R. A. 334, which authorizes sale by tenant of right to cut ice on running stream; Mansfield v. Place, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired.

13 L. R. A. 229, *Re* DEAN, 83 Me. 489, 22 Atl. 385.

Naturalization of aliens.

Cited in State ex rel. Engelhard v. Weber, 96 Minn. 429, 113 Am. St. Rep. 630, 105 N. W. 490, holding common pleas court of Meigs county Ohio to have jurisdiction over naturalization.

Cited in note (30 L. R. A. 763) on powers of state legislature and courts as to naturalization.

13 L. R. A. 233, CLARK v. SULLIVAN, 2 N. D. 103, 49 N. W. 416.

Set-off; by surety of joint indebtedness.

Cited in footnote to Wilson v. Exchange Bank, 69 L.R.A. 97, which sustains right of indorser in suit against maker and indorser to set off individual claim against plaintiff growing out of transaction giving rise to execution of note.

13 L. R. A. 235, BETZ v. SNYDER, 48 Ohio St. 492, 28 N. E. 234.

General assignments; title of assignee.

Cited in Miller v. Waite, 59 Neb. 321, 80 N. W. 907, holding title to property under general assignment passes to assignee upon delivery of deed, without recording; Wilder v. Beed, 4 Ohio N. P. 442, holding assignee under general assignment

not bound by lease of land previously made by assignor, except at his election; Walker v. Walker, 4 Ohio N. P. 329, holding general assignment relates back to date of filing of previously recorded mortgage made with intent to defraud creditors; Ryan v. Root, 56 Ohio St. 309, 47 N. E. 51, holding judgments rendered after general assignment take *pro rata* in proceeds of property with judgment at same term levied upon before the assignment; Wilder v. Beed, 4 Ohio N. P. 442, 7 Ohio S. & C. P. Dec. 392, holding lessee's assignee for benefit of creditors may elect to accept or reject lease; Ohio Valley Nat. Bank v. Walton Architectural Iron Co. 30 Ohio L. J. 383, 11 Ohio Dec. Reprint, 906, holding equities existing between parties to contract for mortgage could not be set up against statutory assignee for benefit of creditors; Foerstner v. Citizens' Sav. & T. Co. 108 C. C. A. 267, 186 Fed. 5, holding that title of trustee in bankruptcy is superior to mortgage filed for record but which was ineffective because it was not properly witnessed.

Jurisdiction of probate court.

Cited in *Re Jones*, 5 Ohio N. P. 107, holding probate court has exclusive jurisdiction over administration of estates under general assignments; Kittredge v. Miller, 12 Ohio C. C. 130, holding court has exclusive jurisdiction of action by attorney to recover compensation for services rendered assignee; Havens v. Horton, 53 Ohio St. 345, 41 N. E. 253, holding jurisdiction acquired by filing of deed of general assignment not ousted by proceedings for foreclosure of mortgage in court of common pleas.

Recording acts.

Cited in *Straman v. Rechtime*, 58 Ohio St. 459, 51 N. E. 44, holding mortgage defectively acknowledged not entitled upon reformation after death of mortgagor, to priority over claims of creditors of mortgagor's estate; Langmede v. Weaver, 65 Ohio St. 34, 60 N. H. 992, holding record of contract, not properly witnessed, for lease of land for more than three years for development of natural gas and oil, ineffectual as against subsequent purchaser.

Sufficiency of record.

Cited in *Eggleston v. Harrison*, 61 Ohio St. 407, 55 N. E. 993, holding general assignment inoperative as to land lying in another county than that of filing with probate judge, as against innocent purchaser without notice; Harrison v. Chatfield, 14 Ohio C. C. 608, holding filing of general assignment with probate judge notice to all the world as to land situated in another county; Webster v. Clear, 49 Ohio St. 398, 31 N. E. 744, holding under statute providing for recording of deeds from state in auditor's office, record in such office is effectual as against subsequent purchaser from state without notice.

Effect of failure to file on record.

Cited in *Re Knepfle*, 4 Ohio N. P. 213, holding unrecorded mortgage of real estate of no validity as against title of assignee under deed of general assignment subsequently executed; Cheney v. Maumee Cycle Co. 64 Ohio St. 214, 60 N. E. 207, holding receiver's title to real estate of debtor superior to previously executed mortgage, not recorded at time of his appointment; *Re Shirley*, 50 C. C. A. 254, 112 Fed. 303, holding mortgage upon real estate withheld from record void as against attaching creditor; Cheney v. Maumee Cycle Co. 20 Ohio C. C. 24, 10 Ohio C. D. 720, holding mortgagee of corporation who did not file his mortgage until after filing of petition for appointment of receiver for corporation, had no rights prior to other creditors; Foerstner v. Citizens' Sav. & T. Co. 108 C. C. A. 267, 186 Fed. 5, on effect of bankruptcy on the rights of the holder of an unfilled mortgage of realty; Baum v. Harrison, 9 Ohio N. P. N. S. 264, 20 Ohio S. & C. P. Dec. 374, holding title of vendee's assignee for benefit of creditors to

safe sold on conditional sale contract not filed until after assignment is good against conditional vendor; *Re Cook*, 6 Ohio N. P. N. S. 303, 18 Ohio S. & C. P. Dec. 545, holding no lien preserved as against creditors by unfiled contract of sale reserving title of vendor.

Cited in footnote to *Lyon v. Cleveland (City)* 30 L.R.A. 400, which holds revival of judgment effective as against grantee of debtor in unrecorded deed made after judgment but before revival.

13 L. R. A. 241, *SAINT NICHOLAS BANK v. STATE NAT. BANK*, 128 N. Y. 26, 27 N. E. 349.

Banks; liability as collecting agent.

Cited in *Kirkham v. Bank of America*, 26 App. Div. 116, 49 N. Y. Supp. 767, and *Bailie v. Augusta Sav. Bank*, 95 Ga. 282, 51 Am. St. Rep. 74, 21 S. E. 717, holding bank receiving from customer draft drawn by third party, for collection, liable for loss occasioned by acts of correspondents or agents to effect collection; *National Revere Bank v. National Bank*, 172 N. Y. 107, 64 N. E. 799, holding bank mailing to drawee, which is its correspondent, drafts received presumably for collection, receiving therefor after delay drawee's worthless drafts, liable to owner; *Kirkham v. Bank of America*, 165 N. Y. 137, 80 Am. St. Rep. 714, 58 N. E. 753, holding bank receiving from depositor draft of third party for collection, and crediting his account therewith on receipt of drawee's check from agent, cannot cancel credit upon dishonor of check; *Sherman v. Port Huron Engine & Threshing Co.* 8 S. D. 350, 66 N. W. 1077, same case on subsequent appeal, 13 S. D. 101, 82 N. W. 413, holding where note payable at bank receiving it for collection, employment of subagents is at risk of bank; *Martin v. Home Bank*, 160 N. Y. 196, 54 N. E. 717, holding depositor paying by mistake amount of check of third party, dishonored through failure of bank to make presentation in due time, entitled to recover from bank; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 459, holding bank sending check to drawee bank by mail for collection, negligent, though within time, and though drawee failed within time allowed for forwarding paper; *Sylvester v. Crohan*, 138 N. Y. 497, 34 N. E. 273, holding duty of payee to drawer, with respect to presentation of draft, not same as duty which bank, in which draft deposited, owes depositor; *Irwin v. Reeves Pulley Co.* 20 Ind. App. 128, 48 N. E. 601 (dissenting opinion), majority holding acceptance of draft for collection binds bank only to exercise of reasonable skill and ordinary care in selection of correspondents; *Winchester Mill. Co. v. Bank of Winchester*, 120 Tenn. 239, 18 L.R.A.(N.S.) 447, 111 S. W. 248, holding a bank receiving a check for collection is negligent in sending it to the drawee bank although only bank in place located; *McBride v. Illinois Nat. Bank*, 138 App. Div. 345, 121 N. Y. Supp. 1041, holding that bank accepting negotiable instrument for collection must upon dishonor take steps necessary to hold indorsers; *Pinkney v. Kanawha County Bank*, 68 W. Va. 268, 32 L.R.A.(N.S.) 995, 69 S. E. 1012, Ann. Cas. 1910 B, 115, holding that action for money had and received lies against collecting bank for amount of check lost through such bank's negligence.

Cited in footnotes to *First Nat. Bank v. Sprague*, 15 L. R. A. 498, which holds bank receiving bill for gratuitous collection not liable for defaults of reputable correspondent; *Beal v. Somerville*, 17 L. R. A. 291, which holds no title to check passes by depositing for collection; *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment.

Cited in notes (37 L. ed. U. S. 365) on liability of bank for collections; (3 L.R.A.(N.S.) 1180) on liability of bank for taking check or drafts in payment of paper held for collection; (77 Am. St. Rep. 626) on duties of banks acting

as collecting agents; (18 L.R.A.(N.S.) 445) on sending check directly to drawee bank; (3 Eng. Rul. Cas. 778, 779) on liability of bank for money received by correspondent bank.

Conflict of laws; application of common law.

Cited in *Nathan v. Lee*, 152 Ind. 243, 43 L. R. A. 826, 52 N. E. 987, holding neither principles of equity nor of common law, as expounded by supreme court of another state, binding, in determining validity of mortgage executed by insolvent corporation of that state, upon real estate in this state in absence of local statute controlling question; *Reid v. Albany County*, 128 N. Y. 370, 28 N. E. 367, holding running of statute of limitation not affected by decision of court of last resort giving right of action previously believed not to exist; *Shaw v. Postal Tele. & Cable Co.* 79 Miss. 693, 56 L. R. A. 492, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion) majority holding construction of statute not common-law question, and decisions of state statute binding upon courts of another state in determining case arising under statute; *Tennent v. Union Central L. Ins. Co.* 133 Mo. App. 353, 112 S. W. 754, construing common law of a sister state according to the precedents of forum; *Coats v. Chicago, R. I. & P. R. Co.* 134 Ill. App. 225, construing a statute of a foreign state according to the law of the forum.

Cited in notes (61 L. R. A. 195) on conflict of laws as to negotiable paper; (63 L.R.A. 524) on conflict of laws as to carrier's contracts; (67 L.R.A. 38) on how case determined when proper foreign law not proved; (6 L.R.A.(N.S.) 213) on conflicting interpretations of common-law rules in different jurisdictions.

Disapproved in *Sykes v. Citizens' Nat. Bank*, 78 Kan. 690, 19 L.R.A.(N.S.) 670, 98 Pac. 206, holding that the negotiability of a note made in Kansas made payable in Missouri is to be governed by law of Missouri.

13 L. R. A. 244, *BARNARD v. KNOX COUNTY*, 105 Mo. 382, 16 S. W. 917.

Municipal indebtedness; constitutional limitations.

Cited in *State ex rel. Robinson v. Columbia*, 111 Mo. 378, 20 S. W. 90, enjoining town or less than 10,000 population from issuing waterworks and electric light bonds, where annual levy exceeded 50 cents on the hundred, although indebtedness not equal to 5 per cent of taxable property; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 384, 34 L. R. A. 838, 71 Am. St. Rep. 926, 45 Pac. 494, holding judgment against county in condemnation proceedings for opening public road, within constitutional provision limiting annual taxation for county revenue; *Wilson v. Knox County*, 132 Mo. 398, 34 S. W. 477, holding warrants for indebtedness incurred prior to Constitution of 1875, not charge upon fund levied within constitutional restrictions for annual expenses of county; *Eaton v. Minnaugh*, 43 Or. 469, 73 Pac. 754, holding constitutional limitation of county indebtedness applies to debt for new courthouse authorized by legislature; *State ex rel. Columbia v. Wilder*, 197 Mo. 9, 94 S. W. 495, holding that in construing constitutional limitation of municipal indebtedness all legal debts of municipality are to be included.

Cited in notes (23 L.R.A. 404, 406; 37 L.R.A.(N.S.) 1095, 1096) on what constitutes an "indebtedness" within meaning of constitutional and statutory restrictions of municipal indebtedness; (44 Am. St. Rep. 236) on what is municipal indebtedness within prohibition against.

Distinguished in *Ewing v. Vernon County*, 216 Mo. 688, 116 S. W. 518, holding that constitutional limitation of municipal indebtedness must be set up to be a defense.

Disapproved in *Rauch v. Chapman*, 16 Wash. 584, 36 L. R. A. 412, 58 Am. St. Rep. 52, 48 Pac. 253, holding liabilities for current expenses of county not with-

in constitutional provision limiting indebtedness to 5 per cent of assessed valuation.

Overruled in *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 221, 32 L. R. A. 166, 31 S. W. 756, Reversing on hearing in banc 128 Mo. 198, 32 L. R. A. 159, 26 S. W. 1025, holding annual payment falling due under water contract not within constitutional provision limiting annual levy to 50 cents on hundred for all purposes.

Validity with respect to existence of funds when debt contracted.

Cited in *Mountain Grove Bank v. Douglas County*, 146 Mo. 50, 47 S. W. 944, holding when sufficient funds on hand to pay warrants at time of issue, they do not become illegal upon money being paid out on warrants subsequently issued; *Reynolds v. Norman*, 114 Mo. 513, 21 S. W. 845, holding warrant lawfully issued in payment of indebtedness created in one year may be paid out of revenues of subsequent year; *Kane v. School District*, 48 Mo. App. 414, holding school-district warrant for which there is no money on hand, nor any provided for in fiscal year in which it is issued, invalid; *State ex rel. Hill v. Wabash R. Co.* 169 Mo. 576, 70 S. W. 132, holding two-thirds vote of citizens necessary to validity of special levy to pay warrants issued in excess of revenue for same year, though within revenue receivable; *State ex rel. Parsons v. Winkleman*, 96 Mo. App. 230, 69 S. W. 1063, holding levee company levying full amount of tax in years when work done cannot be compelled to make special levy to pay judgment therefor, because less than full levy made in other years; *McAleer v. Angell*, 19 R. I. 690, 36 Atl. 588, holding defendant's plea, in action against town, alleging contracting of liability after reaching debt limit, and want of funds, not bad for duplicity.

Stare decisis.

Cited in *Sedalia v. Donohue*, 190 Mo. 416, 89 S. W. 386, 4 A. & E. Ann. Cas. 89, as changing a rule of property relied upon on faith of a prior case.

13 L. R. A. 248, *DANIELS v. NEW YORK & N. E. R. CO.* 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283.

Injury to trespasser on private premises.

Cited in *McGuiness v. Butler*, 159 Mass. 237, 38 Am. St. Rep. 412, 34 N. E. 259, holding child trespasser cannot recover for personal injury unless wantonly inflicted by, or due to recklessly careless conduct of, owner; *Shea v. Gurney*, 163 Mass. 188, 47 Am. St. Rep. 446, 39 N. E. 996, holding owner of saw-mill owes no duty to boy permitted to visit mill and assist employees, save to abstain from injuring him by active misconduct; *Grindley v. McKechnie*, 163 Mass. 495, 40 N. E. 764, holding owner and contractor maintaining trench near sidewalk, during construction of building, not liable for death of boy five years old, from falling therein; *O'Leary v. Brooks Elevator Co.* 7 N. D. 563, 41 L. R. A. 680, 79 N. W. 919, holding child trespasser injured from contact with exposed revolving shaft, running elevator company's yard, cannot recover; *Ryan v. Towar*, 128 Mich. 475, 55 L. R. A. 314, 92 Am. St. Rep. 481, 87 N. W. 644, holding girl injured in attempt to rescue younger sister caught between wheel and wheel-pit in unused pumphouse, not entitled to recover of owner of premises; *Smith v. Jacob Dold Packing Co.* 82 Mo. App. 14, holding corporation emptying hot ashes on vacant lot not liable for injuries to child four years old, burned by running over ash pile; *Paolino v. McKendall*, 24 R. I. 438, 60 L. R. A. 136, 96 Am. St. Rep. 736, 53 Atl. 268, denying liability of owner burning rubbish in lot where children habitually resorted, for injury to five-year-old child; *Ritz v. Wheeling*, 45 W. Va. 270, 43 L. R. A. 153, 31 S. E. 993, holding city not

liable for death of child from falling into fenced reservoir; *McCabe v. American Woolen Co.* 124 Fed. 286, denying liability for drowning of five-year-old child in unguarded mill race passing through thickly settled district; *Quigley v. Clough*, 173 Mass. 430, 45 L. R. A. 502, 73 Am. St. Rep. 303, 53 N. E. 884, holding pedestrian on sidewalk injured from contact with barbed-wire fence maintained along border of private grounds, cannot recover of owner of premises; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 465, 38 Am. St. Rep. 254, 21 S. W. 1062, holding railroad not bound to keep lookout to prevent boys from swinging on ladders of its moving freight trains; *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 301, 38 L. R. A. 459, 67 Am. St. Rep. 116, 22 So. 546, holding street railway company operating dummy line, not liable for injury received by trespassing child from jumping on and off cars while in motion; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 387, 26 L. R. A. 851, 28 S. W. 1069, holding railroad not bound to keep watch to prevent child trespasser in its yards from jumping on slowly moving cars; *Sullivan v. Boston & A. R. Co.* 156 Mass. 379, 31 N. E. 128, holding railroad not liable for death of boy killed by contact with electric wire on top of shed, whither he had gone to recover ball; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 411, 54 L. R. A. 320, 39 S. E. 82, holding railroad not liable for drowning of child in unguarded excavation made for water tank, and partially filled with water; *Walsh v. Fitchburg R. Co.* 145 N. Y. 307, 27 L. R. A. 726, 45 Am. St. Rep. 615, 39 N. E. 1068, and *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 638, 41 L. R. A. 833, 68 Am. St. Rep. 727, 40 Atl. 682, holding railroad not liable for injury to child playing about turntable, though situated near street, and unguarded; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 900, 59 L. R. A. 923, 91 N. W. 880, holding railroad's liability to child injured while playing with turntable, question for jury; *Duncan v. St. Louis & S. F. R. Co.* 152 Ala. 125, 44 So. 418, holding railroad company not negligent in failing to discover a trespasser on track; *West v. Poor*, 196 Mass. 185, 11 L.R.A.(N.S.) 937, 124 Am. St. Rep. 541, 81 N. E. 960, holding case of one giving a child a ride is that of a gratuitous bailee; *Ziegler v. Friedman & G. Iron Works*, 70 Misc. 556, 127 N. Y. Supp. 457, to the point that owner of property near street owes no duty of active diligence to trespasser upon his property; *Bottum v. Hawks*, 84 Vt. 379, 35 L.R.A.(N.S.) 445, 79 Atl. 858, holding that one maintaining opening into underground mill-race located near highway and school building is not liable for death of child who falls into it, although no barriers are about said opening.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tarrt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

Cited in notes (14 L.R.A. 783; 4 L.R.A.(N.S.) 82) on liability of railways for injuries to children trespassing on turntable; (25 Eng. Rul. Cas. 112) on liability for injury to trespasser by dangerous instrumentalities; (49 Am. St. Rep. 418) on negligence in dealing with children; (69 L.R.A. 544) on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained; (19 L.R.A.(N.S.) 1105, 1112, 1132, 1135) on attractive nuisance.

Disapproved in *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 434, 57 L. R. A. 570, 90 N. W. 95, holding railroad liable for injury to child under eight years of age, from playing with unfastened turntable, maintained in unfenced lot near public highway.

Trespasser on obstruction in highway.

Cited in *Fitzgerald v. Rodgers*, 58 App. Div. 301, 68 N. Y. Supp. 946, holding sewer contractor leaving winch used in connection with work, unguarded in high-

way, not liable for injury to child playing thereon; *Kaumeier v. City Electric R. Co.* 116 Mich. 311, 40 L. R. A. 387, 72 Am. St. Rep. 525, 74 N. W. 481, holding street car company leaving car on track in highway, not liable for injury to child falling under wheels, while car pushed by companions; *Gay v. Essex Electric Street R. Co.* 159 Mass. 240, 21 L. R. A. 448, 38 Am. St. Rep. 415, 34 N. E. 186, holding street car company leaving cars standing in street, not liable for death of child from playing with unfastened brake.

Implied invitation.

Cited in *Holbrook v. Aldrich*, 168 Mass. 17, 36 L. R. A. 495, 60 Am. St. Rep. 364, 46 N. E. 115, holding child entering store with parent, to make purchase, and injured from contact with coffee grinder, cannot recover damages from storekeeper; *Leavitt v. Mudge Shoe Co.* 69 N. H. 598, 45 Atl. 558, holding person going upon premises with implied invitation, not extending, however, to elevator, cannot recover for injuries resulting from use of elevator; *Chenery v. Fitchburg R. Co.* 160 Mass. 214, 22 L. R. A. 577, 35 N. E. 554, holding duty of railroad to person crossing track by private way, dependent upon whether reasonably prudent man would understand railroad by implication had declared crossing public; *Driscoll v. Scanlon*, 165 Mass. 349, 52 Am. St. Rep. 523, 43 N. E. 100, holding master not liable for injury to child invited by servant to ride with him on dump cart, and from which he fell; *Thompson v. Baltimore & O. R. Co.* 218 Pa. 451, 19 L.R.A.(N.S.) 1167, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894; *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 229, 4 L.R.A.(N.S.) 84, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 244, 19 L.R.A.(N.S.) 1144, 122 Am. St. Rep. 503, 83 N. E. 66, 11 A. & E. Ann. Cas. 981,—holding railroad company not liable for injury to child playing on a turntable; *Driscoll v. Clark*, 32 Mont. 186, 80 Pac. 1, on doctrine of turntable cases; *Iamurri v. Saginaw City Gas Co.* 148 Mich. 53, 111 N. W. 884 (dissenting opinion), on doctrine of constructive invitation to children; *New York, C. & H. R. R. Co. v. Price*, 16 L.R.A.(N.S.) 1105, 86 C. C. A. 502, 159 Fed. 332, holding railroad not bound to fence tracks to keep children out; *Foster's Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 699, 4 L.R.A.(N.S.) 809, 112 Am. St. Rep. 881, 91 S. W. 199, holding that owner of a stone wagon need not take special precaution to avoid injury to a child attempting to ride upon it; *Wilmot v. McPadden*, 79 Conn. 378, 19 L.R.A.(N.S.) 1111, 65 Atl. 157, holding one tearing down building not bound to anticipate that children will enter premises and undermine chimneys; *O'Leary v. Michigan State Teleph. Co.* 146 Mich. 253, 109 N. W. 434 (dissenting opinion); on the distinction between invitation and temptation; *Briscoe v. Henderson Lighting & Power Co.* 148 N. C. 408, 19 L.R.A.(N.S.) 1129, 62 S. E. 600, holding mere maintenance of a building with large windows through which could be seen machinery in motion not to make owner liable for injury to a child falling into a well of hot water some distance from building.

Cited in footnote to *Com. v. Joslin*, 21 L. R. A. 448, which holds leaving street car in street not invitation to children to play on same.

Disapproved in *Force v. Standard Silk Co.* 160 Fed. 1004, holding that an employer of children is to take precautions against childish instincts.

Proximate cause.

Cited in *Murray v. Boston Ice Co.* 180 Mass. 168, 61 N. E. 1001, holding question of probable cause properly left to jury, where person riding with another injured in collision.

Cited in footnote to *Schreiner v. Great N. R. Co.* 58 L. R. A. 75, which holds

failure to build fence not proximate cause of injury to one pushed on track by cow.

13 L. R. A. 251, ATTY. GEN. v. ABBOTT, 154 Mass. 323, 28 N. E. 346.

Other suit rising out of same facts in Abbott v. Hills, 158 Mass. 396, 33 N. E. 592.

Dedication; acts constituting.

Cited in Bates v. Beloit, 103 Wis. 97, 78 N. W. 1102, holding appropriation of land for public use by act evincing such intent, constitutes dedication *in pais* which becomes absolute by user or acceptance; Conkling v. Mackinaw City, 120 Mich. 74, 79 N. W. 6, holding designation of land on plat as public park, sale of lots adjoining, and subsequent user, sufficient dedication, without formal acceptance; Riley v. Buchanan, 116 Ky. 633, 63 L. R. A. 645, 76 S. W. 527, holding acceptance of highway beneficial to public effected by long continued user; *Re Bartlett*, 163 Mass. 514, 40 N. E. 899, holding gift of real and personal property for public park is a good public charitable gift; Cole v. Minnesota Loan & T. Co. 17 N. D. 421, 117 N. W. 354, 17 A. & E. Ann. Cas. 304; Florida East Coast R. Co. v. Worley, 49 Fla. 306, 38 So. 618,—holding where lots were sold with reference to a plat showing a parcel used for park purposes that this is a dedication; Brewer v. Pine Bluff, 80 Ark. 493, 97 S. W. 1034, holding that where owner sells lots according to a plat showing street that dedication of street is irrevocable; Northport Wesleyan Grove Campmeeting Asso. v. Andrews, 104 Me. 348, 20 L.R.A.(N.S.) 978, 71 Atl. 1027, holding where a dedication to public has been made and public has used it for purpose dedicated owner is estopped to revoke it; Cassidy v. Sullivan, 75 Neb. 849, 106 N. W. 1027, holding an acceptance of a dedication by general public sufficient; Atty. Gen. v. Ellis, 198 Mass. 98, 15 L.R.A.(N.S.) 1123, 84 N. E. 430, sustaining power of state to secure title to private property by adverse possession.

Cited in footnote to Archer v. Salinas City, 16 L. R. A. 145, which holds dedication for park effected by recording map with spaces marked thereon.

Protection of rights under dedication.

Cited in Prince v. Crocker, 166 Mass. 363, 32 L. R. A. 613, 44 N. E. 446, holding taxpayer cannot assert right to continue use of property as public park, or to have compensation paid for surrender of use, against combined acts of legislature and public authorizing surrender; Atty. Gen. v. Williams, 174 Mass. 484, 47 L. R. A. 319, 55 N. E. 77, holding information in equity to restrain erection of public building, contrary to statute limiting height of buildings on public square, may be maintained by attorney general; *Re Certain Land*, 119 Fed. 454, holding municipality may contest taking of public park for postoffice; Atty. Gen. v. Vineyard Grove Co. 181 Mass. 509, 64 N. E. 75, holding dedication of shore lands for purpose of view may be enforced against building interfering with view; Hamlin ex rel. Maine Baptist Missionary Convention v. Property in Webster, 106 Me. 134, 76 Atl. 163, holding that owner of fee of land dedicated to pious use cannot be deprived of fee itself unless by eminent domain or other due process of law.

Cited in notes (14 L.R.A.(N.S.) 1068) on effect of conveyance of lots laid down on plats, to prevent change in use or form; (16 L.R.A.(N.S.) 1075) on precedence as between conveyance for nominal or inadequate consideration and senior unrecorded conveyance.

Appearance for the commonwealth.

Cited in McQuesten v. Atty. Gen. 187 Mass. 186, 72 N. E. 965, holding that an attorney general could authorize an attorney at law not an assistant to take an appeal in behalf of the commonwealth.

13 L. R. A. 255, WATUPPA RESERVOIR CO. v. FALL RIVER, 154 Mass. 305, 28 N. E. 257.

Rights in great ponds.

Cited in Concord Mfg. Co. v. Robertson, 66 N. H. 24, 18 L. R. A. 692, 25 Atl. 718, holding removal of limited quantity of ice from large pond not unreasonable use of which governmental grantee of land on stream flowing from pond can complain; Percy Summer Club v. Astle, 145 Fed. 58; Percy Summer Club v. Astle, 90 C. C. A. 527, 163 Fed. 6,—holding that public has right to fish in lakes and ponds; Conant v. Jordan, 107 Me. 233, 31 L.R.A.(N.S.) 437, 77 Atl. 938, holding that right to free fishing and fowling on ponds of more than ten acres in extent, has always belonged to public.

Cited in footnote to Auburn v. Union Waterpower Co. 38 L. R. A. 188, which holds taking one-fifteenth water supply of great pond for city not unreasonable as to owners of mill privileges.

Cited in note (50 L. R. A. 746) on state and Federal ownership of waters.

Amendment of pleading.

Cited in Merrill v. Beckwith, 168 Mass. 75, 46 N. E. 400, holding bill in equity after entry on docket of "bill dismissed," but before formal decree, may be amended to complaint for damages.

Prescriptive rights.

Cited in Atty. Gen. v. Ellis, 198 Mass. 98, 15 L.R.A.(N.S.) 1123, 84 N. E. 430, holding twenty years' possession by lessee of adverse claimant sufficient.

13 L. R. A. 258, POWERS v. MANNING, 154 Mass. 370, 28 N. E. 290.

Attorneys; withdrawal from suit.

Cited in Thompson v. Dickinson, 159 Mass. 213, 34 N. E. 262, holding evidence that attorneys withdrew from cause after notice, and that they understood client to consent to it, does not show withdrawal wrongful or without justification.

13 L. R. A. 262, BENSON v. GRAY, 154 Mass. 391, 28 N. E. 275.

Custom to vary written contract.

Cited in Menage v. Rosenthal, 175 Mass. 361, 56 N. E. 579, holding under contract for services of salesman to be rendered in "New England," not admissible to show custom to render part of service in New York; People's Ice Co. v. Employers' Liability Assur. Corp. 161 Mass. 125, 36 N. E. 754, holding custom of ice dealers to erect own ice houses, not sufficient to bring injuries from fall of ice house in course of construction within conditions of employer's liability policy insuring injuries to employees occupied in "all operations connected with business of ice dealers;" Louisville-Cincinnati Packet Co. v. Rogers, 20 Ind. App. 599, 49 N. E. 970, holding bill of lading for shipment on particular boat named, cannot be varied by proof of usage to ship by first boat leaving port; Boruszewski v. Middlesex Mut. Assur. Co. 186 Mass. 593, 72 N. E. 250, holding evidence of a custom not admissible to change the plain terms of a contract; Shute v. Bills, 191 Mass. 438, 7 L.R.A.(N.S.) 967, 114 Am. St. Rep. 631, 78 N. E. 96, refusing to allow evidence to show a custom for property owners to retain control of outside portions of property; De Friest v. Bradley, 192 Mass. 353, 78 N. E. 467, holding parol evidence not admissible to show a condition to a specifically stated covenant of a lease.

Carriers; liability for injury to freight.

Cited in footnotes to Chicago, B. & Q. R. Co. v. Williams, 55 L. R. A. 289, which holds carrier liable for failure to properly provide for live stock knowingly taken without caretaker; Betts v. Chicago, R. I. & P. R. Co. 26 L. R. A.

248, which holds carrier liable for injuries to live stock by breaking of slats; Illinois C. R. Co. v. Harris, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported.

Cited in notes (37 L. ed. U. S. 296) on duty and liability as carrier of live-stock; (63 Am. St. Rep. 559) on respective duties of carriers and shippers of livestock.

13 L. R. A. 263, BADENFELD v. MASSACHUSETTS MUT. ACCL. ASSO. 154 Mass. 77, 27 N. E. 769.

Agreements to arbitrate.

Cited in Smith v. Preferred Masonic Mut. Acci. Asso. 51 Fed. 522, holding action on benefit certificate not abated, because of stipulation for arbitration of any claim thereunder; Prudent Patricians of Pompeii v. Marr, 20 App. D. C. 375, holding policy prohibiting proceedings for collection, except "through regular channels of the order," does not preclude assured from having recourse to courts; Lewis v. Brotherhood Acci. Co. 194 Mass. 6, 17 L.R.A.(N.S.) 716, 79 N. E. 802, holding an agreement to abide by an arbitration invalid; Hartford F. Ins. Co. v. Bourbon County, 115 Ky. 117, 72 S. W. 739, holding that one cannot contract not to try his case before the courts; Nolan v. Ocean Acci. & Guarantee Corp. 5 Ont. L. Rep. 549, on invalidity of unlimited agreements to arbitrate and be concluded thereby.

Cited in footnotes to Brock v. Dwelling House Ins. Co. 26 L. R. A. 623, which denies right of insurer uniting in appointment of appraisers to claim appointment premature; Grand Rapids F. Ins. Co. v. Finn, 50 L. R. A. 555, which holds appraisal of loss not required by policy unless demand made by insurer.

Cited in note (15 L.R.A.(N.S.) 1066) on arbitration as condition precedent to action on insurance policy.

Construction of insurance policy.

Cited in Traders' Ins. Co. v. Dobbins, 114 Tenn. 233, 86 S. W. 383, holding a policy of insurance construed most strongly against insurer.

Cited in footnote to Jarnagin v. Travelers' Protective Asso. 68 L.R.A. 499, which holds that failure of police officers to protect insured while in their charge from assaults by other persons will not take his killing out of provision against recovery in case of death from intentional injuries.

Insurance; avoidance of policy for misrepresentation.

Cited in footnotes to Globe Mut. L. Ins. Asso. v. Wagner, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead; White v. Providence Sav. Life Assur. Soc. 27 L. R. A. 398, which holds technical warranties as well as representations included in provision against misrepresentations material.

Death or injury by accidental means.

Cited in Noyes v. Commercial Travellers' Eastern Acci. Asso. 190 Mass. 183, 76 N. E. 665, holding it an accident where the foot of one about to take a car gave away allowing him to fall and be injured.

Cited in footnotes to Fidelity & C. Co. v. Lowenstein, 46 L. R. A. 450, which holds death by accidentally inhaling gas while asleep covered by accident policy; American Acci. Co. v. Reigart, 21 L. R. A. 651, which holds death by choking on food covered by accident policy; Dailey v. Preferred Masonic Mut. Acci. Asso. 26 L. R. A. 171, which holds risk of getting on and off moving train by passenger conductor covered by accident policy.

Distinguished in Garcelon v. Commercial Travellers Eastern Acci. Asso. 195 Mass. 537, 10 L.R.A.(N.S.) 963, 81 N. E. 201, holding negligence of plaintiff in

boarding a moving train to bar a recovery where policy stipulated against injury from plaintiff's own negligence.

Burden of proof as to excepted causes of death.

Cited in *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 659, 61 N. W. 485, holding breach of conditions limiting insurance is matter of defense, which insurer must prove; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 150, 36 N. E. 891, holding burden on insurer to show death was from voluntary exposure to unnecessary danger, or to want of due diligence; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 357, 26 L. R. A. 407, footnote p. 306, 44 Am. St. Rep. 367, 38 N. E. 973, holding burden on insurer to show injury to insured resulted from causes specified in policy as not within insurance; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 92, 50 Am. St. Rep. 427, 31 S. W. 578, holding where plaintiff shows body of insured found mangled on railroad track, but not cause of accident, burden is on insurer to show death result of breach of conditions of policy; *Canadian R. Acci. Ins. Co. v. McNevin*, 32 Can. S. C. 198, holding burden on insurance company to prove facts which relieve company from liability; *Jamison v. Continental Casualty Co.* 104 Mo. App. 314, 78 S. W. 812, holding that burden was on defendant to show that insured met death in way that would bring into operation minimum indemnity clause where such was defense on accident policy.

Cited in notes (33 L.R.A.(N.S.) 1214) on burden of proof as to contributory negligence; (4 L.R.A.(N.S.) 638) on duty of insured to negative death or accident from excepted cause; (50 Am. St. Rep. 442) on evidence of cause of death of insured.

Distinguished in *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 286, 68 Am. St. Rep. 306, 76 N. W. 683, holding burden on plaintiff to show death resulted from accidental cause, and if evidence in equipoise as to such fact, plaintiff must fail.

Voluntary exposure to unnecessary danger.

Cited in *Aetna L. Ins. Co. v. Hicks*, 23 Tex. Civ. App. 79, 56 S. W. 87, holding voluntary over-exertion and exposure by assured will not defeat recovery on policy, unless proximate cause of accident; *Whalen v. Peerless Casualty Co.* 75 N. H. 299, 139 Am. St. Rep. 695, 73 Atl. 642, holding that "voluntary exposure" in conscious or intentional exposure to known risk and not one which is merely inadvertent or accidental.

Cited in footnotes to *Follis v. United States Mut. Acci. Asso.* 28 L. R. A. 78, which holds attempt to cross bridge on ties voluntary exposure to danger; *Shevlin v. American Mut. Acci. Asso.* 36 L. R. A. 52, which holds jumping in dark from moving freight train exposure to unnecessary danger.

Cited in notes (40 L.R.A. 444) on voluntary exposure to unnecessary danger within meaning of insurance policy; (139 Am. St. Rep. 713) on voluntary exposure of insured to danger; (10 L.R.A.(N.S.) 959) on boarding or alighting from moving train as within provision of accident policy as to exposure to danger.

Presumptions as to cause of death.

Cited in *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 94, 50 Am. St. Rep. 427, 31 S. W. 578, holding presumption that assured was exercising ordinary care at time of accident, not overcome by fact that body was found mangled on railroad track.

Breach of condition subsequent.

Cited in *Westfield Cigar Co. v. Insurance Co. of N. A.* 169 Mass. 385, 47 N. E. 1026, holding breach of condition subsequent not defense, where insurer, after

receipt of proofs of loss, admitted liability, save as to goods not covered by policy.

13 L. R. A. 267, *EQUITABLE ACCI. INS. CO. v. OSBORN*, 90 Ala. 201, 9 So. 869.

Pleading; general issue.

Overruled in *Louisville & N. R. Co. v. Trammell*, 93 Ala. 352, 9 So. 870, holding pleas alleging allegations of complaint are untrue, or denying each and every allegation contained therein, equivalent to general issue.

Construction of conditions in an insurance policy.

Cited in *Thomson v. United States Fidelity & G. Co.* 44 Wash. 391, 87 Pac. 486; *Pacific Union Club v. Commercial Union Assur. Co.* 12 Cal. App. 513, 107 Pac. 728,—holding exceptions in a policy are construed most strongly against the insured; *Starr v. Aetna L. Ins. Co.* 41 Wash. 204, 4 L.R.A. (N.S.) 641, 83 Pac. 113, holding that a provision that an accident policy does not cover being on any railway right of way means on the track.

Cited in note (8 L.R.A. (N.S.) 971) on restriction of insurer's liability where injuries received on "roadbed" of railway.

Insurance; voluntary exposure to unnecessary danger.

Cited in *DeLoy v. Travelers Ins. Co.* 171 Pa. 11, 50 Am. St. Rep. 787, 32 Atl. 1108, holding "voluntary exposure" to unnecessary danger means intentional exposure; *Employers' Liability Assur. Corp. v. Anderson*, 5 Kan. App. 26, 47 Pac. 331, holding to avoid policy there must be unnecessary risk to known danger, which of itself is actual cause of death or injury; *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 204, 40 L. R. A. 440, 69 N. W. 191, holding attempt to scale bluff, with loaded gun in hand while hunting, not voluntary exposure to unnecessary danger; *Hess v. Preferred Masonic Mut. Acci. Asso.* 112 Mich. 207, 40 L. R. A. 451, 70 N. W. 460, holding bank cashier going into planing mill, where he stumbled and fell against buzz-saw, not voluntary exposure; *Fidelity & C. Co. v. Chambers*, 93 Va. 144, 40 L. R. A. 436, 24 S. E. 896, holding not voluntary exposure to sit talking on railroad track and when warned of approaching train to attempt to recover valise from front of train; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 667, 61 N. W. 485, holding to bring case within exception, act resulting in death must be not only unnecessary, but such as reasonable and ordinary prudence would pronounce dangerous; *Smith v. Aetna L. Ins. Co.* 115 Iowa, 220, 56 L. R. A. 274, 91 Am. St. Rep. 153, 88 N. W. 368, holding, where assured, killed by stepping or falling from steps of moving train, test is whether assured appreciated he was hazarding life or limb; *Payne v. Fraternal Acci. Asso.* 119 Iowa, 346, 93 N. W. 361, holding "voluntary exposure to unnecessary danger" or person injured while crossing track, question for jury; *Jamison v. Continental Casualty Co.* 104 Mo. App. 314, 78 S. W. 812, on what constitutes voluntary exposure to danger; *Diddle v. Continental Casualty Co.* 65 W. Va. 174, 22 L.R.A. (N.S.) 786, 63 S. E. 962, holding inadvertent exposure is not voluntary exposure; *Bateman v. Travelers Ins. Co.* 110 Mo. App. 452, 85 S. W. 128, holding a voluntary exposure covenant clause does not cover every act of negligence; *Whalen v. Peerless Casualty Co.* 75 N. H. 299, 139 Am. St. Rep. 695, 73 Atl. 642, holding that "voluntary exposure" is conscious or intentional exposure to known risk, and not one which is merely inadvertent or accidental.

Cited in notes (13 L. R. A. 265) on voluntary exposure to unnecessary risks; (40 L. R. A. 432) on voluntary exposure to unnecessary danger within meaning of accident insurance policy; (139 Am. St. Rep. 700, 704, 706) on voluntary exposure of insured to danger.

Accidental death.

Cited in *Collins v. Fidelity & C. Co.* 63 Mo. App. 256, holding death from pistol shot fired by another to be from accidental means; *Berliner v. Travelers' Ins. Co.* 121 Cal. 461, 41 L. R. A. 468, 66 Am. St. Rep. 49, 53 Pac. 918, holding death of passenger while temporarily riding upon locomotive, not within exception in accident policy, of death from being on conveyance not provided for transportation of passengers; *Sullivan v. Modern Brotherhood*, 167 Mich. 534, — L.R.A.(N.S.) —, 133 N. W. 486, holding that insurer against accident is liable, where death or injury is caused by disease not resulting from any bodily infirmity or disease existing at time of accident but which disease is itself caused by accident.

Cited in note (30 L. R. A. 213) on what constitutes an accident within meaning of an accident insurance policy.

13 L. R. A. 270, *STEVENS v. LUDLUM*, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771.

Estoppel in pais.

Cited in *Myers v. Byars*, 99 Ala. 487, 12 So. 430, holding person representing he holds funds subject to adjudication of conflicting claims by courts, estopped to deny in action to settle claims, that he holds money; *Barchent v. Selleck*, 89 Minn. 516, 95 N. W. 455, holding vendee under land contract, knowing of intended purchase from owner, and surrendering possession to purchaser, estopped to assert claim; *Fergestad v. Gjertsen*, 46 Minn. 371, 49 N. W. 127, holding agreement of subcontractor with owner as condition to permission to erect dwelling, that cost should not exceed stated sum, not estopped against claim for greater sum; *Christian v. Michigan Debenture Co.* 134 Mich. 178, 96 N. W. 22; *Thompson v. Borg*, 90 Minn. 213, 95 N. W. 896,—holding it not necessary that there be an actual intent to mislead or deceive; *Weidemann v. Springfield Breweries Co.* 78 Conn. 664, 63 Atl. 162; *Pleasant Hill Light, Power & Water Co.* 130 Mo. App. 492, 109 S. W. 1061,—holding it cannot be based on statements made to third parties which are not intended to be communicated to party claiming benefit therefor; *Dallett v. Ogden*, 11 Del. Co. Rep. 423, 20 Pa. Dist. R. 850, holding that one who holds himself out as partner, on faith of which others give credit to firm, will be held liable to equitable estoppel for firm debts.

Distinguished in *Irish-American Bank v. Ludlum*, 49 Minn. 348, 51 N. W. 1046, holding merchant not estopped by statement to commercial agency as to one not patron, and having no right to rely and act thereon.

Fraud; representations to commercial agency.

Cited in *P. Cox Shoe Co. v. Adams*, 105 Iowa, 415, 75 N. W. 316, holding patron of commercial agency selling goods to merchant in reliance upon false representations made to agency as to business responsibility, entitled to rescind; *Davis v. Louisville Trust Co.* 30 L.R.A.(N.S.) 1015, 104 C. C. A. 24, 181 Fed. 15, holding that person purchasing treasury stock of corporation on strength of statements made by corporation to mercantile agency, may rescind if statements are false.

Cited in note (14 L. R. A. 264) on fraud in obtaining credit.

Distinguished in *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 805, 56 N. W. 389, holding merchant's statement of liabilities to bank, though false, not fraud constituting ground for attachment, in favor of person selling him goods on faith of statement.

13 L. R. A. 272, HEILIGMANN v. ROSE, 81 Tex. 222, 26 Am. St. Rep. 804, 16 S. W. 931.

Evidence; proof of tortious acts.

Cited in Rider v. Hunt, 6 Tex. Civ. App. 241, 25 S. W. 314; Granrud v. Rea, 24 Tex. Civ. App. 300, 59 S. W. 841, holding fraud may be presumed from facts and circumstances proved; Elliott v. Ferguson, 37 Tex. Civ. App. 49, 83 S. W. 56, holding a criminal act may be proved in a civil case only by clear and satisfactory proof; Cox v. Thompson, 37 Tex. Civ. App. 609, 85 S. W. 34, holding a preponderance of evidence sufficient in civil case to prove criminal act.

Proof of damage.

Cited in Hodges v. Causey, 77 Miss. 358, 48 L. R. A. 96, 78 Am. St. Rep. 525, 26 So. 945, holding in trespass for killing dog, if it has no market value, plaintiff may prove special pecuniary value to himself; Gulf, C. & S. F. R. Co. v. Vancil, 2 Tex. Civ. App. 428, 21 S. W. 303, holding in action against carrier for loss of trunk, plaintiff may testify to value of use of property while deprived of it.

Instructions as to damages.

Cited in Yazoo & M. Valley R. Co. v. Williams, 87 Miss. 359, 39 So. 489, holding that instruction to allow what damages the jury "see fit" in an action for assault to be proper; Western U. Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 304, 81 S. W. 1052, holding same where jury were instructed to allow such damages as would "compensate" for mental suffering.

Right of property in dogs.

Cited in Salley v. Manchester & A. R. Co. 54 S. C. 485, 71 Am. St. Rep. 810, 32 S. E. 526, holding action will lie for damages from negligent killing of dog.

Cited in notes (40 L. R. A. 510) on property right in dogs; (15 L. R. A. 249) on right to kill dogs; (67 Am. St. Rep. 292) on property in dogs and remedies for its enforcement; (9 Eng. Rul. Cas. 687) on property rights in, and liability for, injuries by dogs.

Form of verdict.

Cited in Trimble v. Borroughs, 41 Tex. Civ. App. 559, 95 S. W. 614, holding that a verdict need not itemize damages.

13 L. R. A. 275, ADAMS v. ADAMS, 154 Mass. 290, 28 N. E. 260.

Wills; construction.

Cited in Hayden v. Barrett, 172 Mass. 474, 70 Am. St. Rep. 295, 52 N. E. 530, holding illegitimate son within meaning of will making bequest to "heirs by blood" of his mother; Brandeis v. Atkins, 204 Mass. 475, 26 L.R.A.(N.S.) 231, 90 N. E. 861, holding that the meaning of the term "heirs at law" in an agreement compromising a will is to be determined by the laws of the state where compromise is made.

Cited in notes (25 Eng. Rul. Cas. 531) on right of illegitimate child to take under legacy of children; (2 Brit. Rul. Cas. 563) on law governing ascertainment of members of class taking under will; (2 L.R.A.(N.S.) 453) on conflict of laws as to wills.

Bastards; Subsequent marriage of parents.

Cited in Fowler v. Fowler, 131 N. C. 172, 59 L. R. A. 319, footnote, p. 318, 42 S. E. 563, holding bastard child made legitimate, under laws of domicile, by subsequent marriage of parents, legitimacy follows him to another state having different law; Olmsted v. Olmsted, 190 N. Y. 465, 123 Am. St. Rep. 585, 83 N. E. 569, holding a subsequent illegal marriage of father to mother of his illegitimate child not to render child legitimate.

Cited in footnote to *Ives v. McNicoll*, 43 L. R. A. 772, which holds illegitimate child legitimated by parent's subsequent marriage and acknowledgment, although mother married woman when child begotten.

Judgments; effect on persons not parties.

Cited in *Tucker v. Fisk*, 154 Mass. 577, 28 N. E. 1051, holding decree of adoption not binding upon heirs attacking same for fraud, when not parties to proceeding, nor having any notice thereof.

Effect of judgment in foreign state.

Cited in *Taft v. Com.* 158 Mass. 551, 33 N. E. 1046, holding tribunal cannot establish its own jurisdiction by adjudicating it to exist; *Andrews v. Andrews*, 176 Mass. 94, 57 N. E. 333, holding decree of divorce void, where parties not domiciled in fact in state where rendered, although court rendering decree found to contrary; *VanMatre v. Sankey*, 148 Ill. 554, 23 L. R. A. 671, 36 N. E. 628, holding decree of adoption by court of another state, having jurisdiction of parties and subject-matter, binding, unless attacked for fraud; *Clark v. Clark*, 191 Mass. 132, 77 N. E. 702, holding that where one state has complete jurisdiction of one of parties it may determine status of marriage.

Cited in footnotes to *Felt v. Felt*, 47 L. R. A. 546, which holds divorce on substituted service in other state where complainant domiciled entitled to recognition by interstate comity; *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds judgment for alimony, though subject to alteration, final for enforcement in other state; *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Williams v. Williams*, 14 L. R. A. 220, which refuses to recognize foreign divorce on personal service.

Cited in notes (19 L. R. A. 814) on validity of decree of divorce obtained on publication or service out of state where defendant did not appear; (59 L. R. A. 183) on conflict of laws on subject of divorce.

13 L. R. A. 282, *BUFFINGTON v. GROSVENOR*, 46 Kan. 730, 27 Pac. 137.

Wife's contingent interest in husband's lands.

Cited in *Chapman v. Chapman*, 48 Kan. 638, 29 Pac. 1071, holding dower not such vested right as to forbid legislature from changing or repealing contingent interest; *Jenkins v. Henry*, 52 Kan. 608, 35 Pac. 216, holding conveyance and subsequent abandonment of land by husband alone, while sole occupant, and while wife nonresident, valid as against dower and homestead claims of wife; *Small v. Small*, 56 Kan. 11, 30 L. R. A. 248, 54 Am. St. Rep. 581, 42 Pac. 323, holding married man as against post-mortem claim of widow, not resident of state, may give bulk of property to children, though effect is to diminish share widow would otherwise have been entitled to; *Union P. R. Co. v. Barnard & L. Mfg. Co.* 1 Kan. App. 29, 41 Pac. 201, holding wife's inchoate interest in husband's equitable estate in lands held under contract of sale not divested by assignment of contract by husband alone.

Distinguished in *Kennedy v. Haskell*, 67 Kan. 617, 73 Pac. 913, holding wife formerly residing in state may inherit interest in husband's land.

Rights of nonresidents.

Cited in *Miner v. Morgan*, 83 Neb. 403, 119 N. W. 781, holding under state law that nonresident wife has no dower interest in lands conveyed by resident husband; *Nagle v. Tieperman*, 74 Kan. 52, 9 L.R.A.(N.S.) 682, 85 Pac. 941, 10 A. & E. Ann. Cas. 977 (dissenting opinion), on rights of a nonresident wife in property.

Cited in footnote to *Bond v. Martin*, 44 L. R. A. 430, which sustains nonresident's right to exemption of household furniture from execution.

Cited in notes (84 Am. St. Rep. 448) on constitutionality of statutes affecting rights based on pre-existing marriage; (25 Am. St. Rep. 884) on 14th amendment as to special privileges, burdens and restrictions.

13 L. R. A. 286, *PEOPLE v. WAGNER*, 86 Mich. 594, 24 Am. St. Rep. 141, 49 N. W. 609.

Police power of states.

Cited in *State v. Hodgson*, 66 Vt. 145, 28 Atl. 1089, holding police power extends to all regulations affecting health, good order, peace and safety of society; *State v. Theriault*, 70 Vt. 627, 43 L. R. A. 294, 67 Am. St. Rep. 702, 41 Atl. 1030, holding statute depriving one of right to fish in stream on own land, save under conditions prescribed, within police power; *State v. Loomis*, 115 Mo. 329, 21 L. R. A. 808, 22 S. W. 350 (dissenting opinion), majority holding statute making payment of wages otherwise than in lawful money of United States, except orders redeemable at option of holder at place of business of employer, misdemeanor, is unconstitutional; *Chicago v. Bartels*, 146 Ill. App. 187, sustaining a weights and measure ordinance; *State v. McCool*, 83 Kan. 430, 111 Pac. 477, holding that statute establishing standard weight for loaf of bread is valid exercise of police power; *House v. Mayes*, 227 Mo. 639, 127 S. W. 305, holding that statute providing for inspection of weights and measures and requiring dealers to use only those so inspected and approved, is within police power; *Chicago v. Schmidinger*, 243 Ill. 171, 90 N. E. 369, 17 A. & E. Ann. Cas. 614, sustaining an ordinance regulating weight of a loaf of bread; *Chicago v. Bowman Dairy Co.* 234 Ill. 298, 17 L.R.A.(N.S.) 687, 123 Am. St. Rep. 100, 84 N. E. 913, 14 A. & E. Ann. Cas. 700, sustaining an ordinance regulating the size of milk bottles or jars; *American Linseed Oil Co. v. Wheaton*, 25 S. D. 65, 41 L.R.A.(N.S.) 151, 125 N. W. 127, holding that political code section 2897, fixing standard of purity for linseed oil, and forbidding sale of oil not complying therewith, is within police power; *State v. Co-operative Store Co.* 123 Tenn. 406, 131 S. W. 867, Ann. Cas. 1912 C, 248, holding that statute fixing standard of corn meal, and regulating its sale in packages is constitutional; *State v. Holton*, 148 Iowa, 726, 126 N. W. 1125, holding that laws providing for prevention and detection of frauds are held, generally, to be free from constitutional objection.

Cited in footnotes to *State v. Layton*, 62 L.R.A. 164, which upholds constitutionality of statute prohibiting manufacture or sale of baking powder containing alum; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food, whereby damage or inferiority is concealed.

Cited in notes (48 L.R.A. 261) on legal restrictions on department stores; (78 Am. St. Rep. 241, 242) on acts which legislature may declare criminal; (48 Am. St. Rep. 236) on equality of right.

Failure to express subject in title as affecting validity of ordinance.

Cited in *Chicago Union Traction Co. v. Chicago*, 207 Ill. 547, 69 N. E. 849, holding constitutional provision requiring expression of subject of law in title inapplicable to municipal ordinances.

13 L. R. A. 289, *KINCAID v. MCGOWAN*, 88 Ky. 91, 4 S. W. 802.

Title to minerals as separate estate.

Cited in *Stuart v. Com.* 94 Ky. 596, 23 S. W. 367, holding metals and minerals may be taxed as apart from land, when held as separate estate; *Barrett v. Kansas & T. Coal Co.* 70 Kan. 654, 79 Pac. 150, holding that a grantor might

retain title to coal on land by exception in deed; *Moore v. Griffin*, 72 Kan. 167, 4 L.R.A.(N.S.) 479, 83 Pac. 395, holding that title to oil and gas may be reserved by provision in deed; *Gill v. Fletcher*, 74 Ohio St. 306, 113 Am. St. Rep. 962, 78 N. E. 433, holding where one claims title to minerals a distinct title thereto must be set up and established; *Carlson v. Minnesota Land & Colonization Co.* 113 Minn. 364, 129 N. W. 768, holding that deed of land may operate as conveyance of land with exception of coal and iron contained therein, reserving right to enter land for purpose of exploring and mining minerals excepted; *Pellow v. Arctic Iron Co.* 164 Mich. 105, — L.R.A.(N.S.) —, 128 N. W. 918, Ann. Cas. 1912 B, 827, holding that one of two tenants in common of minerals underlying land may not without consent of cotenant convey interest which he owns in portion of entire estate, so as to create new tenancy in common.

Cited in footnote to *Williams v. South Penn Oil Co.* 60 L. R. A. 795, which holds right to oil and gas does not pass under deed of "surface" retaining right to remove coal.

Cited in note (13 L. R. A. 628) on conveyance of mineral beneath surface of land.

Distinguished in *Snoddy v. Bolen*, 122 Mo. 492, 24 L. R. A. 512, 25 S. W. 932, holding where mineral is reserved in dedication of street, conveyance of abutting lot without reservation carries mineral under street.

Actions to quiet title.

Cited in *Campbell v. Disney*, 93 Ky. 42, 18 S. W. 1027, holding complaint alleging setting up of claim to land by one not owner, without averment that claim is hostile, is demurrable; *Morse v. South*, 80 Fed. 210, holding both legal title and possession necessary to maintenance of suit to quiet title; *Newsome v. Hamilton*, 142 Ky. 7, 133 S. W. 952, to the point that legal owner in actual possession of land may maintain action to quiet title; *Carlson v. Curren*, 48 Wash. 252, 93 Pac. 315, holding in an action to quiet title all adverse claimants may be made parties defendant; *Shouse v. Taylor*, 115 Ky. 25, 72 S. W. 324, holding statute giving party in possession of lands and having legal title the right to sue one claiming title not to authorize suit against mortgagee on ground of fraud in procuring mortgage.

13 L. R. A. 294, *LIME ROCK NAT. BANK v. MOWRY*, 66 N. H. 598, 22 Atl. 555.

Rights of purchaser of notes secured by mortgage.

Cited in footnote to *Kernehane v. Hanns*, 29 L. R. A. 317, which holds bona fide purchaser before maturity of genuine notes secured by mortgage entitled to priority over previous assignee of genuine mortgage and forged copies of notes.

Cited in note (99 Am. St. Rep. 168) on merger of estates.

13 L. R. A. 299, *AMERICAN FREEHOLD LAND MORTG. CO. v. SEWELL*, 92 Ala. 163, 9 So. 143.

Followed without discussion in *Farrior v. New England Mortg. Secur. Co.* 92 Ala. 178, 12 L. R. A. 857, 9 So. 532.

Mortgages; foreclosure by sale under power.

Cited in *Edgell v. Ham*, 35 C. C. A. 588, 93 Fed. 763, holding foreclosure under power of sale in mortgage cuts off equity of redemption as fully as foreclosure by decree of court.

Disaffirmance of sale.

Cited in *Lovelace v. Hutchinson*, 106 Ala. 422, 17 So. 623, holding where mortgagee purchases at own sale, without authority, mortgagor has election to redeem, if seasonably expressed; *American Freehold Land Mortg. Co. v. Pollard*, 120 Ala.

7, 24 So. 736, and American Freehold Land Mortg. Co. v. Turner, 95 Ala. 275, 11 So. 211, holding foreclosure sale, at which mortgagee purchaser, can be avoided only by affirmative action of mortgagor and offer to pay debt secured; New England Mortg. Secur. Co. v. Powell, 97 Ala. 486, 12 So. 55, holding offer, in bill to cancel mortgage to pay sum due, is substantial offer to do equity; Diefenbach v. Vaughan, 116 Ala. 155, 23 So. 88, holding mortgagor cannot set up election to disaffirm foreclosure sale, because mortgagee purchaser, as defense to ejectment by mortgagee; Marx v. Clisby, 130 Ala. 509, 30 So. 517, holding beneficiary cannot enforce trust as against purchaser at foreclosure sale of unauthorized mortgage by trustee without accounting for moneys received thereunder and used by trustee to pay debts of testator; Pollard v. American Freehold Land Mortg. Co. 103 Ala. 298, 16 So. 801, holding mortgagee bringing bill to compel mortgagor to elect to affirm or avoid sale on account of purchase by mortgagee, must account for and apply purchase money as stranger; American Freehold Land Mortg. Co. v. Pollard, 127 Ala. 235, 29 So. 598, holding right of election to disaffirm foreclosure sale cannot become barred pending proceedings to compel election; Haggart v. Wilczinski, 74 C. C. A. 176, 143 Fed. 28, holding where a mortgage foreclosure sale is voidable at election of mortgagee or his heirs that purchaser could by suit compel an election.

Cancellation of mortgages.

Cited in Grider v. American Freehold Land Mortg. Co. 99 Ala. 291 42 Am. St. Rep. 58, 12 So. 775; George v. New England Mortg. & Secur. Co. 109 Ala. 551, 20 So. 331; Southern Bldg. & L. Asso. v. Casa Grand Stable Co. 119 Ala. 182, 24 So. 886,—holding mortgagor seeking cancellation of mortgage on ground mortgagee not entitled to do business in state, must offer to repay money with interest; Ross v. New England Mortg. & Security Co. 101 Ala. 367, 13 So. 564, holding equity will not cancel mortgage as violative of statute, where complainant offers to pay debt if held valid.

Conflict of laws; construction of contracts.

Cited in Lomb v. Pioneer Sav. & L. Asso. 96 Ala. 433, 11 So. 154, holding where bill for foreclosure of mortgage fails to disclose state in which contract made, courts will treat same as Alabama contract; Dundee Mortg. & Trust Invest. Co. v. Nixon, 95 Ala. 321, 10 So. 311, holding in absence of other evidence note presumed to have been executed at place where dated; Ashurst v. Ashurst, 119 Ala. 230, 24 So. 760, holding note and mortgage providing same should be construed by laws of Alabama where they were made, constitute Alabama contract, though made payable in New York.

Usury.

Cited in George v. New England Mortg. Secur. Co. 109 Ala. 552, 20 So. 331, holding loan not usurious because of commission paid broker employed by borrower; Falls v. United States Sav. Loan & Bldg. Co. 97 Ala. 434, 24 L. R. A. 182, 38 Am. St. Rep. 194, 13 So. 25, holding where loan made by foreign corporation through local agent, at higher rate of interest than allowed in Alabama, and papers executed, and money paid in that state, contract is usurious; Pioneer Sav. & L. Co. v. Nonnemacher, 127 Ala. 545, 30 So. 79, holding contract for loan by resident of Alabama with corporation of Minnesota, at rate of interest allowed in that state, but not allowed in Alabama, debt being made payable in Minnesota, not usurious.

Cited in notes (55 L. R. A. 939) on whether *lex rei sitæ* with respect to interest and usury necessarily controls in action to foreclose real-estate mortgage; (62 L. R. A. 51, 55, 61) on conflict of laws as to interest and usury.

Ejectment.

Cited in *Hambrick v. New England Mortg. Secur. Co.* 100 Ala. 552, 13 So. 778, holding mortgagee purchasing at own sale may maintain ejectment, so long as sale not set aside and mortgagor makes no attempt to redeem by offering to do equity; *Pitts v. American Freehold Land Mortg. Co.* 123 Ala. 473, 26 So. 286, holding mortgagee in possession under voidable foreclosure sale after mortgagor's death, regarded as holding under mortgage in privity of title with heirs; *Southern R. Co. v. Hood*, 126 Ala. 317, 85 Am. St. Rep. 32, 28 So. 662, holding ejectment against railroad taking land without conveyance or condemnation proceedings will not be enjoined without offer to compensate owners.

Equity pleading; sufficiency of bill.

Cited in *Dickerson v. Winslow*, 97 Ala. 494, 11 So. 918, holding bill to cancel mortgage as void, and offering to pay amount due, not demurrable on ground of repugnancy; *Tipton v. Wortham*, 93 Ala. 324, 9 So. 596, holding bill to cancel mortgage not multifarious because of election to disaffirm foreclosure sale and praying for accounting and permission to redeem; *McMinn v. Karter*, 123 Ala. 509, 26 So. 649, and *Brackin v. Newman*, 121 Ala. 312, 26 So. 3, holding when original bill not withdrawn on filing of amendment, two are to be taken together as constituting complaint; *Lanier v. Union Mortg. Bkg. & T. Co.* 64 Ark. 56, 40 S. W. 466, by Bourland, J., dissenting, who holds where bill not attacked on account of repugnance in court below, objection not available on appeal.

Foreign corporations; compliance with local regulations.

Cited in *McLeod v. American Freehold Land Mortg. Co.* 100 Ala. 498, 14 So. 409, holding constitutional requirement that foreign corporation must designate place of business in state, and authorized agent residing thereat, complied with by filing certificate designating agent without place of business; *Ross v. New England Mortg. Security Co.* 101 Ala. 367 13 So. 564, holding mortgage to foreign corporation executed after enactment, but before statute, regulating manner of conducting business by foreign corporations became effective, valid.

13 L. R. A. 304, *GILMAN v. TUCKER*, 128 N. Y. 190, 40 N. Y. S. R. 71, 26 Am. St. Rep. 464, 28 N. E. 1040.

Constitutional law; test of invalidity of statute.

Cited in *Colon v. Lisk*, 153 N. Y. 194, 60 Am. St. Rep. 609, 47 N. E. 302; *Rochester v. West*, 164 N. Y. 514, 53 L. R. A. 550, 79 Am. St. Rep. 659, 58 N. E. 673; *Rathbone v. Wirth*, 6 App. Div. 313, 40 N. Y. Supp. 535,—holding constitutionality of statute to be determined, not by what has been done, but by what may be done, under its authority; *People ex rel. Balcom v. Mosher*, 163 N. Y. 42, 79 Am. St. Rep. 552, 57 N. E. 88; *Rathbone v. Wirth*, 150 N. Y. 494, 34 L. R. A. 421, 45 N. E. 15, Affirming 6 App. Div. 313, 40 N. Y. Supp. 535, per O'Brien, J., concurring opinion, who holds that constitutionality of statute appointing chief of police for municipality determined by nature, character, and scope of powers attempted to be conferred, whether actually exercised or not; *Riglander v. Star Co.* 34 N. Y. Civ. Proc. Rep. 98, 90 N. Y. Supp. 772; *Grout v. Williams*, 34 N. Y. Civ. Proc. Rep. 247, 93 N. Y. Supp. 711; *Cahill v. Hogan*, 44 Misc. 368, 89 N. Y. Supp. 1022; *Re Grout*, 105 App. Div. 110, 93 N. Y. Supp. 711,—holding that the constitutionality of a statute is to be tested not by what has been done under it but by what may be done under it.

Cited in note (104 Am. St. Rep. 643) on municipal regulations of street railways for protection of public.

Statutes impairing rights vested under judgment.

Cited in *People ex rel. Reynolds v. Buffalo*, 48 N. Y. S. R. 635, holding award,

duly confirmed, not affected by subsequent repeal of statute under which proceedings had; *Livingston v. Livingston*, 173 N. Y. 382, 61 L. R. A. 803, 93 Am. St. Rep. 600, 66 N. E. 123, Affirming 74 App. Div. 267, 77 N. Y. Supp. 476, holding statute authorizing modification of judgments for divorce in respect to allowance for support of wife and children, unconstitutional as applied to judgments previously entered, in which right to modification not reserved; *Re Greene*, 166 N. Y. 492, 60 N. E. 183, Affirming 55 App. Div. 482, 67 N. Y. Supp. 291, holding judgment in favor of county against receiver of bank cannot be impaired by subsequent special statute providing for retrial of legality of claim; *Re Handley*, 75 Utah, 221, 62 Am. St. Rep. 926, 49 Pac. 829, declaring unconstitutional, statute requiring courts to grant new trial in cases where polygamous children denied right to inherit; *Merchants Bank v. Ballou*, 98 Va. 118, 44 L. R. A. 310, 81 Am. St. Rep. 715, 32 S. E. 481, holding statute validating deed of corporation cannot impair superior lien of judgment recovered after recording of deed, but before statute enacted; *Evans-Snider-Buel Co. v. McFadden*, 58 L. R. A. 907, 44 C. C. A. 505, 105 Fed. 304 (dissenting opinion), majority giving retrospective operation to statute validating recording of mortgage, as against lien by attachment created prior to enactment of statute, where proceedings to determine priority of liens pending at time of enactment; *Cassard v. Tracy*, 52 La. Ann. 848, 49 L. R. A. 277, 27 So. 368, holding Constitution 1898, conferring upon court of appeals jurisdiction to determine questions of fact as well as of law, not applicable to appeals pending when Constitution adopted (overruled on rehearing); *People ex rel. Rodgers v. Coler*, 56 App. Div. 108, 67 N. Y. Supp. 701, holding where contractor duly performs work under authorized contract with municipality, legislature cannot relieve corporation from obligation to pay; *Spremich v. Maurepas Land & Lumber Co.* 114 La. 1054, 38 So. 827, holding that the legislature cannot divest one of a vested right in a judgment; *People ex rel. American Exch. Nat. Bank v. Purdy*, 196 N. Y. 284, 89 N. E. 838, holding that the legislature has no power to directly or indirectly deprive constitutional courts of jurisdiction in matters then pending; *Farnam v. Farnam*, 83 Conn. 374, 77 Atl. 70, holding that judicial interpretation placed by court upon will twenty-five years ago, under which property rights have become vested, will not be disturbed; *Humphrey v. Gerard*, 83 Conn. 353, 77 Atl. 65, to the point that when rights under statute have been judicially passed upon, they become vested as so declared by judicial decision.

Due process of law.

Cited in *Re Fuller*, 34 Misc. 754, 70 N. Y. Supp. 1050, holding statute allowing tax appraised per centage of tax, deprives taxpayer of property without due process of law; *Parker v. Elmira, C. & N. R. Co.* 165 N. Y. 280, 59 N. E. 81, holding authority of railroad under special act to charge 4 cents per mile, is privilege or franchise in nature of property, which is transferable; *State ex rel. Broatch v. Moores*, 52 Neb. 782, 73 N. W. 299, holding statute requiring clerk of court to pay over to county treasurer unclaimed fees and costs remaining in his hands for two years, deprives persons entitled to funds of property without due process of law; *Bennett v. Davis*, 90 Me. 107, 37 Atl. 864, holding statute making deposit of all taxes with clerk of court, condition to right to contest validity, deprives citizen of property without due process of law; *Barry v. Port Jervis*, 64 App. Div. 291, 72 N. Y. Supp. 104, holding village charter denying right of action for personal injury, unless notice of injuries filed with village clerk within forty-eight hours, deprives person injured of property without due process of law; *Williams v. Port Chester*, 72 App. Div. 513, 76 N. Y. Supp. 631, holding void, provision of village charter denying right of action against village for personal injury, unless notice of injuries be given president of village within thirty days;

Forster v. Scott, 136 N. Y. 584, 18 L. R. A. 547, 32 N. E. 976, holding statute denying compensation for building erected on land taken for street after filing of map, unconstitutional; Williams v. Port Chester, 97 App. Div. 101, 89 N. Y. Supp. 671, holding that legislature cannot deprive a party injured through negligent keeping of a sidewalk, of his remedy to recover for injury; People v. Golding, 55 Misc. 436, 106 N. Y. Supp. 821, holding that legislature cannot deprive one who has been illegally deprived of his property access to courts; MacMullen v. Middletown, 112 App. Div. 89, 98 N. Y. Supp. 145, holding unconstitutional a statute requiring written notice to council to remove snow and ice from sidewalk before suit could be maintained for injury thereby; People ex rel. Loughran v. Flynn, 110 App. Div. 291, 96 N. Y. Supp. 655, holding that a liquor tax certificate could not be revoked without an opportunity to be heard; Riglander v. Star Co. 98 App. Div. 105, 90 N. Y. Supp. 772, holding a statute unconstitutional which requires a suitor irrespective of circumstance to try his case designated for trial; Frank L. Fisher Co. v. Woods, 187 N. Y. 95, 12 L.R.A.(N.S.) 710, 79 N. E. 836, denying authority of legislature to prohibit offering for sale the real property of another without written authority.

Cited in footnote to Gulf, C. & S. F. R. Co. v. Ellis, 17 L. R. A. 286, which holds valid act authorizing attorneys' fees against railroad corporations in suits on claims.

Cited in note (69 L.R.A.) 52) on relief of purchaser upon annulling judicial or execution sale.

13 L. R. A. 311, HUBBLE v. COLE, 88 Va. 236, 29 Am. St. Rep. 716, 13 S. E. 441.

Landlord and tenant; breach of covenants.

Cited in Knotts v. McGregor, 47 W. Va. 572, 35 S. E. 899, holding covenant for quiet enjoyment broken by lessor withholding possession from lessee.

13 L. R. A. 313, WHITE SEWING MACH. CO. v. DAKIN, 86 Mich. 581, 49 N. W. 583.

Alteration of instruments.

Cited in Port Huron Engine & Thresher Co. v. Sherman, 14 S. D. 467, 85 N. W. 1008, holding clerk's insertion of name of bank in note, as memorandum, without knowledge of holder, not such alteration as would avoid note; Lanum v. Patterson, 143 Ill. App. 249, holding a material alteration of a judgment note by the attorney for the plaintiff made without authority not to render note void.

Cited in note (86 Am. St. Rep. 103, 105) on unauthorized alteration of written instruments.

Bonds; penalty as measure of liability.

Cited in People's Sav. Bank v. Campau, 124 Mich. 110, 82 N. W. 803, holding damages, including interest, cannot exceed amount of bond.

Cited in note (62 L. R. A. 447) on form of judgment on penal bonds.

13 L. R. A. 315, HALLOWELL v. BLACKSTONE NAT. BANK, 154 Mass. 359, 28 N. E. 281.

Pledge; consideration.

Cited in Citizens' Bank & T. Co. v. Thornton, 98 C. C. A. 478, 174 Fed. 762, holding the renewal of note not to release pledged security.

Cited in note (32 Am. St. Rep. 717) on collateral securities.

Distinguished in National Safe Deposit Sav. & T. Co. v. Gray, 12 App. D. C. 293, holding pre-existing debt insufficient to support pledge of stock by one clothed with apparent legal title, as against equities of real owner.

Partnership as legal entity.

Cited in *Hughes v. Gross*, 166 Mass. 65, 32 L. R. A. 621, 55 Am. St. Rep. 375, 43 N. E. 1031, holding contract of service with partnership not dissolved by death of partner; *Waterman v. Alden*, 143 U. S. 202, 36 L. ed. 124, 12 Sup. Ct. Rep. 435, holding that will providing for cancelation of indebtedness of brothers and sisters to testator, does not include debts contracted by beneficiaries jointly with third person, as partners or otherwise; *Re William Hill & Sons*, 186 Fed. 570, holding that agreement, in note secured by collateral, that securities should be applicable to other obligations held by payee, entitle payee to apply surplus to obligation of firm of which maker is partner.

13 L. R. A. 318, *DODGE v. BOSTON & P. R. CO.* 154 Mass. 299, 28 N. E. 243.

Meaning of word "family."

Cited in *Day v. Lawrence*, 167 Miss. 374, 45 N. E. 751, holding permanent boarders members of householder's family, within statute exempting household furniture from taxation; *Townsend v. Townsend*, 156 Mass. 456, 31 N. E. 632, holding where testator twice married, devise providing for equal division of residue of estate to "families" designated by names of his two wives, each family constitutes class, and entitled to one half of estate; *Re Bennett*, 134 Cal. 323, 66 Pac. 370, holding provision of will that in case of death of any legatee, his share should revert to "family" of which legatee is member, means family of legatee, and not that of testator; *People ex rel. Sagazei v. Sagazei*, 27 Misc. 733, 59 N. Y. Supp. 701, holding statute providing husband abandoning "wife and children" may be required to give bond to support them, not authority for bond to support obligor's "family;" *Spear v. Boston Police Relief Asso.* 195 Mass. 353, 81 N. E. 196, holding that children who have married and moved away cannot take under designation in benefit society certificate as "members of family;" *Robbins v. Bangor R. & Electric Co.* 100 Me. 505, 1 L.R.A.(N.S.) 968, 62 Atl. 136, holding a water rate for a "dwelling house containing a family" not to apply to a boarding house.

Construction of written instruments.

Cited in note (29 L. R. A. 737) on receipt as evidence of payment as against third parties.

Annotation in 13 L. R. A. 318, particularly referred to in *Hart v. Gardner*, 74 Miss. 159, 20 So. 877, holding deed should be so construed as to give effect to intention of parties.

13 L. R. A. 321, *BALLENTINE v. WEBB*, 84 Mich. 38, 47 N. E. 485.

Nuisance.

Cited in *Gallagher v. Flury*, 99 Md. 189, 57 Atl. 672, holding a stable in a city not per se a nuisance.

Cited in footnote to *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Cited in note (107 Am. St. Rep. 241) on what are public nuisances.

Abatement of nuisances.

Cited in *Northwood v. Barber Asphalt Paving Co.* 126 Mich. 288, 54 L. R. A. 455, 85 N. W. 724, holding defendant not absolved from liability to punishment for contempt in failing to obey general clause of decree for abatement of nuisance by complying with special directions, which prove insufficient; *Lone Star Salt Co. v. Blount*, 49 Tex. Civ. App. 142, 107 S. W. 1163, holding that a decree granting an injunction should specify acts to be done or not to be done; *Schuster v. Mil-*

waukee Electric R. & Light Co. 142 Wis. 585, 126 N. W. 26, holding where great damage would be caused defendant by granting and small damage to plaintiff by not granting that compensation might be granted instead of an injunction.

Cited in footnotes to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden; *Rowland v. Miller*, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants."

Cited in notes (20 L. R. A. 165) on power of equity to grant mandatory injunctions; (51 L. R. A. 657) on right of municipality to maintain suit to enjoin or abate public nuisance.

Distinguished in *Blagen v. Smith*, 34 Or. 405, 44 L. R. A. 526, 56 Pac. 292, holding equity will enjoin maintenance of bawdy house in business district upon complaint of neighboring proprietor.

13 L. R. A. 325, *STELZ v. SCHRECK*, 128 N. Y. 263, 26 Am. St. Rep. 475, 28 N. E. 510.

Estates by entirety.

Cited in *Banzer v. Banzer*, 10 Misc. 25, 30 N. Y. Supp. 803, holding tenancy by the entirety created only by conveyance to husband and wife; *Reynolds v. Strong*, 82 Hun, 204, 31 N. Y. Supp. 329, holding husband and wife receiving conveyance in their joint names take as tenants by the entirety, and survivor takes whole estate; *Germania Sav. Bank v. Jung*, 28 Abb. N. C. 82, 18 N. Y. Supp. 709, holding by conveyance to husband and wife, "and to their heirs and assigns," they take as tenants by the entirety, and same character attaches to surplus from mortgage sale of property; *Mardt v. Scharmach*, 65 Misc. 126, 119 N. Y. Supp. 449, holding where husband and wife hold estate by entirety and wife acquires husband's interest at an execution sale she holds the entire estate; *Hayes v. Horton*, 46 Or. 600, 81 Pac. 386, holding that a divorce between persons holding land by entirety dissolves that estate and they become tenants in common; *Lerbs v. Lerbs*, 71 Misc. 53, 129 N. Y. Supp. 903, holding that, in absence of words signifying contrary intention, deed to husband and wife creates estate by entirety; *Craig v. Bradley*, 153 Mo. App. 597, 134 S. W. 1081, holding that husband and wife hold note, taken for borrowed money supplied both, as estate by entirety; *Vollaro v. Vollaro*, 144 App. Div. 243, 129 N. Y. Supp. 43, holding that tenancy by entirety while partaking of some of qualities of joint tenancy is different estate both in form and substance.

Cited in footnotes to *Re Albrecht*, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife; *Thornburg v. Wiggins*, 22 L. R. A. 42, which holds tenancy by entirety not created by conveyance to husband and wife "in joint tenancy."

Cited in notes (30 L.R.A. 334) on tenancy by entireties; (10 L.R.A.(N.S.) 463) on effect of divorce on tenancy by entireties.

Distinguished in *Jooss v. Fey*, 129 N. Y. 19, 29 N. E. 136, holding where husband and wife equally contribute of own means to purchase price, and conveyance is to them as joint tenants, they do not hold as tenants by the entirety.

13 L. R. A. 329, *O'BRIEN v. CUNARD S. S. CO.* 154 Mass. 272, 28 N. E. 266.

Negligences; respondeat superior.

Cited in *Allan v. State S. S. Co.* 132 N. Y. 99, 15 L. R. A. 168, 28 Am. St. Rep. 556, 30 N. E. 482, holding under statute requiring passenger ships to carry "duly qualified medical practitioner," steamship company not liable to passenger for negligence of physician, if duly qualified practitioner employed; *Eighmy v. Union P. R. Co.* 93 Iowa, 541, 27 L. R. A. 297, 61 N. W. 1056; *Atchison, T. & S. F. R.*

Co. v. Zeiler, 54 Kan. 350, 38 Pac. 282; Quinn v. Kansas City, M. & B. R. Co. 94 Tenn. 720, 28 L. R. A. 556, 45 Am. St. Rep. 767, 30 S. W. 1036; Galveston, H. & S. A. R. Co. v. Scott, 18 Tex. Civ. App. 324, 44 S. W. 589; Southern P. Co. v. Mauldin, 19 Tex. Civ. App. 169, 46 S. W. 650; South Florida R. Co. v. Price, 32 Fla. 51, 13 So. 638,—holding if railroad obligated to furnish medical or surgical aid to sick or injured employees, duty is discharged when it employs person of ordinary skill in profession; Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 450, 74 S. W. 456, denying liability of railroad selecting surgeon with reasonable care, for his malpractice in treating employee; Pittsburgh, C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 91, 27 L. R. A. 843, 50 Am. St. Rep. 313, 40 N. E. 138, holding railroad furnishing surgical aid to injured employees gratuitously, not liable for negligent amputation of arm; Collins v. New York Post Graduate Medical School, 59 App. Div. 66, 69 N. Y. Supp. 106, holding public charitable hospital not liable for negligence of surgeon performing operation; Joel v. Woman's Hospital, 89 Hun, 74, 35 N. Y. Supp. 37, holding public charitable hospital not liable for injury to inmate from negligence of nurse; Warren v. Merchants Exchange, 52 Mo. App. 171, holding merchants' exchange conducting auction sales at its call board not liable for failure of clerk to record sale, unless negligent in making appointment; Barden v. Atlantic Coast Line R. Co. 152 N. C. 328, 67 S. E. 971, holding railroad company not liable for malpractice of a physician in its hospital; Kellogg v. Church Charity Foundation, 128 App. Div. 216, 112 N. Y. Supp. 566, on nonliability of master for malpractice of physician.

Cited in notes (31 L.R.A. 263) on duty of carrier as to passengers taken ill during journey; (36 L.R.A.(N.S.) 52) on liability of one other than physician or surgeon contracting to provide medical attention; (19 Eng. Rul. Cas. 219) on liability of ship owner for collision due to negligence of qualified pilot.

Distinguished in *Tompkins v. Pacific Mut. L. Ins. Co.* 53 W. Va. 500, 62 L. R. A. 499, 97 Am. St. Rep. 1006, 44 S. E. 439, holding accident insurance company liable for negligence of its examiner, removing and failing to replace plaster cast on sprained foot.

Assault; justification.

Cited in note (15 L. R. A. 854) on consent as justification for assault.

13 L. R. A. 332, *OLD COLONY R. CO. v. FRAMINGHAM WATER CO.* 153 Mass. 561, 27 N. E. 662.

Eminent domain; taking property already devoted to public use.

Cited in *Boston & A. R. Co. v. Cambridge*, 166 Mass. 224, 44 N. E. 140, holding to authorize taking property devoted to public use for another public use, intention to grant authority must be plainly manifested in statute; *Chicago, M. & St. P. R. Co. v. Starkweather*, 97 Iowa, 162, 31 L. R. A. 185, 59 Am. St. Rep. 404, 66 N. W. 87, holding street may be opened across depot grounds of railroad, under general authority of statute; *Boston v. Brookline*, 156 Mass. 175, 30 N. E. 611, holding land used as public highway may be taken under right of eminent domain for purpose of laying water pipes, where two uses not inconsistent; *New Haven Water Co. v. Wallingford*, 72 Conn. 302, 44 Atl. 235, holding statute authorizing borough "to take and use the water of any stream, lake, or pond, in whole or in part;" not authority for taking waters already appropriated to public use; *Prince v. Crocker*, 166 Mass. 362, 32 L. R. A. 612, 44 N. E. 446, holding tax payers not entitled to enjoin construction of subway through Boston Common and Public Garden against combined action of legislature in passing statute, and of city in accepting it; *Framingham Water Co. v. Old Colony R. Co.* 176 Mass. 412, 57 N. E. 680, holding, notwithstanding condemnation of pond by water company, rail-

road has right to use waters of pond, so far as use does not interfere with needs of water company; *Atty. Gen. v. Vineyard Grove Co.* 181 Mass. 509, 64 N. E. 75, holding person licensed to erect building in tide water, not entitled to maintain structure in violation of dedication to public made by predecessor in title; *United States v. Certain Land*, 165 Fed. 789, holding that property previously devoted to public use might be taken by United States; *Codman v. Crocker*, 203 Mass. 150, 25 L.R.A. (N.S.) 990, 89 N. E. 177, sustaining the right of taking of public property for an entirely different use; *Eldredge v. Norfolk County*, 185 Mass. 188, 70 N. E. 36, holding that land acquired by eminent domain might be used for purpose not inconsistent with original purpose.

Cited in notes (58 L.R.A. 246) on acquisition of water supply by right of eminent domain; (24 L.R.A. (N.S.) 384) on right to condemn property previously condemned or purchased for public use, but not actually used.

Payment of compensation.

Cited in *Salt Lake City Water & Electrical Power Co. v. Salt Lake City*, 24 Utah, 296, 67 Pac. 791, holding statute authorizing plaintiff in condemnation to enter upon land pending proceedings, upon filing sufficient bond, not unconstitutional; *Whitman v. Nantucket*, 169 Mass. 149, 47 N. E. 611, holding statute providing in case of disagreement as to damages, same may be determined as in case of laying out of highway, sufficient in providing compensation.

13 L. R. A. 336, *PICO v. COHN*, 91 Cal. 129, 25 Pac. 970, 25 Am. St. Rep. 159, 27 Pac. 537.

Judgment; grounds for relief against perjury.

Cited in *Maryland Steel Co. v. Marney*, 91 Md. 374, 46 Atl. 1077; *Steen v. March*, 132 Cal. 617, 64 Pac. 994, holding use of perjured testimony in obtaining judgment not ground for setting aside; *McDougall v. Walling*, 21 Wash. 487, 75 Am. St. Rep. 849, 58 Pac. 669; *Adamski v. Wiczorek*, 93 Ill. App. 363, holding perjured testimony merely affecting right of evidence upon issues tried, not sufficient to support bill of review; *Holton v. Davis*, 47 C. C. A. 259, 108 Fed. 150, holding perjured testimony not ground for relief against judgment, unless reasonably certain that judgment would have been different, if such testimony had not been given; *Young v. Leach*, 27 App. Div. 296, 50 N. Y. Supp. 670, holding action will not lie for damages from judgment obtained through perjury or subordination of perjury; *Donovan v. Miller*, 12 Idaho, 607, 9 L.R.A. (N.S.) 527, 88 Pac. 82, 10 A. & E. Ann. Cas. 444; *Graves v. Graves*, 132 Iowa, 203, 10 L.R.A. (N.S.) 224, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104; *Bradbury v. Wells*, 138 Iowa, 678, 16 L.R.A. (N.S.) 242, 115 N. W. 880; *Bleakley v. Barclay*, 75 Kan. 470, 10 L.R.A. (N.S.) 236, 89 Pac. 906; *Electric Plaster Co. v. Blue Rapids City Twp.* 81 Kan. 735, 25 L.R.A. (N.S.) 1239, 106 Pac. 1079; *Nelson v. Meehan*, 12 L.R.A. (N.S.) 380, 83 C. C. A. 597, 155 Fed. 9,—holding perjury not ground for relief against a judgment; *Mahoney v. State Ins. Co.* 133 Iowa, 575, 9 L.R.A. (N.S.) 494, 110 N. W. 1041, on same point; *Steele v. Culver* (*South Haven & E. R. Co. v. Culver*) 157 Mich. 350, 23 L.R.A. (N.S.) 569, 122 N. W. 95, holding that judgment was obtained through perjury no ground for injunction against its enforcement; *Harden v. Card*, 17 Wyo. 220, 97 Pac. 1075; *Reeves v. Reeves*, 24 S. D. 441, 25 L.R.A. (N.S.) 577, 123 N. W. 869,—denying relief from a decree granting divorce on ground that residence was established by perjury; *Zeitlin v. Zeitlin*, 202 Mass. 208, 23 L.R.A. (N.S.) 570, 132 Am. St. Rep. 490, 88 N. W. 762, refusing to vacate a decree of divorce on ground of perjury where a marriage has been entered into on faith of decree and a child born; *El Capitan Land & Cattle Co. v. Lees*, 13 N. M. 415, 86 Pac. 924; *Kennedy v. Dickie*, 34 Mont. 223, 85 Pac. 982,—holding false testimony not sufficient to justify opening up of judgment; *Cragie* L.R.A. Au. Vol. II.—63.

v. Roberts, 6 Cal. App. 314, 92 Pac. 97, holding one having a chance to be heard cannot set up false testimony to show a patent was obtained illegally; Cagle v. Dunham, 14 Okla. 621, 78 Pac. 561, refusing to set aside the decision of the land department which was obtained by perjury; Horner v. Schinstock, 80 Kan. 140, 23 L.R.A.(N.S.) 136, 101 Pac. 996, holding a judgment in original action a bar to action for damages for perjury against adverse party; Fealey v. Fealey, 104 Cal. 359, 43 Am. St. Rep. 111, 38 Pac. 49, holding a judgment though obtained by false testimony is binding.

Cited in notes (10 L.R.A.(N.S.) 230) on perjury as ground for relief against judgment; (54 Am. St. Rep. 233) on relief in equity against judgments and other judicial determinations.

Distinguished in Boring v. Ott, 138 Wis. 268, 19 L.R.A.(N.S.) 1083, 119 N. W. 865, holding perjury ground for relief where party could not have discovered or known it at trial; Carpenter v. Sibley, 153 Cal. 218, 15 L.R.A.(N.S.) 1147, 126 Am. St. Rep. 77, 94 Pac. 879, 15 A. & E. Ann. Cas. 484, allowing an action for malicious prosecution where conviction of a crime is procured by fraud and perjury.

Laches defeating relief from judgment.

Cited in Snider v. Rinehart, 20 Colo. 460, 39 Pac. 408, holding that equity would not interfere with a judgment where an adequate remedy by appeal has been lost by laches.

Fraud.

Cited in Bergin v. Haight, 99 Cal. 56, 33 Pac. 760, holding fraud upon jurisdiction of court in procuring sale of real estate in probate, ground for action to set aside sale; Pepin v. Lautman, 28 Ind. App. 78, 62 N. E. 60; Camp v. Ward, 69 Vt. 291, 60 Am. St. Rep. 929, 37 Atl. 747, holding fraud for which judgment will be set aside, must have relation to some extrinsic or collateral matter, and not to matter on which judgment rendered; Langdon v. Blackburn, 109 Cal. 26, 41 Pac. 814, holding fraud in procuring execution and probate of will, and concealing same and size of estate from heir, not ground for equitable action to declare trust; Mulcahey v. Dow, 131 Cal. 75, 63 Pac. 158, holding fraud in procuring order of distribution in probate, by representing oneself as sole heir, not ground for declaration of trust; Sullivan v. Lumsden, 118 Cal. 668, 50 Pac. 777, holding mistake and inadvertence of referees in making partition of lands, ground for setting aside decree upon petition filed within year; Hanley v. Hanley, 114 Cal. 693, 46 Pac. 736, holding false representation of widow that real estate was community property, and that declaration of homestead had been filed, not ground for vacating decree in probate setting aside property as homestead; Keith v. Alger, 114 Tenn. 21, 85 S. W. 71, holding that fraud must be extrinsic or collateral to issues in former suit to authorize setting aside the judgment therein; Bacon v. Bacon, 150 Cal. 483, 89 Pac. 317, denying relief where fraud is intrinsic; Friese v. Hummel, 26 Or. 150, 46 Am. St. Rep. 610, 37 Pac. 458, holding a fraud in consideration of merits no ground for new trial; Ametoy Estate Co. v. Los Angeles, 5 Cal. App. 276, 90 Pac. 420, holding fraud to be ground for setting away judgment must not be fraud as to questions determined by the court; Thomason v. Thompson, 129 Ga. 447, 26 L.R.A.(N.S.) 544, 59 S. E. 236, holding fraudulent concealment of evidence not ground for relief where evidence to establish such fraud was given on trial; Campbell-Kawannakoa v. Campbell, 152 Cal. 209, 92 Pac. 184; Tracy v. Muir, 151 Cal. 373, 121 Am. St. Rep. 117, 90 Pac. 832,—holding fraud in having a forged will probated to be intrinsic fraud; Miller v. Perris Irrig. Dist. 85 Fed. 701, holding organization of an irrigation district conclusive against an attack for fraud; Keyes v. Brackett, 187 Mass. 308, 72 N. E. 986, 3 A. & E. Ann. Cas. 81, can-

celling a bond given to dissolve a mechanic's lien the approval of which by master was obtained by fraud; *Tollefson v. Tollefson*, 137 Iowa, 154, 114 N. W. 631, holding fraud in getting wife to leave country for purpose of procuring divorce from her while away sufficient to set aside a divorce; *Anderson v. Bank of Lassen County*, 140 Cal. 698, 74 Pac. 287, setting aside a judgment obtained by collusion to defraud creditors; *Parsons v. Weis*, 144 Cal. 415, 77 Pac. 1007, setting aside a judgment where a knowing false petition is presented to court and it is acted on by court; *Flood v. Templeton*, 152 Cal. 155, 13 L.R.A.(N.S.) 584, 92 Pac. 78, setting aside a decree of foreclosure of a mortgage where fraud of mortgagor induced him not to interpose a valid defense; *Uecker v. Thiedt*, 133 Wis. 152, 113 N. W. 447, on fraud as basis for setting aside a judgment; *Welch's Estate*, 3 Cof. Prob. Dec. 305, holding allegations did not make out fraud; *Re Burton*, 5 Cof. Prob. Dec. 242, holding bill insufficient to show fraud vitiating a decree; *Michael v. American Nat. Bank*, 84 Ohio St. 382, 38 L.R.A.(N.S.) 223, 95 N. E. 905, holding that equity will set aside judgment only when fraud consists of acts extrinsic and outside matter directly tried and determined.

Cited in note (43 Am. St. Rep. 117) on relief of inequity from judgment at law.

Distinguished in *Silva v. Santos*, 138 Cal. 542, 71 Pac. 703, holding fraudulent concealment of moneys misappropriated by guardian, ground for setting aside decree settling account; *Doyle v. Hampton*, 159 Cal. 734, 116 Pac. 39, holding that judgment quieting title to land which was obtained upon constructive service without any knowledge on part of defendant, and order for which service was based on false statements will be set aside.

13 L. R. A. 340, *FREES v. BAKER*, 81 Tex. 216, 16 S. W. 900.

Conveyances by insolvents.

Cited in *Keating Imp. Cement & Mach. Co. v. Terre Haute Carriage & Buggy Co.* 11 Tex. Civ. App. 219, 32 S. W. 556, holding failing debtor may protect surety by transfer of property reasonably proportioned to amount of debt; *Kessler v. Halff*, 21 Tex. Civ. App. 95, 51 S. W. 48, holding goods transferred to creditor absolutely, though with intent to defraud, cannot be attached by notice only.

Contribution among sureties.

Cited in footnote to *Gibson v. Sheehan* 28 L. R. A. 400, which denies right of surety companies indemnifying one surety on official bond, to contribution against cosurety.

Creditors.

Cited in *Welch v. Morris*, 193 Mo. 323, 92 S. W. 98, holding the indemnified party to an indemnity contract a creditor within purview of statute concerning conveyances fraudulent as to creditors from the date of contract, contingent on the happening of event indemnified against.

13 L. R. A. 343, *HOYT v. HOYT*, 143 Pa. 623, 24 Am. St. Rep. 575, 22 Atl. 755.

Trademarks; who are entitled to use.

Cited in *McVey v. Brendel*, 144 Pa. 246, 13 L. R. A. 379, 27 Am. St. Rep. 625, 22 Atl. 912, holding Cigar Makers' International Union, not being trader, can have no distinctive trademark; *Adelburg v. Burkham*, 9 North. Co. Rep. 131, to the point that right to injunction to protect trademark exists though without registration.

Cited in note (85 Am. St. Rep. 121) on what words or phrases may constitute a valid trademark.

Simulating product of another.

Cited in *Lafean v. Weeks*, 177 Pa. 431, 34 L. R. A. 174, 35 Atl. 693, holding

manufacturer not chargeable with infringement of trademark in use of own name or initials, though used in same kind of letters, and upon same colored background; *Clark v. Scott*, 4 Lack. Legal News, 164, holding use of one's name upon tobacco packages in form indicating artifice for producing impression that product identical with that of rival concern, is infringement of trademark; *Tygart-Allen Fertilizer Co. v. J. E. Tygart Co.* 21 Pa. Co. Ct. 195, 7 Pa. Dist. R. 431, holding unfair trading in using name, word, or device adopted by another to distinguish his goods, and in so using it as to put off goods as those of other party.

Cited in note (17 L. R. A. 129, 130) on use of trademarks.

Distinguished in *Shepp v. Jones*, 15 Pa. Co. Ct. 164, 3 Pa. Dist. R. 542, 35 W. N. C. 29, holding equity will enjoin merchant from so simulating product of another merchant as to deceive public.

13 L. R. A. 346, *MOORE v. DARBY*, 6 Del. Ch. 193, 18 Atl. 768.

Tenancy by curtesy.

Cited in notes (112 Am. St. Rep. 589) on tenancy by the curtesy; (128 Am. St. Rep. 475, 489) on nature and existence of estates of tenancy by the curtesy.

13 L. R. A. 349, *MICHIGAN MUT. L. INS. CO. v. REED*, 84 Mich. 524, 47 N. W. 1106.

Insurance; misrepresentations avoiding policy.

Cited in *Ketcham v. American Mut. Acci. Asso.* 117 Mich. 523, 76 N. W. 5, holding agent's knowledge of facts will not avoid forfeiture, if assured knew answers in application were untrue; *Beebe v. Ohio Farmers' Ins. Co.* 93 Mich. 524, 18 L. R. A. 486, 32 Am. St. Rep. 519, 53 N. W. 818, holding policy not avoided by failure of application to show encumbrance, when same known to agent who filled out application, and had insured sign, without reading; *Mudge v. Supreme Court I. O. O. F.* 149 Mich. 469, 14 L.R.A.(N.S.) 282, 119 Am. St. Rep. 686, 112 N. W. 1130, holding insurer not estopped to set up fraud in application made out by its agent with assent of insured.

Cited in notes (67 L.R.A. 708, 736) on retention of policy as waiver of mistake or fraud of insurer or its agent; (22 Am. St. Rep. 883) on waiver or estoppel by insurance agent.

13 L. R. A. 353, *FONES BROS. HARDWARE CO. v. ERB*, 54 Ark. 645, 17 S. W. 7.

Contracts for public works; plans and specifications.

Cited in *Packard v. Hayes*, 94 Md. 250, 51 Atl. 32, holding contract for disposal of garbage, let upon advertisement inviting bidders to submit scheme, feasibility of which was to be determined by city council, void; *Sanitary District v. Lee*, 79 Ill. App. 169, holding advertisement for construction of bridge, costing over \$500, by sanitary district, must leave nothing to discretion of trustees, except to determine who is lowest bidder; *Andrews v. Ada County*, 7 Idaho, 457, 63 Pac. 592, holding plans and specifications for public bridge must be adopted before advertising for competitive bids; *Moran v. Thompson*, 20 Wash. 536, 56 Pac. 29, holding under city charter requiring contract for local improvement to be let to lowest bidder, board of public works without authority, after accepting bid, to modify contract for addition to waterworks; *Holmes v. Detroit*, 120 Mich. 236, 45 L. R. A. 126, 77 Am. St. Rep. 587, 79 N. W. 200, holding advertisement for proposals for paving may limit bidding to material controlled by single dealer; *Saunders v. Iowa City*, 134 Iowa, 142, 9 L.R.A.(N.S.) 397, 111 N. W. 529, holding that a city may contract for use of patented pavement when let to

lowest bidder; *Bluffton v. Miller*, 33 Ind. App. 527, 70 N. E. 989, holding that a resolution for street improvement not stating the exact material to be used but leaving an option of three kinds is invalid for not stating the "kind" to be bid upon; *Baltimore v. Flack*, 104 Md. 136, 64 Atl. 702, holding that a specification may be made for three different kinds of pavement to be used in one notice if the kinds are put in competition against each other and the city may select the lowest bid on any one kind even though there is a lower bid on another kind; *Huntington County v. Pashong*, 41 Ind. App. 77, 83 N. E. 383, holding a contract let by board on plans filed without specifications, the specifications to be supplied by bidder may be enjoined by tax payer; *Goshert v. Seattle*, 57 Wash. 650, 107 Pac. 860, holding a call for bids on a fire alarm system which the city may deem adequate no adequate system being specified, is void; *Healey v. Anglo-California Bank*, 5 Cal. App. 285, 90 Pac. 54, holding that material discrepancies between plans and notice avoid an attempted acceptance and award to a bidder; *Hart v. New York*, 201 N. Y. 53, 94 N. E. 219, holding that contract entered into following competitive bidding is not valid unless plans and specifications furnished intelligent and uniform test for purpose of showing which was lowest bid; *Hilger v. Chrisp*, 98 Ark. 494, 136 S. W. 660, holding that definite plans and specifications must accompany advertisement for bids for building public bridge; *City Street Improv. Co. v. Kroh*, 158 Cal. 317, 110 Pac. 933, holding that plans and specifications for public work must be sufficiently definite to enable bidder reasonably to know outlay to be made in performing work.

Cited in note (30 L.R.A.(N.S.) 215, 219) on sufficiency of specifications for guidance of bidder for public contract.

Necessity for previous appropriation.

Cited in *Wiegel v. Pulaski County*, 61 Ark. 77, 32 S. W. 116, holding contract made by county judge for turnpike road, without previous appropriation therefor, void; *Thompson v. Searcy County*, 6 C. C. A. 678, 12 U. S. 618, 57 Fed. 1035, holding contract for courthouse costing \$29,000 valid, although only \$2,200 previously appropriated.

Distinguished in *Durrett v. Buxton*, 63 Ark. 400, 39 S. W. 56, holding statute requiring appropriation before contract can be made by county, not applicable to contract for building courthouse and jail.

Use of specific fund.

Cited in *Bowman v. Frith*, 73 Ark. 526, 84 S. W. 709, holding that the right of the levying judge to exceed amount appropriated for improvement does not authorize an excess to the extent of building a new court house under a contract purporting to be one for improvement only; *Kerwin v. Caldwell*, 80 Ark. 283, 46 S. W. 1058, holding that an appropriation for building and maintaining a county hospital includes the power to purchase land as a site therefor.

Advertisement for bids.

Cited in footnote to *Crowder v. Sullivan*, 13 L. R. A. 647, which holds notice for bids for electric light contract unnecessary.

Rights of bidders.

Cited in *Hannan v. Board of Education*, 25 Okla. 378, 30 L.R.A.(N.S.) 223, 107 Pac. 646, to the point that all discretion is withheld from contracting officers, and they are bound to give contract to lowest bidder, and cannot let it out for individual gain or reward to another; *Smith v. Rogers County*, 26 Okla. 825, 110 Pac. 669, holding that injunction does not lie to prevent county commissioners to let contract to construct bridge, where appeal from order of commissioners is provided for by statute.

Cited in footnote to *McNeil v. Boston Chamber of Commerce*, 13 L. R. A. 559, which holds rights of bidders not determinable by printed notice where terms orally fixed.

Cited in notes (26 L. R. A. 709) on right of lowest bidder on public contract; (38 L.R.A.(N.S.) 664) on discretion in choosing between bidders for public contract.

Taxpayers right to question public contract.

Followed in *Bowman v. Frith*, 73 Ark. 526, 84 S. W. 709, holding that a tax payer may maintain a suit to cancel a void contract for public improvement.

Construction favoring statute.

Cited in *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 471, 117 S. W. 238, as illustrating a judicial enforcement of legislative intent although unable to sustain the literal language of the statute.

13 L. R. A. 359, *SNIDER v. BAER*, 144 Pa. 278, 22 Atl. 897.

Wills; life estate.

Cited in *Reynolds's Estate*, 8 Kulp, 190, holding devise of all of testator's estate unto his wife "for and during her natural life," gives wife life estate only.

Devise of fee not cut down by subsequent qualifying words.

Cited in *Fidelity Trust Co. v. Bobloski*, 228 Pa. 56, 28 L.R.A.(N.S.) 1099, 76 Atl. 720, holding that a direction in a will that testator's wife take and enjoy all his real and personal estate considered with rest of will passes the fee in the realty to her; *Caslow v. Strausbaugh*, 233 Pa. 71, 81 Atl. 927, holding that devise generally or indefinitely, with power of disposition carries fee.

Cited in footnotes to *Roth v. Rauschenbusch*, 61 L. R. A. 455, which holds fee simple by devise to one absolutely and forever, not cut down by subsequent clause as to disposition of any remainder on devisee's death; *Cornwell v. Wulff*, 45 L. R. A. 53, which holds absolute power of disposition in instrument conveying land carries full power in land itself.

Cited in note (18 L.R.A.(N.S.) 469) on power of disposition bestowed on devise as indicative of quantum of estate intended to be devised.

Precatory words.

Cited in *Boies's Estate*, 177 Pa. 196, 35 Atl. 724, holding absolute devise, followed by declaration of trust as to same, with directions that income be paid to devisee during life, gives devisee authority to dispose of corpus of estate; *Hendricks v. Senior*, 25 Pa. Co. Ct. 223, 17 Montg. Co. L. Rep. 140, holding under devise to wife for life, with directions that remainder shall go to such of wife's relations as she shall name, wife takes fee; *Byrne v. Weller*, 61 Ark. 376, 33, S. W. 421, holding where testator gives entire property to wife for life, and in subsequent clause, after certain specific bequests, gives to her remainder of estate, wife takes fee.

13 L. R. A. 360, *WENGERD'S APPEAL*, 143 Pa. 615, 22 Atl. 869.

Vesting of legacy.

Cited in *Long's Estate*, 3 Pa. Super. Ct. 330, holding that bequest to sons and to children of deceased son conditioned upon survival of sons after cumulative trust vests an unconditional legacy in children of deceased son; *Jackson's Estate*, 21 Lanc. L. Rev. 146, holding that request to granddaughter, "when she arrives at age of 21 years, but in case of death before that time to others," vested at death of testator; *Blecher's Estate*, 22 Lanc. L. Rev. 17, holding that bequest of personal property relates to time of testator's death unless contrary intention is clearly indicated in will; *Dilworth's Estate*, 58 Pittsb. L. J. 47,

holding that under devise to children fixing certain periods for distribution, shares vested at time fixed for distribution whether paid or not; Long's Estate, 228 Pa. 600, 77 Atl. 924, holding that in case of doubtful construction law leans in favor of absolute rather than defeasable estate; of vested rather than contingent one.

Cited in note (10 Eng. Rul. Cas. 820) as to when remainder is vested.

Distinguished in McClure's Estate, 221 Pa. 562, 70 Atl. 860, holding that where testator provides that named legatee shall take legacy if living when his estate shall have been settled up it is his plain meaning that the legatee will take only if he be living at the time when the estate is settled.

13 L. R. A. 362, ATCHISON, T. & S. F. R. CO. v. TEMPLE, 47 Kan. 7, 27 Pac. 98.

Carriers; notice of damage to freight.

Cited in Atchison, T. & S. F. R. Co. v. Collins, 47 Kan. 14, 27 Pac. 99, holding notice of claim for damage for injury to mare given from five to seven days after unloading, sufficient; Wichita & W. R. Co. v. Koch, 47 Kan. 756, 28 Pac. 1013, holding notice of damage given nearly two weeks after delivery and removal of stock, insufficient; Wichita & W. R. Co. v. Koch, 8 Kan. App. 647, 56 Pac. 538, holding notice unnecessary as to stock dead at time of re-loading by railroad; Atchison, T. & S. F. R. Co. v. Poole, 73 Kan. 468, 87 Pac. 465, holding a failure to notify for damage to stock shipped as per limited liability contract does not apply to loss of market caused by carrier's negligent delay; Missouri K. & T. R. Co. v. Davis, 24 Okla. 684, 24 L.R.A.(N.S.) 870, 104 Pac. 34, holding that written notice after removal from receiving pens to shippers barns but before mingling with other stock is sufficient compliance with contract for notice before removal where barns were nearer to station than pens and carrier's agent inspected the stock in the barns.

Cited in notes (7 L.R.A.(N.S.) 1043) on reasonableness of time fixed in contract of shipment of live stock for presentation of claim for damages; (24 L.R.A.(N.S.) 867) on removal of live stock from carrier's premises before notice of claim where given in time for examination; (88 Am. St. Rep. 116) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 348) on special limitations of liability of carrier.

13 L. R. A. 364, LITTLE ROCK & M. R. CO. v. WILSON, 90 Tenn. 271, 25 Am. St. Rep. 693, 16 S. W. 613.

Railroads; liability for nonobservance of statutory precautions to prevent accidents.

Cited in Knoxville, C. G. & L. R. Co. v. Acuff, 92 Tenn. 34, 20 S. W. 348, holding statute making railroad liable for damages from running train without look-out, applicable where train pushed by engine; Iron Mountain R. Co. v. Dies, 98 Tenn. 660, 41 S. W. 860, holding liability of railroad for injury to person by engine and tender running backwards, is absolute, if not engaged in switching in yards; Southern R. Co. v. Pugh, 95 Tenn. 421, 32 S. W. 311, holding statute not applicable where injury occurs during switching in railroad yards, depot grounds, or side tracks; Towles v. Southern R. Co. 103 Fed. 406, holding statute not applicable whenever company compelled to run trains or cuts of cars backwards, however remote from switching yard; Cincinnati, N. O. & T. P. R. Co. v. Davis, 62 C. C. A. 569, 127 Fed. 937; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L. R. A. 699, 9 C. C. A. 675, 22 U. S. App. 220, 61 Fed. 613, holding contributory negligence will not defeat action for injuries based on failure of railroad to observe statutory precautions to prevent accident, but may be considered in

mitigation of damages; *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 394, 102 Pac. 347, holding that the negligence of carrier by failure to ring bell or blow whistle at crossing does not abrogate the doctrine of contributory negligence; *Louisville & N. R. Co. v. Martin*, 113 Tenn. 287, 87 S. W. 418, holding it error to refuse to charge that noncompliance with statute in running a train constituted negligence; *St. Louis & S. F. R. Co. v. Finley*, 122 Tenn. 133, 118 S. W. 692, 18 Ann. Cas. 1141, holding that statutory precautions to prevent accidents on railroads are declaratory of common law except as to burden of proof and absolute liability.

Cited in notes (25 L.R.A. 292) on duty to maintain lookout on railroad train; (31 L.R.A.(N.S.) 1039) on intoxication of persons on track as affecting applicability of doctrine of last clear chance.

Distinguished in *Southern R. Co. v. Simpson*, 65 C. C. A. 563, 131 Fed. 708, holding the operation of an engine backwards in day time with proper lookout is not a violation of statute requiring lookout ahead; *Gilliam v. Texas & P. R. Co.* 114 La. 276, 38 So. 166, holding that company is not liable for death of intoxicated person sleeping on track caused by pushing of cars with engine behind and without a headlight on the front cars, there being no requiring statute.

Doubtful or erroneous citation.

Cited in *Southern R. Co. v. Hamblen County*, 115 Tenn. 530, 92 S. W. 238, on the powers of county courts.

13 L. R. A. 366, *FEARN v. WEST JERSEY FERRY CO.* 143 Pa. 122, 22 Atl. 708.

Evidence; record in another case.

Cited in *Walker v. Philadelphia*, 195 Pa. 173, 78 Am. St. Rep. 801, 45 Atl. 657, holding verdict and judgment in action by wife for personal injury, not evidence of negligence in action by husband against same defendant, for injury in same accident.

Depositions; admissibility in subsequent proceedings.

Followed in *Roberts v. Powell*, 210 Pa. 597, 60 Atl. 258, holding deposition of former suit inadmissible in partition proceedings for non-identity of parties in latter suit.

Cited in *Kyper v. Sheaffer*, 42 Pa. Super. Ct. 281, holding that identity of subject matter and identity of parties must unite to render testimony in one case admissible in another.

Presumption of negligence.

Cited in *Bernhardt v. West. Pennsylvania R. Co.* 159 Pa. 364, 28 Atl. 140, holding presumption of negligence of railroad not created by passenger stepping upon bung from keg in alighting from train; *Proud v. Philadelphia & R. R. Co.* 64 N. J. L. 707, 50 L. R. A. 470, 46 Atl. 710, holding railroad not negligent because of filth recently deposited on steps of car; *Allen v. Northern P. R. Co.* 35 Wash. 229, 66 L.R.A. 808, 77 Pac. 204, holding fact that passenger is injured by agency under control of carrier is not necessarily prima facie evidence of carrier's negligence; *Green v. Baltimore & O. R. Co.* 32 Pa. Co. Ct. 279, 14 Pa. Dist. R. 293, holding that negligence of railroad company cannot be presumed from proof of the presence of a cuspidor in the aisle of its station which caused injury to plaintiff; *Foster v. American Bitumastic Enamel Co.* 15 Pa. Dist. R. 319, holding that the presence of a bucket of hot enamel on the deck and the spot of enamel on which plaintiff slipped are not alone conclusive of negligence; *Ammon v. Conestoga Traction Co.* 25 Lanc. L. Rev. 98, holding that no presumption of negligence arising from injury to passenger from cut received from broken window glass, which was broken shortly before accident; *Stanford v. Chester Traction*

Co. 11 Del. Co. Rep. 242, holding that presence of transitory foreign obstacle in car, such as banana peel, does not import negligence, unless evidence shows it was there with carrier's employee's knowledge; *Sutton v. Pennsylvania R. Co.* 230 Pa. 526, 79 Atl. 719, holding that no presumption of negligence arises from presence on steps of car of thin layer of ice, in action by passenger for injuries sustained while alighting.

Cited in notes (15 L.R.A. 36) on presumption of negligence from occurrence of accident; (113 Am. St. Rep. 999, 1031) on presumption of negligence from happening of accident causing personal injuries.

Distinguished in *Foster v. Old Colony Street R. Co.* 182 Mass. 380, 65 N. E. 795, holding street car company liable to passenger slipping on ice accumulating on step during storm.

Contributory negligence.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Aldridge*, 27 Ind. App. 500, 61 N. E. 741, holding passenger alighting from rear platform of railroad car, when steps covered with snow and ice, guilty of contributory negligence.

Carrier; duty to passengers.

Cited in *Vaneleve v. St. Louis, M. & S. E. R. Co.* 107 Mo. App. 103, 80 S. W. 706, holding company not bound to keep up an inspection of entire train en route and remove mud accumulated on steps from feet of passengers especially when its presence is unknown to operators of train; *Riley v. Rhode Island Co.* 29 R. I. 145, 15 L.R.A. (N.S.) 524, 69 Atl. 338, 17 A. & E. Ann. Cas. 50, holding company not bound to remove ice and snow continually accumulating on exposed steps of train en route.

Cited in footnote to *Sturgis v. Kountz*, 27 L. R. A. 390, which requires ferry-boat owner's duty to provide sufficient bar to driveway.

Cited in notes (68 L.R.A. 158) on ferryman as a common carrier; (33 L.R.A. (N.S.) 532) on duty of steamship company to passengers as to condition of decks; (5 Eng. Rul. Cas. 463) on extent of duty to secure safety of passengers.

13 L. R. A. 370, *HALLSTEAD v. CURTIS*, 143 Pa. 352, 22 Atl. 977.

Banks; liability of stockholder as partner.

Cited in *Gibbs's Estate*, 157 Pa. 68, 22 L. R. A. 281, 27 Atl. 383, holding that creditor seeking to hold stockholders of bank individually liable as partners, has burden of proof as to existence of partnership.

Cited in note (22 L. R. A. 278) on presumption as to incorporation.

Proof of partnership.

Cited in *Re Littman*, 159 Fed. 235, as containing a review of facts necessary to prove a partnership in contemplation of law.

13 L. R. A. 374, *KEHLER v. SCHWENCK*, 144 Pa. 348, 27 Am. St. Rep. 633, 22 Atl. 910.

Master and servant; duty as to character of appliances.

Cited in *Shadford v. Ann Arbor Street R. Co.* 111 Mich. 393, 69 N. W. 661; *Linkitus v. Butler Colliery*, 7 Kulp, 75; *Reese v. Hershey*, 163 Pa. 257, 43 Am. St. Rep. 795, 29 Atl. 907,—holding negligence cannot be imputed to employer from employment of methods or machinery in general use in business; *Mason v. Fourteen Min. Co.* 82 Mo. 370; *Keenan v. Waters*, 181 Pa. 250, 37 Atl. 342; *Hunt v. Graham*, 15 Pa. Super. Ct. 49; *Bonner v. Pittsburgh Bridge Co.* 5 Pa. Super. Ct. 284,—holding test of employer's liability is whether employee exposed to danger through failure to provide reasonably safe machinery, and test of reasonable safety is ordinary use; *Dooner v. Delaware & H. Canal Co.* 171 Pa.

600, 33 Atl. 415, holding railroad not liable for injury to brakeman resulting from absence of steps or handholds on freight car, same being in common use; Higgins v. Fanning, 195 Pa. 602, 46 Atl. 102, holding absence of guard on laundry mangle not negligence, in absence of evidence that guards are in ordinary use; Louisville & N. R. Co. v. Boland, 96 Ala. 629, 18 L. R. A. 261, 11 So. 667, holding railway company receiving from other companies for transportation, cars having couplings inferior to those in use on its own road, but in general use, not negligent; Eckhart & S. Mill Co. v. Schaefer, 101 Ill. App. 508, holding evidence as to other appliances used for certain purpose inadmissible on question of safety of appliance complained of; Gravadahl v. Chicago Ref. Co. 85 Ill. App. 347, holding evidence of better and safer method of constructing scaffold than construction of that causing injury not admissible; Hoffner v. Prettyman, 6 Pa. Super. Ct. 22, 41 W. N. C. 259, holding where evidence conflicting as to proper construction of scaffolding, question for jury; Haines v. Spencer, 92 C. C. A. 658, 167 Fed. 271, holding it not duty of employer to supply newest or safest machinery but only to special due care in supplying such as is reasonably safe.

Cited in footnote to Duntley v. Inman, P. & Co. 59 L. R. A. 785, which denies liability for failure to furnish better belt shifter if one furnished under proper use.

Cited in notes (48 L.R.A. 70) on employer's liability for injuries received by servants owing to want of blocking at switches; (98 Am. St. Rep. 295) on liability to servant for injuries due to defective machinery and appliances; (65 Am. St. Rep. 738) on duty of railroads to furnish improved appliances.

— **Apparatus such as commonly used.**

Cited in Brands v. St. Louis Car Co. 213 Mo. 711, 18 L.R.A. (N.S.) 706, 112 S. W. 511, on duty of master with respect to character of apparatus used; Pauza v. Lehigh Valley Coal Co. 231 Pa. 580, 80 Atl. 1126; Reeder v. Lehigh Valley Coal Co. 231 Pa. 570, 80 Atl. 1121,—holding that master is only bound to furnish such appliances as are in general use in business, trade or industry in which he is engaged; Soward v. American Car Co. 66 W. Va. 270, 66 S. E. 329, holding that master is not bound to furnish very best and safest machinery and appliances, but only such as are reasonably safe; Boop v. Laurelton Lumber Co. 212 Pa. 525, 61 Atl. 1021, holding proof of repair of wheel as such wheels are ordinarily repaired not sufficient to show that it was in proper condition to be used in saw mill according to ordinary usage in such cases.

Cited in footnote to Service v. Shoneman, 69 L.R.A. 792, which denies master's liability for injuries by boiler furnished where it was one in ordinary use and was procured in exercise of business prudence.

Cited in notes (16 L.R.A. (N.S.) 130) on furnishing servant article in general use as measure of master's duty; (6 L.R.A. (N.S.) 493) on standard of master's duty as to selection between different styles or makes of appliances.

Duty to warn employee of danger.

Cited in Baldwin v. Urner, 206 Pa. 464, 56 Atl. 38, denying employer's liability for failure to instruct boy of eighteen as to danger in walking upon automatic elevator doors; Smith v. Brown, 27 Lanc. L. Rev. 172, holding that it is not negligence to fail to instruct boy of fourteen who had worked around machinery for a year and run machine ten days before injury.

Assumption of risk.

Cited in footnotes to Mensch v. Pennsylvania R. Co. 17 L. R. A. 450, which holds danger from projection of bolt from end of car assumed by brakeman; Stager v. Troy Laundry Co. 53 L. R. A. 459, which holds risk of hand passing

under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

Contributory negligence.

Cited in *Schmidt v. Cook*, 4 Misc. 87, 23 N. Y. Supp. 799, holding child of eleven years, and in possession of faculties, responsible for observance of care for personal safety, but only of degree proper to age and condition; *Greenway v. Conroy*, 160 Pa. 189, 34 W. N. C. 99, 40 Am. St. Rep. 715, 28 Atl. 692, holding court cannot assume that boy over fourteen, with six months experience in machine shop, incapable of forming judgment of danger of climbing ladder to put belt on pulley. *Dynes v. Bromley*, 208 Pa. 636, 57 Atl. 1123, and *Rachmel v. Clark*, 205 Pa. 321, 62 L. R. A. 962, 54 Atl. 1027, holding whether child exercised care commensurate with age and discretion, question for jury; *Parker v. Washington Electric Street R. Co.* 207 Pa. 441, 56 Atl. 1001, holding contributory negligence of child seven years and eight months old, question for court, where facts settled and inferences clear; *Pennsylvania Co. v. Finney*, 145 Ind. 560, 42 N. E. 816, holding brakeman descending ladder of freight car, without looking out for water plug situated dangerously near track, guilty of contributory negligence; *Daniels v. Johnson*, 39 Colo. 184, 89 Pac. 811, holding that capacity of 14-year-old girl to apprehend danger under conflicting evidence is a question for the jury; *Kirchner v. Oil City Street R. Co.* 210 Pa. 47, 59 Atl. 270, holding that evidence of want of capacity to absolve 15-year-old boy from negligence in riding on car platform must be very clear; *Bice v. Wheeling Electrical Co.* 62 W. Va. 693, 59 S. E. 626, holding that consideration of the age and general information of a minor may be specially required of jury though not to exclusion of all other facts and circumstances; *Sullenberger v. Chester Traction Co.* 33 Pa. Super. Ct. 16, holding that the sending of a child under seven years of age on an errand across a busy street in which the child is killed is conclusive of the negligence of parent; *Bice v. Wheeling Electrical Co.* 62 W. Va. 699, 59 S. E. 626, holding for jury the question of contributory negligence in grasping hold of a highly charged light wire supposed to have been insulated and of small voltage.

Cited in footnote to *Duntley v. Inman, P. & Co.* 59 L. R. A. 785, which holds want of care not shown by breaking of piece of machinery causing servant's death.

Cited in notes 29 L.R.A.(N.S.) 489, 491) on presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger; (49 Am. St. Rep. 410, 411) on negligence in dealing with children.

Distinguished in *Fick v. Jackson*, 3 Pa. Super. Ct. 383, 39 W. N. C. 537, holding where it clearly appears employee had intelligent knowledge of risk, jury should be instructed to find for defendant.

Instructions to jury.

Cited in *Dooner v. Delaware & H. Canal Co.* 164 Pa. 34, 30 Atl. 269, holding instruction on damages stating "no sane man would lose leg for any compensation," prejudicial; *Smith v. Chester Traction Co.* 11 Del. Co. Rep. 393, holding that in submitting to jury question of amount which should be allowed for pain and suffering care should be taken not to inflame but to steady minds of jury.

13 L. R. A. 377, *McVEY v. BRENDDEL*, 144 Pa. 235, 27 Am. St. Rep. 625, 22 Atl. 912.

Union labels; right of union to protect.

Cited in *Schmalz v. Wooley*, 56 N. J. Eq. 651, 39 Atl. 539, holding association of journeymen hatters, not owning or trading in hats to which label applied, cannot enjoin use of counterfeit union label by hat manufacturer; *E. T. Fraim Lock Co. v. Shimer*, 43 Pa. Super. Ct. 231, 12 North. Co. Rep. 11, on trademark

as consisting of words in common use designating locality, section or region of territory.

Cited in footnote to *Cohn v. People*, 23 L. R. A. 821, which holds statute giving right to trade-mark in union label valid.

Cited in notes (29 L.R.A. 200, 206) on protection of trade union labels or trademarks; (25 Eng. Rul. Cas. 239) on subject-matter of trademark; (39 L.R.A. (N.S.) 1199) on law as to union labels.

Disapproved in *Hetterman Bros. v. Powers*, 102 Ky. 140, 39 L. R. A. 213, 80 Am. St. Rep. 348, 43 S. W. 180, holding employee whose skilled labor creates demand for commodity, and increases wages, has property right in exclusive use of label to designate product; *State v. Bishop*, 128 Mo. 381, 29 L. R. A. 205, 49 Am. St. Rep. 569, 31 S. W. 9, holding use of label of cigar makers union may be protected by making use of counterfeit, misdemeanor, though ownership not exclusive.

Label discriminating against nonunion labor.

Cited in *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223, holding union label declaring opposition to all "inferior rat-shop," etc., "workmanship," not beyond protection of law; *Cohn v. People*, 149 Ill. 493, 23 L. R. A. 824, 41 Am. St. Rep. 304, 37 N. E. 60, holding union label declaring opposition "to inferior rat-shop, coolie, prison, or filthy tenement house workmanship" not contrary to rules of morality or public policy.

— Statute protecting use constitutional.

Cited in *Com. v. Norton*, 16 Pa. Super. Ct. 432, Affirming 9 Pa. Dist. R. 132, 23 Pa. Co. Ct. 386, holding statute making counterfeiting label of cigar maker's union indictable offense, not special legislation; *Com. v. Meads*, 29 Pa. Super. 328, holding "an act to provide for adoption of trademarks, labels, symbols or private stamps by an incorporated or unincorporated association or union of working men and to regulate the same," to be constitutional and not defective in title.

Counterfeiting label; intention.

Cited in *Com. v. Norton*, 16 Pa. Super. Ct. 431, holding innocent intention cannot be claimed by one using counterfeit cigar label; *Com. v. Martin*, 35 Pa. Super. Ct. 247, on the wrongfulness of counterfeiting a union label; *Perham v. Richman*, 158 Fed. 548, holding injunction not to lie against the use of "Order of Railroad Telegrapher's Despatchers, Agents and Signalmen" as name of new order in favor of Order of Railroad Telegraphers in absence of intent to deceive.

Clean hands in equity.

Cited in *Little v. Cunningham*, 116 Mo. App. 549, 92 S. W. 734, on the maxim that "he who comes into equity must come with clean hands."

13 L. R. A. 380, *WILMER v. THOMAS*, 74 Md. 485, 22 Atl. 403.

Good-will.

Cited in *Lindemann v. Rusk*, 125 Wis. 233, 104 N. W. 119, holding that a bank may acquire good will which when acquired constitutes a species of property.

Transfer of trade-mark and good will.

Cited in *Acme Harvester Co. v. Craver*, 110 Ill. App. 419, holding sale of manufacturing plant and everything thereunto appertaining includes good will; *Lothrop Pub. Co. v. Lothrop L. & S. Co.* 191 Mass. 355, 5 L.R.A. (N.S.) 1080, 77 N. E. 841, holding that good will trade name and trademarks pass by the assignment to assignee for creditors, even though no provision made in the assignment for conduct of the business by assignees; *Haugen v. Sundseth*, 106 Minn. 134, 118 N. W. 666, 16 A. & E. Ann. Cas. 259, holding that a transfer of good will is not limited to the original grantees by the mere fact that "successors and assigns"

are not mentioned in contract and also citing annotation on this point; *Seabrook v. Grimes*, 107 Md. 417, 16 L.R.A.(N.S.) 488, 126 Am. St. Rep. 400, 68 Atl. 883, holding that the devise of the name of a publication apart from the specific plant and publishing business passes no property right.

Cited in footnotes to *Slack v. Suddoth*, 45 L. R. A. 589, which denies outgoing partner's right to have first sale of good will of dental business; *Merchants' Ad-Sign Co. v. Sterling*, 46 L. R. A. 142, which holds stockholder's attempt to transfer good will of corporation with stock, invalid; *Hutchinson v. Nay*, 68 L.R.A. 186, which sustains surviving partner's right to enter into competing business and solicit trade from customers of old firm, notwithstanding sale of good will as part of firm assets at instance of personal representative of deceased.

Cited in notes (46 L.R.A. 542, 543, 544) on transfer of trademark by bankruptcy or insolvency assignment; (1 L.R.A.(N.S.) 711, 716) on sale of trademark; (5 L.R.A.(N.S.) 1078) on good will as impliedly passing with transfer of business.

13 L. R. A. 383, *ALTGELT v. SAN ANTONIO*, 81 Tex. 436, 17 S. W. 75.

Exclusive franchise.

Cited in *Scott v. Laporte*, 162 Ind. 59, 69 N. E. 675, holding that an act of a city granting exclusive rights to supply its citizens with water for a given time is void as creating a monopoly.

Cited in footnote to *Vincennes v. Citizens' Gaslight & Coke Co.* 16 L. R. A. 485, which holds exclusive use of streets for gaspipes not implied by grant of privilege to lay same.

Cited in note (16 L. R. A. 259) on power of public officers to make contracts binding on their successors, or for a term of years; (61 L. R. A. 82) on right to confer exclusive franchise for municipal water supply.

Public service contracts, specification of quantity.

Cited in *Cady v. San Bernardino & L. Creek Power Co.* 153 Cal. 28, 94 Pac. 242, holding that on calling for bids for the supplying of a city with light it is not necessary that the council fix an absolute number of lights on which proposals would be received.

Municipal contracts; injunction.

Cited in *Dallas Electric Co. v. Dallas*, 23 Tex. Civ. App. 328, 58 S. W. 153, holding taxpayer not entitled to enjoin performance of contract for electric lighting because of informality, without showing of injury; *Wood v. Victoria*, 18 Tex. Civ. App. 580, 46 S. W. 284, refusing to enjoin performance of illegal contract to furnish water outside city limits, on petition of taxpayer, in absence of showing of injury, for which there is no adequate protection at law.

Cited in footnotes to *Westminster Water Co. v. Westminster*, 64 L.R.A. 630, which denies right of municipality to contract for perpetual water supply; *Zuelly v. Casper*, 63 L.R.A. 133, which upholds right to taxpayer of county to bring suit for restoration to treasury of money illegally appropriated as fees of officers.

Cited in note (61 L. R. A. 76) on rights of taxpayer in relation to municipal water supply.

Distinguished in *Thaison v. Sanchez*, 13 Tex. Civ. App. 76, 35 S. W. 478, holding payment of salary voted mayor during term properly enjoined, where compensation dependent on fees, and thereafter office deprived of fees.

Taxation; illegal exemptions.

Cited in *Tampa v. Kaunitz*, 39 Fla. 699, 63 Am. St. Rep. 202, 23 So. 416, holding entire assessment not invalid because of taxable property placed on as-

assessment roll, and taxes extended, with fraudulent intention not to collect same; *Barbee v. Dallas*, 26 Tex. Civ. App. 573, 64 S. W. 1018, holding personal property of branch of religious publishing house not within constitutional provision exempting "institutions of purely public charity."

Cited in notes (15 L. R. A. 861) on power of municipality to exempt property from taxation; (60 L. R. A. 853) on taxation of municipal waterworks; (61 L. R. A. 67) on consideration for contract for municipal water supply.

13 L. R. A. 388, *DEMPSEY v. PFORZHEIMER*, 86 Mich. 652, 49 N. W. 465.

Validity of unrecorded mortgage as against creditors.

Cited in *Vining v. Millar*, 116 Mich. 146, 74 N. W. 459, holding unrecorded chattel mortgage invalid as against subsequent creditor of mortgagor, who takes mortgage without notice of prior lien; *Landis v. McDonald*, 88 Mo. App. 340, holding recorded mortgage qualified by unrecorded agreement permitting mortgagor to purchase goods, invalid against subsequent creditors; *Blumauer v. Clock*, 24 Wash. 600, 85 Am. St. Rep. 966, 64 Pac. 844, holding servant taking employee's lien for service rendered with actual knowledge of mortgage, has superior lien; *Read v. Horner*, 90 Mich. 157, 51 N. W. 207, holding purchaser of land with actual knowledge of unrecorded mortgage on movable building, not purchaser in good faith within recording statute; *Ruggles v. Cannedy*, 127 Cal. 299, 46 L. R. A. 374, footnote, p. 371, 53 Pac. 911, questioning, without deciding, validity of unrecorded mortgage as against previous creditor; *People use of Esper v. Burns*, 161 Mich. 174, 137 Am. St. Rep. 466, 125 N. W. 740, holding that chattel mortgage, where possession is not given, is void as against mortgagor's creditors, if not put on file in proper office, even though recorded elsewhere by mistake.

Distinguished in *Littauer v. Houck*, 92 Mich. 164, 31 Am. St. Rep. 572, 52 N. W. 464, holding lien of judgment for debt contracted before execution of unrecorded mortgage, and of which agent or attorney of creditor had notice before suit brought, not superior.

Disapproved in *Youngberg v. Walsh*, 72 Kan. 227, 83 Pac. 972, holding that an unrecorded mortgage though void for some purposes becomes valid when recorded and of the same force and effect as a new mortgage then made and recorded.

Right to contest validity of mortgage.

Cited in *Union Nat. Bank v. Oium*, 3 N. D. 200, 44 Am. St. Rep. 533, 54 N. W. 1034, holding general creditor without lien cannot contest validity of prior unrecorded chattel mortgage.

Mortgage of property not in being.

Cited in note (23 L. R. A. 464, 477) on sale or mortgage of future crops.

13 L. R. A. 394, *O'CONNELL v. EAST TENNESSEE, V. & G. R. CO.* 87 Ga. 246, 27 Am. St. Rep. 246, 13 S. E. 489.

Right to protect land from overflow of river.

Followed in *Sullivan v. Dooley*, 31 Tex. Civ. App. 590, 73 S. W. 82, granting injunction against construction of levee increasing overflow of lands of opposite riparian owner.

Cited in *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 682, 27 L. R. A. 763, 48 Am. St. Rep. 579, 17 So. 78, holding railroad not liable for increasing overflow of river on opposite side from embankment, when channel left mile to mile and half wide; *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 533, 62 Fed. 134, holding overflow of river in times of ordinary flood, constitute waters of river, and are not surface waters which riparian proprietor may turn at will; *Peck v.*

Venghause, 127 Iowa, 532, 103 N. W. 773, 4 A. & E. Ann. Cas. 716, holding that a riparian owner may not embank against the natural overflow of an inland stream where the effect will cause the presence of an increased volume of water on the land of another to his damage.

Cited in footnote to *Payne v. Kansas City, J. & C. B. R. Co.* 17 L. R. A. 628, which holds dam to protect land built by legislative authority in abandoned river bed a lawful public improvement.

Cited in notes (24 L.R.A.(N.S.) 215, 217) on right to confine flood water within banks; (23 Eng. Rul. Cas. 810) on right to erect barriers against the sea; (25 Eng. Rul. Cas. 425) on liability for injury to adjoining land due to protecting one's own land from flood.

Disapproved in *Jean v. Pennsylvania Co.* 9 Ind. App. 57, 36 N. E. 159, holding railroad not liable in damages for construction of embankment to protect right of way from overflow of river in time of high water.

Diverting channel of surface waters.

Cited in *Albany v. Sikes*, 94 Ga. 33, 26 L. R. A. 654, 47 Am. St. Rep. 132, 20 S. E. 257, adopting rule of civil law, that owner of servient estate cannot by diverting natural channel of surface water, cast whole burden upon estate of neighbor, and referring with approval to annotation in 13 L.R.A. 394; *Desberger v. University Heights Realty & Develop. Co.* 126 Mo. App. 219, 102 S. W. 1060, holding that a riparian owner cannot change the ordinary course of a river to benefit his own holdings to the damage of another's; *Cole v. Missouri, K. & O. R. Co.* 20 Okla. 230, 15 L.R.A.(N.S.) 270, 94 Pac. 540, holding that diversion of stream insufficient to provide for flood water doing injury to lower owner is actionable; *Cook v. Seaboard Air Line R. Co.* 107 Va. 38, 10 L.R.A.(N.S.) 968, 122 Am. St. Rep. 825, 57 S. E. 564, holding that the obstruction of the flood course of a stream though such stream is artificial is actionable.

Cited in footnotes to *Champion v. Crandon*, 19 L. R. A. 856, which holds diversion of surface water by changing grade of highway not actionable; *Johnson v. Chicago, St. P. M. & O. R. Co.* 14 L. R. A. 495, which authorizes diversion of surface water.

Cited in note (25 L. R. A. 530, 531) on what is surface water.

Surplus or flood waters.

Approved in *Price v. Oregon R. & Nav. Co.* 47 Or. 359, 83 Pac. 843, holding that waters flowing in one continuous body with main stream are not surface waters.

Cited in *Miller v. Madera Canal & Irrig. Co.* 155 Cal. 78, 22 L.R.A.(N.S.) 398, 99 Pac. 502, holding that water covering low land bordering stream during flood season flowing in continuous stream with main channel is part of the water course; *Fordham v. Northern P. R. Co.* 30 Mont. 429, 66 L.R.A. 559, 104 Am. St. Rep. 729, 76 Pac. 1040, holding that flood waters forming a continuous flowing body with the main channel may not be treated as surface water; *Jefferson v. Hicks*, 23 Okla. 688, 24 L.R.A.(N.S.) 218, 102 Pac. 79, holding that flood waters breaking from the banks and following a well defined course away from and back into main stream are not surface waters; *Uhl v. Ohio River R. Co.* 56 W. Va. 498, 68 L.R.A. 140, 107 Am. St. Rep. 968, 49 S. E. 378, 3 A. & E. Ann. Cas. 201, holding that flood waters do not cease to be part of stream unless so situated as to prevent their return to their natural course.

Distinguished in *Johnson v. Gray's Point Terminal R. Co.* 111 Mo. App. 384, 85 S. W. 941, holding that where water breaks from its natural course into another course causing the latter to exceed even its flood banks such excess water is surface water subject to diversion.

13 L. R. A. 401, PAPPENHEIM v. METROPOLITAN ELEV. R. CO. 128 N. Y. 436, 26 Am. St. Rep. 486, 28 N. E. 518.

Followed without discussion in Sterry v. New York Elev. R. Co. 129 N. Y. 620, 29 N. E. 68, and Odell v. New York Elev. R. Co. 130 N. Y. 691, 29 N. E. 998, 3 Silv. Ct. App. 669, and Minton v. New York Elev. R. Co. 130 N. Y. 340, 29 N. E. 319.

Right of action for damage from construction of railroad in street.

Cited in Ascher v. South Shore Traction Co. 144 App. Div. 236, 128 N. Y. Supp. 1044, holding that in suit to enjoin traction company from constructing road in part of street owned by abutter judgment should not provide that upon payment of amount fixed, abutter shall convey right to use street.

Cited in footnotes to Aldrich v. Metropolitan West Side Elev. R. Co. 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; De Geofroy v. Merchants' Bridge Terminal R. Co. 64 L. R. A. 959, sustaining right of abutter, not owning fee in street, to compensation for construction of elevated railroad.

Cited in note (36 L.R.A.(N.S.) 784, 792) on abutter's right to compensation for railroads in streets.

Disapproved in Kuhl v. Chicago & N. W. R. Co. 101 Wis. 53, 77 N. W. 155, holding consent to occupancy of street by railroad makes possession rightful, subject only to right of abutting owner to compensation for property taken, and damages to property not taken.

Right of action for trespass to real property.

Cited in Hutton v. Metropolitan Elev. R. Co. 19 App. Div. 245, 46 N. Y. Supp. 169, holding owner's right of action for interference with easements of light, air, and access, ceases, as to him with conveyance of premises; Badger v. Mayer, 8 Misc. 534, 28 N. Y. Supp. 765, and Stokes v. Manhattan R. Co. 47 App. Div. 60, 62 N. Y. Supp. 333, holding plaintiff in action to enjoin maintenance of elevated railway, who conveys property pending proceedings, loses right to restrain continuance of trespass, although all damages reserved; Pegram v. New York Elev. R. Co. 147 N. Y. 146, 41 N. E. 424, holding reservation in conveyance of damages which have accrued, or which may thereafter accrue, from elevated railway, will not entitle grantor to damages accruing subsequent to conveyance; Israel v. Metropolitan Elev. R. Co. 58 App. Div. 268, 69 N. Y. Supp. 218, holding plaintiff selling property pending proceeding to enjoin trespass by elevated railway, and for damages, entitled only to damages sustained before action begun; McKenna v. Brooklyn Union Elev. R. Co. 184 N. Y. 396, 77 N. E. 615, holding that light, air and access appurtenant to real property abutting on public street go with the estate, and a conveyance of the latter carries with it the former though grantor reserves same in deed including right of action for invasion of same; Schomacker v. Michaels, 189 N. Y. 65, 81 N. E. 555, holding that easements of light, air and access in public street, are inseparable from the abutting estate but the grantor may by stipulation in deed make his grantee trustee for damages collected for invasion of same; Re New York, 193 N. Y. 126, 85 N. E. 1064, as inapplicable to the question of apportionment of damages resulting to property from condemnation for public use; Tucker v. Edison Electric Illuminating Co. 100 App. Div. 410, 91 N. Y. Supp. 439 (dissenting opinion), on remedy by damages and injunction for trespass to realty; Muller v. Manhattan R. Co. 124 App. Div. 302, 108 N. Y. Supp. 852, Affirming 53 Misc. 140, 102 N. Y. Supp. 454, holding that the purchasers of property take it with all the rights respecting easements in street abutting that the infant grantors in partition had.

— **Purchasers or lessees after commission of continuing trespass.**

Cited in *Sterry v. New York Elev. R. Co.* 3 Silv. Ct. App. 599, 29 N. E. 68, holding purchasers of premises after construction of elevated railway entitled to fee damage on account of maintenance and operation; *Hughes v. Metropolitan Elev. R. Co.* 130 N. Y. 28, 28 N. E. 765, holding purchaser subsequent to erection of elevated railway entitled to fee damages from time of erection to trial of action; *Shepard v. Manhattan R. Co.* 169 N. Y. 166, 62 N. E. 151, holding reservation in deed of right of action for damages from construction of elevated railway does not deprive subsequent grantee of right to maintain action; *Ward v. Metropolitan Elev. R. Co.* 152 N. Y. 44, 46 N. E. 319, Affirming 82 Hun, 549, 31 N. Y. Supp. 527, holding wrongful character elevated railway's possession of easements of light, air, and access, appurtenant to abutting property, not presumed to continue in support of action for damages by purchaser, without notice of prior release by grantor; *Flammer v. Manhattan R. Co.* 56 App. Div. 184, 67 N. Y. Supp. 617, and *Wallach v. Manhattan R. Co.* 60 N. Y. S. R. 171, 28 N. Y. Supp. 483, holding purchasers pending action to enjoin trespass of elevated railway, and for damages, cannot be joined as parties plaintiff; *Storms v. Manhattan R. Co.* 178 N. Y. 500, 66 L. R. A. 625, 71 N. E. 3, Affirming 77 App. Div. 98, 79 N. Y. Supp. 60, holding tenant owning building, taking renewal lease after construction, may recover damages occasioned by elevated railroad; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 21, 58 L. R. A. 508, 64 N. E. 745 (dissenting opinion), majority holding tenant entering after creation of nuisance by electric lighting plant, may maintain action to abate nuisance and for damages sustained; *Calkins v. Postal Teleg. Co.* 11 Pa. Dist. R. 307, holding if original taking was on consent or has been purged of illegality before conveyance the grantor is entitled to damages, otherwise they pertain to the grantee.

Distinguished in *Re Grade Crossing*, 64 App. Div. 78, 71 N. Y. Supp. 674, holding owner of equity of redemption, and not purchaser at foreclosure sale, or his assignee, entitled to damages for change of grade made pending foreclosure proceedings; *Burkhalter v. Oliver*, 88 Ga. 479, 14 S. E. 704, holding where person in possession of land at time of construction of railroad not owner, but purchases before action, he cannot recover damages for permanent injury to freehold.

— **Lessors, heirs, remainder-men, etc.**

Cited in *Kernochan v. Manhattan R. Co.* 161 N. Y. 344, 55 N. E. 906, holding underground lease beginning before construction of elevated railway, and continuing for term of years thereafter, with rental to be fixed at stated intervals, lessor entitled to damages for depreciation in rental value from first readjustment of rent after construction of road; *Mitchell v. Metropolitan Elev. R. Co.* 134 N. Y. 14, 31 N. E. 260, holding upon death of owner intestate, right of action for subsequent damage from unlawful construction of elevated railway vests in heirs, and same not barred, although damages erroneously recovered by trustees under will; *Thompson v. Manhattan R. Co.* 130 N. Y. 363, 29 N. E. 264, holding remainder-men may maintain action to enjoin continuance of trespass by elevated railway, as injury to inheritance; *Mortimer v. Manhattan R. Co.* 129 N. Y. 84, 29 N. E. 5, holding executors entitled, as trustees under will, to recover for depreciation in rental value, from wrongful construction of elevated railway, both before and since death of testator.

Distinguished in *Kernochan v. New York Elev. R. Co.* 128 N. Y. 568, 29 N. E. 65, holding owner who has leased premises for term of years, after construction of elevated railway, may maintain action for impairment of easements appurtenant to premises.

Remedy for permanent trespass to real property.

Cited in *Rumsey v. New York & N. E. R. Co.* 63 Hun, 205, 17 N. Y. Supp. 672, holding judgment for damages from construction of railroad cutting off plaintiff's access to river, not bar to action for damages subsequently accruing.

— Damage to fee not recoverable in law action.

Cited in *Paret v. New York Elev. R. Co.* 46 N. Y. S. R. 32, 18 N. Y. Supp. 580, holding damages for loss of fee or selling value cannot be recovered in common-law action for money only; *Mott v. Lewis*, 52 App. Div. 560, 65 N. Y. Supp. 31, holding in trespass for piling dirt upon plaintiff's premises recovery is limited to damages accruing prior to commencement of action; *Reed v. Canastota Northern R. Co.* 47 N. Y. S. R. 601, 20 N. Y. Supp. 241, holding in trespass for unlawful construction of railroad, difference in value of land before and after construction of road not measure of damage; *Mitchell v. White Plains*, 91 Hun, 192, 36 N. Y. Supp. 204, holding unlawful appropriation of land for highway and sewer purposes does not give owner right of action to compel purchase by trespasser at price fixed by court; *Covert v. Valentine*, 50 N. Y. S. R. 518, 21 N. Y. Supp. 219, holding in action for damages for diverting water from pond, plaintiff entitled to recover only damages from diminution in value down to commencement of action.

— Remedy by injunction.

Cited in *Connole v. Boston & M. Consol. Copper & Silver Min. Co.* 20 Mont. 527, 52 Pac. 263, and *Olivella v. New York & H. R. R. Co.* 31 Misc. 205, 64 N. Y. Supp. 1086, holding owner of property affected by illegal structure may resort to equity to prevent continuance of trespass, and to avoid multiplicity of actions at law; *Kornder v. Kings County Elev. R. Co.* 41 App. Div. 359, 58 N. Y. Supp. 518, holding consent of abutting owner to construction of elevated railway, but reserving right to compensation, does not preclude action to restrain operation, unless damages paid; *Black v. Brooklyn Heights R. Co.* 32 App. Div. 472, 53 N. Y. Supp. 312, holding court in its discretion may grant injunction against unauthorized use of street by railway, or give reasonable time to obtain requisite consents; *Hahl v. Sugo*, 27 Misc. 7, 57 N. Y. Supp. 920, holding owner of building encroaching upon adjoining premises, may be compelled by mandatory injunction to remove same, notwithstanding offer to pay value; *Ackerman v. True*, 56 App. Div. 56, 66 N. Y. Supp. 6, and *Goldbacher v. Eggers*, 38 Misc. 39, 76 N. Y. Supp. 881, holding in action to compel removal of wall and for damages, plaintiff entitled to injunction and to damages only to entry of judgment; *Stowers v. Gilbert*, 156 N. Y. 604, 51 N. E. 282, holding recovery for only temporary damage from encroachment of wall over division line, can be had in action for injunction; *Brown v. Ontario Tale Co.* 81 App. Div. 274, 80 N. Y. Supp. 837, holding riparian proprietor entitled to injunction against maintenance of dam of private corporation, causing river to overflow premises in times of high water; *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 88, 35 N. Y. Supp. 557, refusing temporary injunction pending trial of action to enjoin change of grade crossing for railway, without compensation to abutting owner.

Distinguished in *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 462, 70 Am. St. Rep. 810, 54 Pac. 244, holding maintenance of pipe line for conveyance of water across land of another will not be enjoined, where no appreciable damage sustained, and trespasser would suffer irreparable injury.

— Damages for permanent injury in lieu of injunction.

Followed in *Shaw v. Rochester, S. & E. R. Co.* 131 App. Div. 531, 115 N. Y. Supp. 1026, holding that where a trolley company has been allowed to operate for years without consent or deed from owner of land abutting and owning to center

of street injunction against its operation will only lie where it refuses to pay damages and costs on submission of deed.

Cited in *Amerman v. Deane*, 132 N. Y. 361, 28 Am. St. Rep. 584, 30 N. E. 741, holding in equity action to enjoin maintenance of tenement house, erected in violation of covenant in deed, damages for permanent injury may be recovered; *Peck v. Schenectady R. Co.* 170 N. Y. 308, 63 N. E. 357, holding in action to enjoin street railway from occupying street, defendant not entitled as of right to alternative relief of paying damages in lieu of perpetual injunction; *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 277, 24 N. Y. Supp. 793, holding party erecting undesirable building in violation of covenant may have election to pay damages to avoid permanent injunction; *Gallagher v. Kingston Water Co.* 25 App. Div. 84, 49 N. Y. Supp. 250, sustaining injunction against permanent diversion of waters from mill by water company, unless company elects to make compensation for rights taken; *Herman v. Manhattan R. Co.* 58 App. Div. 372, 68 N. Y. Supp. 1020, holding in action to enjoin maintenance of elevated railway, judgment in gross sum for past and future damages, and giving execution therefor, without injunction, erroneous; *New York v. Pine*, 185 U. S. 104, 46 L. ed. 825, 22 Sup. Ct. Rep. 592, Reversing 103 Fed. 339, holding in action to enjoin diversion of waters of stream, court of equity may award compensation in lieu of cessation of trespass, although trespasser could not have acquired right of appropriating water by condemnation; *St. Paul, M. & N. R. Co. v. Western U. Teleg. Co.* 55 C. C. A. 285, 118 Fed. 519, holding equity may, upon railroad's application for injunction against use of lines on right of way upon expiration of agreement with telegraph company, determine, and permit continued use upon payment thereof, reasonable compensation; *Gaskill v. Washington Water Power Co.* 17 Idaho, 137, 105 Pac. 51, on reference to ascertain damages as upon condemnation where injunction is sought to restrain taking; *Hart v. Seattle*, 45 Wash. 303, 88 Pac. 205, 13 A. & E. Ann. Cas. 438, holding that a court may in lieu of granting an injunction against lowering street level and commanding its restoration to former condition, give the city the privilege of leaving street in altered condition on payment of damage; *McCleery v. Highland Boy Gold Min. Co.* 140 Fed. 954, holding that because of the tardiness in bringing injunction a court of equity may award past uncompensated damages and those to accrue in future in perpetuity and issue injunction only on failure of defendant to pay same.

Cited in note (20 L. R. A. 755) on damages in lieu of injunction.

Distinguished in *Knoth v. Manhattan R. Co.* 109 App. Div. 809, 96 N. Y. Supp. 844, holding that an injunction will not issue on refusal to pass damages against the operation of a third track where although a trespass it is of great public benefit and has been operated for years.

Measure of damages for trespass to real property.

Cited in *Ottawa, O. C. & C. G. R. Co. v. Peterson*, 51 Kan. 607, 33 Pac. 606, and *Chicago, K. & W. R. Co. v. Union Investment Co.* 51 Kan. 603, 33 Pac. 378, holding in action by abutting owner to enjoin construction of railroad in streets, and for damages, plaintiff may recover damages suffered to commencement of action, but not for depreciation in value of property; *Re Brooklyn Union Elev. R. Co.* 95 App. Div. 110, 88 N. Y. Supp. 426, holding measure of damages resulting to abutting property from propinquity of elevated road where no benefit accrues from its erection is difference in value of property before and after construction, as a result of such construction.

— When damage permanent.

Cited in *Krumwiede v. Manhattan R. Co.* 9 Misc. 555, 30 N. Y. Supp. 400,

holding that measure of permanent damage from trespass of elevated railway is difference between fair market value of property without railway, and that with railway, less benefits; *Mitchell v. Metropolitan Elev. R. Co.* 132 N. Y. 554, 30 N. E. 385, holding evidence of value of property without elevated railway, material and relevant, in action for injunction because of wrongful appropriation of easements; *Re New York Elev. R. Co.* 76 Hun, 388, 28 N. Y. Supp. 110, holding in assessment of damages in condemnation proceedings neither past damages, nor past benefits, can be considered.

13 L. R. A. 408, *LEMP v. FULLERTON*, 83 Iowa, 192, 48 N. W. 1034.

Followed without discussion in *Anheuser-Busch Brewing Assn. v. Fullerton*, 83 Iowa, 760, Appx. 50 N. W. 56.

Replevin of property seized under criminal process.

Cited in *P. Schoenhofen Brewing Co. v. Armstrong*, 89 Iowa, 676, 57 N. W. 436, holding replevin will not lie for property taken by sheriff under search warrant.

Cited in notes (20 L.R.A.(N.S.) 1121) on right to levy upon intoxicating liquors; (15 L.R.A.(N.S.) 925) on constitutional right to prohibit sale of intoxicants; (80 Am. St. Rep. 763) as to when replevin or claim and delivery is sustainable.

13 L. R. A. 411, *GILBERT v. ELDRIDGE*, 47 Minn. 210, 49 N. W. 679.

Referred to for facts in *Gilbert v. Emerson*, 60 Minn. 63, 61 N. W. 820.

Riparian rights separated from shore lands.

Cited in *Duluth v. St. Paul & D. R. Co.* 49 Minn. 210, 51 N. W. 1163, holding platting of submerged land beyond street parallel to lake shore, and also under water, indicates intention that streets running into former street should not extend beyond it; *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 63, 53 N. W. 1066, holding platting of land partly submerged into blocks and streets, indicates intention to separate same from shore blocks so that conveyance of shore block will not carry riparian rights; *Hobart v. Hall*, 174 Fed. 459, to the point that owner of shore land may legally disassociate therefrom and sell to another his riparian rights; *Gifford v. Horton*, 54 Wash. 604, 103 Pac. 988, to the point that platting and conveyance of land in water beyond shore line disassociated riparian rights from upland.

Cited in note (40 L. R. A. 394) on separation of riparian rights from upland.

Distinguished in *State v. St. Paul & D. R. Co.* 81 Minn. 424, 84 N. W. 302, holding riparian rights cannot be taxed as real estate independent of parent estate to which they belong, until separated therefrom by some act of owner.

Effect of conveyance of shore and submerged lands to different persons.

Cited in *Duluth v. St. Paul & D. R. Co.* 49 Minn. 209, 51 N. W. 1163, holding riparian proprietor may convey fee in land above shore line, and reserve private rights in land under water, originally appurtenant to estate; *Gilbert v. Emerson*, 55 Minn. 259, 43 Am. St. Rep. 502, 56 N. W. 818, holding where submerged land platted into blocks not extending to navigable waters, conveyance of outer-most blocks carries riparian rights as against original proprietor, and his grantee of shore block; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 304, 50 N. W. 82, holding conveyance of submerged land carries with it riparian rights incident thereto, including title to dry land formed beyond natural low-water line by gradual alluvial deposits.

Effect of erosion upon riparian rights.

Cited in *Ocean City Assn. v. Shriver*, 64 N. J. L. 564, 51 L. R. A. 431, 46 Atl.

690, holding grantee of lot according to plat whereon street is designated between lot and ocean, does not become riparian proprietor upon street and part of lot being carried away by erosion, where ocean subsequently recedes; *Peuker v. Canter*, 62 Kan. 371, 63 Pac. 617, holding where land separated from river partly carried away by erosion, owner entitled to equitable proportion of alluvion formed within originally surveyed lines upon river receding.

Cited in footnote to *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in note (51 L. R. A. 426) on right to follow accretions across division line previously submerged by action of water.

13 L. R. A. 415, *ST. PAUL UNION DEPOT CO. v. MINNESOTA & N. W. R. CO.* 47 Minn. 154, 49 N. W. 646.

Cited in *Chicago G. W. R. Co. v. St. Paul Union Depot Co.* 68 Minn. 221, 71 N. W. 23, and *Chicago, St. P. & K. C. R. Co. v. St. Paul Union Depot Co.* 54 Minn. 413, 56 N. W. 129, for other branches of same controversy.

13 L. R. A. 418, *KIESSIG v. ALLSPAUGH*, 91 Cal. 231, 27 Pac. 653.

Discharge of sureties.

Cited in *Eppinger v. Kendrick*, 114 Cal. 626, 46 Pac. 613, holding that the deposit of wheat the proceeds of which would pay a note in hands of holder with instructions that it be so applied discharges an accommodation endorser though it be not so applied.

Cited in footnote to *Schuster v. Weiss*, 19 L. R. A. 183, which holds sureties on appeal bond discharged by change in statute.

— On contractor's bond

Cited in *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 497, 99 Pac. 856, holding that a change of plan from a one story building to a two without consent of surety in contractor's bond will release such surety; *Glenn County v. Jones*, 146 Cal. 523, 80 Pac. 695, 2 A. & E. Ann. Cas. 764, holding that premature payment of contractor without consent of surety on such contractor's bond will release such surety.

Cited in note (5 L.R.A.(N.S.) 418) on release of surety on building contractor's bond by making payments not authorized by contract.

13 L. R. A. 419, *STATE v. ARMSTRONG*, 106 Mo. 395, 27 Am. St. Rep. 361, 16 S. W. 604.

Followed without discussion in *Arnold v. Sayings Co.* 76 Mo. App. 182.

Information; verification.

Cited in *State v. Murlin*, 137 Mo. 307, 38 S. W. 923, holding verification of information sufficient; *State v. Simpson*, 136 Mo. App. 666, 118 S. W. 1187, holding affidavit that facts alleged in information are true to the best knowledge, information and belief of affiant insufficient to support the information.

Time for objection for duplicity.

Cited in *State v. Fox*, 148 Mo. 525, 50 S. W. 98, and *State v. Wilson*, 143 Mo. 344, 44 S. W. 722, holding objection that indictment bad for duplicity, too late after verdict.

Form of information.

Cited in *State v. Niesman*, 101 Mo. App. 512, 74 S. W. 638, holding indictment for selling cigars from boxes bearing counterfeit union label not defective because genuine label pasted in information instead of being set forth in writing.

Libelous publications.

Cited in *McGinnis v. G. Knapp & Co.* 109 Mo. 146, 18 S. W. 1134, holding publication of letter from newspaper correspondent charging member of legislature with using "\$50,000 slush fund" to secure passage of bill, libelous; *State v. McCabe*, 135 Mo. 459, 34 L. R. A. 130, footnote, p. 127, 58 Am. St. Rep. 589, 37 S. W. 123, holding statute making it misdemeanor to send letter threatening credit or reputation of another, does not infringe rights secured by bill of rights; *Kenworthy v. Journal Co.* 117 Mo. App. 335, 93 S. W. 882, holding a publication that three of seven persons named are about to be arrested for perjury is not actionable by any of the seven in absence of proof that he was preferred to the one to be arrested.

Cited in footnotes to *Kansas City, M. & B. R. Co. v. Delaney*, 45 L. R. A. 600, which holds letters of recommendation stating that former employee left employer's service during strike not actionable *per se*; *Mitchell v. Bradstreet Co.* 20 L. R. A. 138, which holds voluntary publication by mercantile agency of false statement that firm has assigned, not privileged.

Cited in note (3 L.R.A.(N.S.) 340) on charging one with refusal to pay debt as libel; (58 Am. St. Rep. 603) on criminal uses of United States mail; (9 Eng. Rul. Cas. 194) on right to show truth of libel on criminal prosecution.

Distinguished in *Denney v. Northwestern Credit Assn.* 55 Wash. 334, 25 L.R.A. (N.S.) 1023, 104 Pac. 769, holding that where the words published are not actionable *per se* a direct traceable loss must be pleaded.

What constitutes publication.

Cited in footnote to *Gambrill v. Schooley*, 52 L. R. A. 87, which holds dictation of libelous letter to confidential stenographer, a publication.

Cited in note (9 Eng. Rul. Cas. 38) on what constitutes a publication of libel.

Jury judges of both law and facts.

Cited in *Heller v. Pulitzer Pub. Co.* 153 Mo. 212, 54 S. W. 457, holding peremptory instruction to jury to find for plaintiff in civil action for libel, error; *State v. Powell*, 66 Mo. App. 615, holding instruction to jury in prosecution for libel "to be guided by the instructions of the court" in determining law of case, error; *State v. Heacock*, 106 Iowa, 201, 76 N. W. 654, holding instruction to jury in prosecution for libel, that they are judges of law and facts, but cautioning them against assuming superior knowledge of law, proper; *Arnold v. Jewett*, 125 Mo. 252, 28 S. W. 614, holding instructions should limit jury's right to judge of law in libel case to question whether publication was libelous; *McCloskey v. Pulitzer Pub. Co.* 152 Mo. 344, 53 S. W. 1087, holding refusal of instruction defining libel according to statute, error, though failing to state truth of publication is defense; *Wagner v. Scott*, 164 Mo. 303, 63 S. W. 1107, holding where issue is one of qualified privilege, and there is evidence that defendant knew of falsity of charge, question is for jury; *Cook v. Globe Printing Co.* 227 Mo. 540, 127 S. W. 332; *Advertiser Co. v. Jones*, 169 Ala. 207, 53 So. 759,—to the point that jury are final judges of both law and fact in prosecution for criminal libel; *Sands v. G. W. Marquardt & Sons*, 113 Mo. App. 497, 87 S. W. 1011, holding that a direction to the jury to determine the law in a libel case "according to instructions of court" and conferring upon the jury the right to adjudge the law of the whole case is prejudicial error; *State v. Simpson*, 136 Mo. App. 666, 118 S. W. 1187, holding an instruction erroneous which states that words quoted constitute a charge of a crime and that if the jury believe them to have been spoken to convict; *Cook v. Globe Printing Co.* 227 Mo. 541, 127 S. W. 332, holding that the jury's right to judge the law as well as fact is limited to the sole question of whether the publication was in fact libelous while on all

other questions the jury are as much bound by instructions as in any other action, this including amount of verdict.

Cited in footnote to *State v. Main*, 36 L. R. A. 623, which holds jury in criminal case must take decision of court as to constitutionality of statute on which prosecution based.

Cited in notes (33 L.R.A.(N.S.) 212) on effect of provision that jury shall determine law and facts in libel cases; (42 Am. St. Rep. 290) on jury as judges of law and fact.

Distinguished in *Grimes v. Thorp*, 113 Mo. App. 658, 88 S. W. 638, holding that an instruction in a civil action for slander that the jury are themselves the judges of the law of slander as well as of the facts and are not required to accept the instructions given by the court as being conclusive of the law of slander, is erroneous.

Transfer of case to court in banc.

Cited in *State v. Orrick*, 106 Mo. 128, 17 S. W. 329, holding failure of member of division of supreme court hearing cause to take part in decision, not ground for transfer to court *in banc*.

13 L. R. A. 427, *GENESEE FORK IMPROV. CO. v. IVES*, 144 Pa. 114, 22 Atl. 887.

Eminent domain bonds.

Cited in *Philadelphia & T. R. Co. v. Neshaminy Elev. R. Co.* 26 Pa. Co. Ct. 516, holding common bond of railroad to indemnify persons whose property may be injured by construction, sufficient to protect individual claimants; *Philadelphia & T. R. Co. v. Neshaminy Elev. R. Co.* 11 Pa. Dist. R. 465, holding that an eminent domain bond filed in favor of the commonwealth sufficiently secures the payment of just compensation to individual land holders for a taking for public use.

Public corporation rates.

Cited in notes (33 L.R.A. 182) on legislative power to fix tolls, rates, or prices; (6 L.R.A.(N.S.) 836) on businesses affected with public interest subjecting them to regulation and control in respect to rates or prices.

Right to collect tolls for navigation improvement.

Cited in *Madunkeunk Dam & Improv. Co. v. E. F. Allen Clothing Co.* 102 Me. 262, 66 Atl. 537, holding a stream improvement company can collect toll for logs if their improvement though not necessary to facilitate the logging.

Cited in note (67 L.R.A. 840) on right to improve navigability of stream.

13 L. R. A. 431, *MIFFLIN BRIDGE CO. v. JUNIATA COUNTY*, 144 Pa. 365, 22 Atl. 896.

Municipality taking property of public corporation; damages.

Referred to in *Re Monongahela Water Co.* 223 Pa. 324, 72 Atl. 625, on the measure of damages recoverable by a public corporation from a municipality.

Cited in *Clarion Turnp. & Bridge Co. v. Clarion County*, 172 Pa. 250, 33 Atl. 580, holding when toll bridge of corporation taken by county, measure of damage is value of property to owners, including cost of structure and value of franchise; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 48, 37 Atl. 905, holding measure of damage for turnpike road taken by county, is just compensation for loss suffered by owners, including cost of construction and value of franchise; *Re Chambersburg & B. Turnp. Road*, 20 Pa. Super. Ct. 181, holding value, and not cost of construction, should be considered in condemning toll road; *Lanquist v. Chicago*, 200 Ill. 74, 65 N. E. 681, holding proof of purchase

price inadmissible in condemnation proceedings, where paid in part by cancellation of indebtedness; *Harrisburg, C. & C. Turnpike Road Co. v. Cumberland County*, 225, Pa. 469, 74 Atl. 340, holding that jury may consider condition of road amount of tolls received or which would be received under proper management and the market value of stock of company as elements of damage for condemnation of turnpike; *Clarion Turnpike & Bridge Co. v. Clarion County*, 26 Pittsb. L. J. N. S. 274, holding that where bridge is taken by county measure of damages is just compensation for loss suffered, being value of bridge, approaches and franchise; *Rea v. Pittsburgh & C. R. Co.* 229 Pa. 118, 140 Am. St. Rep. 721, 78 Atl. 73, to the point that in condemnation of bridge owned by company witness who constructed bridge may testify as to value of bridge but not contract price.

Cited in footnote to *Re Brooklyn*, 26 L. R. A. 270, which upholds act authorizing city to acquire property of water company.

Condemnation of property devoted to public use.

Cited in footnotes to *Diamond Jo Line Steamers v. Davenport*, 54 L. R. A. 859, which authorizes condemnation for public wharf of land used by carrier as landing place; *Butte, A. & P. R. Co. v. Montana U. R. Co.* 31 L. R. A. 298, which holds railroad land not actually used or necessary subject to condemnation by other railroad; *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* 60 L. R. A. 383, which denies power of reservoir company to condemn land devoted to purpose of railroad unless public necessity requires; *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co.* 62 L. R. A. 941, which holds telegraph company seeking to appropriate part of railroad's right of way must show its use will not materially interfere with use by railroad; *Martin v. Tyler*, 25 L. R. A. 838, which holds order on drainage fund not sufficient payment for land taken for public use.

Bridges; erection by county.

Cited in *Hogsett's Appeal*, 2 Pa. Super. Ct. 277, holding statute authorizing construction of county bridge, when "public road or highway" crosses stream, includes bridging of borough streets.

Control of toll bridges.

Cited in note (58 L. R. A. 169) on rights and duties of toll-bridge proprietors.

Statement admissible to show value.

Cited in *Indiana Union Traction Co. v. Benadum*, 42 Ind. App. 126, 83 N. E. 261, holding sworn statement as to value of property made in April for assessment purpose admissible in August as to value in an action for injury as an admission by plaintiff, though it is not conclusive as to value; *Re Simmons*, 68 Misc. 66, 124 N. Y. Supp. 744, holding that in condemnation proceedings owner may be asked as to price at which she authorized the sale.

Cited in note (25 Eng. Rul. Cas. 297) on value of property taken in eminent domain proceedings.

13 L. R. A. 433, *ULRICH v. REINOEHL*, 143 Pa. 238, 24 Am. St. Rep. 534, 22 Atl. 862.

Insurance; when assignment of policy wagering contract.

Cited in *Shaffer v. Spangler*, 144 Pa. 231, 22 Atl. 865, holding in determining whether insurance disproportioned to debt, regard must be had to age of assured, his expectation of life, and cost of carrying insurance, with interest; *McHale v. McDonnell*, 175 Pa. 646, 34 Atl. 966, holding assignment of policy of \$2,000 to secure debt of \$700 valid, where expectancy of life of assured, and date of policy or of assignment not shown; *Nye v. Grand Lodge, A. O. U. W.* 9 Ind. App. 147, 36 N. E. 429, holding assignment of policy for \$2,000 to one without insurable in-

terest, in consideration of payment of \$300, not wagering contract as matter of law; *Wheeland v. Atwood*, 192 Pa. 240, 73 Am. St. Rep. 803, 43 Atl. 946, holding assignment of policy for \$5,000 on life of wife, as security for debt of husband of \$1,900, not wagering contract, though wife died after payment of two premiums; *White v. Bradley*, 28 Lanc. L. Rev. 366, holding that assignment of policy of life insurance to person not relative or creditor of insured is void, though made in good faith.

Cited in footnotes to *Morris v. Georgia Loan, Sav. & Bkg. Co.* 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds sufficient to pay debt and advances only; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds assignee's insurable interest as creditor not condition of recovery on policy; *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as having no insurable interest.

Cited in note (3 L.R.A.(N.S.) 940, 951) on validity of assignment of interest in life insurance to one paying premiums.

Disapproved in *Exchange Bank v. Loh*, 104 Ga. 454, 44 L. R. A. 376, footnote p. 372, 31 S. E. 459, holding interest of assignee in policy cannot exceed debt and disbursements in carrying policy.

Amount of interest insurable in another's life.

Cited in *Harvey's Estate*, 15 Pa. Dist. R. 300, holding that a policy on life tenants life taken out by his assignee for \$5,000 is not against public policy or unwarranted where he purchased the tenancy for \$4,500.

Cited in footnote to *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, which holds that creditor has an insurable interest in life of debtor.

Cited in note (52 Am. St. Rep. 560) on mutual or membership life or accident insurance.

13 L. R. A. 438, *CONESTOGA CIGAR CO. v. FINKE*, 144 Pa. 159, 22 Atl. 868.

Custom as part of contract.

Cited in footnotes to *German American Ins. Co. v. Commercial F. Ins. Co.* 16 L. R. A. 291, which holds custom in particular city as to what constitutes "building" or "risk" not presumed to be known to foreign company; *Pennsylvania R. Co. v. Naive*, 64 L. R. A. 443, which denies carrier's liability for failure to deliver perishable freight arriving on 4th of July, when business is customarily suspended; *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* 65 L.R.A. 388, which holds marine policy providing that no risk shall attach until amount and description is approved and indorsed thereon, not changed into open and unrestricted policy covering all property assured elects to report, by adopting agreement fixing uniform premium, supplying blanks on which to report risks, and a long continued custom of reporting risks by assured when convenient, and their uniform acceptance by insurer.

When custom enforceable.

Cited in footnotes to *Baltimore Base Ball & Exhibition Co. v. Pickett*, 22 L. R. A. 690, which holds special contract for definite time not affected by custom to discharge ball players on ten days' notice; *Harris v. Sharples*, 58 L. R. A. 214, which denies right under contract to add lithographer's name for advertising purposes to lithographed cover design.

Annotation in 13 L. R. A. 438, referred to particularly in *Becker v. Hall*, 116 Iowa, 593, 56 L. R. A. 575, 88 N. W. 324, holding custom to appropriate ice in public waters unreasonable and in conflict with public rights.

13 L. R. A. 441, BLEVINS v. SMITH, 104 Mo. 583, 16 S. W. 213.

Dower; bar of inchoate right.

Cited in *McCreary v. Lewis*, 114 Mo. 591, 21 S. W. 855, holding right to dower not cut off by bond for deed, nor by deed executed in pursuance thereof, to neither of which was wife a party; *Motley v. Motley*, 53 Neb. 379, 68 Am. St. Rep. 608, 73 N. W. 738, and *Lynde v. Wakefield*, 19 Mont. 29, 47 Pac. 5, holding widow's inchoate right of dower not affected by sheriff's sale of lands under judgment against husband alone; *Crosby v. Farmers' Bank*, 107 Mo. 443, 17 S. W. 1004, holding wife may compel offer of land in parcels at sheriff's sale to enable her to protect dower right; *Bartlett v. Ball*, 142 Mo. 37, 34 S. W. 583, holding statute making devisees answerable upon covenant to extent of lands devised, does not affect widow's dower right where she is devisee; *Bartlett v. Tinsley*, 175 Mo. 334, 75 S. E. 143, holding widow may claim dower in lands owned by husband before all claims for damages for breach of his warranty have been ascertained and satisfied; *Thomas v. Woods*, 26 L.R.A. (N.S.) 1188, 97 C. C. A. 535, 173 Fed. 593, holding that wife is entitled to dower rights in property acquired by husband in Missouri, whether the parties are residents or not provided she executes no release thereof; *Lucas v. Purdy*, 142 Iowa, 369, 24 L.R.A. (N.S.) 1299, 120 N. W. 1063, holding that valid tax deed divests wife of the inchoate right of dower.

Cited in footnote to *Lewis v. Apperson*, 68 L.R.A. 867, which holds dower right not barred by deed signed by wife and a court commissioner conveying husband's real estate.

Cited in notes (18 L.R.A. 79) on power of husband or his creditors to defeat wife's right of dower; (24 L.R.A. (N.S.) 1295) on effect of tax sale upon inchoate dower.

Nature of suit to collect tax.

Cited in *State ex rel. Hayes v. Snyder*, 139 Mo. 556, 41 S. W. 216, holding payment of taxes cannot be enforced by personal judgment against owner of land; *State v. Chicago & N. W. R. Co.* 128 Wis. 502, 108 N. W. 594, distinguished taxes from debts on grounds of nature of remedy for enforcement thereof.

Enforcement of tax liens; parties.

Cited in *Perkinson v. Meredith*, 158 Mo. 463, 59 S. W. 1099, holding commencement of suit to enforce special tax lien against record owner after her death, cannot affect title, heirs not parties; *Jaicks v. Sullivan*, 128 Mo. 184, 30 S. W. 890, holding action to foreclose lien for street improvement, begun against record owner after his decease, and to which heirs not made parties until after running of statute of limitations, is barred; *Brickell v. Farrell*, 82 Fed. 221, holding beneficiaries in unforeclosed deed of trust not necessary party to suit to enforce delinquent tax lien; *Longwell v. Kansas City*, 69 Mo. App. 184, holding mortgagee is "owner" within statute requiring owners of property to be made parties to condemnation proceedings for street opening.

Distinguished in *Hilton v. Smith*, 134 Mo. 510, 33 S. W. 464, holding purchaser at tax sale may be divested of title by sale for subsequent taxes before he acquires deed, although not party to proceedings.

Necessary parties.

Distinguished in *Hardy v. Atkinson*, 136 Mo. App. 599, 118 S. W. 516, holding administrator of mortgagor not a necessary party to foreclosure proceedings where the homestead and dower rights of widow entirely consume equity of redemption.

Title under tax sale.

Cited in *Charter Oak Land & Lumber Co. v. Bippus*, 200 Mo. 705, 98 S. W. 546, holding that title obtained at a tax sale subsequent to an unrecorded prior sale

for taxes is superior though the parties thereto knew of the prior sale; *Rothenberger v. Garrett*, 224 Mo. 198, 123 S. W. 574, holding that the purchaser at a tax sale acquires only the title of the recorded owner, which is nothing where he or the tax collector know that title has been transferred to a person not a party to the proceedings.

13 L. R. A. 452, *COOK v. BARTHOLOMEW*, 60 Conn. 24, 22 Atl. 444.

Agreements for support and maintenance.

Cited in *Davison v. Smith*, 36 Pa. Co. Ct. 349, 18 Pa. Dist. R. 712, holding that an amount mentioned as recoverable on breach of a maintenance agreement does not control the amount of recovery therefor such recovery being limited to loss sustained by breach.

Cited in footnote to *Glocke v. Glocke*, 57 L. R. A. 458, which holds land conveyed by aged parent to son promising to support him, reverts to former on breach of agreement.

Mortgage or deed.

Cited in note (18 Eng. Rul. Cas. 13) on test between mortgage and conditional sale.

Difficulty in estimating damage not ground for refusing relief.

Cited in *Broughel v. Southern New England Teleph. Co.* 73 Conn. 622, 84 Am. St. Rep. 176, 48 Atl. 751, holding damages for loss of life, based on value to estate, not too vague and uncertain to be estimated pecuniarily.

Debt.

Cited in *Lothrop v. Parke*, 202 Mass. 106, 88 N. E. 666, holding that a judgment based on a claim founded on fraud is a debt within meaning of statute providing for bond conditioned on payment of debts and legacies.

13 L. R. A. 454, *AMERICAN RAPID TELEG. CO. v. HESS*, 125 N. Y. 641, 21 Am. St. Rep. 764, 26 N. E. 919.

Interest of public service corporations in streets.

Cited in *People ex rel. Western U. Telegr. Co. v. Dolan*, 126 N. Y. 176, 12 L. R. A. 253, 27 N. E. 269, holding interest of telegraph company in street in which right granted to construct line, deemed license merely, in determining value for taxation; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 379, 20 L. R. A. 133, 26 Atl. 510, holding ordinance granting street-railway right to lay double track may be repealed, and company restricted to single track, even after tracks laid, if public interests require it; *Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 305, 92 N. W. 79, sustaining right of municipality to require removal of street-car tracks to middle of street, placing at grade, and paving; *Newark v. State Bd. of Taxation*, 66 N. J. L. 469, 49 Atl. 525, holding interest of street railway company in street over which it passes taxable as real estate; *Western New York & P. Traction Co.* 143 App. Div. 718, 128 N. Y. Supp. 363, holding that vested rights of street railroad in streets are subject to reasonable use of street by public for travel and other purposes.

Cited in notes (12 L. R. A. 864) on authority to construct telegraph line as mere license; (34 L. R. A. 370) on grant of franchises to electric subway companies; (50 L. R. A. 147, 150) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

Corporate franchises subject to police power.

Cited in *Geneva v. Geneva Teleph. Co.* 30 Misc. 241, 62 N. Y. Supp. 172, holding legislature may authorize city to require existing electric companies to place wires under ground in conduits constructed by city; *Rochester v. Bell Teleph. Co.*

52 App. Div. 10, 64 N. Y. Supp. 804, holding right of telephone company to use streets, subject to police authority of municipality to require use of conduits of another company; *Electric Power Co. v. New York*, 29 Misc. 51, 60 N. Y. Supp. 590, holding statute requiring electric light wires and cables to be placed under ground within police power, as to electric company operating under franchise previously granted; *Westport v. Mulholland*, 84 Mo. App. 325, sustaining ordinance requiring obtaining permission to dig up city street, as applied to street-railway obtaining franchise before inclusion of highway in city limits; *Coverdale v. Edwards*, 155 Ind. 383, 58 N. E. 495, holding poles and wires of electric company not removed upon notice from city, when power reserved to terminate license, become nuisance *per se*, and may be summarily removed by municipality; *Utica v. Utica Teleph. Co.* 24 App. Div. 364, 48 N. Y. Supp. 916, holding statute authorizing telegraph company to construct lines over any streets and highways, not authority for such construction without consent of city and in violation of its ordinances; *American Teleg. & Teleph. Co. v. Harborcreek Twp.* 23 Pa. Super. Ct. 441, sustaining road commissioners' regulation requiring removal of telegraph poles to property line of road; *O'Brien v. Erie*, 20 Pa. Co. Ct. 343, 7 Pa. Dist. R. 495, holding municipality has power to construct conduit for accommodation of electric wires when reasonable and necessary; *Philadelphia v. Postal Teleg. Cable Co.* 67 Hun, 23, 21 N. Y. Supp. 556, holding state taxation of telegraph line extended over military or post road under Federal authority, not interference with interstate commerce; *Brinkman v. Eisler*, 40 N. Y. S. R. 866, 7 N. Y. Supp. 193, holding contractor erecting awning over sidewalk for another, contrary to statute, cannot recover; *Buffalo v. Delaware L. & W. R. Co.* 136 App. Div. 281, 120 N. Y. Supp. 1081, holding that the legislature may require a railroad company operating under franchise from city to change its style of bridge from stationary to swinging over a river to facilitate navigation thereon; *New Union Teleph. Co. v. Marsh*, 96 App. Div. 125, 89 N. Y. Supp. 79, holding that municipal authorities may reasonably regulate use of streets by telephone company but their consent to use of streets is not essential, such right being granted by state; *Carthage v. Central New York Teleph. & Teleg. Co.* 110 App. Div. 627, 96 N. Y. Supp. 919, reversing 48 Misc. 425, 96 N. Y. Supp. 917, on the power and right of legislature to limit, restrict or revoke the right of a telegraph or telephone company to maintain its poles in a street; *New York C. & H. R. R. Co. v. New York*, 142 App. Div. 590, 127 N. Y. Supp. 513, holding that license given by legislature to railroad to use streets may be revoked at will of legislature; *Merced Falls Gas & Electric Co. v. Turner*, 2 Cal. App. 723, 84 Pac. 239, holding that a city may compel removal of poles from street so placed by permission and franchise; such permission and franchise not giving an indefeasible right.

Cited in footnotes to *Northwestern Teleph. Exch. Co. v. Minneapolis*, 53 L. R. A. 175, which requires council's discretion in compelling telegraph company to put underground, wires placed overhead under ordinance, to be reasonably exercised; *Michigan Teleph. Co. v. Benton Harbor*, 47 L. R. A. 104, which holds city's consent unnecessary to use of streets by telephone companies; *Wallace v. Reno*, 63 L.R.A. 337, which upholds statute authorizing revocation of license without notice to licensee.

Cited in notes (31 L. R. A. 800, 801, 804) on police regulation of electric companies; (39 L. R. A. 619) on municipal control over public nuisances on public streets and highways created by street railroads and other electric companies; (24 L. R. A. 165) on power of states to control or impose burdens on interstate telegraph and telephone companies; (14 L.R.A.(N.S.) 655) on right to require underground telegraph or telephone wires.

Contracts with public service corporations.

Cited in *Wright v. Glen Teleph. Co.* 48 Misc. 195, 95 N. Y. Supp. 101, holding that although the right to put wires over streets and highways is conferred by legislature a company may make a binding contract as to rates of service with a city in consideration of being allowed to put line through park and other public places; *Ganz v. Ohio Postal Telegr. Cable Co.* 72 C. C. A. 186, 140 Fed. 695, holding that a county board has no power to contract even for a consideration with respect to a telephone company's use of a highway for a period of time; *People ex rel. New York Electric Lines Co. v. Ellison*, 188 N. Y. 526, 81 N. E. 447, as upholding a contract entered into between a telephone company and board of commissioners of electric subways obligating company to put its conductors in subway; *State ex rel. Townsend v. Park Comrs.* 100 Minn. 154, 9 L.R.A.(N.S.) 1048, 110 N. W. 1121, holding that a park board cannot contract to perpetually maintain certain land dedicated as a parkway and such parkway may be vacated in favor of public interest.

13 L. R. A. 458, *WOODEN v. WESTERN N. Y. & P. R. CO.* 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050.

Enforcement of rights of action arising in foreign jurisdiction.

Cited in *Messler v. Schwarzkopf*, 35 Misc. 73, 71 N. Y. Supp. 241, holding common-law liability of members of joint-stock association as partners, presumed to exist in another state, in absence of proof to contrary; *Burdiet v. Missouri P. R. Co.* 123 Mo. 229, 26 L. R. A. 387, 45 Am. St. Rep. 528, 27 S. W. 453, holding proof of law of foreign state, where accident occurred, unnecessary to support action for negligence causing loss of arm; *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 528, 61 S. W. 617, holding in action upon contract made in another state, presumption obtains that common law prevails in such state, and not that statutes are same as those of *lex fori*; *Harrill v. South Carolina & G. Extension R. Co.* 132 N. C. 658, 44 S. E. 109, sustaining administrator's right of action for killing of intestate in another state having similar statute; *Romaine v. New York, N. H. & H. R. Co.* 87 App. Div. 571, 84 N. Y. Supp. 491, as to administratrix's right of action for negligent killing of decedent in another state; *Christensen v. Floriston Pulp & Paper Co.* 29 Nev. 562, 92 Pac. 210, holding that a right of action growing out of the laws of another state will be here enforced when not contrary to local public policy; *Bain v. Northern P. R. Co.* 120 Wis. 416, 98 N. W. 241, holding cause of action arising by statute for personal injuries is not local but transitory and may be instituted in courts of any state having jurisdiction of parties if statute is not contrary to public policy or law of former; *Re Taylor*, 144 App. Div. 637, 129 N. Y. Supp. 378, to the point that action for wrongful death in another state cannot be enforced here by comity beyond extent of such remedial limitations as public policy attaches to kindred rights of action arising under our laws; *Johnson v. Phoenix Bridge Co.* 197 N. Y. 319, 90 N. E. 953, 2 N. Y. Civ. Proc. Rep. N. S. 39, affirming 133 App. Div. 808, 118 N. Y. Supp. 210, holding that the action authorized by statute of foreign country where death is caused and occurs is maintainable in courts of this state; *Fithian v. St. Louis & S. F. R. Co.* 188 Fed. 844, holding that where right of action for injuries is based entirely upon statute it can be brought only in name of person to whom right is given by statute.

— Proof necessary when action based upon statute.

Cited in *Geoghegan v. Atlas S. S. Co.* 3 Misc. 225, 22 N. Y. Supp. 749, holding burden on plaintiff to prove negligently causing death is actionable wrong in foreign country where accident occurred; *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 110, 48 S. W. 778, holding action for ejection of passenger from train

in foreign country, cannot be maintained after death of passenger, without proof that action permitted by foreign statute; *The Lamington*, 87 Fed. 753, holding action for injury to seaman aboard British vessel on high seas not maintainable unless permitted by law of Great Britain; *Howlan v. New York & N. J. Teleph. Co.* 131 App. Div. 445, 115 N. Y. Supp. 316, holding that where a right of action for negligence depends on a foreign statute, it can only be maintained in this state on proof that the statute of the foreign state gives the right of action and is similar to local statute; *Zeikus v. Florida East Coast R. Co.* 144 App. Div. 92, 128 N. Y. Supp. 933, 2 N. Y. Civ. Proc. Rep. N. S. 233, affirming 70 Misc. 340, 128 N. Y. Supp. 931, holding that action for death by negligence in another state can only be maintained upon proof that statute of such state gives right of action and that it is similar to ours; *Cuba R. Co. v. Crosby*, 95 C. C. A. 539, 170 Fed. 383, reversing 158 Fed. 147, on pleading and proof of foreign statute on which is based the cause of action as essential.

Cited in notes (15 L.R.A. 583) on right of action for causing death accruing under foreign statutes; (67 L.R.A. 60) on how case determined when proper foreign law not proved.

— **Dissimilarity between *lex loci* and *lex fori*.**

Cited in *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1129, 13 Sup. Ct. Rep. 224, holding in Federal courts, action may be maintained in one state, for actionable wrong done in another state, although wrong not actionable in *lex fori*, if not contrary to policy of laws; *Evey v. Mexican C. R. Co.* 38 L. R. A. 394, 26 C. C. A. 417, 52 U. S. App. 118, 81 Fed. 304, holding dissimilarity of statute of foreign country, giving right of action for personal injury, from *lex fori*, not ground for Federal court refusing enforcement; *Kiefer v. Grand Trunk R. Co.* 12 App. Div. 30, 42 N. Y. Supp. 171, holding action will lie for negligently causing death in foreign country, where statute of such country possesses general characteristics of statute of this state; *Hanna v. Grand Trunk R. Co.* 41 Ill. App. 130, holding action will lie for negligently causing death in foreign country, although foreign statute does not limit recovery, as does that of *lex fori*, and provisions for distribution of fund are dissimilar; *Boston & M. R. Co. v. McDuffey*, 25 C. C. A. 249, 51 U. S. App. 111, 79 Fed. 936, holding wife and children may sue employer in Vermont, for death of employee from negligence of fellow servant in Canada, under statute of that country, although under Vermont statute action must be by executor or administrator, and negligence of fellow servant would preclude recovery; *Strauss v. New York, N. H. & H. R. Co.* 91 App. Div. 584, 87 N. Y. Supp. 67, holding statute providing for survival to personal representative of causes of action for injury to person not materially different from statute giving personal representative right to maintain suit for negligently causing death; *Marshall v. Sherman*, 148 N. Y. 25, 34 L. R. A. 766, 51 Am. St. Rep. 654, 42 N. E. 419, holding stockholder's liability, under statute of Kansas, to single creditor, for recovery of specific sum, not enforceable in New York; *Cross v. United States Trust Co.* 131 N. Y. 341, 15 L. R. A. 609, 27 Am. St. Rep. 597, 30 N. E. 125, holding trust in personal property created by will, and valid by statutes of state of testator's domicile, enforceable, although in contravention of local statute against perpetuities; *St. Louis, I. M. & S. R. Co. v. Haist*, 71 Ark. 264, 100 Am. St. Rep. 65, 72 S. W. 893, holding that differences in detail are immaterial where the fundamental and main provisions and principles of *lex loci* and *lex fori* are similar; *Keep v. National Tube Co.* 154 Fed. 124, holding a limitation of action under statute sued on in foreign state to two years controls and is not against the policy of the statute of the former having a 12 month limit.

Cited in note (56 L. R. A. 196, 206, 207, 212) on conflict of laws as to action for death or bodily injury.

Criticized in *Boyle v. Southern R. Co.* 36 Misc. 290, 73 N. Y. Supp. 465, holding action for negligently causing death, based upon statute of another state, may be maintained, though statute substantially dissimilar from that of *lex fori*.

— **Right to recover determined by *lex loci*.**

Cited in *Meekin v. Brooklyn Heights R. Co.* 164 N. Y. 149, 51 L. R. A. 236, 79 Am. St. Rep. 635, 58 N. E. 50, holding action brought by father for negligently causing death of daughter, upon death of plaintiff, may be revived for benefit of mother and brothers and sisters; *Stone v. Groton Bridge & Mfg. Co.* 77 Hun, 101, 28 N. Y. Supp. 446, holding administrator not entitled to maintain action for causing death, under statute of another state providing action shall be brought by and in name of state; *Fabel v. Cleveland, C. C. & St. L. R. Co.* 30 Ind. App. 271, 65 N. E. 929, holding father cannot maintain action for son's death in another state, statute of which provides such actions shall be brought by personal representative; *Thorpe v. Union P. Coal Co.* 24 Utah, 481, 68 Pac. 145, holding action for causing death not maintainable by heirs, where laws of state where accident occurred provide such action shall be brought by personal representative; *Dailey v. New York, O. & W. R. Co.* 26 Misc. 540, 57 N. Y. Supp. 485, holding limitation in statute of another state giving next of kin right of action for negligently causing death enforced in this state; *Kiefer v. Grand Trunk R. Co.* 12 App. Div. 32, 42 N. Y. Supp. 171, holding in action for negligently causing death, under statute of another state, interest from date of injury cannot be recovered, unless allowed by foreign statute; *Re Degaramo*, 86 Hun, 395, 33 N. Y. Supp. 502, holding foreign statute under which action brought for negligently causing death controls distribution of fund; *Mundt v. Glokner*, 24 App. Div. 116, 48 N. Y. Supp. 940, Overruling 20 Misc. 65, 44 N. Y. Supp. 430 (dissenting opinion), majority holding, upon death of plaintiff, in action for causing death, brought by administrator and father, action may be continued by administrator *de bonis non*. Cited in note (15 L. R. A. 583) on rights of action for causing death occurring under foreign statutes.

— **Law governing damages.**

Cited in *Slater v. Mexican Nat. R. Co.* 194 U. S. 132, 48 L. ed. 905, 24 Sup. Ct. Rep. 581 (dissenting opinion), majority holding assessment of damages for wrongful killing governed by *lex loci*; *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 163, 98 N. W. 918, 4 A. & E. Ann. Cas. 519, holding that the character and extent of remedy for action arising in foreign jurisdiction is to be determined by the *lex fori* except where the statute creating right of action also contains directly or inferentially the remedy.

Cited in notes (56 L.R.A. 314; 91 Am. St. Rep. 727, 730, 731) on conflict of laws as to measure of damages.

Right of action for causing death — Release of.

Cited in *Mella v. Northern S. S. Co.* 127 Fed. 417, sustaining widow's right to release, prior to appointment as administratrix, cause of action for wrongful killing of husband.

— **Persons entitled to.**

Cited in *Gurofsky v. Lehigh Valley R. Co.* 121 App. Div. 128, 105 N. Y. Supp. 514, on action by person designated in statute as entitled to right of action for negligent death; *Hall v. Southern R. Co.* 149 N. C. 112, 62 S. E. 899, holding that a foreign administrator cannot bring an action for negligent death in state having a statute providing that action be brought by personal representative; *Dodge v. North Hudson*, 177 Fed. 991, holding that the person named in statute sued upon as entitled to bring the action need not bring it since the procedure of the state where the action is brought governs.

Correlation of statutory rights and remedies.

Cited in *Re Comesky*, 83 App. Div. 141, 81 N. Y. Supp. 1049, holding municipality exercising statutory authority to change street grade cannot attack constitutionality of abutter's remedy therein provided; *Rosin v. Lidgerwood Mfg. Co.* 89 App. Div. 253, 86 N. Y. Supp. 49, by Woodward, J., who holds statute requiring notice to employer before bringing action would be unconstitutional, where cause of action existed at common law.

Presumption of the existence of similar foreign law.

Cited in *Waters v. Spencer*, 44 Misc. 17, 89 N. Y. Supp. 693, holding that the presumption that the law of a foreign state is similar to that of forum does not apply to positive statutory law.

13 L. R. A. 462, *MACDONALD v. FIRST NAT. BANK*, 47 Minn. 67, 28 Am. St. Rep. 3, 49 N. W. 395.

Operation of insolvent law upon nonresidents.

Cited in *Re Kahn*, 55 Minn. 512, 57 N. W. 154, holding validity of agreement by insolvent in Minnesota, to give unlawful preference by transfer of goods to creditor in Wisconsin, determined by law of former state, although title vested in Wisconsin.

Cited in notes (23 L. R. A. 34) on transfer of property out of state by bankruptcy proceedings or assignment for creditors; (37 L. R. A. 479) on effect of insolvency statutes on mortgage or sale preferring creditors.

13 L. R. A. 463, *TABERT v. COOLEY*, 46 Minn. 366, 49 N. W. 124.

Malevolent prosecution; probable cause.

Cited in *Scott v. Dennett Surpassing Coffee Co.* 51 App. Div. 323, 64 N. Y. Supp. 1016, holding test of probable cause not actual knowledge, but any knowledge which prosecutor could or ought to have gained in exercise of ordinary prudence; *Hutchinson v. Wenzel*, 155 Ind. 55, 56 N. E. 845, holding belief of prosecutor must be honest, and supported by reasonable grounds after such investigation as prudent person would make; *Shafer v. Hertzog*, 92 Minn. 175, 99 N. W. 796, holding that it is not necessary that witnesses to the actual facts make the complaint, if they act without prejudice and malice upon such a degree of impartiality as can be expected from an ordinarily prudent man; *Price v. Denison*, 95 Minn. 113, 103 N. W. 728, holding that the plaintiff had the right to prove such facts as might have come within the prosecutor's knowledge had he made proper investigation and inquiry.

13 L. R. A. 465, *BENNETT v. NORTHERN P. R. CO.* 2 N. D. 112, 49 N. W. 408.
Second appeal in 3 N. D. 92, 54 N. W. 314.

Third appeal in 4 N. D. 350, 61 N. W. 18.

Master's knowledge of defects.

Cited in notes (41 L.R.A. 103) on knowledge as element of employer's liability to injured servant; (16 L.R.A.(N.S.) 134) on furnishing servant article in general use as measure of master's duty; (98 Am. St. Rep. 301, 307, 319) on liability to servant for injuries due to defective machinery and appliances.

Evidence; declarations of pain and suffering.

Cited in *Western Steel Car & Foundry Co. v. Rean*, 163 Ala. 261, 50 So. 1012, holding that an answer by witness, "that plaintiff complained every day of his leg, hip and back hurting him" is admissible and citing annotation on this point; *Puls v. Grand Lodge, A. O. U. W.* 13 N. D. 571, 102 N. W. 165, holding

admissible testimony relating to acts and complaints of deceased expressing nature and degree of pain he was at the time undergoing.

Cited in footnote to *Williams v. Great Northern R. Co.* 37 L. R. A. 199, which holds admissible expressions as to pain and suffering, only when made at time of suffering.

Cited in note (24 L.R.A.(N.S.) 262) on admissibility of expressions or statements, subsequent to injury, of present pain.

Disobedience of rules.

Cited in *Smith v. Centennial Eureka Min. Co.* 27 Utah, 323, 75 Pac. 749, holding that where decedent is killed by taking two cars at once down grade when rules of employer limit number to one there can be no recovery.

Cited in note (37 L. ed. U. S. 150) on liability for injuries received by employee in coupling cars.

13 L. R. A. 472, *MILLS v. PARKHURST*, 126 N. Y. 89, 26 N. E. 1041.

Election of remedies.

Cited in *Roberge v. Winne*, 144 N. Y. 712, 39 N. E. 631, holding filing of bill to rescind agreement, without more, not such election of remedies as to preclude suit for specific performance; *Droege v. Ahrens & O. Mfg. Co.* 163 N. Y. 470, 57 N. E. 747, holding filing of proof of claim, under contract of sale, with assignee under general assignment, with knowledge of fraud of vendee, precludes action to rescind on ground of fraud; *Re Hildebrant*, 120 Fed. 996, holding vendor filing claim in bankruptcy for goods sold and delivered cannot claim return of goods on hand as fraudulently obtained; *Groves v. Rice*, 148 N. Y. 233, 42 N. E. 664, holding creditor requesting assignee to complete contract partly performed by assignor, and performance accordingly by assignee, does not estop creditor from suing to set aside assignment; *Re Garver*, 176 N. Y. 391, 68 N. E. 667, Affirming 84 App. Div. 264, 82 N. Y. Supp. 594, sustaining right of creditor attacking general assignment with partial success, but without benefiting himself, to share in assigned property; *Chase v. New York*, 23 App. Div. 324, 48 N. Y. Supp. 333, holding landowner procuring reduction of void assessment for local improvement, not precluded from suing to recover such reduced assessment paid under protest; *Schoeneman v. Chamberlin*, 55 App. Div. 356, 67 N. Y. Supp. 284, holding replevin by vendor to recover goods obtained by fraud does not preclude action upon implied contract for value of goods not recovered; *Stier v. Harms*, 154 Ill. 480, 40 N. E. 296, holding dismissal of action of replevin for property taken under distress warrant, not bar to subsequent action of trespass for wrongful seizure of property; *McLaughlin v. Gillings*, 18 Misc. 58, 41 N. Y. Supp. 22, holding promise of third party to pay creditor of promisee, does not preclude creditor from suing original debtor, in absence of election to rely on promise; *Hurst v. Trow Printing & Bookbinding Co.* 2 Misc. 365, 22 N. Y. Supp. 371, holding rescission of contract does not extinguish liability upon notes given thereunder, consideration for which maker had received and retained when contract terminated; *Henry v. Herrington*, 193 N. Y. 221, 20 L.R.A.(N.S.) 251, 86 N. E. 29, holding that the institution of an action never available to the plaintiff does not bar him from the prosecution of an inconsistent available action; *Parker v. Murphy*, 56 Misc. 544, 107 N. Y. Supp. 202, holding an election to cancel insurance policy and sue on proportional part of premium note due precludes an attempt to sue on entire note; *Re Rutaced Co.* 137 App. Div. 718, 122 N. Y. Supp. 454, holding that judgment creditor may maintain supplementary proceedings against assignor for benefit of creditors.

Cited in footnotes to *Miller v. Hyde*, 25 L. R. A. 42, which holds replevin of horse not defeated by prior attachment suit for trover; *Barchard v. Kohn*, 29 L.

R. A. 803, which holds enforcement of chattel mortgage on exempt property not defeated by prior judgment and attempted levy on exempt property.

Cited in notes (54 L.R.A. 345, 348, 349, 351) on right of creditor to participate under assignment or deed of trust for benefit of creditors which he had repudiated; (34 L.R.A.(N.S.) 312) on bringing suit not prosecuted to judgment as election of remedies.

Disapproved in *Moody v. Templeman*, 23 Tex. Civ. App. 378, 56 S. W. 588, holding garnishment of fund belonging to assigned estate precludes creditor from sharing in trust fund.

Assignments for benefit of creditors.

Cited in *Wright v. Seaman*, 32 App. Div. 111, 52 N. Y. Supp. 893, holding assignment for creditors upheld only when all conditions met for prevention of fraud; *Re Dauchy*, 59 App. Div. 386, 69 N. Y. Supp. 827, holding individual general assignment of member of firm, directing payment of all debts and liabilities due from assignor, provides for payment of both individual and partnership debts.

Cited in note (24 L. R. A. 381) on necessity of acceptance of assignment or deed of trust for creditors.

13 L. R. A. 475, *SMITH v. PHOENIX INS. CO.* 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738.

Title of assured.

Cited in *Loventhal v. Home Ins. Co.* 112 Ala. 118, 33 L. R. A. 262, 57 Am. St. Rep. 17, 20 So. 419, holding party in possession of real estate under executory contract of purchase, has "unconditional and sole ownership" within condition of policy; *Arkansas F. Ins. Co. v. Wilson*, 67 Ark. 558, 48 L. R. A. 512, 77 Am. St. Rep. 584, 55 S. W. 933, holding condition avoiding policy if "interest" of assured become other than entire, not violated by offer to buy and agreement to sell at future time; *Davis v. Phoenix Ins. Co.* 111 Cal. 413, 43 Pac. 1115, holding condition as to ownership waived, where application made part of policy, shows assured not owner; *Allen v. Phoenix Assur. Co.* 12 Idaho, 665, 8 L.R.A.(N.S.) 907, 88 Pac. 245, 10 A. & E. Ann. Cas. 328, holding that title of homesteader in government claim land is sufficient to support a policy on buildings thereon calling for unconditional or fee-simple title.

Cited in note (17 L. R. A. 179) on right of property arising from acceptance of goods.

Passing of title.

Cited in *Finkbohner v. Glens Falls Ins. Co.* 6 Cal. App. 384, 92 Pac. 318, holding that an executory contract of sale putting vendee in possession on payment of part purchase price, title to be conveyed on full payment, constitutes a change in title avoiding policy thereon; *Brickell v. Atlas Assur. Co.* 10 Cal. App. 27, 101 Pac. 16, holding that an executory contract of sale accompanied with possession to vendee and part payment of purchase price remainder to be paid in monthly instalments to be applied as rent on default under contract constitutes change of title avoiding policy; *Swank v. Farmers' Ins. Co.* 126 Iowa, 551, 102 N. W. 429, holding that a contract and deed of insured property being executed and placed in hands of broker to facilitate raising of money on which sale of the property is conditioned such contract and deed not to be used until approved of by owner does not constitute change of title avoiding policy; *Bowdle v. Jencks*, 18 S. D. 94, 99 N. W. 98, holding that on a contract to exchange property to be consummated on delivery of papers at specified bank where the defendant's property is destroyed by fire before he has deposited papers and after

plaintiff has deposited the loss is on defendant; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 334, 25 L.R.A.(N.S.) 615, 104 Pac. 432, holding that where plaintiff "does by these presents, sell, convey, assign, transfer and set over to defendant a certain indenture of lease to have and to hold" for remainder of term subject to occupancy of vendor for time specified, title passed as of the date of the agreement; *Queen of Arkansas Ins. Co. v. Pendola*, 94 Ark. 598, 128 S. W. 559 (dissenting opinion), on change of possession of personal property from one bailee to another, as affecting validity of policy of insurance.

Cited in notes (17 L.R.A. 179) on essentials to valid sale of goods; (35 L.R.A.(N.S.) 1069) on right to crops on, or rental of, realty sold upon contract; (15 Eng. Rul. Cas. 809) on statutory requirements as excuse for landlord's breach of covenant.

13 L. R. A. 481, *MT. VERNON FIRST NAT. BANK v. SARLLS*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434.

Injunction; public and private injuries.

Cited in *Adams v. Ohio Falls Car Co.* 131 Ind. 379, 31 N. E. 57, holding maintenance of log way at public wharf, and operation of steam engine thereon, such injury to neighboring dwelling as entitled owner to injunction; *People's Gas Co. v. Tyner*, 131 Ind. 283, 16 L. R. A. 445, 31 Am. St. Rep. 433, 31 N. E. 59, sustaining temporary injunction, on petition of private citizen, against explosion of nitroglycerine in gas well, in center of city, to increase flow of gas; *Griswold v. Brega*, 160 Ill. 495, 52 Am. St. Rep. 350, 43 N. E. 864, Affirming 57 Ill. App. 556, holding grant of permit to remove wooden building within fire limits may be enjoined on petition of neighboring property owners; *Carmien v. Cornell*, 148 Ind. 89, 47 N. E. 216, holding policy holders of mutual insurance company entitled to injunction to prevent assessment to pay invalid claim; *Pollard v. First Ave. Coal Min. Co.* 27 Ind. App. 196, 61 N. E. 9, holding city cannot maintain suit to enjoin erection of wooden building within fire limits, in violation of ordinance, without showing special injury; *O'Brien v. Louer*, 158 Ind. 213, 61 N. E. 1004, holding person not damaged thereby cannot enjoin violation of fire limits ordinance; *O'Bryan v. Highland Apartment Co.* 128 Ky. 292, 15 L.R.A.(N.S.) 422, 108 S. W. 257, holding that a property owner may sue to enjoin the erection of a building in violation of a building ordinance; *Bangs v. Dworak*, 75 Neb. 716, 5 L.R.A.(N.S.) 495, 106 N. W. 780, 13 A. & E. Ann. Cas. 202, holding that private person may enjoin erection of a building in violation of an ordinance though such erection is not a nuisance per se provided he can show damage not common to the public; *Caskey v. Edwards*, 128 Mo. App. 241, 107 S. W. 37, holding that a private citizen may enjoin construction of livery stable contrary to ordinance where specially injurious to suitor; *Mason v. Deitering*, 132 Mo. App. 34, 111 S. W. 862, holding that court will enjoin livery stable where facts show that its maintenance would depreciate value of plaintiff's property in vicinity and destroy comfort of homes and endanger health of neighborhood; *Chimene v. Baker*, 32 Tex. Civ. App. 524, 75 S. W. 330, holding that a violation of an ordinance will be enjoined though not a nuisance per se where suitor can show infliction of material injury thereby; *Mason v. Deitering*, 132 Mo. App. 33, 111 S. W. 862, holding the violation of a public right not enjoinable by private person except where private rights are also sustained; *Micks v. Mason*, 145 Mich. 214, 11 L.R.A.(N.S.) 657, 108 N. W. 707, 9 A. & E. Ann. Cas. 291, holding that a city having right to establish fire limits may abate a building constructed in violation of an ordinance without respect to whether it is a nuisance per se or not.

Cited in notes (41 L.R.A. 328) on injunction by municipalities against nuisances affecting public morals, peace, and good order and health and safety; (21

L.R.A.(N.S.) 586) on injunction against crime which is private nuisance or which involves property rights; (5 L.R.A.(N.S.) 493, 495) on injunction by private person against violation of municipal ordinance; (5 L.R.A.(N.S.) 262) on violation of police ordinance as ground for private action.

Distinguished in *Lemmon v. Guthrie Center*, 113 Iowa, 42, 86 Am. St. Rep. 361, 84 N. W. 986, enjoining city from removing wooden building, where owner without adequate remedy at law.

Joinder of plaintiffs.

Cited in *Chicago & S. E. R. Co. v. Kenney*, 159 Ind. 78, 62 N. E. 26, holding common interest in having railroad receiver appointed authorizes joinder of several plaintiffs; *American Plate Glass Co. v. Nicolson*, 34 Ind. App. 648, 73 N. E. 625, holding that the owner of land and one operating a stone quarry thereon may be joined as plaintiffs in an action for the flooding of the quarry.

Police power of cities.

Cited in *Evansville v. Miller*, 146 Ind. 618, 28 L. R. A. 171, 45 N. E. 1054, holding ordinance declaring partially burnt building nuisance, without regard to annoyance as injury to public, invalid; *Rushville Natural Gas Co. v. Morristown*, 30 Ind. App. 460, 66 N. E. 179, and *State ex rel. Indianapolis v. Indianapolis Union R. Co.* 160 Ind. 59, 60 L. R. A. 837, 66 N. E. 163, holding municipality cannot, under general power to define nuisances, declare nuisances *per se* things not recognized as such by common law; *Champer v. Greencastle*, 138 Ind. 346, 24 L. R. A. 772, 46 Am. St. Rep. 390, 35 N. E. 14, holding city ordinance prohibiting use in saalons of screens, colored glass or other obstructions to view, invalid, in absence of legislation conferring power; *Crawfordsville v. Braden*, 130 Ind. 155, 14 L. R. A. 271, 30 Am. St. Rep. 214, 28 N. E. 849, holding erection and operation of electric lighting plant, to furnish light in public places and to private consumers, within police powers of city; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 581, 15 L. R. A. 324, 28 N. E. 853, upholding ordinance fixing maximum rates chargeable by natural gas company.

Cited in footnote to *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

Cited in notes (38 L. R. A. 162, 165) on municipal power of buildings and other structures as nuisances; (36 L. R. A. 598) on power of municipal corporation to define, prevent, and abate nuisances; (47 Am. St. Rep. 545) on quarantine and health laws and regulations; (18 L.R.A.(N.S.) 403) on power of municipality granting permission to build or repair wooden building within fire limits to limit time of continuance of structure; (21 L.R.A.(N.S.) 454, 455) on power to require removal, or to prohibit repairs, of wooden building within fire limits when damaged by fire; (26 L.R.A.(N.S.) 124) on what constitutes repair, reconstruction, alteration, etc., of building within fire-limit statute or ordinance; (16 Eng. Rul. Cas. 529) on what constitutes a building within act relating to fire limits; (16 Eng. Rul. Cas. 515) on right to rebuild after tearing down of building as interfering with street line, etc.

Distinguished in *Chicago v. Jackson*, 196 Ill. 503, 63 N. E. 1013, holding construction of subway in street for railroad, not exercise of police power as to abutting property, relieving city from liability for damage from change of grade.

Reasonableness of fire regulations.

Cited in *O'Bryan v. Highland Apartment Co.* 128 Ky. 291, 15 L.R.A.(N.S.) 422, 108 S. W. 257, holding a fire ordinance reasonable which prohibits construction of a wooden building within 60 feet of a permanent structure the walls of which are of stone, concrete, brick or iron; *Roanoke v. Bolling*, 101 Va. 187,

43 S. E. 343, holding that an arbitrary action of the city council in refusing to allow repairing of a partially burned building may be enjoined; *Harvey v. Elkins*, 65 W. Va. 309, 64 S. E. 247, holding that the refusal of a city to allow the making of minor alterations and repairs in a private building under an ordinance regulating erections and repairs will be enjoined.

13 L. R. A. 487, *BROWNELL v. DURKEE*, 79 Wis. 658, 24 Am. St. Rep. 743, 48 N. W. 241.

Officers; liability for unlawful seizure of property.

Cited in footnote to *Vickery v. Crawford*, 49 L. R. A. 773, which holds sheriff not protected by writ of sequestration in seizing property of stranger.

13 L. R. A. 490, *HINDMAN v. O'CONNER*, 54 Ark. 627, 16 S. W. 1052.

Limitation of actions to set aside voidable judicial sales.

Cited in *Gibson v. Herriott*, 55 Ark. 92, 29 Am. St. Rep. 17, 17 S. W. 589, holding purchase by administratrix at own sale voidable at election of heirs, but right to have set aside may be lost through acquiescence or laches; *Thomas v. Sybert*, 61 Ark. 589, 33 S. W. 1059, holding delay of minor heir for fifteen years after coming of age, before bringing suit to set aside purchase by administrator at own sale, fatal; *Bland v. Fleeman*, 58 Ark. 93, 23 S. W. 4, holding statute requiring action for recovery of lands sold at judicial sale to be brought within five years, applicable to equitable action to set aside administrator's sale; *Salinger v. Black*, 68 Ark. 456, 60 S. W. 229, holding five year limitation applicable to action to set aside collusive sale by administrator, when latter in open and adverse possession from date of sale; *H. B. Claffin Co. v. Middlesex Bkg. Co.* 113 Fed. 961, holding action to redeem from voidable foreclosure sale, barred after seven years, where purchaser holds possession under claim of absolute title.

Existence of fiduciary relation.

Cited in *Thomas v. Sybert*, 61 Ark. 580, 33 S. W. 1059, holding stepfather administering father's estate stands in loco parentis to minor received into family; *Parker v. Bowers*, 37 Tex. Civ. App. 258, 84 S. W. 380, holding that attorney for a guardian and for the estate of the wards occupies a fiduciary relationship to them; *Thoman v. Mills*, 159 Mich. 409, 124 N. W. 33, on directors of corporations as trustees for stockholders and also citing annotation on this point.

Cited in note (89 Am. St. Rep. 307, 308) on common law powers of guardians.

Judicial sales; purchase by person holding fiduciary relation.

Cited in *Dormitzer v. German Sav. & Loan Soc.* 23 Wash. 222, 62 Pac. 862, holding order for sale of interest of minor heirs to father to enable him to mortgage real estate, absolutely void; *Montgomery v. Black*, 75 Ark. 188, 86 S. W. 1006, holding that administrator of estate may not purchase at sheriff's sale of lands sold under judgment in favor of the estate; *Eagle v. Terrell*, 95 Ark. 437, 130 S. W. 550, holding that administrator cannot lawfully become purchaser of property of decedent at sale by commissioner under order of chancery court; *Burel v. Baker*, 89 Ark. 171, 116 S. W. 181, holding that mother occupying homestead with her children cannot purchase it at foreclosure sale so as to have the legal title as against the children; *Thweatt v. Freeman*, 73 Ark. 580, 84 S. W. 720, holding that an attorney may not become a purchaser of his client's estate without the latter's knowledge and without full disclosure; *Reeder v. Meredith*, 78 Ark. 115, 115 Am. St. Rep. 22, 93 S. W. 558, holding invalid a purchase of lands by brother who was administrator of the estate as against sister who received inadequate consideration for her rights; *Haynes v. Montgomery*, 96 Ark. 576, 132 S. W. 651, holding that sale of infant's property by guardian to him-

self either directly or indirectly may be set aside by ward; *Baker v. Seattle-Tacoma Power Co.* 61 Wash. 591, 112 Pac. 647, Ann. Cas. 1912 C, 859 (dissenting opinion), on voidability of acts of person in fiduciary relation where he profits thereby at expense of principal.

Cited in footnotes to *Frazier v. Jeakins*, 57 L. R. A. 575, which holds guardian's sale to her husband void; *Harrison v. Mulvane*, 54 L. R. A. 405, which holds one charged with selling corporate stock to pay encumbrances one of which he owns, not forbidden, as trustee, to buy prior liens to protect own interests.

Cited in note (136 Am. St. Rep. 804) on who may not purchase at judicial, execution, or other compulsory sales because so doing may conflict with their duties.

Accounting upon setting aside voidable sale.

Cited in *Gibson v. Herriott*, 55 Ark. 99, 29 Am. St. Rep. 17, 17 S. W. 589, holding when purchase by administratrix set aside in favor of minor heirs, purchaser entitled to compensation for improvements, less rents, and to be reimbursed for purchase money and taxes paid.

Necessity of jurisdiction to appear in record.

Cited in *Morris v. Dooley*, 59 Ark. 487, 28 S. W. 30, holding decree of adoption void, when face of record does not show child was resident of county.

Distinguished in *Johnson v. Hunter*, 127 Fed. 227, holding decree in statutory proceeding to foreclose tax lien, record not showing jurisdiction of person, not collaterally assailable.

13 L. R. A. 499, *ROBERTS v. NEW YORK ELEV. R. CO.* 128 N. Y. 455, 28 N. E. 486.

Second appeal in 155 N. Y. 35, 49 N. E. 262.

Followed without discussion in *Messenger v. Manhattan R. Co.* 129 N. Y. 649, 29 N. E. 1032; *Keller v. Metropolitan Elev. R. Co.* 129 N. Y. 667, 30 N. E. 65; *Malcom v. Manhattan R. Co.* 133 N. Y. 664, 31 N. E. 624; *Werfelman v. Manhattan R. Co.* 134 N. Y. 614, 31 N. E. 629, and *Bohlen v. Metropolitan Elev. R. Co.* N. Y. 677, 31 N. E. 626.

Opinions of experts.

Cited in *Gray v. Manhattan R. Co.* 128 N. Y. 508, 28 N. E. 498; *Kernochnan v. New York Elev. R. Co.* 130 N. Y. 652, 3 Silv. Ct. App. 584, 14 L. R. A. 674, 29 N. E. 245; *Sillcocks v. New York Elev. Co.* 46 N. Y. S. R. 672, 19 N. Y. Supp. 476, —holding opinion of expert as to fee damage to abutting property from interference of elevated railway with easements of air, light, etc., incompetent; *Martin v. Coleman*, 14 Misc. 506, 35 N. Y. Supp. 1069, holding plaintiff's testimony as to amount of his damage from overflow of water, incompetent; *Comesky v. Postal Teleg. Cable Co.* 41 App. Div. 246, 58 N. Y. Supp. 467, holding testimony to depreciation of property from erection and maintenance of telegraph poles in front of premises, incompetent; *Charman v. Hibbler*, 31 App. Div. 480, 52 N. Y. Supp. 212, holding in action for breach of covenant, expert testimony as to value of premises, with or without restrictions upon use of property, incompetent; *Davis v. New York, L. E. & W. R. Co.* 69 Hun, 177, 51 N. Y. S. R. 535, 23 N. Y. Supp. 358, holding testimony as to sufficiency of hemlock timber for partition in coal bin, inadmissible in action for personal injury from giving away of partition; *Flanagan v. New York, L. E. & W. R. Co.* 83 Hun, 525, 32 N. Y. Supp. 84, holding in action for personal injury to employee engaged in operating gates at railroad, testimony as to whether gates could be operated in safe manner, and with safety to operator, incompetent; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 38, 36 N. E. 813, holding in action for injury from breaking of belt to move machinery, testi-

mony as to safety and fitness of fastener used for belt, incompetent; *Stoothoff v. Brooklyn Heights R. Co.* 50 App. Div. 588, 64 N. Y. Supp. 243, holding in action for personal injury, testimony of expert as to whether injury is serious or trivial, incompetent; *Dougherty v. Milliken*, 163 N. Y. 534, 79 Am. St. Rep. 608, 57 N. E. 757, holding in action for injury from breaking of eyebolt, to which two derricks were fastened, testimony as to whether eyebolt was sufficient or insufficient, incompetent; *New York Electric Equipment Co. v. Blair*, 25 C. C. A. 219, 51 U. S. App. 81, 79 Fed. 898, holding expert testimony as to necessity, in hoisting iron pipes, by attaching bagging to end of pipe, incompetent; *Pursley v. Edge Moor Bridge Works*, 56 App. Div. 82, 67 N. Y. Supp. 719, holding expert testimony competent as to safety of piles for support by scaffold, and as to safety of scaffold without X braces and cleats; *Union Elevator Co. v. Kansas City Suburban Belt R. Co.* 135 Mo. 375, 36 S. W. 1071, holding admission of opinions of witnesses as to amount of damage from construction of railroad across property, not of itself ground for reversal; *Blashfield v. Empire State Teleph. & Teleg. Co.* 147 N. Y. 524, 42 N. E. 2, as to competency of expert testimony to amount of damage; *Hoagland v. Canfield*, 160 Fed. 168, holding inadmissible expert opinion as to within what distance a truck drawn by horses could be stopped; *Kelly v. Wills*, 116 App. Div. 761, 102 N. Y. Supp. 223, on jury as being at liberty to disregard opinions of experts; *C. W. Hahl & Co. v. Southland Immigration Asso.* 53 Tex. Civ. App. 600, 116 S. W. 831, holding that upon proof of details of transaction if of character that jury could from their own knowledge form intelligent judgment of value of services, verdict will be sustained, although no evidence as to value of services was introduced.

— Effect of act complained of.

Cited in *Peyton v. New York Elev. R. Co.* 62 Hun, 538, 17 N. Y. Supp. 244, and *Blum v. Manhattan R. Co.* 1 Misc. 120, 48 N. Y. S. R. 681, 20 N. Y. Supp. 722, holding testimony of expert that construction of elevated railway has decreased rental value of abutting property, incompetent; *Flynn v. Kings County Elev. R. Co.* 3 App. Div. 255, 38 N. Y. Supp. 204, holding testimony that construction of elevated railway is cause of decline in rental and fee values of real estate, incompetent; *Purdy v. Manhattan R. Co.* 3 Misc. 52, 22 N. Y. Supp. 943, holding testimony directly to fact that benefits were conferred by proximity of elevated railroad, erroneously admitted; *Burditt v. New York C. & H. R. R. Co.* 71 Hun, 363, 24 N. Y. Supp. 1137, holding testimony as to effect of construction of railroad switch upon abutting property, incompetent; *Rorke v. Kings County Elev. R. Co.* 22 App. Div. 516, 48 N. Y. Supp. 42, holding expert may give opinion as to cause of decrease in value of property abutting on elevated railway; *Seufferle v. MacFarland*, 28 App. D. C. 103, holding that jury summoned to assess damages for taking land for public use need not receive and give weight to expert testimony as to value and damage; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 335, 59 Atl. 654, 3 A. & E. Ann. Cas. 660, holding inadmissible expert opinion as to exact amount of damages to property from smoke and gas from tunnel.

— Values of property under past and present conditions.

Cited in *Colton v. New York Elev. R. Co.* 7 Misc. 628, 28 N. Y. Supp. 149, holding expert may testify directly to opinion concerning value of premises at different periods, in action for damages from construction of elevated railway; *Cook v. New York Elev. R. Co.* 144 N. Y. 118, 39 N. E. 2, and *Wright v. Syracuse, O. & N. Y. R. Co.* 92 Hun, 36, 36 N. Y. Supp. 901, holding, in action to enjoin operation of railway, testimony is admissible to show fee and rental values.

Distinguished in *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 552, 34 N. E. 400, holding in action for damages from taking property for railway

without compensation, testimony is admissible as to existing value of property, and cause of rentals; *Gerber v. Metropolitan Elev. R. Co.* 3 Misc. 431, 23 N. Y. Supp. 166, holding expert evidence as to increase or decrease in rental values in immediate neighborhood and side streets admissible in action for damages from construction of elevated railroad; *Ft. Collins Development R. Co. v. France*, 41 Colo. 520, 92 Pac. 953, holding admissible expert opinion as to value of property before and after act complained of.

— **Values under hypothetical conditions.**

Cited in *Doyle v. Manhattan R. Co.* 128 N. Y. 494, 28 N. E. 495; *Becker v. Metropolitan Elev. R. Co.* 131 N. Y. 513, 30 N. E. 499; *Jefferson v. New York Elev. R. Co.* 132 N. Y. 486, 30 N. E. 981; *McGay v. Manhattan Elev. R. Co.* 40 N. Y. S. R. 669, 16 N. Y. Supp. 155; *Wallach v. Manhattan R. Co.* 40 N. Y. S. R. 670, 16 N. Y. Supp. 156,—holding in action for damages from construction of elevated railway, evidence as to possible value of abutting property without railway, improper; *Pratt v. New York C. & H. R. R. Co.* 77 Hun, 141, 28 N. Y. Supp. 463, holding expert testimony as to rental value of abutting property, if railroad were absent, not admissible.

Cited in footnote to *Kernochan v. New York Elev. R. Co.* 14 L. R. A. 673, which holds incompetent, opinion as to what rental value would have been without elevated railroad.

Distinguished in *Gallagher v. Kingston Water Co.* 25 App. Div. 85, 49 N. Y. Supp. 250, holding in action for diverting water from mill, expert testimony as to value of mill if water were not diverted, competent; *Beardsley v. Lehigh Valley R. Co.* 142 N. Y. 176, 36 N. E. 877, holding admission of opinions in action to compel construction of farm crossing, showing difference in value with and without crossing, no ground for reversal.

Disapproved in *Blagen v. Thompson*, 23 Or. 256, 18 L. R. A. 321, 31 Pac. 647, holding expert opinion as to what suburban property would be worth, if motor line built as contracted, competent.

— **General conditions and values of other property in same locality.**

Cited in *Hitchings v. Brooklyn Elev. R. Co.* 6 Misc. 430, 27 N. Y. Supp. 132, and *Taber v. New York Elev. R. Co.* 8 Misc. 18, 28 N. Y. Supp. 68, holding expert testimony as to cause of values of similar property in locality since construction of elevated road, admissible; *Schmidt v. New York Elev. R. Co.* 2 App. Div. 481, 37 N. Y. Supp. 1100, holding expert testimony that building of elevated railroad tended to increase value of property upon line of road, incompetent; *Witmark v. New York Elev. R. Co.* 149 N. Y. 399, 44 N. E. 78, holding damage by elevated railway to abutting property cannot be determined by showing rental value of other property in vicinity before and after construction of railway.

Distinguished in *Shaw v. New York Elev. R. Co.* 187 N. Y. 196, 79 N. E. 984, holding admissible evidence of general appreciation in property values elsewhere and that property in question would have increased also but for the construction of the railroad.

— **Objectionable nature of expert testimony.**

Cited in *Frankfort v. Manhattan R. Co.* 12 Misc. 15, 33 N. Y. Supp. 36, holding expert testimony not credited by courts, beyond strict sanction of law.

— **Sufficiency of objection to competency of expert opinion.**

Distinguished in *Kernochan v. New York Elev. R. Co.* 128 N. Y. 570, 29 N. E. 65, and *Mitchell v. Metropolitan Elev. R. Co.* 132 N. Y. 554, 30 N. E. 385, holding competency of opinion of expert as to value of property without elevated railway, not raised by objection that evidence is immaterial, incompetent, irrelevant, and not measure of permanent damage; *Mortimer v. Manhattan R. Co.*

129 N. Y. 85, 29 N. E. 5, holding objection to question as to diminution in rental value, that it is "improper, irrelevant, and immaterial as assuming property has been injured," does not raise question of substitution of opinion for judgment of jury; *Steinmetz v. Metropolitan Elev. R. Co.* 18 N. Y. Supp. 209, holding admission of expert testimony to increased value of property from railway, not subject to complaint, when given on cross-examination, without objection or exception.

Railroad unlawfully taking property; injunction.

Cited in *Blumenthal v. New York Elev. R. Co.* 42 N. Y. S. R. 684, 17 N. Y. Supp. 481, and *Gray v. Manhattan R. Co.* 128 N. Y. 510, 28 N. E. 498, holding where decree for injunction conditioned upon nonpayment of damage by elevated railway to abutting property, judgment reversed where damages awarded based on incompetent evidence; *Mead v. New York Elev. R. Co.* 24 N. Y. Supp. 912, holding where question as to fee damage not raised by pleadings, right of defendant to resort to condemnation proceedings not waived by responding to proceedings for injunction; *Doyle v. Metropolitan Elev. R. Co.* 136 N. Y. 512, 32 N. E. 1008, Affirming 1 Misc. 378, 20 N. Y. Supp. 865, holding compulsory reference of case for injunction against operation of elevated railway, for taking of testimony as to amount of damage to abutting property, error.

Cited in note (20 L. R. A. 756) on damages in lieu of injunction.

Damages; injury to property.

Cited in *Ainsley v. Bank of Piedmont*, 113 Ala. 479, 59 Am. St. Rep. 122, 21 So. 59, holding damage to purchaser of real estate from breach of contract of vendor to make improvements in locality, too speculative to support action; *Eckington & S. H. R. Co. v. McDewitt*, 18 App. D. C. 509, holding measure of damage for breach of contract to build and operate railway to plaintiff's real estate, is difference between value of land with railway in operation, and that with railway abandoned; *Malcolm v. New York Elev. R. Co.* 147 N. Y. 318, 41 N. E. 790 (dissenting opinion), majority holding that where neighborhood has been built up since construction of elevated railway, and fee, and rental values to abutting property increased, damage is not shown.

13 L. R. A. 510, *WERTZ v. WESTERN U. TELEG. CO.* 7 Utah, 446, 27 Pac. 172.

Telegraphs; contracts limiting liability.

Cited in *Wertz v. Western U. Teleg. Co.* 8 Utah, 500, 33 Pac. 136, and *Brooks v. Western U. Teleg. Co.* 26 Utah, 156, 72 Pac. 499, holding contract relieving telegraph company from liability for negligence of agents unless message repeated, invalid; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 696, 56 L. R. A. 493, footnote p. 487, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority holding Massachusetts contract relieving telegraph company from liability for mistakes in cipher message, unless additional charge paid, being valid in that state, is enforceable in Mississippi.

Cited in footnotes to *Birkett v. Western U. Teleg. Co.* 33 L. R. A. 404 which holds valid, condition against liability beyond amount paid for sending un-repeated message; *Brown v. Postal Teleg. Cable Co.* 17 L. R. A. 648, which holds limitation of amount of liability for mistake in transmitting telegram void as to mistake caused by negligence.

Cited in note (11 L.R.A.(N.S.) 563) on validity of limitation of liability for un-repeated telegrams.

Negligent transmission of telegram.

Cited in *Brooks v. Western U. Teleg. Co.* 26 Utah, 154, 72 Pac. 499, sustaining recovery of damages resulting from nondelivery of messages evidently relating to commercial transaction.

Cited in footnote to *Coit v. Western U. Teleg. Co.* 53 L. R. A. 678, which holds transmission of telegram while wires working badly not gross negligence if wires working well when actually sent.

13 L. R. A. 512, *ALLEN COUNTY v. SIMONS*, 129 Ind. 193, 28 N. E. 420.

Taxation of Indian lands.

Cited in *Revoir v. State*, 137 Ind. 334, 36 N. E. 1109, holding lands of Indians exempt from taxation, under ordinance of 1787, when acquired and held under tribal relation; *Miami County v. Godfroy*, 27 Ind. App. 614, 60 N. E. 177, holding lands of Indian who has become citizen of United States not exempt from taxation.

Cited in note (19 L. R. A. 81) on power of state legislature to exempt from taxation.

13 L. R. A. 515, *HYLAND v. CENTRAL IRON & STEEL CO.* 129 Ind. 68, 28 N. E. 308.

Taxation; necessity for tender of admitted tax before enjoining invalid tax.

Cited in *Smith v. Rude Bros. Mfg. Co.* 131 Ind. 152, 30 N. E. 947, holding complaint to enjoin collection of tax on increased assessment of capital stock of corporation must offer to pay admitted taxes; *Yocum v. First Nat. Bank*, 144 Ind. 275, 43 N. E. 231, holding where whole of increased assessment is invalid, tender or payment of admitted taxes not condition precedent to action to annul; *Thompson v. Lexington*, 104 Ky. 170, 46 S. W. 481, holding action to enjoin irregular assessment on instalment basis for street improvement cannot be maintained without tender of admitted tax on cash basis; *Douglass v. Fargo*, 13 N. D. 484, 101 N. W. 919, holding that in action to set aside tax levy complaint must show payment or tender of taxes justly due.

Taxation of capital stock of corporation.

Cited in *Jones v. Rushville Natural Gas Co.* 135 Ind. 598, 35 N. E. 390, holding it within power and duty of board of equalization to assess capital stock of corporation, where value exceeds that of tangible property; *Smith v. Stephens*, 173 Ind. 570, 30 L.R.A.(N.S.) 707, 91 N. E. 167, to the point that if capital stock exceeds in value that of tangible property, stock is taxable on excess.

Cited in notes (58 L. R. A. 529, 559, 611) on taxation of capital stock on corporations in the United States; (57 L. R. A. 53) on taxation of corporate franchises in the United States.

Distinguished in *Eaton v. Union County Nat. Bank*, 141 Ind. 161, 40 N. E. 693, holding notice to national bank necessary to jurisdiction of county board of equalization to increase valuation.

13 L. R. A. 518, *DEMING v. MERCHANTS' COTTON-PRESS & STORAGE CO.* 90 Tenn. 306, 17 S. W. 89.

Referred to, for history of case, in *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 373, 38 L. ed. 200, 4 Inters. Com. Rep. 502, 14 Sup. Ct. Rep. 367; *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 50 Fed. 246, and *Insurance Co. v. Carrier Cos.* 91 Tenn. 538, 19 S. W. 755.

Carriers; liability for loss of freight.

Cited in *Atlanta Nat. Bank v. Southern R. Co.* 106 Fed. 629, holding railroad delivering cotton to compress in course of transportation liable for misdelivery by compress company, where companies identical; *Stewart v. Gracy*, 93 Tenn. 320, 27 S. W. 664, holding carrier to whom property constructively delivered,

not liable for loss of same by fire while in custody of shipper's warehouseman; *Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 365, 105 Am. St. Rep. 955, 79 S. W. 1031, holding special contract of shipment invalid unless shipper is allowed a reasonable and bona fide chance to choose it or to ship without limitation; *Houtz v. Union P. R. Co.* 33 Utah, 194, 17 L.R.A.(N.S.) 641, 93 Pac. 439, on binding of proving special contract and that it is reasonable being upon carrier setting it up as a defense; *Louisville & N. R. Co. v. Smith*, 123 Tenn. 688, 134 S. W. 866, holding that carrier is not bound to offer, formally, a common law liability, to make valid limited liability contract for shipment of stock; *Robert v. Chicago & A. R. Co.* 148 Mo. App. 116, 127 S. W. 925, holding that carrier must allow shipper to choose between restricted and full liability of carrier.

Cited in footnotes to *Union State Bank v. Fremont, E. & M. Valley R. Co.* 59 L. R. A. 939, which sustains initial carrier's right to limit liability to own line; *Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S. Co.* 70 L.R.A. 562, which holds that carrier must prove that fire was purely accidental and impossible to prevent to escape liability where cotton on railroad platform in course of delivery is damaged by fire.

Cited in notes (32 L.R.A.(N.S.) 314) on what constitutes delivery of freight to carrier; (28 L.R.A.(N.S.) 638, 641) on effect of shipping contract limiting common-law liability, signed under compulsion; (88 Am. St. Rep. 94, 101) on limitation of carrier's liability in bills of lading; (113 Am. St. Rep. 996) on presumption of negligence from happening of accident causing personal injuries.

Distinguished in *Bird v. Southern R. Co.* 99 Tenn. 725, 63 Am. St. Rep. 586, 42 S. W. 451, holding intermediate carrier notified by ultimate carrier of refusal to forward goods without prepayment of freight, and delaying to notify initial carrier or shipper until property had become worthless, liable for loss.

Proximate cause of injury.

Cited in *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 705, 17 L. R. A. 695, 30 Am. St. Rep. 902, 20 S. W. 312, holding carrier erroneously informing consignee goods had not arrived, liable for subsequent loss by fire without its fault; *Anderson v. Miller*, 96 Tenn. 44, 31 L. R. A. 606, 54 Am. St. Rep. 812, 33 S. W. 615, holding unauthorized use of premises for storage of cotton, renders lessee liable for damage to adjoining premises by fire, originating without his fault, where fire would not have been communicated but for cotton; *Weeks v. McNulty*, 101 Tenn. 500, 43 L. R. A. 187, 70 Am. St. Rep. 693, 48 S. W. 809, holding absence of fire escapes to hotel not proximate cause of death from fire, of guest locking himself in room, and failing to avail himself of avenues of escape; *Postal Teleg. Cable Co. v. Zopfi*, 93 Tenn. 374, 27 S. W. 633, holding telegraph pole left at road side, proximate cause of injury to one slipping in attempt to step over pole to platform, wet from rain, and falling backwards against pole; *Zopfi v. Postal Teleg. Cable Co.* 9 C. C. A. 311, 22 U. S. App. 136, 60 Fed. 989, holding obstacle in highway not proximate cause of injury to person falling thereon, unless obstacle contributed to cause of fall; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 338, 60 L. R. A. 461, 97 Am. St. Rep. 844, 70 S. W. 616, holding act of employee in entering burning building to telephone alarm proximate cause of death; *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 157, 84 N. E. 549, holding proximate cause sufficiently alleged where complaint showed machinery unguarded and injury by contact therewith, where statute required machinery to be guarded; *Bales v. McConnell*, 27 Okla. 409, 40 L.R.A.(N.S.) 944, 112 Pac. 978, holding that unguarded cogs were proximate cause of injury, where employee slipped from wagon and upon striking ground threw out his hand to steady himself, and was injured by his hand coming in contact with moving cogwheels; *Bekamp v. Chicago & A. R. Co.* 123 Mo. App. 284, 100

S. W. 689, holding that the slipping of a bar in the hands of a fellow servant by which a beam was permitted to fall, was not as a matter of law the proximate cause of injury to a workman under it where the acts of a foreman had made the place unsafe; *Foley v. McMahon*, 114 Mo. App. 444, 90 S. W. 113, as defining proximate cause.

Cited in note (36 Am. St. Rep. 838) on proximate and remote cause.

Insurance; provisions against double insurance.

Cited in *Carleton v. China Mut. Ins. Co.* 174 Mass. 286, 46 L. R. A. 168, 54 N. E. 559, and *London Assur. Corp. v. Paterson*, 106 Ga. 552, 32 S. E. 650, holding question whether concurrent insurance is prior or subsequent to be determined from date policies issue, and not from time they attach to specific risk; *Gross v. New York & T. S. S. Co.* 107 Fed. 520, holding American clause against double insurance not applicable as between policies upon shipment taken out by carrier and consignee.

Cited in footnote to *Johnston v. Charles Abresch Co.* 68 L.R.A. 934, which sustains right of carriage maker to insure in policy taken in his own name customer's interest in carriage in his possession for repair and sale.

Distinguished in *Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* 185 Fed. 177, holding that loan of money by insurance company to owner of property destroyed, to be repaid to company if amount was recovered from another company that also had policy covering destroyed property, may be recovered.

Subrogation.

Cited in note (44 Am. St. Rep. 734, 735) on subrogation of insurer.

Parties to action.

Cited in *Insurance Cos. v. Carrier Cos.* 91 Tenn. 538, 19 S. W. 755, holding in action by shipper against compress company, for loss by fire of cotton held by it as agent of common carrier, latter is necessary party; *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 441, 99 Fed. 124, holding trustee in trust deed of railroad not indispensable parties to action by corporation against holders of stock and bonds, for surrender of same, and for accounting.

13 L. R. A. 533, *COOK v. PORT OF PORTLAND*, 20 Or. 580, 27 Pac. 263.

Municipal corporations; constitutionality.

Cited in *Donahue v. Morgan*, 24 Colo. 397, 50 Pac. 1038, holding consolidation act constituting aldermen of consolidated city trustees of waterworks for whole municipality, within powers of general assembly; *Middel Kittitas Irrig. Dist. v. Peterson*, 4 Wash. 150, 29 Pac. 995, holding irrigation district organized pursuant to statute not municipal corporation within Constitution; *United States v. Port of Portland*, 147 Fed. 866; *The Geo. W. Elder*, 159 Fed. 1006; *The John McCracken*, 145 Fed. 796,—holding act incorporating the port of Portland, constitutional; *Farrell v. Portland*, 52 Or. 584, 98 Pac. 145, on same point.

Cited in footnote to *Stockton v. Powell*, 15 L. R. A. 42, which holds improvement of navigation within county a county purpose.

Distinguished in *Farrell v. Port of Columbia*, 50 Or. 171, 91 Pac. 546, holding act creating Port of Columbia to be a special act and unconstitutional.

Uniformity of taxation.

Cited in *Yamhill County v. Foster*, 53 Or. 130, 99 Pac. 286, holding that rate of taxation must be uniform throughout a taxing district.

Cited in footnotes to *High School Dist. No. 137 v. Lancaster*, 49 L. R. A. 343, which holds void, statute allowing outside pupils to attend high school free, but requiring county to pay specified sum as tuition; *Com. v. Brown*, 28 L. R. A. 110, which sustains weekly tax on sales of oysters; *Nathan v. Spokane Coun-*

ty, 65 L.R.A. 337, which holds property liable to taxation under general laws of state not exempt because returned for taxation for same years in another state.

When statute declared unconstitutional.

Cited in *Ellis v. Frazier*, 38 Or. 464, 53 L. R. A. 456, 63 Pac. 642, holding to declare statute unconstitutional, incompatibility with organic law must be apparent and free from doubt; *Simon v. Northup*, 27 Or. 495, 30 L. R. A. 175, 40 Pac. 560, refusing to declare statute, to enable city to acquire title to bridges, unconstitutional, though validity not free from doubt; *Kadderly v. Portland*, 44 Or. 144, 74 Pac. 710; *Straw v. Harris*, 54 Or. 428, 103 Pac. 777,—holding that all reasonable doubts as to the validity of an act must be resolved in its favor.

Definition of terms.

Cited in *Straw v. Harris*, 54 Or. 429, 103 Pac. 777, holding that "port" as used in act of legislature a district of many places classed together for purpose of revenue; *Acme Dairy Co. v. Astoria*, 49 Or. 524, 90 Pac. 153, on meaning of terms "municipality" and "district," "local" and "special;" *State v. Cochran*, 55 Or. 182, 105 Pac. 884, holding that prohibitions in state constitution must be strictly construed.

Delegation of power.

Cited in *Straw v. Harris*, 54 Or. 432, 103 Pac. 777, holding that power to declare the incorporation of a port may be delegated to the county court.

13 L. R. A. 538, *Re THOMAS*, 16 Colo. 441, 27 Pac. 707.

Admission of women to practise law.

Cited in *Re Leach*, 134 Ind. 671, 21 L. R. A. 706, 34 N. E. 641, holding woman entitled to admission to bar under Constitution and statute providing every person "being a voter," shall be admitted; *Ricker's Petition*, 66 N. H. 247, 24 L. R. A. 759, 29 Atl. 559, holding attorney at law not public officer within common-law rule of New Hampshire disqualifying women from holding public office.

Cited in notes (21 L. R. A. 702) on right of women to practise law; (19 L. R. A. 226) on what is included in term "person."

Right of women to hold office.

Cited in *Atty. Gen. v. Abbott*, 121 Mich. 568, 47 L. R. A. 103, 80 N. W. 372, holding woman, not being elector, cannot hold office of prosecuting attorney.

Cited in footnote to Opinion of Justices, 32 L. R. A. 350, which denies right to authorize appointment of women as notaries.

13 L. R. A. 541, *VEASEY v. BRIGMAN*, 93 Ala. 548, 9 So. 728.

Identification of persons from similarity of names.

Cited in *Schlaacks v. Johnson*, 13 Colo. App. 133, 56 Pac. 673, holding summons addressed to "Schlaacks," returned as served on "Schlack," sufficient to support judgment; *Dolan v. Mutual Reserve Fund Life Assn.* 173 Mass. 202, 53 N. E. 398, holding application for naturalization by "Fardell Dolan" competent evidence upon question whether "Farrell Dolan" misrepresented age in application for insurance; *Abraham v. Miller*, 52 Or. 11, 95 Pac. 814, holding summons to Albert Abraham returned as served upon "Alfred Abraham the defendant" sufficient service; *State v. Porter*, 18 S. D. 28, 99 N. W. 80, holding bail-bond executed by C. M. Porter and sureties sufficient proof that C. M. Porter and Charles Porter were the same where Charles Porter was the name recited in the body of the bond; *Morrow v. Norvell-Shapleigh Hardware Co.* 165 Ala. 334, 51 So. 766, holding that return of officer stating that summons was served upon

"V. M. Morrow, defendant" where defendant's name was B. W. Morrow, was sufficient.

Cited in footnote to Illinois Watch Case Co. v. Pearson, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name.

Cited in note (17 L. R. A. 824, 825) on presumption of identity of person from identity of name.

13 L. R. A. 542, MISSOURI P. R. CO. v. CULLERS, 81 Tex. 382, 17 S. W. 19.

Right of Indian to sue.

Cited in Whirlwind v. Von der Ahe, 67 Mo. App. 630, holding tribal Indians when off reservation, entitled to sue for enforcement of contract made during sojourn in states.

Due process of law.

Cited in note (50 L. R. A. 590, 594) on what service of process insufficient to constitute due process of law.

Transitory actions.

Cited in footnote to Schmaltz v. York Mfg. Co. 59 L. R. A. 907, which sustains jurisdiction in equity in one state of suit by citizen to enjoin other citizen removing alleged fixtures from land on which former has mortgage.

Cited in note (26 L.R.A.(N.S.) 938, 939, 940) on jurisdiction of action for damages for breach of contract, or for tort concerning realty in another state or country.

Right of action against wrongdoer.

Cited in East Dallas v. Barksdale, 83 Tex. 122, 18 S. W. 329, and Dallas v. Miller, 7 Tex. Civ. App. 506, 27 S. W. 498, holding proof of actual and exclusive possession of real estate gives prima facie right to recover for damage done by trespasser; Missouri, K. & T. R. Co. v. Starr, 22 Tex. Civ. App. 357, 55 S. W. 393, holding innocent purchaser of railroad ties, made from timber taken by trespasser, liable to owner of land for value of ties as received from trespasser; King v. Great Northern R. Co. 20 Idaho, 694, 119 Pac. 709, holding that action for destruction of standing timber must be brought by owner of land and not by person merely in possession.

Cited in footnote to Norfolk & W. R. Co. v. Fritts, 68 L.R.A. 864, which sustains liability for fire of railroad company unnecessarily running heavy freight train up grade at double its scheduled speed in dry season and during heavy wind.

Cited in notes (21 L.R.A. 261) on liability for setting fires which spread to property of others; (20 L.R.A.(N.S.) 93) on weather conditions as independent, intervening, efficient cause.

Distinguished in Northern P. R. Co. v. Lewis, 162 U. S. 382, 40 L. ed. 1008, 16 Sup. Ct. Rep. 831, holding possession of purchaser from trespasser not such prima facie evidence of title as entitles him to maintain action for wrongful destruction of property.

Requests for instructions.

Cited in Burnham v. Logan, 88 Tex. 7, 29 S. W. 1067, holding attorneys must take risk of putting requested instructions in proper form to enable court to pass upon same separately.

13 L. R. A. 549, FORBES v. ESCAMBIA COUNTY BD. OF HEALTH, 28 Fla. 26, 9 So. 862.

Municipal quarantine regulations.

Cited in notes (26 L.R.A. 486, 490) on quarantine regulations by health

authorities; (47 Am. St. Rep. 548) on quarantine and health laws and regulations; (80 Am. St. Rep. 229) on powers which may be delegated to boards of health.

Liability of municipal corporation for negligence.

Cited in *Nicholson v. Detroit*, 129 Mich. 255, 56 L. R. A. 605, 88 N. W. 695, denying city's liability for death of employee from smallpox contracted while tearing down old pest house to make room for another; *Kirk v. Board of Health* (*Kirk v. Wyman*) 83 S. C. 383, 23 L.R.A. (N.S.) 1194, 65 S. E. 387, on members of Board of Health not being personally liable for errors in the doing of official acts.

Cited in note (5 L.R.A. (N.S.) 636) on personal liability of health authorities.

Distinguished in *Jacksonville v. Smith*, 24 C. C. A. 100, 41 U. S. App. 657, 78 Fed. 295, holding city liable for personal injury sustained by reason of defect in street, although action not authorized by statute.

13 L. R. A. 556, *SULLIVAN v. HALL*, 86 Mich. 7, 48 N. W. 646.

Notary public as attorney.

Cited in *Allen v. West Bay City*, 140 Mich. 114, 103 N. W. 514, 6 A. & E. Ann. Cas. 35, holding verification of claim against city for personal injury valid, though notary before whom made, subsequently became attorney for the claimant in action for the injury.

13 L. R. A. 559, *McNEIL v. BOSTON CHAMBER OF COMMERCE*, 154 Mass. 277, 28 N. E. 245.

Authority for contract of corporation.

Cited in *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 506, 38 Am. St. Rep. 453, 34 N. E. 1083, holding corporation bound by note signed by treasurer, under authority implied from course of conduct and dealing with knowledge of directors; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 444, 34 N. E. 625, holding president and trust officer, having management of business of title insurance company, may bind it by representation as to title of mortgaged property; *Franklin Sav. Bank v. Cochrane*, 182 Mass. 588, 61 L. R. A. 762, 66 N. E. 200, holding corporation bound by assumption of mortgage by treasurer permitted by directors to manage affairs; *Clarke v. Warwick Cycle Mfg. Co.* 174 Mass. 436, 54 N. E. 887, holding employment of accountant shown by proof of having commenced work under authority of one of three members of committee of stockholders, and of subsequently receiving similar directions from other two; *Seribner v. Flagg Mfg. Co.* 175 Mass. 538, 56 N. E. 603, holding proof of recognition of corporation to make written contract for payment of commissions, sufficient prima facie evidence of authority to enter into subsequent oral agreement as to same subject-matter; *May v. Gloucester*, 174 Mass. 585, 55 N. E. 465, holding contract with city for use of horses supported by evidence that horses were kept in sight at engine house, and vote of standing committee at end of hiring for allowance of bill; *John A. Robeling's Sons Co. v. Barre & M. Traction & Power Co.* 76 Vt. 136, 56 Atl. 530, holding directors of corporation bound by purchase, where chairman of its executive committee made the purchase, another member knew of the bill charging it to the corporation and the third member was ignorant of the transaction; *Eliot Nat. Bank v. Woonsocket Electric Mach. & P. Co.* 31 R. I. 70, 76 Atl. 782, holding that officers of corporation may be empowered to bind corporation by implied consent of directors to course of conduct and dealing by him with others; *Parrot v. Mexican C. R. Co.* 207 Mass. 190, 34 L.R.A. (N.S.) 273, 93 N. E. 590, holding that general passenger agent had au-

thority to contract for publication of guide book to popularize hunting grounds on their line, although he was instructed not to make contracts involving such expenditure without authority of executive officer.

Cited in note (88 Am. St. Rep. 783, 785) on liability of principal for unauthorized acts of agent.

Effect of published proposal to contract.

Distinguished in *Anderson v. Public Schools*, 122 Mo. 67, 26 L. R. A. 712, 27 S. W. 610, holding advertisement of school board for bids for erection of school building, which reserves right to reject bids, does not operate as contract with lowest bidder.

Sufficiency of vote of city council.

Cited in footnote to *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant.

13 L. R. A. 563, *BRYAN v. MILBY*, 6 Del. Ch. 208, 24 Atl. 333.

Wills; sufficiency to create trust.

Cited in *Mead v. Robertson*, 131 Mo. App. 198, 110 S. W. 1095, holding that to create a trust, the property to which it is designed to attach, must be definite and certain; *Smullin v. Wharton*, 73 Neb. 685, 103 N. W. 288, holding no express trust created by a request that "I want the bulk of my property to go to my people;" *St. James v. Bagley*, 138 N. C. 394, 70 L.R.A. 164, 50 S. E. 841, holding that no trust was created by recital in conveyance that it was made "for the purpose of aiding in the establishment of a home for indigent widows or orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated.

Cited in footnotes to *Jewell v. Louisville Trust Co.* 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention on liberal terms of specified person in employ of firm of which testator a partner; *Williams v. Baptist Church*, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church and "suggesting" as to application; *Morgan v. Halsey*, 36 L. R. A. 716, which holds power of appointment of property to testatrix's daughter in any manner she may deem proper limited by subsequent clauses of will.

Cited in notes (37 L.R.A.(N.S.) 662) on creation of trust by precatory words in will; (106 Am. St. Rep. 528) on precatory trusts.

13 L. R. A. 565, *HEPLER v. DAVIS*, 32 Neb. 556, 29 Am. St. Rep. 457, 49 N. W. 458.

Judgments; validity of revivor.

Cited in *Betts v. Johnson*, 68 Vt. 555, 35 Atl. 489, holding judgment rendered upon scire facias without notice to defendant, to revive judgment entered upon note containing warrant of attorney, invalid; *Robb v. Anderson*, 43 Ill. App. 576; *Rice v. Moore*, 48 Kan. 592, 16 L. R. A. 199, footnote, p. 199, 30 Am. St. Rep. 318, 30 Pac. 10, and *Owens v. Henry*, 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 693, holding revivor of judgment by scire facias, without personal service or voluntary appearance, insufficient to prevent bar of statute of limitations in favor of defendant residing in another state.

Cited in notes (37 L.R.A.(N.S.) 1164) on service of notice in proceedings to revive judgment; (122 Am. St. Rep. 112) on scire facias.

Distinguished in *Leman v. Cunningham*, 12 Idaho, 142, 85 Pac. 212, holding that revivor of judgment where personal service was made upon defendant, and

he appeared by attorney, prevents statute of limitations from running in favor of defendant in another state where he resides; *Davis v. Davis*, 98 C. C. A. 494, 174 Fed. 791, holding that nonresidence at time of revival of judgment cannot be set up by demurrer, where it does not appear upon the face of the record.

Validity of judgment without personal service.

Cited in *Kirk v. United States*, 124 Fed. 340, enjoining execution on forfeited recognizance, where scire facias not personally served on nonresident complainant.

Limitation of actions.

Cited in note (5 Eng. Rul. Cas. 944) on law governing remedies.

13 L. R. A. 567, *SCHLEY v. COLLIS*, 47 Fed. 250.

Wills; election.

Cited in *Farmington Sav. Bank v. Curran*, 72 Conn. 348, 44 Atl. 473, holding person taking beneficial interest under will, thereby confirms and ratifies every other part of will; *Colvert v. Wood*, 93 Tenn. 463, 25 S. W. 963, holding where testator included partnership property in will, persons interested both as devisees and partners electing to claim partnership property, thereby set free share of testator in partnership property in favor of other devisees; *Young v. Biehl*, 166 Ind. 361, 77 N. E. 406, holding that devisee accepting provisions of will favorable to him cannot set up claims inconsistent with other provisions of the will; *Sparks v. Dorrell*, 151 Mo. App. 186, 131 S. W. 761, holding that he who accepts benefit under will must adopt all its contents and conform to all its provisions.

Cited in footnote to *Tripp v. Nobles*, 67 L.R.A. 449, which holds widow offering for probate and undertaking to carry out as administratrix with the will annexed husband's will devising her own land to her for life with remainder over and an additional sum of money estopped to assert her absolute title to the land.

Cited in note (10 Eng. Rul. Cas. 326) on necessity of devisee who accepts devise relinquishing all claims to estate devised to another.

13 L. R. A. 569, *SCHULTZ v. BYERS*, 53 N. J. L. 442, 26 Am. St. Rep. 435, 22 Atl. 514.

Lateral support; liability for damage from excavations.

Cited in *Church of Holy Communion v. Paterson Extension R. Co.* 63 N. J. L. 474, 43 Atl. 696, holding notice of intended excavation may be requisite, if building upon adjoining property is to be endangered; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 515, 49 N. E. 296 (dissenting opinion), majority holding party making excavation not bound to extraordinary care to protect adjoining building, when owner has knowledge of intended excavation; *Gildersleeve v. Hammond*, 109 Mich. 436, 33 L. R. A. 49, 67 N. W. 519, holding excavation in sandy soil close to division line, without precautions to protect neighbor's soil, whereby over 4 feet of latter caves in, and undermines foundation of building, creates liability for damage to both soil and superstructure; *Church of the Holy Communion v. Paterson Extension R. Co.* 68 N. J. L. 410, 53 Atl. 1079, by *Collins, J.*, dissenting, who holds owner of building cannot recover for injuries thereto by excavation on adjoining premises; *Pullan v. Stallman*, 70 N. J. L. 12, 56 Atl. 116, denying recovery for personal injury to adjacent owner who, with knowledge that lateral support for his land has been removed, goes too near the edge and is injured by the ground giving way; *McGrath v. St. Louis & H. Constr. Co.* 215 Mo. 209, 114 S. W. 611, holding that the falling of an adjoining wall

into excavation in alley is not of itself sufficient proof of negligence to justify recovery; *Manning v. New Jersey Short Line R. Co.* 80 N. J. L. 350, 32 L.R.A. (N.S.) 157, 78 Atl. 200, holding that railroad acquiring land by condemnation is entitled to lateral support from remaining land for such weight as operation of road renders necessary; *Pohlman v. Chicago, M. & St. P. R. Co.* 131 Iowa, 95, 6 L.R.A. (N.S.) 149, 107 N. W. 1025, on extent and meaning of term "lateral support."

Cited in footnotes to *Clemens v. Speed*, 19 L.R.A. 240, which denies to party-wall owners reciprocal easement from support of buildings; *Davis v. Summerfield*, 63 L.R.A. 492, which holds lot-owner liable for injury to adjoining building due to negligent excavation on his own lot by an independent contractor.

Cited in notes (33 Am. St. Rep. 470) on right to lateral support; (68 L.R.A. 684) on liability for removal of lateral or subjacent support of land in its natural condition; (10 Eng. Rul. Cas. 163) on right to support of land in its natural state and to support of buildings thereon.

Distinguished in *Hudson County v. Woodcliff Land Improv. Co.* 74 N. J. L. 357, 65 Atl. 844, holding that one conveying land for a road to be built according to a certain plan, burdens his adjoining land with lateral support for the road built according to the terms of the deed.

Criticized in *Larson v. Metropolitan Street R. Co.* 110 Mo. 243, 16 L. R. A. 332, footnote p. 330, 33 Am. St. Rep. 439, 19 S. W. 416, holding one promising adjoining owner to excavate and lay up wall in sections liable for fall of building due to digging dangerous trench without notice after laying one section.

13 L. R. A. 574, *Ex parte VANCE*, 90 Cal. 208, 27 Pac. 209.

Expiration of time of sentence without imprisonment.

Cited in *Miller v. Evans*, 115 Iowa, 105, 56 L. R. A. 103, 91 Am. St. Rep. 143, 88 N. W. 198, holding judgment not satisfied by expiration of time for which defendant sentenced, without imprisonment, through failure of sheriff to execute mittimus; *Neal v. State*, 104 Ga. 517, 42 L. R. A. 194, 69 Am. St. Rep. 175, 30 S. E. 858, holding suspension of sentence by order of court until after expiration of period of commitment, does not preclude defendant being committed subsequently for full term; *Re Collins*, 8 Cal. App. 370, 97 Pac. 188; *Ex parte Eldridge*, 3 Okla. Crim. Rep. 503, 27 L.R.A. (N.S.) 627, 139 Am. St. Rep. 967, 106 Pac. 980, holding that expiration of time without imprisonment does not affect the term of imprisonment provided by the sentence; *Re McCauley*, 123 Wis. 33, 100 N. W. 1031, 3 A. & E. Ann. Cas. 414, holding that, where prisoner escapes from custody and is recaptured, the time he is at liberty is not counted in his favor as part of his term of imprisonment.

Cited in footnote to *Henderson v. James*, 27 L. R. A. 290, which authorizes completion of original sentence of escaped convict after completion of subsequent sentence under other name to same penitentiary.

13 L. R. A. 576, *BULL v. BRAY*, 89 Cal. 286, 26 Pac. 873.

Fraud; sufficiency of evidence.

Cited in *Wolters v. Rossi*, 126 Cal. 653, 59 Pac. 143, holding insolvent's transfer of certificate of deposit to wife, without consideration, and after order for his examination as judgment debtor, raises irresistible inference of intent to defraud; *First Nat. Bank v. Maxwell*, 123 Cal. 372, 69 Am. St. Rep. 64, 55 Pac. 980, holding intent to defraud creditors sufficient to avoid conveyance, although grantor has other property sufficient to satisfy creditors; *Re Benton*, 131 Cal. 475, 63 Pac. 775, holding to support judgment rejecting probate of will, because of fraud and undue influence, such ultimate facts must appear conclusively from

probative facts found by jury; *White v. Besse*, 145 Cal. 226, 78 Pac. 649, holding deeds valid where no fraud is shown, though made without consideration.

Effect of fraudulent intent upon voluntary conveyance.

Cited in *Bekins v. Dieterle*, 5 Cal. App. 694, 91 Pac. 173, holding that where fraudulent intent is found, a voluntary conveyance is void as against creditors, regardless of how much other property grantor may have.

Cited in note (90 Am. St. Rep. 505) on attacks by creditors on conveyances made by husbands to wives.

Intent as question of fact.

Cited in *Winahaus v. Bootz*, 92 Cal. 622, 28 Pac. 557; *Knox v. Moses*, 104 Cal. 505, 38 Pac. 318; *Cook v. Cockins*, 117 Cal. 153, 48 Pac. 1025; *Emmons v. Barton*, 109 Cal. 671, 42 Pac. 303,—holding that to avoid voluntary conveyance as to creditors, a fraudulent intent must be proved as a question of fact; *Laugherty v. Laugherty*, 104 Cal. 223, 37 Pac. 889; *Stevens v. Meyers*, 14 N. D. 403, 104 N. W. 529,—holding intent to be question of fact in action to set aside conveyance as fraudulent; *Haas v. Whittier*, 97 Cal. 420, 32 Pac. 449; *Re Muller*, 118 Cal. 434, 50 Pac. 660,—holding that question of intent of insolvent debtor to make fraudulent preference is one of fact; *Threlkel v. Scott*, 89 Cal. 353, 26 Pac. 879, holding that in action to set aside voluntary conveyance as fraudulent, it is necessary to allege fraudulent intent.

Findings of fact.

Cited in *Barry v. Beamer*, 8 Cal. App. 203, 96 Pac. 373; *Southern P. R. Co. v. Whitaker*, 109 Cal. 274, 41 Pac. 1083,—on sufficiency of findings; *Jules Levy & Bro. v. A. Mautz & Co.* 16 Cal. App. 669, 117 Pac. 936, holding that in absence of statement of case findings of trial court are conclusive, and if conclusions deduced therefrom necessarily follow, judgment must be upheld.

13 L. R. A. 581, *LUKENS'S APPEAL*, 143 Pa. 386, 24 Am. St. Rep. 557, 22 Atl. 892.

Enforcement of antenuptial contracts.

Cited in *Re Devoe*, 113 Iowa, 16, 84 N. W. 923, and *Mauk's Estate*, 19 Pa. Super. Ct. 341, holding antenuptial contract will be sustained, though provision for wife disproportionate to husband's means, if representatives of husband establish there was no concealment of any material fact; *Carr v. Lackland*, 112 Mo. 457, 20 S. W. 624, holding antenuptial contract, if unambiguous and unimpeached, must be enforced according to language employed; *Re Warner*, 33 Pittsb. L. J. N. S. 430, refusing to sustain antenuptial contract containing no provision for wife, though husband's estate fully disclosed at time of execution; *Deller v. Deller*, 141 Wis. 262, 25 L.R.A. (N.S.) 756, 124 N. W. 278, on intention of parties as governing construction of antenuptial contract.

Cited in note (12 Eng. Rul. Cas. 765) on conveyance in fraud of intended husband or wife.

Consideration for agreement.

Cited in *McGlynn v. Scott*, 4 N. D. 29, 58 N. W. 460, holding surrender of imagined lien on personal property, when none exists in fact, not sufficient consideration for promissory note; *Price v. First Nat. Bank*, 62 Kan. 751, 64 Pac. 639, holding agreement to forbear issue of execution on extinguished judgment not sufficient consideration for assignment of life insurance policy as collateral security.

Cited in footnote to *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds moral obligation sufficient consideration for promise.

Cited in notes (34 L.R.A. 33) on performance of existing contract obligation

as consideration for new promise; (6 Eng. Rul. Cas. 21) on what may constitute consideration for contract.

Distinguished in *Christie's Estate*, 36 Pa. Super. Ct. 508, holding note based upon good consideration where given by husband to wife upon her promise to remain and resume marital relations after she had for good cause decided to leave him.

13 L. R. A. 584, *TALBOTT v. FIDELITY & C. CO.* 74 Md. 536, 22 Atl. 395.

State control of foreign corporations.

Cited in notes (57 L. R. A. 87) on taxation of corporate franchises in the United States; (24 L. R. A. 305) on restrictions on business of foreign insurance companies.

Distinguished in *Western & Southern L. Ins. Co. v. Com.* 133 Ky. 295, 117 S. W. 376, holding that foreign insurance company cannot be taxed at a higher rate upon its business within the state than is a local company.

Presumption as to legislative intent.

Cited in *State v. Central Trust Co.* 106 Md. 272, 67 Atl. 267, on presumption that legislature intends what it says in clear and plain terms.

13 L. R. A. 587, *RICHMOND v. DUDLEY*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312.

Followed without discussion in *Plymouth v. Schultheis*, 135 Ind. 701, 35 N. E. 14.

City ordinances permitting exercise of arbitrary discrimination.

Cited in *Plymouth v. Schultheis*, 135 Ind. 342, 35 N. E. 12, holding ordinance requiring permit to conduct tannery, and giving board of health power to determine persons entitled to permit, and location and character of building, void; *State v. Tenant*, 110 N. C. 613, 15 L. R. A. 424, 28 Am. St. Rep. 715, 14 S. E. 387, holding ordinance requiring permission of aldermen to erection of any building, without prescribing general rule for exercise of discretion, invalid; *Newbern v. McCann*, 105 Tenn. 165, 50 L. R. A. 477, 58 S. W. 114, holding void ordinance requiring consent of mayor for owner or employee to enter saloon on Sunday for any purpose; *State v. Gerhardt*, 145 Ind. 480, 33 L. R. A. 327, 44 N. E. 469 (dissenting opinion), majority holding statute authorizing county commissioners to consider "personal fitness" of applicant in granting permission to carry on other business in room where liquors sold, valid; *Montgomery v. West*, 149 Ala. 314, 9 L.R.A.(N.S.) 662, 123 Am. St. Rep. 33, 42 So. 1000, 13 A. & E. Ann. Cas. 651, holding invalid an ordinance prohibiting the operation of steam engines within city limits without the consent of the council; *Elkhart v. Murray*, 165 Ind. 305, 1 L.R.A.(N.S.) 943, 112 Am. St. Rep. 228, 75 N. E. 593, 6 A. & E. Ann. Cas. 748, holding invalid ordinance prohibiting the running of street cars without "fender, to be approved by the council or street committee;" *Ensley v. State*, 172 Ind. 209, 88 N. E. 62, holding invalid ordinance for granting of liquor licenses, which conferred upon common council power to determine fitness of applicants; *Bear v. Cedar Rapids*, 147 Iowa, 351, 27 L.R.A.(N.S.) 1155, 126 N. W. 324, holding invalid ordinance granting board of health power to grant or withhold license to milk dealers; *Com. v. Maletsky*, 203 Mass. 248, 24 L.R.A.(N.S.) 1174, 89 N. E. 245, holding invalid an ordinance forbidding the use of any building for picking, sorting or storing rags, without permit from chief of fire-department; *Richmond v. Model Steam Laundry*, 111 Va. 761, 69 S. E. 932, holding that test of validity of ordinance is not what has been done, but what may be done under it.

Cited in footnote to *Crowley v. Ellsworth*, 69 L.R.A. 276; which sustains ordi-

nance prohibiting storage of explosive oils in large quantities within corporate limits though it has effect of putting an end to a business and rendering valueless structures used in connection therewith.

Cited in notes (38 L. R. A. 642) on municipal power over nuisances relating to trade or business; (38 L. R. A. 308) on municipal power over nuisances affecting safety, health, and personal comfort; (1 L.R.A.(N.S.) 940) on validity of ordinance vesting in officer's discretion as to subject-matter; (108 Am. St. Rep. 358) on power of city to regulate or prevent keeping of explosives in city limits; (123 Am. St. Rep. 44) on test of validity of municipal ordinance as denying equal protection of the laws.

Distinguished in *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 371, holding city ordinance authorizing mayor to refuse permit to Salvation Army to hold meetings in streets, valid.

City ordinances creating monopoly.

Cited in *Re Lowe*, 54 Kan. 765, 27 L. R. A. 548, 39 Pac. 710, holding city ordinance restricting scavenger business to two persons to be selected by mayor, invalid; *St. Louis v. Russell*, 116 Mo. 257, 20 L. R. A. 728, 22 S. W. 470, holding city ordinance requiring consent of one half of owners in block to erection of livery stable, invalid.

13 L. R. A. 590, *FARIST STEEL CO. v. BRIDGEPORT*, 60 Conn. 278, 22 Atl. 561.

Taking private property for public use.

Cited in *Keifer v. Bridgeport*, 68 Conn. 407, 36 Atl. 801, holding noncompliance with jurisdictional requirements of charter in laying out of highway prevents city acquiring interest in land, and owner, without appeal, may prove irregularities in action of trespass; *Parker v. Com.* 178 Mass. 205, 59 N. E. 634, questioning whether statute limiting height of building in specified locality, without providing compensation to owners, would be constitutional.

Cited in notes (34 L.R.A.(N.S.) 424) on right to obstruct wharf rights in navigable waters for public purposes, without compensation; (34 L.R.A.(N.S.) 998, 999) on exercise of police power for esthetic purposes; (22 L.R.A.(N.S.) 26, 52, 53, 89, 153) on judicial power over eminent domain; (88 Am. St. Rep. 929, 934, 938) on existence of public use as question for courts; (102 Am. St. Rep. 838) on uses for which power of eminent domain cannot be exercised.

Distinguished in *Henderson v. Lexington*, 132 Ky. 407, 22 L.R.A.(N.S.) 36, 111 S. W. 318, holding that the motive of the council in closing a street will not be enquired into where the record shows that it was for the public good and there is no evidence of any improper motive.

Title to tide lands.

Cited in *Shively v. Bowlby*, 152 U. S. 20, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding title to tract of land bounded by navigable river, derived from United States, extends only to high-water mark.

Cited in notes (40 L.R.A. 596) on right of owner of upland to access to navigable water; (23 Eng. Rul. Cas. 186, 187) on ownership of riparian owner to thread of stream.

13 L. R. A. 596, *WARDWELL v. CHICAGO, M. & ST. P. R. CO.* 46 Minn. 514, 24 Am. St. Rep. 246, 49 N. W. 206.

Railroads; ejection of passenger for refusal to pay fare.

Cited in *Lake Shore & M. S. R. Co. v. Orndorff*, 55 Ohio St. 595, 38 L. R. A. 142, 60 Am. St. Rep. 716, 45 N. E. 447, and *Braun v. Northern P. R. Co.* 79 Minn. 408, 49 L.R.A. 320, 79 Am. St. Rep. 497, 82 N. W. 675,—holding return of unused

value of ticket necessary to right to eject passenger for refusal to pay fare for child.

13 L. R. A. 598, *ALSUP v. BANKS*, 68 Miss. 664, 24 Am. St. Rep. 294, 9 So. 895.

Termination of contracts.

Cited in *Cox v. Martin*, 75 Miss. 240, 36 L. R. A. 803, 65 Am. St. Rep. 604, 21 So. 611, holding mortgage upon future crops, in consideration of advances for supplies to be made thereafter, not terminated by death of mortgagor before supplies wholly furnished, or all crops planted.

Cited in note (12 Eng. Rul. Cas. 63) on liability of executor or administrator for rent.

Effect of reletting abandoned premises.

Cited in *Oldewurtel v. Wiesenfeld*, 97 Md. 176, 54 Atl. 969, holding tenant liable for rent of abandoned premises relet by landlord; *Oldewurtel v. Wiesenfeld*, 97 Md. 176, 54 Atl. 969; *Higgins v. Street*, 19 Okla. 49, 13 L.R.A. (N.S.) 405, 92 Pac. 153, 14 A. & E. Ann. Cas. 1086,—holding that tenant wrongfully abandoning leased premises is not released from liability under the lease though lessor sublets the premises and credits lessee with rents received; *Stein v. Hyman-Lewis Co.* 95 Miss. 299, 48 So. 225, holding that absolute and unqualified taking of possession of premises by landlord shows acceptance of surrender, unless landlord expresses purpose to hold tenant for rent.

Cited in footnote to *Gray v. Kaufman Dairy & Ice Cream Co.* 49 L. R. A. 580, which denies right to recover rent of landlord reletting after tenant's abandonment, notwithstanding unanswered letter that premises will be leased at tenant's risk.

Cited in notes (51 L. ed. U. S. 224) on landlord's duty to relet on defaulting tenant's account; (13 L.R.A. (N.S.) 400) on remedy of landlord upon abandonment of premises; (114 Am. St. Rep. 720, 722) on right of landlord on abandonment of premises by tenant.

13 L. R. A. 600, *STRICKER v. LEATHERS*, 68 Miss. 803, 9 So. 821.

Punitive damages against common carrier.

Cited in *Harlan v. Wabash R. Co.* 117 Mo. App. 541, 94 S. W. 737, holding punitive damages recoverable from carrier for wilfully and intentionally carrying a passenger past his point of destination; *Webb v. Atlantic Coast Line R. Co.* 76 S. C. 199, 9 L.R.A. (N.S.) 1220, 56 S. E. 954, 11 A. & E. Ann. Cas. 834, holding punitive damages recoverable from carrier for wilful failure to deliver baggage at destination with reasonable despatch.

13 L. R. A. 601, *SUPREME ASSEMBLY R. SOC. OF G. F. v. CAMPBELL*, 17 R. I. 402, 22 Atl. 307.

Validity of agreements of settlement.

Cited in *Nicholson v. Acme Cement Plaster Co.* 145 Mo. App. 533, 122 S. W. 773, holding party bound by an agreement pursuant to which the other party thereto had acted to his detriment; *Burnes v. Burnes*, 70 C. C. A. 377, 137 Fed. 801, on binding effect of family settlements of conflicting claims; *Martin v. Martin*, 98 Ark. 104, 135 S. W. 348, holding that family settlements will not be disturbed by court unless strong reasons exist.

Distinguished in *Nichols v. Nichols*, 79 Conn. 656, 66 Atl. 161, holding "family agreement" not binding where it deprived a member, who was non compos mentis, of his fair share of the property.

13 L. R. A. 605, *SWIM v. WILSON*, 90 Cal. 126, 25 Am. St. Rep. 110, 27 Pac. 35.
Conversion; liability of parties acting in good faith.

Cited in *Shafer v. Lacy*, 121 Cal. 579, 54 Pac. 72, holding pledge of personal property by bailee for safe keeping, confers no title on innocent pledgee, although pledgeor represented property to be his own; *Farmers' Bank v. Diebold Safe & Lock Co.* 66 Ohio St. 377, 58 L. R. A. 624, 90 Am. St. Rep. 586, 64 N. E. 518, holding pledgee of stock, standing in name of pledgeor, obtains no title as against prior pledgee, from whose possession it was wrongfully taken by pledgeor; *Johnson v. Martin*, 87 Minn. 375, 59 L. R. A. 735, footnote p. 733, 94 Am. St. Rep. 706, 92 N. W. 221, holding owner of wheat wrongfully diverted from destination, and sold by innocent factor under forged bill of lading, entitled to recover value from factor; *Craig v. Hesperia Land & W. Co.* 113 Cal. 13, 35 L. R. A. 308, 54 Am. St. Rep. 316, 45 Pac. 10, holding purchaser of stock takes subject to lien of corporation for payment of delinquent assessment; *Bassett v. Perkins*, 65 Misc. 110, 119 N. Y. Supp. 354, holding broker, selling stock without disclosing his principal, liable to purchaser for forged endorsement thereon.

Cited in footnotes to *Doty v. First Nat. Bank*, 17 L.R.A. 259, which holds right of transferee of national bank stock under unrecorded transfer superior to subsequent attachment; *Greer v. Newland*, 70 L.R.A. 554, which holds commission merchant receiving mortgaged cattle sent to him for sale without mortgagee's knowledge and in violation of terms of mortgage and selling them and paying proceeds less commission to consignor without notice of mortgage not liable to mortgagee on implied contract; *The Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co.* 70 L.R.A. 787, which holds corporation canceling registration of bonds and making them payable to bearer contrary to agreement liable to owner for their value, although transfer agent was deceived by forgeries of owner's agent while acting outside scope of authority.

Cited in notes (50 L.R.A. 655) on liability of servant or agent for conversion, trespass, or other positive act of wrongdoing against third persons under orders of employer; (2 L.R.A.(N.S.) 660) on liability of agent toward principal and third person respectively for money or property received in course of agency; (103 Am. St. Rep. 982) on title acquired by bona fide purchaser of stolen property; (131 Am. St. Rep. 500) on law of auction sales.

Distinguished in *Walker v. First Nat. Bank*, 43 Or. 105, 72 Pac. 635, denying liability for conversion of wheat of bank collecting draft on purchaser of flour made therefrom; *National Safe Deposit Sav. & Trust Co. v. Hibbs*, 32 App. D. C. 478, holding bona fide purchaser and also broker who makes the sale, protected where stocks endorsed in blank are fraudulently sold by employee of trust company holding the bonds for a specific purpose.

13 L. R. A. 607, *STATE v. BUSH*, 47 Kan. 201, 27 Pac. 834.

Elections; right of registration.

Cited in footnote to *Barret v. Taylor*, 36 L. R. A. 129, upholding right to have name registered as voter of unnaturalized minor who becomes qualified voter before revision of registry.

Intent in statutory crimes.

Cited in *State v. Pierce*, 52 Kan. 527, 35 Pac. 19, holding county commissioners may be guilty of misdemeanor in office, in issuing warrant for purchase of bridge, contrary to statute, though acting upon advice of counsel; *Williams v. People*, 26 Colo. 276, 57 Pac. 701, holding information for perjury alleging that defendant did "feloniously" testify, etc., sufficiently charges that false testimony was wilfully given; *State v. McDaniel*, 45 La. Ann. 688, 12 So. 751, holding use of word

"feloniously" equivalent to word "wilfully" in charging assault with intent to kill; *Bise v. United States*, 74 C. C. A. 1, 144 Fed. 375, 7 A. & E. Ann. Cas. 165, holding that "unlawfully" and "feloniously" imply a criminal intent; *State v. Fordham*, 13 N. D. 500, 101 N. W. 888, holding intent to steal sufficiently alleged by allegation of "wrongful" taking.

Interpretation of statutes.

Cited in *State v. Kennedy*, 82 Kan. 386, 108 Pac. 837, on criminal statute being interpreted with reference to the mischief it was intended to remedy.

13 L. R. A. 611, *HABERMAN v. BAKER*, 128 N. Y. 253, 28 N. E. 370.

Specific performance of contracts to purchase real estate.

Cited in *Forsyth v. Leslie*, 74 App. Div. 521, 77 N. Y. Supp. 826, decreeing specific performance notwithstanding incompleteness of descriptions of property as to facts ascertainable, and defects in title apparently cured by statute or limitations; *Holly v. Hirsch*, 135 N. Y. 598, 32 N. E. 709, holding doubt as to validity of conveyance in chain of title, involving question of law merely, which is settled by former decision, not ground for refusing specific performance; *Merges v. Ringler*, 24 Misc. 318, 53 N. Y. Supp. 674, refusing to relieve purchaser at judicial sale from performance, because of encroachment of building upon adjoining premises few inches, where title by adverse possession substantially complete; *Baumeister v. Demuth*, 84 App. Div. 399, 82 N. Y. Supp. 831, holding courts not as liberal in relieving purchaser under private contract on account of technical defects in title, as at judicial sale.

Deeds; construction of conveyance describing land as bounded by street or other way.

Cited in *Hennessy v. Murdock*, 137 N. Y. 322, 33 N. E. 330, holding under deeds to lots described as bounded on alley, grantees take to center of alley, subject to right of passage in common; *Mangam v. Sing Sing*, 11 App. Div. 214, 42 N. Y. Supp. 950, holding under conveyance describing land as bounded on highway, grantee entitled to one half of road upon abandonment of highway for six years; *Mitchell v. Einstein*, 42 Misc. 363, 86 N. Y. Supp. 759, holding conveyance of land bounded by road passes grantor's title to center; *Gere v. McChesney*, 84 App. Div. 40, 82 N. Y. Supp. 191, holding state's conveyance bounding land upon street passes title to center; *India Wharf Brewing Co. v. Brooklyn Wharf & Warehouse Co.* 59 App. Div. 92, 69 N. Y. Supp. 274, holding conveyance of all lots "lying on easterly side" of wharf named, does not include wharf; *Watson v. New York*, 67 App. Div. 579, 73 N. Y. Supp. 1027, holding presumption that conveyance describing land as bounded by streets conveys fee to center of street, rebutted by subsequent deed of streets to town; *Graham v. Stern*, 168 N. Y. 521, 85 Am. St. Rep. 694, 61 N. E. 891, Affirming 51 App. Div. 408, 64 N. Y. Supp. 728, holding presumption that conveyance of land as bounded by street carries fee to center of street does not obtain when conveyance is by municipal corporation; *Paige v. Schenectady R. Co.* 38 Misc. 388, 77 N. Y. Supp. 889, holding presumption that grant bounding on highway carries fee to center does not prevail where fee vested in public; *Johnson v. Grenell*, 188 N. Y. 410, 13 L.R.A.(N.S.) 554, 81 N. E. 161, affirming 112 App. Div. 620, 98 N. Y. Supp. 629, holding that conveyance of a lot abutting upon a boulevard along the waterfront includes the fee to the boulevard and water rights belonging thereto; *Gifford v. Horton*, 54 Wash. 603, 103 Pac. 988, holding that, where a plat dedicates a street along a lake shore to its highwater mark, a purchaser of abutting lots acquires the fee to the entire street; *Inter City Realty Co. v. Newman*, 128 App. Div. 199, 112 N. Y. Supp. 481, holding that fee to unused and unopened street passed by descrip-

tion of lots with reference to map which showed the street as included, though lots were also described as bounded by such street; *Kidder v. Childs*, 130 App. Div. 263, 114 N. Y. Supp. 561 (dissenting opinion), on conveyance of land as including fee to centre of adjoining highway; *Mott v. Eno*, 97 App. Div. 610, 90 N. Y. Supp. 608, on presumption as to ownership of fee in road; *Willetts v. Whitson*, 69 Misc. 232, 125 N. Y. Supp. 135, holding that deed bounding property on creek runs to middle of creek.

Cited in footnote to *Crocker v. Cotting*, 33 L. R. A. 245, which holds no part of passageway included in grant of land "bounded by" such passageway.

Cited in notes (24 L.R.A.(N.S.) 542) on effect of bounding grant on private way to carry title thereto; (30 Am. St. Rep. 853) on highways or streets as boundaries.

Disapproved in *Gould v. Wagner*, 196 Mass. 275, 82 N. E. 10, holding that conveyance of land conveys title to fee to centre of private way wholly in grantor's land, though he own no land on the other side of the way; *Hamlin v. Atty. Gen.* 195 Mass. 312, 81 N. E. 275, on same point.

Validity of conveyances by trustees.

Cited in *McLean v. Ladd*, 66 Hun, 347, 21 N. Y. Supp. 196, holding executor without power to mortgage, may yet make valid mortgage of property coming into his hands in contravention of trust; *Salmon v. Salmon*, 24 Misc. 417, 53 N. Y. Supp. 648, holding executors, without power to sell, may yet sell and convey real estate not acquired from testator, but properly coming into their hands under execution of trust; *Re Bolton*, 20 Misc. 535, 46 N. Y. Supp. 908, holding surrogate's court cannot convert personal estate of ward into real estate, by authorizing guardian to purchase home for ward; *Re Bolton*, 2 Gibbons, Sur. Rep. 224, holding that surrogate's court has no power to authorize guardian to use personal property in purchase of home for ward; *Hine v. Hine*, 118 App. Div. 587, 103 N. Y. Supp. 535, holding that where executors purchase at mortgage foreclosure brought by testator, they hold the land in trust for the estate as personalty; *Werner v. Wheeler*, 142 App. Div. 362, 127 N. Y. Supp. 158, to the point that where attorney of record bids in property sold at foreclosure sale, deed taken would be substitute for security of mortgage.

Cited in notes (78 Am. St. Rep. 178) on common-law powers of executor; (136 Am. St. Rep. 800) on who may not purchase at judicial, execution, or other compulsory sales because so doing may conflict with their duties.

Judicial sales.

Cited in *Heim v. Schwoerer*, 51 Misc. 99, 99 N. Y. Supp. 553, holding that court will favor purchaser at judicial sale to a greater extent than it will a purchaser dealing direct with the parties.

Cited in note (135 Am. St. Rep. 922) as to whether, when, and how a purchaser at a judicial sale may object to title.

13 L. R. A. 614, *BRESSLER v. WAYNE COUNTY*, 32 Neb. 834, 49 N. W. 787.

Taxation of national bank shares.

Cited in *Dutton v. Citizens' Nat. Bank*, 53 Kan. 460, 36 Pac. 719; *First Nat. Bank v. Turner*, 154 Ind. 464, 57 N. E. 110, holding owner of international bank stock not entitled to deduct bona fide indebtedness from value of shares; *Commercial Nat. Bank v. Chambers*, 21 Utah, 344, 56 L. R. A. 351, 61 Pac. 560, holding national bank not entitled, in assessment of stock for taxation, to credit for value of real estate situated in another state, and for debts of nonresident share-

holders; *Johnson County v. Johnson*, 173 Ind. 93, 89 N. E. 590, holding that different classes of property may be differently classified for taxation.

Cited in note (45 L. R. A. 753) on state taxation of national banks.

Banking.

Cited in *Merica v. Burget*, 36 Ind. App. 461, 75 N. E. 1083, on definition of "banking."

13 L. R. A. 619, *SPAULDING v. HARVEY*, 129 Ind. 106, 28 Am. St. Rep. 176, 28 N. E. 323.

Right of subrogation.

Cited in *Fowler v. Maus*, 141 Ind. 55, 40 N. E. 56, subrogating purchaser paying mortgage and judgment liens to protect title, to rights under mortgage executed by grantor to protect former owner against said liens, as against wife claiming dower; *Davis v. Schlemmer*, 150 Ind. 478, 50 N. E. 373, holding replevin bail for stay of execution at request of third party entitled to subrogation upon being required to pay judgment; *Warford v. Hankins*, 150 Ind. 496, 50 N. E. 468, holding party advancing money to take up note for purchase money of real estate, under agreement that note should be transferred uncanceled as security, entitled to enforce lien reserved in deed, as against subsequent mortgagee without notice that note was unpaid; *White River School Twp. v. Dorrell*, 26 Ind. App. 539, 59 N. E. 867, holding party advancing money to school district to pay contractor for schoolhouse, entitled to be subrogated to rights of contractor; *Gooch v. Botts*, 110 Mo. 424, 20 S. W. 192, holding party in possession of real estate under decree of court, afterwards reversed on appeal, entitled to subrogation as to existing encumbrances paid to protect title, before reversal; *Fullerton v. Bailey*, 17 Utah, 98, 53 Pac. 1020, holding claimant against estate of decedent, accepting mortgaged real estate in payment, and paying mortgage to protect title, entitled to subrogation against claim subsequently filed against estate; *Alberti v. Moore*, 20 Okla. 89, 14 L.R.A.(N.S.) 1042, 93 Pac. 543, holding landowner, who is compelled to pay subcontractor entitled to be subrogated to the latter's rights against the main contractor; *Coffinberry v. McClellan*, 164 Ind. 135, 73 N. E. 97, on surety's right of subrogation as not being founded upon contract but upon principle of justice.

Cited in footnote to *Faires v. Cockrill*, 28 L. R. A. 528, which denies right to contribution or subrogation between co-obligors on written contract.

Cited in notes (68 L.R.A. 514) on extinction of judgments against principals by sureties' payment; (99 Am. St. Rep. 478, 481, 521) on right of subrogation; (44 Am. St. Rep. 731) on subrogation of insurer.

Distinguished in *Heiney v. Lontz*, 147 Ind. 423, 46 N. E. 665, holding third party advancing money to pay mortgage, upon mere promise of repayment by mortgagor, without agreement for subrogation, not entitled thereto.

13 L. R. A. 621, *COLLAR v. COLLAR*, 86 Mich. 507, 49 N. W. 551.

Trusts; enforcement.

Cited in *Tanner v. Page*, 106 Mich. 160, 63 N. W. 993, holding person receiving money in trust for another liable to action for money had and received, if he fails to pay it over; *Church v. Anti-Kalsomine Co.* 118 Mich. 240, 76 N. W. 383, holding fiduciary relation not shown by bill alleging destruction of property and profits, which defendant had undertaken to protect, but not claiming defendant has profits, money, or property in its hands belonging to plaintiff; *Lasley v. Delano*, 139 Mich. 607, 102 N. W. 1063, holding that an accounting may be had of proceeds of sale though such sale was made pursuant to parol agreement; *Logan v. Brown*, 20 Okla. 348, 20 L.R.A.(N.S.) 307, 95 Pac. 441, holding that action

will lie to recover proceeds of sale of lands by one in whom title was placed under verbal promise to pay over proceeds; *Valley City Desk Co. v. Travelers' Ins. Co.* 143 Mich. 513, 106 N. W. 1125, holding void a parol trust by which vendee of purchaser at foreclosure sale was to deed a portion of the land to a railroad and hold the proceeds in trust for landowner; *Mitchell v. Bilderback*, 159 Mich. 490, 124 N. W. 557, holding that enforceable parol trust cannot be created in fund not in existence.

Cited in note (20 L.R.A.(N.S.) 299) on parol agreement to take title to realty, sell and account for proceeds, as affected by statute of frauds.

Evidence to vary written contract.

Cited in note (17 L. R. A. 271) on parol evidence to vary, add to, or alter written contract.

13 L. R. A. 625, *CANFIELD v. GREAT CAMP*, K. OF M. 87 Mich. 626, 24 Am. St. Rep. 186, 49 N. W. 875.

Mutual benefit associations; rules affecting right of action.

Cited in *Robinson v. Templar Lodge No. 17*, I. O. O. F. 117 Cal. 375, 59 Am. St. Rep. 193, 49 Pac. 170; *Fillmore v. Great Camp K. of M.* 103 Mich. 441, 61 N. W. 785; *Hembeau v. Great Camp K. of M.* 101 Mich. 163, 49 L. R. A. 593, 45 Am. St. Rep. 400, 59 N. W. 417,—holding by-law of mutual benefit association providing decision of association upon death claim shall be final, and bar action in courts, valid; *Raymond v. Farmers' Mut. F. Ins. Co.* 114 Mich. 392, 72 N. W. 254, holding by-law of mutual fire insurance company providing for settlement of differences with members by arbitration, not invalid; *Russell v. North American Ben. Asso.* 116 Mich. 702, 75 N. W. 137, holding by-law providing for arbitration of disputed claims, that no award shall be valid unless signed by all arbitrators, and prohibiting resort to courts, not unreasonable and oppressive; *Cotter v. Grand Lodge A. O. U. W.* 23 Mont. 90, 57 Pac. 650, holding by-law making decision of association as to allowance of death benefit final, valid to extent of making exhaustion of remedies within order condition precedent to action; *Finnerty v. Supreme Counsel, C. K. of A.* 115 Iowa, 401, 88 N. W. 834, holding failure of member to exhaust remedies within order for reversal of suspension, complete defense to action by beneficiary upon certificate; *Modern Woodmen v. Taylor*, 67 Kan. 373, 71 Pac. 806, upholding benefit association by-law making suspension conclusive on member's failure to appeal; *Hoste v. Dalton*, 137 Mich. 526, 110 N. W. 750, holding agreement for final settlement of dispute in circuit court valid, though review by the supreme court was thereby precluded; *Hogadone v. Grange Mut. F. Ins. Co.* 133 Mich. 343, 94 N. W. 1045, on conclusiveness of decision of fraternal insurance society where the contract of insurance so provides; *Conley v. Supreme Court, I. O. F.* 158 Mich. 197, 122 N. W. 567, on necessity of decision by fraternal order before bringing action in court, and conclusiveness of such decision; *Patrons' Mut. F. Ins. Co. v. Atty. Gen.* 166 Mich. 442, 131 N. W. 1119; *Allen v. Patrons' Mut. F. Ins. Co.* 165 Mich. 22, 130 N. W. 196,—holding that member of mutual fire insurance must as condition precedent to right of action on policy exhaust remedies within society.

Cited in footnotes to *Mead v. Stirling*, 23 L. R. A. 227, which requires exhaustion of remedies in local lodge, against grand master of grand lodge before seeking aid of court; *Reno Lodge No. 99*, I. O. O. F. v. *Grand Lodge*, I. O. O. F. 26 L. R. A. 98, which denies right to enjoin assessments on subordinate lodges before exercise of right of appeal to grand lodge; *Lavalle v. Société St. Jean Baptiste*, 16 L. R. A. 392, which holds member unlawfully expelled from benefit society no right of action for damages; *Industrial Trust Co. v. Green*, 17 L. R. A. 202,

which holds illegal deposition of president not ground for subsequent dissolution of benevolent association.

Cited in notes (49 L.R.A. 374) on conclusiveness of decisions of tribunals of associations and corporations; (59 Am. St. Rep. 208, 209) on remedies of members of associations; (52 Am. St. Rep. 546) on mutual or membership life or accident insurance.

Distinguished in *Supreme Lodge, O. S. F. v. Raymond*, 57 Kan. 651, 49 L. R. A. 378, 47 Pac. 533, holding constitutional provision of benefit association, that decisions of supreme lodge shall be supreme law of order, not applicable to controversies over contracts of insurance.

Disapproved in *Pepin v. Société St. Jean Baptiste*, 3 R. I. 82, 91 Am. St. Rep. 620, 49 Atl. 387, holding benefit association's by-law requiring submission of member's claims to committee, whose decision final, invalid.

13 L. R. A. 627, *LILLIBRIDGE v. LACKAWANNA COAL CO.* 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035.

Respective rights of owner of surface and owner of minerals.

Cited in *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 295, 18 L. R. A. 706, 34 Am. St. Rep. 645, 25 Atl. 597, holding surface owner, who has parted with interest in coal, entitled to way through coal to strata beneath; *Mansfield Coal & Coke Co. v. Royal Gas Co.* 27 Pittsb. L. J. N. S. 73, holding under coal lease reserving right to lessor to drill through coal for water, lessor will not be enjoined from drilling for gas or oil; *Webber v. Vogel*, 189 Pa. 158, 42 Atl. 4, holding owner of land above and below coal strata entitled to reversion of space occupied by coal, within time contemplated by parties to grant; *Catlin Coal Co. v. Lloyd*, 176 Ill. 282, 52 N. E. 144, holding prescriptive title may be acquired in coal and minerals in place, where title thereto has been severed from title to surface; *Virginia Coal & I. Co. v. Kelly*, 93 Va. 337, 24 S. E. 1020, holding owner of surface title and owner of minerals and timber not tenants in common, so as to prevent surface owner acquiring outstanding title to whole estate, and holding adverse to owner of timber and minerals; *Murray v. Allred*, 100 Tenn. 119, 39 L. R. A. 253, 66 Am. St. Rep. 740, 43 S. W. 355, holding possession of land for agricultural purposes, under deed purporting to convey full title, not adverse to owner of minerals; *Williams v. South Penn Oil Co.* 52 W. Va. 187, 60 L. R. A. 798, footnote p. 795, 43 S. E. 214, which holds right to oil and gas does not pass under deed of "surface" retaining right to remove coal; *Fairbanks v. San* possession may be acquired in building, although title to land supporting it remain in another; *Moore v. Indian Camp Coal Co.* 75 Ohio St. 501, 80 N. E. 6, holding that one purchasing the minerals under land may use the space from which such mineral has been removed until all the supply has been exhausted; *New York & P. Coal Co. v. Hillside Coal & I. Co.* 225 Pa. 214, 74 Atl. 26, holding that lessee of coal cannot be charged rental for the use of gangways on the premises for transporting coal from other lands; *Sloss-Sheffield Steel & I. Co. v. Sampson*, 158 Ala. 594, 48 So. 493, on owner of mineral under land as not being liable for injury to waters under the surface caused by his mining operations; *Armstrong v. Maryland Coal Co.* 67 W. Va. 607, 69 S. E. 195, to the point that grant of mining rights give grantee right to remove through certain tracts coal from other tracts.

Cited in notes (135 Am. St. Rep. 134, 137) on rights of owner of surface as against owner of minerals thereunder; (17 Eng. Rul. Cas. 475) on effect of grant of surface and of mines to different persons; (140 Am. St. Rep. 952) on what constitutes adverse possession by surface owner of severed mineral estate; (40

L.R.A.(N.S.) 826, 828) on right of grantee of coal in place to transport coal from adjoining tract; (91 Am. St. Rep. 855) on cotenants in mines.

Distinguished in *Moore v. Price*, 125 Iowa, 355, 101 N. W. 91, holding that conveyance of coal under land will not authorize grantee to take coal from other land out through grantor's land; *Smoot v. Consolidated Coal Co.* 114 Ill. App. 516, holding that conveyance of coal in place under land does not give grantee any right to other minerals under the land.

Estate created by lease or reservation of mineral rights.

Cited in *Rockafellow v. Hanover Coal Co.* 6 Kulp, 508, 12 Pa. Co. Ct. 241, 2 Pa. Dist. R. 109, holding coal lease is sale or conveyance of coal in place, and vests in lessees fee-simple estate; *Kirk v. Mattier*, 140 Mo. 31, 41 S. W. 252, holding grant of right to mine coal creates interest in land, and that ejectment will lie to enforce forfeiture for condition broken; *Jennings Bros. v. Beale*, 158 Pa. 287, 27 Atl. 948, holding conveyance of "perpetual right to mine, dig, and carry away coal," not grant of exclusive right to grantee; *Snoddy v. Bolen*, 122 Mo. 487, 24 L. R. A. 510, 24 S. W. 142, holding minerals reserved from dedication of streets and alleys pass to grantee of lots abutting thereon, if not excepted from conveyance; *Kirker v. Kaufmann*, 31 Pittsb. L. J. N. S. 206, holding reservation in deed of coal, and perpetual right of removing coal from other lands through entries, and without liability for support of surface, not performance of contract to convey with simple reservation of "coal rights;" *Sanford's Appeal*, 75 Conn. 594, 54 Atl. 739, holding lease for forty years for purpose of mining, not taxable as realty; *Verdolite Co. v. Richards*, 7 Northampton Co. Rep. 123, discussing, without deciding, interest created by instrument which gives, grants, demises, and leases "exclusive right" to mine "soapstone only;" *Barrett v. Kansas & T. Coal Co.* 70 Kan. 653, 79 Pac. 150, holding that where deed excepts and reserves minerals under the land, title thereto remains absolutely in grantor; *Gordon v. Park*, 219 Mo. 613, 117 S. W. 1163, holding "premises" to be proper as designation of minerals as owned separate from the land; *Rockwell v. Keefer*, 39 Pa. Super. Ct. 472, holding that mineral right owned as separate from the land itself, may be assessed separately; *Rockwell v. Warren County*, 228 Pa. 432, 139 Am. St. Rep. 1006, 77 Atl. 665, holding that title to oil, gas and minerals may be severed from surface of unseated lands, and may be separately taxed; *Preston v. White*, 57 W. Va. 282, 50 S. E. 236, holding that where conveyance of land reserved oil and gas in and under the land, such oil and gas became a separate estate in land; *Coolbaugh v. Lehigh & W. B. Coal Co.* 213 Pa. 31, 4 L.R.A.(N.S.) 210, 62 Atl. 94, construing instrument in terms a "lease" of coal to be a sale of coal as land; *New York & P. Coal Co. v. Hillside Coal & I. Co.* 13 Luzerne Leg. Reg. Rep. 263; *Lazarus v. Lehigh & W. B. Coal Co.* 13 Luzerne Leg. Reg. Rep. 280; *New York & P. Coal Co. v. Hillside Coal & I. Co.* 14 Luzerne Leg. Reg. Rep. 74,—holding leases or demises of "all" coal in lands amount to fee grant of the coal in place; *Thos. Beck & Sons v. Economy Coal Co.* 149 Iowa, 32, 127 N. W. 1109, to the point that mineral underlying surface is subject to absolute conveyance separate from surface.

Cited in note (4 L.R.A.(N.S.) 207) as to when agreement or instrument conferring right to mine coal is to be regarded as absolute sale or conveyance of coal in place, as distinguished from lease or conditional sale.

Distinguished in *Rockafellow v. Hanover Coal Co.* 6 Kulp, 509, 12 Pa. Co. Ct. 241, 2 Pa. Dist. R. 109, enjoining lessee from removing coal from other lands, and carrying same over lands described in lease.

13 L. R. A. 633, *LEE v. HAWKS*, 68 Miss. 669, 9 So. 828.

Statute of frauds; agreements to transfer real estate.

Cited in *Higgins v. Haberstraw*, 76 Miss. 635, 25 So. 168, holding mortgagee in possession estopped from asserting title in equity in violation of parol agreement to surrender possession to mortgagor when debt paid, though agreement obnoxious to statute of frauds.

13 L. R. A. 634, *CENTRAL R. & BKG. CO. v. RYLEE*, 87 Ga. 491, 13 S. E. 584.

Negligence; capacity of children.

Cited in *Central R. & Bkg. Co. v. Golden*, 93 Ga. 514, 21 S. E. 68, holding whether boy twelve years of age knew it was dangerous to climb upon rapidly moving freight train, question for jury; *Savannah, F. & W. R. Co. v. Smith*, 93 Ga. 746, 21 S. E. 157, holding whether boy of ten negligent in boarding train, question for jury; *Manchester Mfg. Co. v. Polk*, 115 Ga. 545, 41 S. E. 1015, holding minor employee cannot recover for injury from defective machinery, if with sufficient capacity to know of danger, and to observe due care, he voluntarily incurred risk; *Ryan v. Towar*, 128 Mich. 471, 55 L. R. A. 315, 92 Am. St. Rep. 481, 87 N. W. 644, holding no exception exists in favor of children, to rule of nonliability for injury to trespassers from negligence; *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 600, 68 Am. St. Rep. 252, 52 N. E. 220 (dissenting opinion), majority holding boy lying on railroad track to sleep, guilty of contributory negligence.

Cited in footnotes to *Lake Erie & W. R. Co. v. Mackey*, 29 L. R. A. 757, which holds negligence of nine-year-old child climbing over coupling of car standing on crossing for jury; *Schmitz v. St. Louis, I. M. & S. R. Co.* 23 L. R. A. 250, which holds young child's right to recover for injuries while passing between cars standing on street; *Rumpel v. Oregon Short Line & U. N. R. Co.* 22 L. R. A. 725, which holds it negligence to crawl under cars across highway.

Implied license to use railroad right of way.

Cited in *Grady v. Georgia R. & Bkg. Co.* 112 Ga. 668, 37 S. E. 861, holding person injured while walking between cars in railroad yard must prove express license, to entitle him to recover unless for wilful injury; *Wagner v. Chicago, & N. W. R. Co.* 122 Iowa, 365, 98 N. W. 141, denying railroad's liability for killing child crawling under cars at place customarily used as crossing; *Southern R. Co. v. Mouchet*, 3 Ga. App. 271, 59 S. E. 927, holding that there can be no implied license to cross between cars in temporary opening while cars are being switched; *Georgia R. & Bkg. Co. v. Fuller*, 6 Ga. App. 457, 65 S. E. 313, holding that no license from user will be implied in case of a railway switch yard; *Curtis v. Southern R. Co.* 130 Ga. 677, 61 S. E. 539, holding no license to be upon track implied from mere knowledge by railroad that persons occasionally did use it; *Bailey v. North Carolina R. Co.* 149 N. C. 173, 62 S. E. 912, holding that no invitation can be implied to stranger to enter railway yard and climb upon moving tender; *Fowler v. Georgia R. & Bkg. Co.* 133 Ga. 668, 66 S. E. 900, holding that one leaving street and crossing through railway switch yard at night cannot recover for injury sustained; *Jones v. Illinois C. R. Co.* 31 Ky. L. Rep. 827, 13 L.R.A.(N.S.) 1071, 104 S. W. 258, holding that one attempting to pass under string of standing cars attached to live engine cannot recover if injured; *Beck v. Southern R. Co.* 146 N. C. 473, 59 S. E. 1015 (dissenting opinion), on no implied license to public to enter upon switching yards of railroad.

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Potter*, 56 L. R. A. 575, as to what constitutes license to cross railroad track at place other than public crossing; *Thomas v. Chicago, M. & St. P. R. Co.* 39 L. R. A. 399, which holds implied license to walk on railroad track from long use imposes care in running

trains; *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531, which holds duty owed to one using footway alongside railroad bridge in accordance with recognized custom; *Ward v. Southern P. Co.* 23 L. R. A. 715, which holds frequent trespassing on railroad track without steps being taken to prevent same, not license to use track; *Chenery v. Fitchburg R. Co.* 22 L. R. A. 575, which holds invitation to cross railroad not shown by custom of crossing without objection; *Anderson v. Chicago, St. P. M. & O. R. Co.* 23 L. R. A. 203, which holds implied license to cross narrow railroad trestle contrary to public policy.

Cited in notes (32 L.R.A.(N.S.) 565) on duty of property owner to trespassing child; (36 L. ed. U. S. 1066) on trespassers or persons on railroad track.

Wilful injury.

Cited in *Charleston & W. C. R. Co. v. Johnson*, 1 Ga. App. 443, 57 S. E. 1064, on knowledge as being a necessary element of wanton or wilful injury.

13 L. R. A. 637, *DURAN v. STANDARD LIFE & ACCI. INS. CO.* 63 Vt. 437, 25 Am. St. Rep. 773, 22 Atl. 530.

Right of action of person violating Sunday law.

Cited in *Hoadley v. International Paper Co.* 72 Vt. 81, 47 Atl. 169, holding working on Sunday not contributory negligence, nor proximate cause of personal injury; *Boyden v. Fitchburg R. Co.* 70 Vt. 128, 39 Atl. 771, holding plea that plaintiff was in act of traveling on Sabbath not answer to declaration for damages against railroad for negligently injuring him at highway crossing.

Cited in notes (36 L.R.A.(N.S.) 549) on violation of Sunday law as defense to action for personal injuries; (30 L.R.A.(N.S.) 468) on amusements prohibited by Sunday laws.

Right to recover on policy.

Cited in *East Carolina R. Co. v. Maryland Casualty Co.* 145 N. C. 118, 58 S. E. 906, holding that where language is clear, the court will construe an insurance contract according to its terms.

Cited in footnote to *Burt v. Union Cent. L. Ins. Co.* 59 L. R. A. 393, which denies right to recover on policy on life of innocent person executed after conviction of capital offense.

Cited in notes (14 Eng. Rul. Cas. 17, 19) on rules for construing insurance policies; (60 Am. St. Rep. 164) on death of insured in known violation of law.

Insurance; proximate cause of death.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

13 L. R. A. 640, *KELSEY v. KELLEY*, 63 Vt. 41, 22 Atl. 597.

Validity of transfers for future support.

Cited in *Smith v. Pierce*, 65 Vt. 204, 25 Atl. 1092, granting specific performance of contract to convey land for future support, as against creditor failing to enforce claim until consideration for agreement fully performed; *Darling v. Ricker*, 68 Vt. 474, 35 Atl. 376, holding transfer of real and personal property for future support valid as against attack by creditors after value of services amount to more than value of property; *Beeman v. Cooper*, 64 Vt. 308, 23 Atl. 794, holding mortgage for present debt may lose priority over mortgage subsequently executed for future support, when latter first recorded, and other mortgagee failed to assert rights until after consideration for junior mortgage fully executed; *Harris v. Brink*, 100 Iowa, 369, 62 Am. St. Rep. 576, 69 N. W. 684, holding real estate conveyed for future support chargeable with claim of cred-

itor, where value exceeds that of services rendered to amount greater than that of claim.

Disapproved in *Massey v. McCoy*, 79 Mo. App. 173, holding conveyance of property for future support invalid as to existing creditors, though rights not asserted until after consideration performed.

Competency of opinions as to value of board.

Cited in *Watriss v. Trendall*, 74 Vt. 57, 52 Atl. 118, holding opinions of witnesses living in vicinity, as to reasonable price of board, competent.

13 L. R. A. 643, *DILLABY v. WILCOX*, 60 Conn. 71, 25 Am. St. Rep. 299, 22 Atl. 491.

Oral promise to pay debt of another.

Cited in *Smith v. Delaney*, 64 Conn. 275, 42 Am. St. Rep. 181, 29 Atl. 496, holding promise to pay existing debt of another may be valid, as original obligation, if based upon transfer of value; *Buchanan v. Moran*, 62 Conn. 88, 25 Atl. 396, holding original agreement of owner of building with subcontractor, made upon insolvency of contractor, need not be in writing; *Warner v. Willoughby*, 60 Conn. 471, 25 Am. St. Rep. 243, 22 Atl. 1014, holding parol promise to pay bill of subcontractor, if he refrains from filing lien and contractor fails to pay, within statute of frauds; *Plumb v. Curtis*, 66 Conn. 171, 33 Atl. 998, holding, where evidence tended to show goods purchased by agent on credit of defendant, instruction that oral promise to pay was within statute of frauds properly refused.

Cited in note (27 Am. St. Rep. 20) on promise to pay debt of another.

13 L. R. A. 646, *BROWN v. THROOP*, 59 Conn. 596, 22 Atl. 436.

Contracts within statute of frauds.

Cited in footnote to *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds.

Cited in notes (15 L.R.A.(N.S.) 318) on effect of statute of frauds upon parol contracts for services performable within a year, though not so intended; (6 Eng. Rul. Cas. 305) on validity of agreement to be performed on a contingency which may take place within a year.

13 L. R. A. 647, *CROWDER v. SULLIVAN*, 128 Ind. 486, 28 N. E. 94.

Contracting power of municipal corporations.

Cited in *Gosport v. Pritchard*, 156 Ind. 401, 59 N. E. 1058, and *Seward v. Liberty*, 142 Ind. 552, 42 N. E. 39, holding discretion of municipal authorities to contract for street lighting cannot be controlled, in absence of fraud; *Pulaski County v. Shields*, 130 Ind. 8, 29 N. E. 385, holding contract of county commissioners employing superintendent of county asylum and poor farm for five years valid; *Campbell v. Barber Asphalt Paving Co.* 6 Lack. Legal News, 121, holding municipal contract for supplying light or water not invalid because extending over considerable number of years.

Limitations upon indebtedness of municipal corporations; obligations in futuro.

Cited in *Saleno v. Neosho*, 127 Mo. 641, 27 L. R. A. 773, 48 Am. St. Rep. 653, 30 S. W. 190, and *Cain v. Wyoming*, 104 Ill. App. 544, holding twenty-year contract for rental of water hydrants, to be paid for annually at agreed price, not within constitutional limitation upon indebtedness; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 20, 43 L. ed. 349, 19 Sup. Ct. Rep. 77, holding contract for water supply at annual rental not invalid, although aggregate of rentals exceed

amount of indebtedness limited by charter; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 491, 78 N. W. 558, holding contract with water company for future service, to be paid for as rendered, not incurring indebtedness; *Fidelity Trust & G. Co. v. Fowler Water Co.* 113 Fed. 566, holding ordinance granting franchise to water company, providing for payment of annual rental for hydrants, and giving city option to purchase, does not create indebtedness within constitutional limitation; *Budd v. Budd*, 59 Fed. 740, holding acceptance of devise of lands for public park, conditioned upon payment of \$3,000 annually to testator's widow, not within charter provision prohibiting appropriations in excess of annual revenue; *Denver v. Hubbard*, 17 Colo. App. 352, 68 Pac. 993, holding contract for lighting city for term of years valid where annual payment does not exceed constitutional limitation of municipal indebtedness; *Foland v. Frankton*, 142 Ind. 548, 41 N. E. 1031, holding contract for street lighting for five years, to be paid for annually, not within statute requiring petition of majority of owners of taxable real estate to authorize creation of indebtedness; *Reynolds v. Waterville*, 92 Me. 327, 42 Atl. 553 (dissenting opinion), majority holding contract for rental of building for municipal purposes, amounting to purchase on instalments, indebtedness within constitutional provision; *Toomey v. Bridgeport*, 79 Conn. 236, 64 Atl. 215, 7 A. & E. Ann. Cas. 148, holding valid contract by municipal corporation for a term of years at a fixed annual sum, though the aggregate of such sums exceeded the amount permitted to be expended for a fiscal year; *Scott v. Laporte*, 162 Ind. 59, 69 N. E. 675, holding invalid an ordinance granting franchise to water company, binding city to purchase water from it for 21 years and pledging city's power of taxation for payment of rentals; *Trask v. Livingston County*, 210 Mo. 599, 109 S. W. 656, holding that county becomes indebted for a bridge, built for it, at the time the contract is let and the work directed to be done.

Cited in notes (23 L.R.A. 405, 407; 37 L.R.A.(N.S.) 1066) on what constitutes "indebtedness" within meaning of constitutional and statutory restrictions of municipal indebtedness; (44 Am. St. Rep. 240) on what is municipal indebtedness within prohibition against.

Distinguished in *Earles v. Wells*, 94 Wis. 298, 59 Am. St. Rep. 885, 68 N. W. 964, holding lease of waterworks to city in consideration of annual rental and payment of taxes and repairs, and making same property of city when payments sufficient to cancel bonds, within constitutional limitation; *Windsor v. Des Moines*, 110 Iowa, 193, 80 Am. St. Rep. 280, 81 N. W. 476, holding municipal contract for erection of electric light plant by private corporation, and pledging revenue derived from special tax in payment thereof, indebtedness within constitutional limitation; *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 469, 35 L. R. A. 688, 58 Am. St. Rep. 359, 45 N. E. 588, holding contract for fire alarm system by city indebted in excess of constitutional limit invalid, where city without funds to pay when contract completed and accepted; *Indianapolis v. Wann*, 144 Ind. 184, 31 L. R. A. 745, 42 N. E. 901, holding municipal contract for street lighting for five years invalid, under statute prohibiting contracts beyond existing appropriations, where appropriations had been made for two months only.

Disapproved in *Spilman v. Parkersburg*, 35 W. Va. 619, 14 S. E. 279, holding lease of electric lighting plant by city in consideration of fixed quarterly payment, which in effect is contract to purchase on instalments, indebtedness within constitutional limitation.

License to use streets not monopoly.

Cited in *Rushville v. Rushville Natural Gas Co.* 132 Ind. 578, 15 L. R. A. L.R.A. Au. Vol. II.—67.

323, 28 N. E. 853, holding ordinance specifically granting to natural gas company right to use streets for laying pipes to supply gas to city and inhabitants not invalid; Vincennes v. Citizens' Gaslight Co. 132, Ind. 124, 16 L. R. A. 489, 31 N. E. 573, holding ordinance granting franchise to gaslight company for twenty-five years, and obligating city to take gas for stated number of street lamps, not objectionable as giving exclusive privilege; McPhee & McG. Co. v. Union P. R. Co. 87 C. C. A. 619, 158 Fed. 17, holding that grant to railway company of right to lay, maintain and operate its railway in the street is a license, not a franchise.

Attacking legality of corporate existence or acts.

Cited in *Gilkey v. How*, 105 Wis. 46, 49 L. R. A. 485, 81 N. W. 120, and *Doty v. Patterson*, 155 Ind. 64, 56 N. E. 668, holding, where there is attempt to comply with statute authorizing creation of corporation, legal existence can be questioned only in directing proceeding; *Smith v. Cleveland, C. C. & St. L. R. Co.* 170 Ind. 398, 81 N. E. 501, holding that corporate existence of de facto consolidated railway company cannot be attacked in proceeding by it to condemn land where it has substantially complied with statute governing consolidation; *Roberts v. Terre Haute Electric Co.* 37 Ind. App. 668, 76 N. E. 323, holding that right of street railway to run freight cars over its line cannot be questioned in action for negligence causing personal injury; *Western Invest. Co. v. Davis*, 7 Ind. Terr. 177, 104 S. W. 573, 15 A. & E. Ann. Cas. 1134, holding that creditor dealing with de facto corporation as a corporation cannot hold the stockholders liable as partners; *Clark v. American Cannel Coal Co.* 35 Ind. App. 71, 73 N. E. 727, on collateral attack on de facto corporation.

13 L. R. A. 649, *KINGSLAND v. KOEPPE*, 137 Ill. 344, 28 N. E. 48.

Parol evidence to explain indorsement.

Cited in *Featherstone v. Hendrick*, 59 Ill. App. 502, holding character of undertaking of indorser, who is not payee, may be shown by parol evidence; *Atkinson v. Bennett*, 103 Ga. 511, 30 S. E. 599; *Ewen v. Wilbor*, 70 Ill. App. 156; *Holmes v. Williams*, 69 Ill. App. 115; *Smith v. North*, 68 Ill. App. 465; *Condon v. Bruse*, 58 Ill. App. 254,—holding indorsement of note by third party prima facie guaranty, but subject to evidence as to real nature of contract; *Chicago Trust & Sav. Bank v. Nordgren*, 57 Ill. App. 349, holding, when maker and indorser of note same party, contract of indorsee cannot be varied by parol evidence; *De Clerque v. Campbell*, 231 Ill. 448, 83 N. E. 224, holding indorsement of note in blank by third party at time of its execution creates a presumption that indorsee intended to assume liability of guarantor although this presumption may be rebutted by parol; *Second Nat. Bank v. Woodruff*, 113 Ill. App. 17, holding ordinarily it is incompetent to show by parol an agreement between indorsers and an indorsee, who has in turn indorsed the note to another, to the effect that such indorsers were not to be held liable as such.

Cited in footnotes to *Spencer v. Allerton*, 13 L. R. A. 806, which holds parol evidence inadmissible as to blank indorsement by stranger; *Young v. Sehon*, 62 L. R. A. 499, which holds parol evidence admissible to show extent of liability of promisee and another indorsing non-negotiable note.

Distinguished in *Hately v. Pike*, 162 Ill. 249, 53 Am. St. Rep. 304, 44 N. E. 441, holding, where note made payable to one as president of corporation, and indorsed by payee both with and without word "president," parol evidence inadmissible to show one indorsement as guaranty; *Cozzens v. Chicago Hydraulic-Press Brick Co.* 166 Ill. 219, 46 N. E. 788, holding one liable as indorser only need not be joined as defendant with guarantor, although printed contract of guaranty stamped over his name.

Judgments against defendants sued jointly.

Cited in *Columbian Hard Wood Lumber Co. v. Langley*, 51 Ill. App. 102, holding in action against makers and guarantors of note, recovery must be against all or none of defendants; *Pease v. Appleton*, 75 Ill. App. 347, holding judgment by default against one of several defendants sued jointly in *assumpsit erroneus*; *Schmelzer v. Chicago Ave. Sash & Door Mfg. Co.* 85 Ill. App. 601, holding, where owner and contractor sued jointly upon claim of subcontractor, judgment against owner alone erroneous; *Finance Co. v. Hanlon*, 75 Ill. App. 190, and *Fisk v. Carbonized Stone Co.* 67 Ill. App. 331, holding plaintiff may appeal from judgment in his favor against one of several parties sued jointly on contract; *Leopold v. Steel*, 41 Ill. App. 18, questioning right to amend declaration, after service of summons, without leave, by adding name of party as coplaintiff; *Dickenson v. Simms*, 128 Ill. App. 20, holding a judgment in an action at law against two defendants is an entirety and cannot be affirmed as to one defendant and reversed as to the other; *Merrifield v. Cottage Piano Co.* 238 Ill. 532, 128 Am. St. Rep. 148, 87 N. E. 379, holding if judgment is set aside at instance of one joint defendant it must be set aside as to all; *Merrifield v. Western Cottage Piano & Organ Co.* 149 Ill. App. 6, to the point that it is error to set aside judgment as to one defendant and grant leave to that one to plead unless judgment is set aside as to all defendants; *Williams v. Breitung*, 216 Ill. 303, 74 N. E. 1060, 3 A. & E. Ann. Cas. 506, as to necessity of judgment on joint contract being rendered against all.

13 L. R. A. 652, *TODE v. GROSS*, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469.

Agreements for protection of trade secrets.

Cited in *Stanley v. Pollard*, 5 Misc. 492, 25 N. Y. Supp. 766, holding agreement of employee not to reveal trade secrets, nor engage in same or similar business in prescribed territory for two years after leaving employer, not invalid; *Westervelt v. National Paper & Supply Co.* 154 Ind. 678, 57 N. E. 552, enjoining employee from divulging information as to secret machine which he had been employed to perfect for benefit of employer; *Hackett v. A. L. & J. J. Reynolds Co.* 30 Misc. 735, 62 N. Y. Supp. 1076, holding agreement of employee not to engage in business in competition with employer, within prescribed territory, for six months after employment ceases, not against public policy; *Stone v. Goss* (N. J.) 63 L. R. A. 345, footnote p. 344, 55 Atl. 736, enjoining use of information obtained from employee wrongfully disclosing trade secret; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A.(N.S.) 146, 82 C. C. A. 158, 153 Fed. 40; *Hartman v. John D. Park & Sons Co.* 145 Fed. 378,—holding sale of secret process with covenant that seller will not use process himself or communicate it to any other person, valid; *Witkop & W. Co. v. Boyce*, 61 Misc. 131, 112 N. Y. Supp. 874, holding trade secrets communicated in course of confidential employment will be protected by injunction.

Cited in footnotes to *O. & W. Thum Co. v. Tloczynski*, 38 L. R. A. 200, which sustains right to enjoin breach of agreement by employee not to communicate trade secrets; *Dempsey v. Dobson*, 32 L. R. A. 761, which holds carpet manufacturers entitled to record of recipes prepared by color mixer employed; *Dempsey v. Dobson*, 40 L. R. A. 550, which holds custom giving color mixer exclusive title as against employer, to combinations of color devised, void; *Watkins v. Landon*, 19 L. R. A. 236, which authorizes person lawfully acquiring knowledge of composition of unpatented medicine, to make and sell same; *Stone v. Goss*, 63 L.R.A. 344, which upholds right to injunction against disclosure of trade secret in violation of contract; *Stewart v. Hook*, 63 L.R.A. 255, which upholds property right of discoverer of medical preparation in his discovery.

Cited in notes (12 L.R.A.(N.S.) 103) on protection of trade secrets; (133 Am. St. Rep. 765, 766), on protection of secret processes and trade secrets.

Distinguished in *Mallinekrodt Chemical Works v. Nemnich*, 83 Mo. App. 13, holding agreement of chemist not to engage in sale or manufacture of drugs manufactured by employer, "within territory of United States," for six years after leaving service, invalid; *Lanzit v. J. W. Sefton Mfg. Co.* 184 Ill. 330, 75 Am. St. Rep. 171, 56 N. E. 393, holding agreement of employee to abandon business of manufacturing paper novelties for period of ten years invalid.

Assignment of trade secrets.

Cited in *Grand Rapids Wood Finishing Co. v. Hatt*, 152 Mich. 138, 115 N. W. 714, holding contract to sell secret process valid and binding; *Vulcan Detinning Co. v. American Can Co.* 67 N. J. Eq. 247, 58 Atl. 290, holding trade secret assignable.

Agreements for protection of good will of business.

Cited in *Ru Ton v. Everitt*, 35 App. Div. 415, 54 N. Y. Supp. 896, upholding agreement of vendor not to engage in same or similar business for ten years, and to use influence for benefit of purchaser; *Underwood v. Smith*, 46 N. Y. S. R. 656, 19 N. Y. Supp. 380, upholding similar agreement of vendor, running fifteen years; *Booth v. Seibold*, 37 Misc. 102, 74 N. Y. Supp. 776, upholding agreement of fish company upon sale of property and good will to competitor, not to engage in business again; *Brett v. Ebel*, 29 App. Div. 259, 51 N. Y. Supp. 573, upholding agreement of vendor of freighting vessels, not to solicit freights or do business with certain ports named, during term of not less than five years; *Williams v. Farrand*, 88 Mich. 480, 14 L. R. A. 164, 50 N. W. 446, refusing to enjoin outgoing partner from using firm name similar to that of old firm; *Vonderbank v. Schmidt*, 44 La. Ann. 271, 15 L. R. A. 467, 32 Am. St. Rep. 336, 10 So. 616, enjoining purchaser of hotel from insolvent estate, from using name of insolvent's vendor, who transferred good will with sale of property; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 439, 26 L. R. A. 552, 38 N. E. 461, holding agreement to withdraw application for waterworks franchise, and to assist another to secure same, in consideration of payment of money, not against public policy.

Cited in note (22 L. R. A. 674) on validity of contracts of sale in restraint of trade, without limitation of place.

Distinguished in *Cummings v. Union Blue Stone Co.* 164 N. Y. 404, 52 L. R. A. 263, 79 Am. St. Rep. 655, 58 N. E. 525, holding combination of blue-stone producers to control market and advance prices, invalid; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 130, 29 C. C. A. 151, 54 U. S. App. 723, 85 Fed. 281, holding combination of iron-pipe manufacturers to control prices and prevent competition invalid both at common law and under Federal anti-trust law; *Richards v. American Desk & Seating Co.* 87 Wis. 514, 58 N. W. 787, holding contract prohibiting furniture manufacturer from selling in large part of United States to other than one dealer, for about five years, invalid.

Combinations to stifle competition.

Cited in *Wood v. Whitehead Bros. Co.* 165 N. Y. 552, 59 N. E. 357, upholding agreement to discontinue business, and thereafter to turn over all orders received to competitor; *Excelsior Quilting Co. v. Creter*, 36 Misc. 700, 74 N. Y. Supp. 361, holding agreement of manufacturer of quilting machines, upon which patent expired, not to make more if customer will purchase stock on hand, valid; *Anchor Electric Co. v. Hawkes*, 171 Mass. 106, 41 L. R. A. 192, 68 Am. St. Rep. 403, 50 N. E. 509, holding combination of three corporations, whereby officers agreed not to enter into or conduct any business in competition therewith for

five years, not invalid; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 488, 23 L. R. A. 641, 49 Am. St. Rep. 784, 28 Atl. 973, holding combination of oleomargarine manufacturers, whereby property was transferred to one corporation, and parties agreed not to engage in same business for five years, valid; *People v. Klaw*, 55 Misc. 85, 106 N. Y. Supp. 341, holding agreement between owners of theaters as to booking attractions not in violation of statute against monopolies or conspiring to commit an act injurious to trade or commerce; *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.* 120 App. Div. 239, 105 N. Y. Supp. 264, holding under state anti trust laws a lease to a corporation organized to create a monopoly is valid although lessor who was not a party to combination knew of motive of lessee in taking lease; *McCall Co. v. Wright*, 198 N. Y. 150, 31 L.R.A.(N.S.) 256, 91 N. E. 516; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 294, 73 N. E. 48,—holding contract in reasonable restraint of trade valid.

Cited in notes (24 L.R.A.(N.S.) 920, 925) on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope; (49 Am. St. Rep. 790) on validity of contracts in restraint of trade.

Penalty or liquidated damages.

Cited in *Pastor v. Solomon*, 26 Misc. 126, 55 N. Y. Supp. 956, Affirming 25 Misc. 323, 54 N. Y. Supp. 575, holding penalty of \$500, imposed by contract for breach of actor's engagement, may be recovered as liquidated damages; *New Britain v. New Britain Teleph. Co.* 74 Conn. 333, 50 Atl. 881, sustaining recovery of liquidated damages stipulated for breach of telephone company's agreement to maintain competition with rival; *Re Van Horn*, 167 Fed. 1023, holding where actual damages for a breach are uncertain in their nature and practically impossible to estimate with certainty and if the contract provides for damages in case of breach the provision will be construed as liquidated damages and not a penalty; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 464, holding naming of a stipulated sum to be paid for the nonperformance of a covenant is conclusive upon the parties in absence of fraud or mutual mistake.

Cited in footnotes to *Chicago-House Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price.

Cited in notes (6 Eng. Rul. Cas. 560, 561) as to when stipulation in contract is for a penalty and when for liquidated damages; (108 Am. St. Rep. 51) on agreements purporting to liquidate damages.

Proof of actual damages in action for liquidated damages.

Cited in *Deeves & Son v. Manhattan L. Ins. Co.* 195 N. Y. 338, 88 N. E. 395 (dissenting opinion), as to it not being necessary to prove actual damages in an action on covenant for liquidated damages.

13 L. R. A. 655, *ROTHHOLZ v. DUNKLE*, 53 N. J. L. 438, 26 Am. St. Rep. 432, 22 Atl. 193.

Slander and libel; privileged communications.

Cited in *Butterworth v. Todd*, 76 N. J. L. 324, 70 Atl. 139, holding complaint made by one member of church against another in accordance with discipline of church, and in belief of its truth is qualifiedly privileged and the burden is upon plaintiff to prove express malice; *Bohlinger v. Germania L. Ins. Co.* 100 Ark. 483, 36 L.R.A.(N.S.) 455, 140 S. W. 257, holding communications between principal and agent, relative to agency, privileged, though containing defamatory

matter as to third person; *Ramsdell v. Pennsylvania R. Co.* 79 N. J. L. 381, 75 Atl. 444, holding that notice in writing set up in office of dining car department of railroad, that certain dining car conductor was discharged for breach of rules is privileged as to other employees.

Cited in footnotes to *Sullivan v. Strahorn-Hutton-Evans Commission Co.* 47 L. R. A. 859, which holds imputation of evil motives and dishonesty in letter complaining of nonpayment of debt by third person through bank not privileged; *Hemmens v. Nelson*, 20 L. R. A. 441, which holds statement by principal of deaf mute institute to executive committee as to improper acts of department superintendent privileged; *Nichols v. Eaton*, 47 L. R. A. 483, which holds communication by principal to agent as to business of agency not actionable unless actuated by malice.

Cited in notes (26 L.R.A.(N.S.) 1082) on qualified privilege of communication between members of association or private corporation; (9 Eng. Rul. Cas. 81) as to what communications enjoy a qualified privilege; (104 Am. St. Rep. 112, 148) on what libelous statements are privileged.

13 L. R. A. 657, *SELLERS v. TEXAS C. R. CO.* 81 Tex. 458, 17 S. W. 32.

Implied easements.

Cited in *Kruegel v. Nitschman*, 15 Tex. Civ. App. 642, 40 S. W. 68, holding sale of land not abutting on highway implies grant of right of passage necessary for reasonable use over adjoining land of owner; *St. Louis Southwestern R. Co. v. Long*, 52 Tex. Civ. App. 46, 113 S. W. 316; *Texas & P. R. Co. v. Ford*, 54 Tex. Civ. App. 316, 117 S. W. 201,—holding that it was duty of railroad to keep road-bed in such condition as not to divert waters from natural course to injury of adjoining lands.

Cited in footnotes to *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor; *Chappell v. New York, N. H. & H. R. Co.* 17 L. R. A. 420, which holds permanent easement retained by reservation in deed of right of way of privilege of crossing and recrossing.

Cited in notes (59 L. R. A. 868) on liability for damming back water of stream; (20 L.R.A. 637) on exceptions and reservation of easements; (8 L.R.A.(N.S.) 342) on implication from necessity of easement other than of way; (26 L.R.A.(N.S.) 323, 327, 336) on easements created by severance of tract with apparent benefit existing.

13 L. R. A. 659, *ALSTON v. STATE*, 92 Ala. 124, 9 So. 732.

Special and general deposits.

Cited in *Shute v. Hinman*, 34 Or. 583, 47 L. R. A. 266, 58 Pac. 882, holding trustee making general deposit of trust fund not entitled to lien, although character of fund deposited known to bank; *Officer v. Officer*, 120 Iowa, 393, 98 Am. St. Rep. 365, 94 N. W. 947, holding deposit of trust fund subject to check, general; *Anheuser-Busch Brewing Asso. v. Clayton*, 6 C. C. A. 110, 13 U. S. App. 295, 56 Fed. 761, holding bank receiving draft for "collection and return," taking check of drawee in payment, and on same day forwarding exchange to drawer, which is not paid, does not entitle drawer to lien on funds of bank; *Curtis v. Parker*, 136 Ala. 227, 33 So. 935, holding relation of debtor and creditor created between bank and principal by deposit for use of agent instructed to use money for principal's benefit; *Butcher v. Butler*, 134 Mo. App. 69, 114 S. W. 564, holding in the case of a special deposit the bank merely assumes charge and custody of the property without authority to use it and the depositor is entitled to receive back the identical thing deposited; *Allen v. Woodruff*, 2 Ala. App. 420, 56

So. 247, to the point that trust money deposited by holder to his general account still belongs to beneficiary.

Cited in notes (16 L.R.A. 517) on when deposit in bank is special so that title remains in depositor; (33 Am. St. Rep. 226) on general and special deposits.

Officers; liability for loss of funds.

Cited in *Mitchell v. Rice*, 132 Ala. 127, 31 So. 498, holding sureties liable for misappropriation of funds for unauthorized general deposit by register in chancery, charged with duty of receiving proceeds of partition sale of land; *Montgomery County v. Cochran*, 62 C. C. A. 75, 126 Fed. 460, same case on prior appeal in 57 C. C. A. 266, 121 Fed. 22, holding county treasurer liable for amount of check received for bonds, deposited in insolvent drawee bank; *Clisby v. Martin*, 150 Ala. 134, 124 Am. St. Rep. 64, 43 So. 742; *Parks v. Bryant*, 142 Ala. 629, 38 So. 180,—holding fact that register of chancery deposited moneys in bank which afterwards became insolvent no defense to action on his bond.

Cited in notes (36 L.R.A.(N.S.) 286, 287, 289, 294) on public officer's liability for loss of funds by failure of bank; (91 Am. St. Rep. 527) on acts for which sureties on official bonds are liable.

Distinguished in *State v. Gramm*, 7 Wyo. 358, 40 L. R. A. 699, 52 Pac. 533, holding state treasurer not liable for moneys lost, without fault on his part, through failure of depository.

13 L. R. A. 661, *PICKETT v. PACIFIC MUT. L. INS. CO.* 144 Pa. 79, 27 Am. St. Rep. 618, 22 Atl. 871.

Insurance; construction of exceptions in policy.

Cited in *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 600, 31 L. R. A. 688, 51 Am. St. Rep. 716, 43 N. E. 54, holding clause in accident policy excepting death from "inhaling gas" applicable only to cases where gas intentionally inhaled; *Fidelity & C. Co. v. Waterman*, 161 Ill. 635, 32 L. R. A. 655, 44 N. E. 283, holding death from involuntary asphyxiation not within clause of accident policy excepting death from anything accidentally absorbed or inhaled; *Fidelity & C. Co. v. Lowenstein*, 46 L. R. A. 452, 38 C. C. A. 31, 97 Fed. 18, Affirming 88 Fed. 476, holding death from involuntary inhalation of illuminating gas not within clause in accident policy excepting injuries from poison or anything accidentally or otherwise taken, absorbed, or inhaled; *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 646, 52 Am. St. Rep. 355, 43 N. E. 765, holding taking poison by mistake not within provision in accident policy excepting death from "taking poison;" *Bole v. New Hampshire F. Ins. Co.* 159 Pa. 57, 28 Atl. 205, holding factory had not ceased to be operated within meaning of fire policy, where machinery not in operation, but factory open for sale of goods by assignee for creditors; *Peterson v. Modern Brotherhood*, 125 Iowa, 572, 67 L.R.A. 635, 101 N. W. 289 (dissenting opinion), as to exceptions against inhalation of gas only applying to voluntary inhalation.

Cited in notes (2 L.R.A.(N.S.) 169) on liability of insurer for death from inhalation of gas; (30 L.R.A.(N.S.) 1182) on death or injury from substance taken internally as caused by external means; (52 Am. St. Rep. 364) on effect of insured's taking poison; (14 Eng. Rul. Cas. 25) on rules for construing insurance policies.

Distinguished in *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 320, 60 U. S. App. 705, 89 Fed. 687, holding death from poison accidentally taken within clause of accident policy excepting from its provisions death from poison; *Kasten v. Interstate Casualty Co.* 99 Wis. 77, 40 L. R. A. 653, 74 N. W. 534, holding clause in accident policy excepting death from poison, or anything accidentally

absorbed or inhaled, applicable to death from absorption of septic poison from cotton used by dentist.

What constitutes accident.

Cited in *Schmid v. Indiana Travelers Acci. Asso.* 42 Ind. App. 494, 85 N. E. 1032, holding death resulting from voluntarily physical exertions not accident; *North West Commercial Travelers' Asso. v. London Guarantee & Acci. Co.* 10 Manitoba L. Rep. 553, holding death by freezing is death through "external, violent and accidental means" within terms of policy; *Sullivan v. Modern Brotherhood*, 167 Mich. 534, — L.R.A.(N.S.) —, 133 N. W. 486, holding that insurer against accident is liable where death or injury is caused by disease not resulting from bodily infirmity or disease existing at time of accident, but which disease is itself caused by accident.

Cited in notes (30 L.R.A. 212) on what constitutes an accident within meaning of accident insurance policy; (5 L.R.A.(N.S.) 660) as to when death or injury primarily caused by insured's voluntary act, deemed caused by accidental means.

Proximate cause of death.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

Application of assured as evidence.

Cited in *Hendel v. Reverting Fund Assur. Asso.* 2 Pa. Dist. R. 117, holding statute requiring that life policies contain, or have attached to them, copies of application applicable to endowment policy; *Standard Life & Acci. Ins. Co. v. Carroll*, 41 L. R. A. 195, 30 C. C. A. 255, 58 U. S. App. 76, 86 Fed. 570, holding statute providing application shall not be evidence unless attached to life policy not applicable in case of accident insurance; *Zimmer v. Central Acci. Ins. Co.* 207 Pa. 476, 56 Atl. 1003, holding statute declaring application for life insurance not evidence unless attached to policy applicable to insurance against accidents and death caused thereby; *Ellis v. Metropolitan L. Ins. Co.* 228 Pa. 231, 77 Atl. 460, holding that person suing on insurance policy cannot be required to put in evidence an incorrect copy of application which was attached to policy.

Distinguished in *Snyder v. Globe Mut. Live Stock Ins. Co.* 38 Pa. Super. Ct. 631, 11 North. Co. Rep. 132, holding statute requiring application and by-laws to be attached to a policy of insurance in order to make such papers admissible in evidence has no application to policies of insurance issued by a live stock insurance company.

13 L. R. A. 664, *HARRINGTON v. PORT HURON*, 86 Mich. 46, 48 N. W. 641.

Ejectment in cases of trespass.

Cited in *Rasch v. Noth*, 99 Wis. 288, 40 L. R. A. 579, footnote p. 577, 67 Am. St. Rep. 858, 74 N. W. 820, holding ejectment will not lie for projection of eaves of barn 10 or 11 inches over division line, where drip received by roof of plaintiff's barn, and carried thereby to defendant's land.

Cited in footnote to *San Francisco v. Grote*, 41 L. R. A. 335, which sustains city's right of ejectment in land dedicated for street.

Cited in notes (18 L.R.A. 791) on what title or interest will support an action of ejectment; (11 L.R.A.(N.S.) 917) on ejectment for encroachments under surface, or overhead.

Duties and liabilities as to sewers.

Cited in note (61 L. R. A. 681, 683, 692) on duty and liability of municipality with respect to drainage.

Riparian rights.

Cited in *People v. Silberwood*, 110 Mich. 105, 32 L. R. A. 696, 67 N. W. 1087,

holding statute reserving submerged lands in Lake Erie for public shooting grounds, and prohibiting cutting of rushes on such lands, not interference with property rights of riparian owner.

Deeds; construction.

Distinguished in *Ladd v. Johnson*, 32 Or. 200, 49 Pac. 756. holding conveyance to trustee for benefit of creditors not mortgage.

13 L. R. A. 668, *ZABEL v. LOUISVILLE BAPTIST ORPHANS' HOME*, 92 Ky. 89, 17 S. W. 212.

Pleading private statute.

Cited in *Nichols v. Bardwell Lodge No. 179*, I. O. O. F. 105 Ky. 174, 48 S. W. 426, holding act incorporating grand lodge of Odd Fellows, being private, must be specially pleaded where corporate existence in issue; *McHenry v. Selvage*, 99 Ky. 235, 35 S. W. 645, holding proof of publication of ordinance for street improvement unnecessary under statute making copy of ordinance and copy of contract, attested by clerk, prima facie evidence of publication.

Taxation; exemption of charitable institutions.

Cited in *Kentucky Female Orphan School v. Louisville*, 100 Ky. 492, 40 L. R. A. 124, 36 S. W. 921, holding property of orphan school leased to tenants, rents of which are devoted to education of destitute orphans, within statute exempting all property and funds devoted to charitable purposes from taxation; *Widows & Orphan Home v. Com.* 126 Ky. 391, 16 L.R.A.(N.S.) 829, 103 S. W. 354, holding home for destitute widows and orphans of members of lodge an "institution of purely public charity," within exemption from taxation clause of constitution.

Validity of special assessments.

Cited in *Owensboro v. Sweeney*, 129 Ky. 616, 18 L.R.A.(N.S.) 185, 130 Am. St. Rep. 477, 111 S. W. 364, holding special assessments cannot be levied unless the property charged receives a corresponding benefit therefrom.

Special assessment not tax.

Cited in *Yates v. Milwaukee*, 92 Wis. 358, 66 N. W. 248, and *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 442, 22 S. W. 750, holding assessment for local street improvement not within statute exempting charitable institution from assessment and taxation under revenue laws; *Gosnell v. Louisville*, 104 Ky. 216, 46 S. W. 722, holding assessment for street improvement not tax within constitutional provisions requiring equality and uniformity in taxation; *Farwell v. Des Moines Brick Mfg. Co.* 97 Iowa, 298, 35 L. R. A. 69, 66 N. W. 176, holding assessment for street improvement not within annexation statute limiting taxation for "any city purpose;" *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 574, 36 L. R. A. 122, 38 S. W. 1052, holding, under city charter making assessment for street improvement lien, mortgage is inferior lien to subsequent street assessment; *Ft. Smith v. Sisters of Mercy*, 86 Ark. 115, 109 S. W. 1165, 15 A. & E. Ann. Cas. 347, holding exemption of charitable association from taxation did not exempt it from special assessments; *Hager v. Gast*, 119 Ky. 507, 84 S. W. 556, holding provisions of constitution relating to taxation do not apply to special assessment; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 379, 94 Am. St. Rep. 301, 90 N. W. 1006, holding that exemption from general taxation does not relieve owner from special assessments.

Cited in notes (35 L.R.A. 38) on liability to local assessments for benefits, of property exempt from general taxation; (3 L.R.A.(N.S.) 838) on special assessment as tax.

Delegation of power to fix street grade.

Cited in note (20 L. R. A. 654) on delegation by city council of power to determine width, grade, material, etc., of street, sidewalk, or sewer improvements.

Validity of street improvement.

Cited in *Richardson v. Mehler*, 111 Ky. 416, 63 S. W. 957, holding extent and character of street improvement must be fixed by ordinance authorizing it.

Distinguished in *Bitzer v. O'Bryan*, 107 Ky. 595, 54 S. W. 951, and *Louisville v. Selva*, 106 Ky. 732, 51 S. W. 447, holding petition for enforcement of street assessment, alleging grade fixed within limits of street to be improved, sufficient.

Sufficiency of petition to enforce lien for street assessment.

Cited in *Barfield v. Gleason*, 111 Ky. 527, 63 S. W. 964, holding averments and prima facie evidence of steps leading to creation of lien for municipal improvement, sufficient basis for judgment as against mere denial; *Bodley v. Finley*, 111 Ky. 618, 64 S. W. 439, as to necessity of alleging street grade fixed by council, in petition to enforce lien for street assessment; *Gaertner v. Louisville Artificial Stone Co.* 114 Ky. 164, 70 S. W. 293, holding averments and prima facie evidence of steps leading to creation of lien for municipal improvements sufficient basis for judgment as against insufficient denial.

13 L. R. A. 670, *ATTY. GEN. v. MARSTON*, 66 N. H. 485, 22 Atl. 560.

Incompatibility of offices.

Cited in *State ex rel. Little v. Slagle*, 115 Tenn. 341, 89 S. W. 326, holding where one accepts a second office incompatible with the one already held by him, the office first held is thereby ipso facto terminated without judicial proceedings of any kind; *Old Dominion Bldg. & L. Asso. v. Sohn*, 54 W. Va. 115, 46 S. E. 222, holding office of notary public and judge of criminal court are incompatible.

Cited in footnotes to *Atty. Gen. ex rel. Moreland v. Detroit*, 37 L. R. A. 211, which holds office of governor incompatible with that of mayor of city; *State ex rel. Walker v. Bus*, 33 L. R. A. 616, which holds deputy sheriff not state officer within prohibition against holding county or municipal office; *Bishop v. State*, 39 L. R. A. 278, which holds postmaster of local postoffice a "deputy postmaster" within provision as to right to hold other office.

When resignation of office complete.

Cited in note (23 L. R. A. 681, 683) on necessity of acceptance to complete resignation of office.

Resignation of one of two incompatible offices.

Cited in footnote to *State ex rel. Childs v. Sutton*, 30 L. R. A. 630, which holds disability of member of legislature to hold other office during term not affected by resignation.

13 L. R. A. 671, *CONDON v. KEMPER*, 47 Kan. 126, 27 Pac. 829.

Followed without discussion in *Rinard v. Gardner*, 49 Kan. 569, 31 Pac. 134; *Cunningham v. Hill*, 80 Kan. 706, 102 Pac. 1102.

Whether stipulated forfeiture regarded as penalty or liquidated damages.

Cited in *Kelly v. Fejervary*, 111 Iowa, 697, 83 N. W. 791, holding stipulation for forfeit of \$10 for each default in performance of building contract, as "liquidated damages," construed as penalty, in absence of evidence to contrary; *Willson v. Baltimore*, 83 Md. 212, 55 Am. St. Rep. 339, 34 Atl. 774, holding deposit by bidder upon municipal contract, conditioned that he will enter into bond for performance if bid accepted, not liquidated damages; *Cimarron Land Co. v. Barton*, 51 Kan. 557, 33 Pac. 317, holding judgment for penalty named in bond for deed.

in default of performance, erroneous, in absence of evidence of actual damage; *St. Louis & S. F. R. Co. v. Gaba*, 78 Kan. 436, 97 Pac. 435, holding extent of a possible future loss to be paid in event of a breach of contract may be agreed upon in advance where there is a difficulty in determining the extent of the loss and the resulting damages are uncertain; *Ross v. Loescher*, 152 Mich. 389, 125 Am. St. Rep. 418, 116 N. W. 193, holding question whether sum named in a building contract was intended as a penalty or as fixed compensation was for jury; *J. I. Case Threshing Mach. Co. v. Fronk*, 105 Minn. 41, 117 N. W. 229, holding that where from nature of contract actual damages are ascertainable the stipulated sum reserved will be construed to be a penalty; *Stony Creek Lumber Co. v. Fields*, 102 Va. 7, 45 S. E. 797, 1 A. & E. Ann. Cas. 242, holding where from the nature of the contract or the work to be performed, it is not difficult or impossible to ascertain and assess the damages resulting from failure to perform, the sum reserved from periodical payments until final settlement or until work is completed, is in nature of penalty and not liquidated damages; *Evans v. Moseley*, 84 Kan. 327, — L.R.A.(N.S.) —, 114 Pac. 374, holding that it will be presumed that parties intended penalty only and not liquidated damages especially where language is susceptible of either construction; *Evans v. Moseley*, 84 Kan. 328, — L.R.A.(N.S.) —, 114 Pac. 374, declaring stipulation for forfeiture in case of breach of contract for sale of cattle to be for a penalty, and not for liquidated damages.

Cited in footnotes to *Wilhelm v. Eaves*, 14 L. R. A. 297, which construes stipulation for liquidated damages as penalty; *Wallis Iron Works v. Monmouth Park Asso.* 19 L. R. A. 456, which holds as liquidated damages amount expressly fixed as damages for default in completing grand stand; *Krutz v. Robbins*, 28 L. R. A. 676, which holds agreement for greater rate of interest on default in paying principal, interest, etc., a penalty; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrototype plates shall pay fine of ten times their price; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, penalty.

Cited in notes (34 L.R.A.(N.S.) 589, 596, 597, 600, 603) on damage provision in building contract as penalty or liquidated damages; (108 Am. St. Rep. 49, 50, 52) on agreements purporting to liquidate damages.

13 L. R. A. 676, *BURDITT v. COLBURN*, 63 Vt. 231, 22 Atl. 572.

Mortgage by individual to self as representative.

Cited in *Brumby v. Jones*, 72 C. C. A. 466, 141 Fed. 323, holding mortgage from one individual to himself as executor void for want of contracting parties.

13 L. R. A. 678, *CROSSMAN v. JOHNSON*, 63 Vt. 333, 22 Atl. 608.

Sales; warranty of quality.

Cited in note (15 L. R. A. 795) on effect of representing things sold to be "good."

13 L. R. A. 680, *MILLER v. WADDINGHAM*, 91 Cal. 377, 27 Pac. 750.

Fixtures.

Cited in *Jordan v. Myres*, 126 Cal. 569, 58 Pac. 1061, holding laborers working mining claim not entitled to lien on engine and other machinery, attached to realty, but not property of employer; *Dietz v. Mission Transfer Co.* 95 Cal. 102, 30 Pac. 380 (dissenting opinion), as to where article is fixture or not being question of fact to be determined by the circumstances; *McCrillis v. Cole*, 25 R. I. 161, 105 Am. St. Rep. 875, 55 Atl. 196, holding where third person purchased an engine and boiler and placed them in a mill without knowledge on

part of owner of an agreement whereby title was to remain in seller, as between owner and seller the former was entitled to the property; *Anderson v. Englehart*, 18 Wyo. 424, 108 Pac. 977, holding that mortgagee has right to restrain removal of fixtures when removal would have effect of impairing security.

Removal of houses on mortgaged land.

Cited in *Stowell v. Waddingham*, 100 Cal. 7, 34 Pac. 436, holding after houses are removed they become personalty and cease to be under operation of mortgage and mortgager cannot injoin further removal; *Conde v. Sweeney*, 16 Cal. App. 163, 116 Pac. 319; *Conde v. Sweeney*, 14 Cal. App. 24, 110 Pac. 973,—to the point that mortgagee cannot disturb mortgagor in use of land so long as sufficiency of security is unimpaired.

Accountability between vendor and purchaser for taxes and like on land.

Cited in *Swanston v. Clark*, 153 Cal. 306, 95 Pac. 1117, holding seller of land not accountable to purchaser in possession for taxes and charges created after he ceased to have rents and profits.

13 L. R. A. 682, *HEWLETT v. GEORGE*, 68 Miss. 103, 9 So. 885.

Deposition.

Cited in note (14 L.R.A.(N.S.) 489) on admissibility of previously taken testimony or deposition of party relating to personal transaction with adversary, after latter's death.

Punitive damages.

Cited in notes (8 Eng. Rul. Cas. 379) on right to punitive damages; (28 Am. St. Rep. 875) on exemplary or punitive damages.

Distinguished in *Wagner v. Gibbs*, 80 Miss. 62, 92 Am. St. Rep. 598, 31 So. 434, holding punitive damages recoverable of assailant in action for assault and battery, notwithstanding death of party assailed.

Compensatory damages.

Cited in *State ex rel. Hartley v. Evans*, 83 Mo. App. 307, holding damages for disgrace and humiliation may be recovered in action for false imprisonment; *Hickey v. Welch*, 91 Mo. App. 15, holding anxiety, fright, and other injuries, mental or physical, may be considered in estimating actual damages from assault; *Cumberland Teleg. & Teleph. Co. v. Hobart*, 89 Miss. 261, 119 Am. St. Rep. 702, 42 So. 349, holding telephone company wrongfully cutting out a subscriber's telephone liable for inconvenience and annoyance as well as for actual damages.

Emancipation of infants.

Cited in note (16 L. R. A. 579) on how far marriage of infant works his emancipation.

Minor's right of action against parent.

Cited in *Clasen v. Pruhs*, 69 Neb. 286, 95 N. W. 640, 5 A. & E. Ann. Cas. 112, holding where child has been taken from custody of its foster mother it may maintain action against her for assault; *Roller v. Roller*, 37 Wash. 246, 68 L.R.A. 894, 107 Am. St. Rep. 805, 79 Pac. 788, 3 A. & E. Ann. Cas. 1, holding no action in tort lies in favor of child against father for rape.

Cited in footnotes to *McKelvey v. McKelvey*, 64 L.R.A. 991, which denies child's right of action against father and stepmother for cruel and inhuman treatment; *Roller v. Roller*, 68 L.R.A. 893, which denies minor child's right of action against father for damages for rape committed upon her.

Cited in note (21 L.R.A.(N.S.) 218) on liability of parent or custodian for punishment of child.

13 L. R. A. 684, *OLNEY v. GERMAN INS. CO.* 88 Mich. 94, 26 Am. St. Rep. 281, 50 N. W. 100.

Insurance; change of title.

Cited in notes (38 L.R.A. 563) on mortgage as effecting change of title or interest in insured property; (19 L. R. A. 218) on severability of insurance in same policy.

13 L. R. A. 686, *BANGOR v. SMITH*, 83 Me. 422, 22 Atl. 379.

Interstate commerce.

Cited in *Compagnie Francaise De Navigation A Vapeur v. State Board of Health*, 186 U. S. 400, 46 L. ed. 1219, 22 Sup. Ct. Rep. 811 (dissenting opinion), majority holding state statute empowering local board of health to exclude healthy persons from locality infected with contagious disease not in conflict with United States Constitution.

Cited in footnote to *Lafarier v. Grand Trunk R. Co.* 17 L. R. A. 111, which holds state statute giving ticket holder stopover rights not applicable outside of state.

13 L. R. A. 689, *HARALSON v. McARTHUR*, 87 Ga. 478, 13 S. E. 594.

Relief from judgment.

Cited in note (80 Am. St. Rep. 270) on negligence or inadvertence of attorney as ground for relief from judgment.

13 L. R. A. 690, *WILLIAMSON v. HILL*, 154 Mass. 117, 27 N. E. 1008.

13 L. R. A. 693, *WOLF v. O'CONNOR*, 88 Mich. 124, 50 N. W. 118.

Followed without discussion in *Seely v. O'Conner*, 88 Mich. 134, 50 N. W. 129.

Fraudulent conveyances; laches.

Cited in *Daniel v. Palmer*, 124 Mich. 338, 82 N. W. 1067, holding bill in equity in aid of execution, to set aside alleged fraudulent conveyance of real estate, must be filed within one year after levy.

Cited in note (58 Am. St. Rep. 88) on fraudulent assignments for creditors.

Execution on equitable interest of debtor.

Cited in *Flynn v. Holmes*, 145 Mich. 613, 11 L.R.A.(N.S.) 215, 108 N. W. 685, holding that deed absolute, to secure debt may be levied on under execution against grantor.

13 L. R. A. 698, *AYRES v. DUTTON*, 87 Mich. 528, 49 N. W. 897.

Contributions to secure location of specific enterprises.

Cited in footnotes to *Fort Wayne Electric Light Co. v. Miller*, 14 L. R. A. 804, which authorizes recovery back on removal of subscriptions made to secure location of factory; *Texas & P. R. Co. v. Scott*, 37 L. R. A. 94, which holds agreement to establish depot at particular point not required keeping it there forever.

Cited in note (19 L. R. A. 268) on condition in deed that land is to be used for specified charitable public or quasi-public purpose.

Distinguished in *Flint & P. M. R. Co. v. Rich*, 91 Mich. 297, 51 N. W. 1001, holding that railroad abandoning road must reimburse persons contributing to construction; *Williams v. Flint & P. M. R. Co.* 116 Mich. 396, 74 N. W. 641, holding contributor to railroad who does not present claim in proceeding by company for abandonment of road, precluded from thereafter presenting same.

13 L. R. A. 701, MILLER v. MEAD, 127 N. Y. 544, 28 N. E. 387.

Mechanics' liens; improvement with "consent of owner."

Cited in *National Wall Paper Co. v. Sire*, 163 N. Y. 130, 57 N. E. 293, Reversing 37 App. Div. 407, 55 N. Y. Supp. 1009, holding lien for repairs made by lessee attaches to realty, where lease provides lessee shall repair at own cost, and improvements belong to owner upon re-entry; *Jones v. Menke*, 168 N. Y. 64, 60 N. E. 1053, holding consent of owner to laying of tile floor shown by lease stipulating premises to be fitted up by lessee for liquor and restaurant business within time fixed; *Mosher v. Lewis*, 10 Misc. 376, 31 N. Y. Supp. 433, holding consent of owner to improvement by lessee shown by covenant of lessee to improve existing building or erect new one at own expense, although lienor had no knowledge of provisions of lease at time work done; *Steeves v. Sinclair*, 56 App. Div. 452, 67 N. Y. Supp. 776, holding lease stipulating for erection of building by lessee, which shall become property of lessor at expiration of term, shows consent of lessor to improvement; *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 211, 58 N. E. 347, holding building erected by lessee under lease providing for approval of plans by lessor, and that improvement shall become part of realty, entitles subcontractor to lien; *Vosseller v. Slater*, 25 App. Div. 371, 49 N. Y. Supp. 478, holding privilege given in executory contract of sale for removal of building by vendee, and knowledge of alterations therein, not sufficient proof of "consent" of vendor; *Malmgren v. Phinney*, 50 Minn. 464, 18 L. R. A. 755, 52 N. W. 915, holding lien for improvements by vendee under executory contract of sale not affected by provision that title and lien under mortgages for purchase money should not be affected by claims for labor and material; *Barnard v. Adorjan*, 116 App. Div. 537, 101 N. Y. Supp. 502, holding the interest of an owner in real property is chargeable with value of work performed or materials furnished in the erection or repair of any building thereon when the same is so performed or furnished with his consent, and a requirement in a contract between vendor and vendee or between landlord and tenant that the vendee or tenant shall make certain improvements on the premises is sufficient consent of owner to charge property with claims which accrue in making those improvements; *Tinsley v. Smith*, 115 App. Div. 710, 101 N. Y. Supp. 382, holding owner of building by giving a lease wherein lessee covenants to repair "consents" to repairs thereon by third person under contract with lessee, so as to charge building with mechanic's lien under statute.

Cited in footnote to *Beck v. Catholic University of America*, 60 L. R. A. 315, Reversing 62 App. Div. 602, 71 N. Y. Supp. 370, which holds vendor's consent to erection of buildings not shown by clause in land contract giving vendee "right of immediate possession" for erection of buildings.

Cited in note (11 L.R.A.(N.S.) 768) on requiring or permitting another to make improvements at his own expense as rendering land owner's interest subject to lien.

Distinguished in *Cowen v. Paddock*, 137 N. Y. 193, 33 N. E. 154, Affirming 43 N. Y. S. R. 344, 17 N. Y. Supp. 387, holding consent of vendor to improvement not shown where vendee took possession contrary to contract, and erected building against protest of vendor; *Regan v. Borst*, 11 Misc. 96, 32 N. Y. Supp. 810, holding lease of premises for hotel and saloon, for which alterations would be necessary, and provision that improvements shall become part of fee, not sufficient to show consent by implication where lease provides no alterations shall be made without written consent of lessor.

Sufficiency of performance as condition to lien.

Cited in *Hollister v. Mott*, 32 N. Y. S. R. 745, 10 N. Y. Supp. 409, holding

substantial performance sufficient to entitle contractor to claim lien; *New v. Carroll*, 73 Hun, 566, 26 N. Y. Supp. 320, holding subcontractor entitled to lien for work done according to plans of owner's architect, although principal contractor disabled from completing contract with owner.

Rights of subcontractors.

Cited in note (20 L. R. A. 565) on payment to contractors or subcontractors as affecting liens of subordinate claimants.

13 L. R. A. 707, *BURKETT v. GRIFFITH*, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. 527.

Slander of title.

Approved in *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. Ct. 234, holding to support action for slander of title it must be shown that the false statement was made in bad faith and that special damage resulted therefrom.

Cited in *Butts v. Long*, 94 Mo. App. 699, 68 S. W. 754 (dissenting opinion), majority holding petition alleging slanderous words uttered after completed contract of sale, but before deed issued, whereby plaintiff was compelled to sell for less sum, sufficient on demurrer; *Continental Realty Co. v. Little*, 135 Ky. 623, 117 S. W. 310, holding petition in an action for slander of title must set out the words constituting the slander and the special damage incurred thereby.

Cited in footnote to *Reyes v. Middleton*, 29 L. R. A. 66, which denies injunction against slander of title.

Cited in notes (16 L.R.A. 244) on injunction against false statements as to plaintiff's property or business; (9 Eng. Rul. Cas. 185) on malice as essential to slander of title.

Argumentative pleading.

Cited in *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 483, 49 Pac. 573, holding complaint sufficient to support action upon promissory note not bad because of recital at end of note that same is secured by mortgage; *Re Cook*, 137 Cal. 191, 69 Pac. 968, holding allegation that inventory and appraisement were made with reference to papers and records in clerk's office not sufficient averment of value in petition for sale of real estate of decedent; *Weinberger v. Weidman*, 134 Cal. 601, 66 Pac. 869, holding defendant's admission of allegation in complaint of amount due upon note, coupled with explanation that change in interest was agreed upon at date before note became barred, not sufficient to show renewal in writing before note barred; *Union Sewer Pipe Co. v. Olson*, 82 Minn. 190, 84 N. W. 756, holding on demurrer, sufficiency of contractor's bond, attached as exhibit to complaint thereon, may be determined from inspection of its provisions; *Cave v. Gill*, 59 S. C. 258, 37 S. E. 817, holding on demurrer to complaint for goods sold and delivered, insufficient allegations as to consideration may be cured by taking same in connection with exhibit of account attached to complaint; *Wells, F. & Co. v. McCarthy*, 5 Cal. App. 307, 90 Pac. 203, holding argumentative pleading is no more permissible under the Code than it was at common law.

Reference to exhibits to supply defect in pleadings.

Cited in *San Francisco Sulphur Co. v. Ætna Indemnity Co.* 11 Cal. App. 698, 106 Pac. 111, holding allegations in complaint control recitals in an undertaking attached to complaint as exhibit; *Barton v. Territory*, 10 Ariz. 109, 85 Pac. 730, holding that statement in exhibit filed with and made part of complaint cannot be taken as substantive allegation and supply omissions in complaint; *Ahlens v. Smiley*, 11 Cal. App. 345, 104 Pac. 997, holding whatever is an essential element to a cause of action must be presented by distinct averment,

and cannot be left to inference drawn from the construction of a document attached to complaint.

Distinguished in *Santa Rosa Bank v. Paxton*, 149 Cal. 199, 86 Pac. 193, holding power of attorney made part of complaint may be referred to to supply defective allegation in complaint.

Construction of pleadings under Code.

Cited in *Witham v. Blood*, 124 Iowa, 698, 100 N. W. 558, holding under code pleadings are to be construed liberally.

13 L. R. A. 711, *COHEN v. KNOX*, 90 Cal. 266, 27 Pac. 215.

Fraudulent conveyances.

Cited in *Vansickle v. Wells, F. & Co.* 105 Fed. 24, holding conveyance to wife in payment of indebtedness, when husband indebted to others, not presumptively fraudulent; *Welch v. Morris*, 193 Mo. 316, 92 S. W. 98; *Priest v. Brown*, 100 Cal. 634, 35 Pac. 323,—holding title of purchaser in good faith not affected by fact that conveyance was made with intention of defrauding creditors; *Emmons v. Barton*, 109 Cal. 671, 42 Pac. 303, holding conveyance made by husband or father to his wife or child is valid as against creditors although the consideration was love and affection alone, unless it was made with intent to defraud his creditors.

Defective complaint cured by answer.

Cited in *Flinn v. Ferry*, 127 Cal. 654, 60 Pac. 434, holding complaint in replevin alleging plaintiff in possession day before filing cured by answer denying plaintiff's right to possession, and alleging ownership and right of possession at all times in defendant; *Bell v. Murray*, 13 Colo. App. 224, 57 Pac. 488, holding complaint in action to restrain sale of property under execution, and to prevent cloud on title defective in showing record title not in judgment debtor, cured by answer showing such party equitable owner of premises; *Antonelle v. Kennedy & S. Lumber Co.* 140 Cal. 321, 73 Pac. 966, holding variance between plaintiff's pleading and proof immaterial, where defendant set out contract relied on in full; *Vance v. Anderson*, 113 Cal. 536, 45 Pac. 816, holding complaint in ejectment which fails to allege that plaintiff was entitled to possession is cured by denial in answer that plaintiff was entitled to possession; *Kreling v. Kreling*, 118 Cal. 420, 50 Pac. 646; *Abner Doble Co. v. Keystone Consol. Min. Co.* 145 Cal. 496, 78 Pac. 1050; *Mahoney v. American Land & Water Co.* 2 Cal. App. 189, 83 Pac. 267; *Donegan v. Houston*, 5 Cal. App. 632, 90 Pac. 1073; *Daggett v. Gray*, 110 Cal. 172, 42 Pac. 568,—holding complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon.

Distinguished in *Vanalstine v. Whelan*, 135 Cal. 234, 67 Pac. 125, holding complaint in replevin, omitting averment of ownership and right of possession at time action commenced, not cured by answer alleging that plaintiff was not owner or entitled to possession at commencement of action, "or at any other time;" *Hibernia Sav. & L. Soc. v. Thornton*, 123 Cal. 63, 55 Pac. 702, holding complaint for recovery merely of judgment for amount of note will not entitle plaintiff to foreclosure, upon answer alleging note one of several secured by mortgage.

13 L. R. A. 714, *PECK v. REES*, 7 Utah, 467, 27 Pac. 581.

Delivery of deeds.

Cited in footnotes to *King v. Smith*, 54 L. R. A. 708, which sustains delivery of gift to donee by third person after donor's final loss of consciousness; *Martin v. Flaharty*, 19 L. R. A. 243, which holds manual delivery of deed not essential;

Parrot v. Avery, 23 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery; *Daggett v. Simonds*, 46 L. R. A. 332, which sustains right of one to whom note delivered in escrow to be delivered on payee's death, to deliver same on happening of condition.

Cited in notes (54 L. R. A. 865, 882) on delivery of deed to third persons; or record, or delivery for record, by grantor; (53 Am. St. Rep. 554) on what is a delivery of a deed; (99 Am. St. Rep. 901, 908) on gifts *causa mortis*.

Distinguished in *Schlicher v. Keeler*, 61 N. J. Eq. 396, 48 Atl. 393, holding delivery to scrivener to hold for grantee until grantor's death, without reservation of control, sufficient.

13 L. R. A. 717, *BAEHR v. CLARK*, 83 Iowa, 313, 49 N. W. 840.

Estoppel to claim title to personal property.

Cited in *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 444, 48 Am. St. Rep. 400, 56 N. W. 663, holding owner not estopped from claiming personal property against innocent purchaser from owner's agent in possession, but without authority to sell; *Quinton v. Cutlip*, 1 Okla. 310, 32 Pac. 269, holding *de jure* municipal corporation not liable for goods sold *de facto* corporation, where delivery made after former came into being, and officers of latter converted property to own use.

Cited in footnote to *O'Connor v. Clark*, 29 L. R. A. 607, which holds one permitting another to have name and occupation painted on wagon estopped to assert title as against innocent purchaser.

Cited in notes (25 L.R.A.(N.S.) 778) on right of one leaving chattels in another's possession as against latter's vendees or creditors; (2 Eng. Rul. Cas. 436) on title of purchaser from one obtaining property from owner by fraud.

13 L. R. A. 719, *REYNOLDS v. HANES*, 83 Iowa, 342, 32 Am. St. Rep. 311, 49 N. W. 851.

Liberal construction of exemption laws.

Cited in *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 471, 27 L. R. A. 810, 48 Am. St. Rep. 885, 39 Pac. 962; *Chase v. Swayne*, 88 Tex. 222, 53 Am. St. Rep. 742, 30 S. W. 1049; *Wright v. Brooks*, 101 Tenn. 604, 49 S. W. 828,—holding proceeds of insurance policy upon exempt property not subject to garnishment for debts of assured; *Ellis v. Pratt City*, 111 Ala. 630, 33 L. R. A. 265, 56 Am. St. Rep. 76, 20 So. 649, holding proceeds of insurance on city hall exempt from garnishment; *Cleveland v. McCanna*, 7 N. D. 459, 41 L. R. A. 854, 66 Am. St. Rep. 670, 75 N. W. 908, and *Treat v. Wilson*, 65 Kan. 733, 70 Pac. 893, refusing to set off judgment against another judgment representing proceeds of exempt property; *Millington v. Laurer*, 89 Iowa, 325, 48 Am. St. Rep. 385, 56 N. W. 533, holding judgment creditor cannot set off judgment against claim of assignee of exempt personal earnings of judgment debtor; *Kinzer v. Stephens*, 121 Iowa, 349, 96 N. W. 858, holding proceeds of heir's voluntary sale of interest in homestead not exempt; *Caldwell v. Ryan*, 210 Mo. 38, 16 L.R.A.(N.S.) 504, 124 Am. St. Rep. 717, 108 S. W. 533, 14 A. & E. Ann. Cas. 314 (dissenting opinion), as to insurance on exempt property from execution being itself exempt.

Cited in footnote to *Equitable Life Assur. Soc. v. Goode*, 35 L. R. A. 690, which holds law library of attorney occupying part of time in legal business exempt.

Cited in notes (19 L. R. A. 34) on how far proceeds of exempt property retain exempt character; (66 Am. St. Rep. 385) on exemption of proceeds of exempt personalty; 45 Am. St. Rep. 238) on exemption of proceeds and produce of homestead.

13 L. R. A. 721, JAMESVILLE & W. R. CO. v. FISHER, 109 N. C. 1, 13 S. E. 698.

Eligibility to office.

Cited in *State v. Toland*, 36 S. C. 520, 15 S. E. 599, holding minor may act as special deputy of sheriff; *Prince v. Dickson*, 39 S. C. 482, 18 S. E. 33, holding appointment of special deputy sheriff to summons to renew judgment authorized; *Somers v. Burke County*, 123 N. C. 584, 68 Am. St. Rep. 834, 31 S. E. 873, upholding that agency of deputy sheriff terminates upon sheriff being adjudged insane.

Cited in footnotes to *State ex rel. Peters v. Davidson*, 20 L. R. A. 311, and *Opinion of Justices*, 32 L. R. A. 350, which hold woman ineligible to office of notary public.

Distinguished in *Atty. Gen. v. Abbott*, 121 Mich. 547, 47 L. R. A. 96, 80 N. W. 372, holding woman ineligible to hold office of prosecuting attorney.

13 L. R. A. 723, *McCLURE v. MELTON*, 34 S. C. 377, 13 S. E. 615.

Subrogation.

Cited in *Robinson v. Lowery*, 52 S. C. 467, 30 S. E. 487, holding purchaser not entitled to be subrogated to rights of mortgagee upon payment of mortgage of which he had notice.

Running of limitations.

Cited in notes (3 L.R.A.(N.S.) 1188) on effect of injunction against suing on running of limitations; (15 L.R.A.(N.S.) 158) as to whether limitations commence to run at time of breach of contract, or at time actual damages sustained.

13 L. R. A. 728, *ROUX v. BLODGETT & D. LUMBER CO.* 85 Mich. 519, 24 Am. St. Rep. 102, 48 N. W. 1092.

Assumption of risk by servant.

Cited in *Dempsey v. Sawyer*, 95 Me. 302, 49 Atl. 1035, holding employee using defective circular-saw machine, after complaint to master and promise to repair, works at master's risk; *McFarlan Carriage Co. v. Potter*, 153 Ind. 115, 53 N. E. 465, Affirming 21 Ind. App. 699, 51 N. E. 737, holding servant does not assume risk, where promise made to repair "soon as job completed," and injury occurs before time expires; *Rice v. Eureka Paper Co.* 174 N. Y. 392, 62 L. R. A. 614, 95 Am. St. Rep. 585, 66 N. E. 979, holding master liable for injuries to servant induced to remain at work by promise to fix defective machine within a few days; *Schlacker v. Ashland Iron Min. Co.* 89 Mich. 261, 50 N. W. 839, holding master responsible for injury from fall of roof of mine, where mining captain when warned of danger promised to attend to same, and ordered employees back to work; *Gardner v. Michigan C. R. Co.* 150 U. S. 360, 37 L. ed. 1110, 14 Sup. Ct. Rep. 140, holding employee's assumption of risk of negligence of fellow servants does not relieve railroad from liability for injury to brakeman from defect in planking between tracks; *Ashman v. Flint & P. M. R. Co.* 90 Mich. 571, 51 N. W. 645, holding failure of railroad to keep frogs in yards filled or blocked negligence; *Schroeder v. Flint & P. M. R. Co.* 103 Mich. 222, 29 L. R. A. 325, 50 Am. St. Rep. 354, 61 N. W. 663 (concurring opinion), majority holding master not liable for injury to servant from failure of foreman to give notice when train, which was being unloaded, was about to move; *Lynch v. Chicago, St. L. & P. R. Co.* 8 Ind. App. 520, 36 N. E. 44, holding servant rolling car wheel along track with knowledge of defective condition, and of danger therefrom, assumes risk; *Pittsburgh, C. C. & St. L. R. Co. v. Woodward*, 9 Ind. App. 171, 36 N. E. 442, holding employee not bound, with master, to inspect appliances to discover

latent defects; *Freeman v. Savannah Electric Co.* 130 Ga. 454, 60 S. E. 1042, holding promise of master to repair or replace a defective machine will not excuse employee from exercise of ordinary care in its use before defect is remedied; *Anderson v. Seropian*, 147 Cal. 209, 81 Pac. 521; *Brouseau v. Kellogg Switchboard & Supply Co.* 158 Mich. 317, 27 L.R.A.(N.S.) 1056, 122 N. W. 620; *Sapp v. Christie Bros.* 79 Neb. 709, 115 N. W. 319; *Morgan v. Rainer Beach Lumber Co.* 51 Wash. 342, 22 L.R.A.(N.S.) 477, 98 Pac. 1120; *Foster v. Chicago, R. I. & P. R. Co.* 127 Iowa, 89, 102 N. W. 422, 4 A. & E. Ann. Cas. 150,—holding when master has expressly promised to repair defect the servant can recover for an injury caused thereby within such a period of time as it would be reasonable to allow for its performance.

Cited in footnote to *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed as matter of law by servant operating mangle in laundry.

Cited in notes (40 L. R. A. 782) on rights of servant who continues work on faith of master's promise to remove specific cause of danger; (17 Eng. Rul. Cas. 239) on assumption of risks by employee; (119 Am. St. Rep. 435) on recovery for injury due to nonrepair of machinery due to master's failure to perform promise to repair.

Distinguished in *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 332, 22 L. R. A. 293, 37 Am. St. Rep. 348, 56 N. W. 756, Reversing on rehearing 97 Mich. 343, 16 L. R. A. 343, 52 N. W. 942, holding railroad not liable for injury to brakeman from neglect of car inspector to observe that car improperly loaded before putting into train.

Contributory negligence.

Cited in *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 608, 54 N. W. 492, and *Ashman v. Flint & P. M. R. Co.* 90 Mich. 573, 51 N. W. 645, holding, when facts respecting negligence are such that different minds may honestly draw different conclusions from them, question for jury; *Haines v. Lake Shore & M. S. R. Co.* 129 Mich. 484, 89 N. W. 349, holding, where evidence as to looking and listening at railroad crossing is conflicting, question of contributory negligence for jury; *Smith v. Spokane*, 16 Wash. 408, 47 Pac. 888, holding contributory negligence of plaintiff using sidewalk covered with snow and ice properly submitted to jury; *Becker v. Detroit Citizens' Street R. Co.* 121 Mich. 587, 80 N. W. 581, holding motorman, who has already made stop required by ordinance, attempting to cross another road with car, when approaching car 150 or 200 feet away, and required also to stop, not negligent; *Saner v. Lake Shore & M. S. R. Co.* 108 Mich. 33, 65 N. W. 624 (dissenting opinion), majority holding section hand injured while passing over moving flat cars, preparatory to getting off train, upon order of conductor, negligent; *Powers v. Thayer Lumber Co.* 92 Mich. 542, 52 N. W. 937 (dissenting opinion), majority holding negligence of brakeman, in so loading logging train as to interfere with tree which he knows stands too near track, proximate cause of injury; *Grostick v. Detroit, L. & N. R. Co.* 90 Mich. 607, 51 N. W. 667 (dissenting opinion), majority holding person looking in one direction only before driving across railroad guilty of contributory negligence.

Distinguished in *Hayball v. Detroit, G. H. & M. R. Co.* 114 Mich. 140, 72 N. W. 145, holding employee continuing to work with defective machinery after repeated complaints, and being told there was no time to fix it, negligent; *Soderstrom v. Holland-Emery Lumber Co.* 114 Mich. 86, 72 N. W. 13, holding employee piling lumber upon dock knowing it to be unsafe, and after orders from superior to refrain from working there, guilty of negligence.

13 L. R. A. 733, *HUNNEWELL v. DUXBURY*, 154 Mass. 286, 28 N. E. 267.

Right of action for deceit.

Cited in *Hunnewell v. Duxbury*, 157 Mass. 2, 31 N. E. 700, holding reference of creditor of corporation to certificate on file, containing false statement of assets, not ground for action of deceit; *Nash v. Minnesota Title, Ins. & T. Co.* 159 Mass. 442, 34 N. E. 625, holding, where letter addressed by title insurance company to trustee of corporation, intended for use in selling bonds, representations concerning value of security deemed made to all persons to whom letter shown; *Henry v. Dennis*, 95 Me. 29, 85 Am. St. Rep. 365, 49 Atl. 58, holding writer of letter containing false representations as to solvency, for purpose of inducing credit, liable in action for deceit to firm of which addressee of letter is member; *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 940, holding bank discounting note, on security of stock on another bank, which had published false statement of condition, without cause of action for deceit; *Dettra v. Kestner*, 147 Pa. 576, 23 Atl. 889, holding misrepresentations of officers of mutual insurance company to induce one to become member no defense to action for assessment where rights of innocent third parties have intervened; *Greene v. Mercantile Trust Co.* 60 Misc. 195, 111 N. Y. Supp. 802, holding to sustain an action for deceit, misrepresentations must have been made to plaintiff individually or as one of a class to whom they are in fact addressed or have been intended to influence his conduct in the particulars of which he complains; *McKee v. Rudd*, 222 Mo. 364, 133 Am. St. Rep. 529, 121 S. W. 312; *Webb v. Rockefeller*, 195 Mo. 70, 6 L.R.A.(N.S.) 878, 93 S. W. 772,—holding filing of false certificate does not render incorporators liable to creditors in action for deceit; *Cheney v. Dickinson*, 28 L.R.A.(N.S.) 359, 96 C. C. A. 314, 172 Fed. 112, holding officers of corporation who issued fraudulent prospectus to sell treasury stock are not liable in damages for the fraud to one who, in reliance upon it, purchased from an individual stock in which corporation had no interest; *McKee v. Rudd*, 222 Mo. 372, 133 Am. St. Rep. 529, 121 S. W. 312, holding that judgment creditor of corporation, whose charter falsely recites that stock is paid up cannot on that ground recover against officers who have not paid their stock in money; *Puffer v. Welch*, 144 Wis. 514, 129 N. W. 525, Ann. Cas. 1912 A, 1120, to the point that person has no right to rely on statements in certificate made by foreign corporation which certificate is required to be filed before doing business in state.

Cited in notes (6 L.R.A.(N.S.) 876) on false statements in required reports to public officers as basis of common law action by individuals for deceit against officers or directors; (85 Am. St. Rep. 390) on liability for misrepresentations indirectly made to complaining party.

Distinguished in *Hindman v. First Nat. Bank*, 57 L. R. A. 117, 50 C. C. A. 634, 112 Fed. 942, Reversing 86 Fed. 1018, holding misrepresentations of bank inducing issue of license to insurance company, ground for action for deceit by one induced to purchase stock, if representation intended also for information of those dealing in shares; *Warfield v. Clark*, 118 Iowa, 72, 91 N. W. 833, holding officer making fraudulent statement of financial condition of insurance company, required by law, liable to purchaser of stock in reliance thereon.

Negligence; proximate cause.

Cited in footnotes to *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall, horse attempting to rise; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582,

as to proximate cause of injury to shipper while stepping from stock car to caboose; *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire cause of destruction of property by back fire.

Statutes requiring foreign corporations to file certificate.

Cited in *Steel v. Webster*, 188 Mass. 480, 74 N. E. 686; *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 196 Mass. 461, 14 L.R.A.(N.S.) 564, 82 N. E. 671, 13 A. & E. Ann. Cas. 510,—as to object of statutes requiring foreign corporations to file certificate stating amount of its capital stock, etc.

13 L. R. A. 737, *McCASKILL v. CONNECTICUT SAV. BANK*, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568.

Instruments not negotiable.

Cited in *Olson v. Peterson*, 50 Ill. App. 329, holding certificate of superintendent of building as to amount due contractor not negotiable; *Mills v. Albany Exch. Sav. Bank*, 28 Misc. 253, 59 N. Y. Supp. 149, holding pass book of savings bank not negotiable instrument within statute providing for actions on lost negotiable instruments.

Cited in note (105 Am. St. Rep. 744, 745) on duties of savings banks toward depositors.

Estoppel.

Cited in *Marden v. Dorthy*, 160 N. Y. 60, 46 L. R. A. 701, 54 N. E. 726, holding grantor not estopped by deed, when signature obtained by trick or artifice.

13 L. R. A. 740, *HORNTHALL v. BURWELL*, 109 N. C. 10, 26 Am. St. Rep. 556, 13 S. E. 721.

Contract; law of domicile.

Cited in *Armstrong v. Best*, 112 N. C. 61, 25 L. R. A. 189, 34 Am. St. Rep. 473, 17 S. E. 14, holding married woman not liable for goods purchased in another state, where contract enforceable, unless free trader, or consent of husband obtained; *Adams v. Fellers*, 88 S. C. 216, 35 L.R.A.(N.S.) 389, 70 S. E. 722, holding that one renting machine to another for use in certain state, does not where he reclaims property as soon as he learns facts, lose title in favor of purchaser in another state to which lessee removes property without authority.

Statutes of domicile.

Cited in *Holshouser v. Gold Hill Copper Co.* 138 N. C. 257, 70 L.R.A. 187, 50 S. E. 650, holding law of comity does not require courts of one state, which are administering the assets of an insolvent foreign corporation, to give effect to a statute of its domicile imposing a license tax upon it, and making the tax a preferred debt in case of insolvency.

Chattel mortgages; removal of property to another state.

Cited in *Shapard v. Hynes* 52 L. R. A. 678, footnote, p. 675, 45 C. C. A. 275, 104 Fed. 453; *Craig v. Williams*, 90 Va. 506, 44 Am. St. Rep. 934, 18 S. E. 899; *Blythe v. Crump Bros.* 28 Tex. Civ. App. 329, 66 S. W. 885,—holding lien of mortgage duly recorded in state where executed not affected by removal of property to another state, though not recorded there; *Woody v. Jones*, 113 N. C. 255, 18 S. E. 205, and *Wilson v. Rustad*, 7 N. D. 332, 66 Am. St. Rep. 649, 75 N. W. 260, holding bona fide purchaser of personal property chargeable with notice of mortgage duly recorded in another state, in which mortgagor and mortgagee domiciled; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla.

368, 60 Pac. 249, upholding lien of chattel mortgage, duly executed and recorded, as against attachment in another state, to which property had been removed by mortgagor; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 494, 64 L. R. A. 508, 94 Am. St. Rep. 948, 44 S. E. 294, holding garnishment of railroad cars in possession of company using them does not affect its rights under contract with company owning them; *Re Franklin*, 151 Fed. 644, holding registration of chattel mortgage notice even when property is carried into another state; *American Trust Co. v. W. & A. Fletcher Co.* 97 C. C. A. 477, 173 Fed. 478; *Hammels v. Sentous*, 151 Cal. 524, 91 Pac. 327, 12 A. & E. Ann. Cas. 945; *Studebaker Bros. Co. v. Mau*, 13 Wyo. 370, 110 Am. St. Rep. 1001, 80 Pac. 151,—holding when personal property which at the time is situated in a given state, is there mortgaged by owner and mortgage is duly executed and recorded by mode required by local law, so as to create a valid lien the lien remains good and effectual, although property is removed to another state, although mortgage is not recorded in state to which removal is made.

Cited in notes (64 L. R. A. 357, 366) on conflict of laws as to chattel mortgages; (109 Am. St. Rep. 454) on mortgagees' right of action against third persons for invasion of their rights; (56 Am. St. Rep. 862) on law of lis pendens; (69 Am. St. Rep. 113) on situs of debts for purposes of garnishment and of property in transit in hands of carriers.

Validity of judgments.

Cited in *Long v. Home Ins. Co.* 114 N. C. 468, 19 S. E. 347, holding personal service of summons in another state insufficient to give jurisdiction for personal judgment against defendant; *Williams v. Whitaker*, 110 N. C. 395, 14 S. E. 924, holding only persons having actual or constructive notice of proceedings for allotment of homestead, bound thereby.

Cited in footnote to *Allred v. Smith*, 65 L.R.A. 924, which holds judgment in action quasi in rem binding on the parties only.

13 L. R. A. 743, *STULTS v. SALE*, 92 Ky. 5, 36 Am. St. Rep. 575, 17 S. W. 143.
Homestead; effect of loss of family.

Cited in *Towne v. Rumsey*, 5 Wyo. 17, 35 Pac. 1025, and *Gowdy v. Johnson*, 104 Ky. 652, 44 L. R. A. 403, 47 S. W. 624, holding homestead right once acquired, not lost by loss of family; *Davis v. H. Feltman Co.* 112 Ky. 299, 9 Am. St. Rep. 289, 65 S. W. 615, holding loss of family by death and marriage does not divest homestead right; *Weaver v. First Nat. Bank*, 76 Kan. 547, 16 L.R.A.(N.S.) 117, 123 Am. St. Rep. 155, 94 Pac. 273; *Deweese v. Deweese*, 121 Ky. 749, 90 S. W. 256; *Palmer v. Sawyer*, 74 Neb. 114, 103 N. W. 1088, 12 A. & E. Ann. Cas. 715,—holding same; *Eastern Kentucky Asylum v. Cottle*, 143 Ky. 720, 137 S. W. 235, holding that lunatic who at time of commitment has homestead does not lose right thereto by reason of his confinement and death of family.

Cited in footnotes to *Purnell v. Reed*, 21 L. R. A. 839, which authorizes childless holder of homestead to dispose of it by will; *Lyons v. Andry*, 55 L. R. A. 724, which holds eighteen-year-old daughter working for father, dependent person within homestead law.

Cited in notes (4 L.R.A.(N.S.) 370) on what constitutes a "family" under homestead and exemption laws; (16 L.R.A.(N.S.) 113) on continuance of family as condition of continuance of homestead where a condition of inception.

Distinguished in Fullerton v. Sherrill, 114 Iowa, 515, 87 N. W. 419, holding widow acquiring homestead after death of husband loses right upon marriage of children, though continuing to occupy premises.

13 L. R. A. 745, *BRYANT v. THOMPSON*, 128 N. Y. 426, 28 N. E. 522.

Appeal; right of review.

Cited in *Merrick v. Kennedy*, 46 Neb. 269, 64 N. W. 989, holding executor without right of appeal from final order of distribution, unless pecuniarily affected by order; *Re Hodgman*, 140 N. Y. 430, 35 N. E. 660, Affirming 69 Hun, 487, 23 N. Y. Supp. 725, holding one of several executors cannot appeal from decree settling accounts, as champion of legatees who have submitted to decree; *Re Coe*, 55 App. Div. 271, 66 N. Y. Supp. 784, holding executor has no right of appeal from decree determining validity of bequest, which, if void, would go to residuary legatees, whom he does not represent; *Re Richmond*, 63 App. Div. 492, 71 N. Y. Supp. 795, holding administrator with will annexed, instituting proceedings for accounting by estate of deceased executor, to which all persons interested made parties, cannot appeal from decree; *Isham v. New York Asso.* 177 N. Y. 222, 69 N. E. 367, denying executor's right to appeal from determination as to what fund transfer tax payable from; *Re Stapleton*, 71 App. Div. 2, 75 N. Y. Supp. 657, holding executor named in will entitled to appeal from refusal of surrogate to admit codicil to will to probate; *Re Woodworth*, 64 Hun, 525, 19 N. Y. Supp. 525, and *Re Manning*, 139 N. Y. 448, 34 N. E. 931, holding appeal will not be entertained when, from lapse of time, no decision would have any practical effect upon controversy or parties; *St. John v. Andrews Institute*, 192 N. Y. 384, 85 N. E. 143, holding executor could not appeal from judgment in action brought by him to construe will; *Stern v. Marcuse*, 128 App. Div. 170, 112 N. Y. Supp. 653; *Betts v. State*, 67 Neb. 206, 93 N. W. 167, 2 A. & E. Ann. Cas. 625,—holding court will refuse to entertain appeals when it is plain nothing can be accomplished by the decision; *People v. Brooklyn Bank*, 140 App. Div. 756, 126 N. Y. Supp. 155 (dissenting opinion) as to when party is "aggrieved" so as to give right to appeal.

Distinguished in *Bliss v. Fosdick*, 76 Hun, 510, 27 N. Y. Supp. 1053, holding executors have right of appeal from adverse decree in action to compel trustee to transfer to them certain certificates of stock belonging to testator; *McLouth v. Hunt*, 154 N. Y. 188, 39 L. R. A. 234, 48 N. E. 548, holding contingency contemplated by will, upon which remainders to immediate beneficiaries of trust may be defeated, sufficient to warrant determination of appeal from decree construing will; *State ex rel. Durner v. Huegin*, 110 Wis. 226, 62 L. R. A. 732, 85 N. W. 1046, holding sheriff entitled to appeal from adjudication in habeas corpus proceeding requiring him to give prisoner liberty.

Wills; effect of proceedings adverse to rights of infants.

Cited in *Re Vandevort*, 62 Hun, 617, 17 N. Y. Supp. 316, holding, where no condition precedent imposed upon legacies to infant grandchildren, same cannot be defeated by action of parent of legatees making claim, which will provides shall have effect to cut off children.

Cited in note (21 L.R.A.(N.S.) 954) on what amounts to contest within forfeiture clause in will.

13 L. R. A. 748, *Re WRIGHT*, 3 Wyo. 478, 31 Am. St. Rep. 94, 27 Pac. 565.

Ex post facto laws.

Cited in *State ex rel. Sherburne v. Baker*, 50 La. Ann. 1249, 69 Am. St. Rep. 472, 24 So. 240, holding constitutional provision for trial of certain offenses without jury, *ex post facto* law as to offense committed before adoption of Constitution; *People ex rel. Chandler v. McDonald*, 5 Wyo. 534, 29 L. R. A. 837, 42 Pac. 15, holding statute taking away right of accused to object to examining magistrate upon information and belief not *ex post facto* law as to felony com-

mitted before enactment; *State v. Kyle*, 16^c Mo. 306, 56 L. R. A. 121, footnote p. 115, 65 S. W. 763, which sustains statute authorizing prosecution by information of crimes already committed; *State v. Rooley*, 12 N. D. 151, 95 N. W. 513, holding statute substituting the penitentiary for county jail as place of confinement pending execution not an *ex post facto* law; *Hallock v. United States*, 107 C. C. A. 487, 185 Fed. 421, holding that statute changing number of grand jurors is not *ex post facto* law as to crimes already committed.

Cited in footnotes to *People v. Hayes*, 23 L. R. A. 830, which holds change in statute, authorizing slighter punishment, not *ex post facto* law; *French v. Deane*, 24 L. R. A. 388, which holds void act giving right to punitive damages as to existing cause of action.

Cited in notes (38 L.R.A.(N.S.) 602) on constitutional or statutory provisions for prosecution of felony upon information without indictment as an *ex post facto* law; (37 Am. St. Rep. 595, 596) on *ex post facto* laws.

Distinguished in *Garnsey v. State*, 4 Okla. Crim. Rep. 555, 38 L.R.A.(N.S.) 606, 112 Pac. 24, holding indictment necessary requisite to give court jurisdiction of crime committed in Oklahoma before its admission as a state.

Due process of law.

Cited in *Re Boulter*, 5 Wyo. 333, 40 Pac. 520, and *State v. Krohne*, 4 Wyo. 359, 34 Pac. 3, holding statute permitting filing of information by county attorney, without preliminary examination of defendant, not unconstitutional; *State v. Tucker*, 36 Or. 296, 51 L. R. A. 249, 61 Pac. 894, holding statute providing for accusation of crime upon information filed by district attorney not violation of 14th Amendment to Federal Constitution.

Cited in footnote to *State v. Guglielmo*, 69 L.R.A. 466, which holds indictment by grand jury unnecessary to due process of law.

Judgments; collateral attack.

Cited in note (39 L. R. A. 452) on decision against constitutional right as nullity subject to collateral attack.

Habeas corpus, what reviewable by.

Cited in *Griffin v. Eaves*, 114 Ga. 66, 39 S. E. 913, holding one indicted, convicted, and sentenced under repealed statute may be discharged by habeas corpus, where question not adjudicated upon trial; *Ex parte Hollman*, 79 S. C. 28, 21 L.R.A.(N.S.) 251, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105 (dissenting opinion), as to void judgment being reviewable by habeas corpus.

Cited in note (87 Am. St. Rep. 175) on release of prisoner on habeas corpus after judgment and sentence.

13 L. R. A. 752, *Re CUMMINS*, 16 Colo. 451, 25 Am. St. Rep. 291, 27 Pac. 887.

Offenses against person particeps criminis.

Cited in *Gilmore v. People*, 87 Ill. App. 141, holding criminal prosecution will lie for obtaining money by false pretenses from one engaged with accused in criminal transaction; *People v. Martin*, 102 Cal. 563, 36 Pac. 952, holding purpose of grantor in conveyance to place property beyond reach of judgment creditor not defense to indictment of grantee procuring such conveyance for obtaining property under false pretenses; *Lovell v. State*, 48 Tex. Crim. Rep. 88, 86 S. W. 758, 13 A. & E. Ann. Cas. 561, holding criminal prosecution wise for obtaining money by false pretenses from one engaged with accused in a criminal transaction.

Cited in note (17 L.R.A.(N.S.) 277) on illegal intent of prosecutor as affecting guilt of one obtaining property by false pretense.

13 L. R. A. 754, *PACIFIC R. CO. v. WADE*, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768.

Independent suit against receiver.

Cited in *De Forrest v. Coffey*, 154 Cal. 452, 98 Pac. 27, holding whether the court will permit, upon application, an independent suit to be brought relative to the property in the hands of a receiver, or will compel intervention in the proceedings in which the receiver is appointed, is a matter for its discretion.

Cited in notes (31 L.R.A.(N.S.) 712) on jurisdiction of equity to try claims against its receiver involving purely legal questions; (71 Am. St. Rep. 354, 358, 361) on relation of receivers to pre-existing liens and remedies for their enforcements.

Joint use of railway track.

Cited in note (25 Am. St. Rep. 478) on rights, duties and obligations of street railway companies.

Jury trial.

Cited in *Raymond v. Flavel*, 27 Or. 231, 40 Pac. 158, holding statute which provides that "whenever (in an equity suit) it becomes necessary or proper to inquire of any fact by verdict of a jury, the court may direct a statement thereof, and a jury may be formed to inquire of same," is merely declaratory of common-law equitable procedure, and in such a suit the submission of a question of fact to a jury is within sound discretion of the court, an abuse of which is reversible on appeal.

13 L. R. A. 757, *EMERICK v. EMERICK*, 83 Iowa, 411, 49 N. W. 1017.

What constitutes mental incapacity.

Cited in *Harrison v. Otley*, 101 Iowa, 659, 70 N. W. 724, refusing to set aside conveyances of real and personal property, heavily encumbered, where evidence conflicting as to extent mind of grantor impaired; *Garretson v. Hubbard*, 110 Iowa, 9, 81 N. W. 174, refusing to set aside decree quieting title to land against person showing signs of mental unsoundness; *Guthrie v. Guthrie*, 84 Iowa, 376, 51 N. W. 13, holding petition, in proceeding to determine sanity, alleging unsoundness of mind to extent of being incapacitated for conducting his business safely, sufficient; *Schick v. Stuhr*, 120 Iowa, 399, 94 N. W. 915, refusing to appoint guardian for man of seventy-five, ordinarily prudent in business, because of high temper and immoral habits; *Arment v. Arment*, 134 Ia. 206, 111 N. W. 812, holding deed of farm by woman of 73 years to her son in consideration of his supporting her during her life and sale of stock thereon at less than actual value did not warrant appointment of guardian on ground of her being of unsound mind; *McDermott v. Rahely*, 146 Iowa, 461, 125 N. W. 219, as to what constitutes mental incapacity of person authorizing appointment of guardian to manage his affairs; *Simmons v. Kelsey*, 76 Neb. 128, 107 N. W. 122, holding where plaintiff reasonably understands the nature and purpose of her suit, the effect of her acts with reference thereto and has the will to decide for herself whether it shall be brought and prosecuted, she has sufficient mental capacity to maintain it. Annotation also cited to this point.

13 L. R. A. 760, *SHIELDS v. JACOB*, 88 Mich. 164, 50 N. W. 105.

Elections; restrictions upon manner of voting.

Cited in *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 547, 25 L. R. A. 329, 58 N. W. 483, holding statute imposing restrictions upon manner of voting valid, although resulting in inconvenience to voter.

Cited in footnote to State *ex rel.* Mize v. McElroy, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

Validity of nominations.

Cited in Stephenson v. Election Comrs. 118 Mich. 401, 42 L. R. A. 216, 74 Am. St. Rep. 402, 76 N. W. 914, holding, when candidate nominated by each of two rival factions in political convention, entitled to place on ticket; State *ex rel.* Dahlman v. Piper, 50 Neb. 36, 69 N. W. 378; Sears v. Kincaid, 33 Or. 220, 53 Pac. 303; State *ex rel.* Blydenburg v. Burdick, 6 Wyo. 465, 34 L. R. A. 850, 46 Pac. 854; State *ex rel.* Wolfe v. Falley, 9 N. D. 455, 83 N. W. 860; Sims v. Daniels, 57 Kan. 563, 35 L. R. A. 150, 46 Pac. 952,—holding that county officers charged with duty of determining objections to certificates of nomination, have no authority to decide which of two rival factions is representative of party; Phelps v. Piper, 48 Neb. 732, 33 L. R. A. 55, 67 N. W. 755; People *ex rel.* Eaton v. District Court, 18 Colo. 36, 31 Pac. 339; People *ex rel.* Hodges v. McGaffey, 23 Colo. 158, 46 Pac. 930,—holding secretary of state having two sets of nominations certified to him by rival factions of same convention should certify both tickets to county clerks for places on official ballot; Baker v. Election Comrs. 110 Mich. 639, 68 N. W. 752, holding fusion ticket nominated by three party organizations not entitled to place of democratic party on ballot on basis of number of votes cast by such party at last election; State *ex rel.* Howells v. Metcalf, 18 S. D. 412, 67 L.R.A. 338, 100 N. W. 923, as to reluctance of courts to enter into inquiry on questions of fact as to which of two contending factions truly represents a political party; State *ex rel.* Cook v. Houser, 122 Wis. 585, 100 N. W. 964, holding courts in solving the right of political party disputes as regards the execution of election laws should be guided by the decision of the highest authority within the party; Allen v. Burrow, 69 Kan. 818, 77 Pac. 555, 2 A. & E. Ann. Cas. 539, holding in absence of fraud a dispute as to which of two persons is the regular nominee of a political party can ordinarily be settled by the special tribunal to which statute commits the determination of such questions.

Cited in footnotes to Stephenson v. Election Comrs. 42 L. R. A. 214, which denies right of chairman of political committee calling convention to determine qualifications of contesting delegates against will of convention; State *ex rel.* Phelan v. Walsh, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; State *ex rel.* Howells v. Metcalf, 67 L.R.A. 331, which holds that faction of county convention assembling at place designated by chairman and majority of county committee organizing and proceeding to nominate candidates the regular representative of the party.

Distinguished in State *ex rel.* Sturdevant v. Allen, 43 Neb. 661, 62 N. W. 35, holding secretary of state may ascertain from record, or from extrinsic evidence, whether candidates of rival factions were in fact placed in nomination by convention claiming to represent party.

13 L. R. A. 761, RUTLEDGE v. CRAWFORD, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779.

Elections; statutory requirements as to ballots.

Cited in Slaymaker v. Phillips, 5 Wyo. 490, 47 L. R. A. 855, 42 Pac. 1049, holding ballot without official stamp or judge's name or initials subject to rejection; Coffey v. Lyman, 92 Cal. 136, 28 Pac. 91, holding ballot valid although word "for" was omitted from top line of ballot contrary to statutory requirement, as the omission was not for purpose of distinguishing ballots.

Cited in footnotes to Parvin v. Wimberg, 15 L. R. A. 775, which holds ballot

counted, although poll clerk's initials indorsed in wrong place; *People ex rel. Nichols v. Onondaga County*, 14 L. R. A. 624, which denies right to count ballots containing wrong indorsement as to polling place; *Shields v. Jacob*, 13 L. R. A. 760, which holds name of political party in vignette at head of ticket sufficient without repetition; *Lindstrom v. Manistee County*, 19 L. R. A. 171, which refuses to exclude ballot with unauthorized vignette; *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *People ex rel. Bradley v. Shaw*, 16 L. R. A. 606, which requires counting of paster ballots for town officers though they also contain other names which cannot be legally voted for; *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (16 L. R. A. 755) on constitutionality of "Australian ballot" statutes.

Distinguishing marks on ballots.

Cited in *Houston v. Steele*, 98 Ky. 611, 34 S. W. 6, holding markings on ballot consisting of three crosses, or single cross having two down strokes, not distinguishing marks invalidating ballot; *Maddux v. Walthall*, 141 Cal. 415, 74 Pac. 1026, holding ballots marked after the words "no nomination" are illegal and void as having a distinguishing mark; *Doll v. Bender*, 55 W. Va. 410, 47 S. E. 293, holding distinguishing marks on a ballot will not cause its exclusion from the count; *Eufaula v. Gibson*, 22 Okla. 512, 98 Pac. 565, holding that "distinguished ballot" which cannot be counted is one which bears identification mark.

Cited in footnotes to *Sego v. Stoddard*, 22 L. R. A. 468, and *Tebbe v. Smith*, 29 L. R. A. 673, as to what constitutes a distinguishing mark on ballot; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots in municipal election with device upon them; *Jennings v. Brown*, 34 L. R. A. 45, which holds legality of ballot not destroyed by addition of party name after candidate's name.

Cited in note (49 Am. St. Rep. 249) on distinguishing marks invalidating ballot.

Marking of ballots.

Cited in *Church v. Walker*, 10 S. D. 96, 72 N. W. 101, holding ballots unintentionally blotted, valid; *Easterbrooks v. Atwood*, 83 Vt. 357, 76 Atl. 109, Ann. Cas. 1912 A, 295, holding that ballots cast cannot be shown to have been intended for particular office, in direct contradiction of plain terms of ballots cast.

Annotation cited in *State ex rel. Orr v. Fawcett*, 17 Wash. 207, 49 Pac. 346, holding the use of two or three crosses instead of one will not invalidate the ballot without evidence of intent to distinguish it.

Cited in footnotes to *State ex rel. Waggoner v. Russell*, 15 L. R. A. 740, which holds provision for marking ballots with ink directory only; *Parker v. Orr*, 30 L. R. A. 227, which holds provision as to marking ballot with cross not mandatory.

Pleading in election contest.

Cited in *Sawin v. Pease*, 6 Wyo. 103, 42 Pac. 750, holding defective petition in contested election case charging fraud may be remedied by amendment; *Bass v. Leavitt*, 11 Cal. App. 585, 105 Pac. 771, holding contestant cannot recover unless

he alleges his constitutional qualifications for eligibility and contestee cannot recover who answers by mere denials; *Gillespie v. Dion*, 18 Mont. 194, 33 L.R.A. 707, 44 Pac. 954, holding an election contest authorized by statute being a special proceeding, the jurisdictional facts must appear on the face of the proceedings and where statute permits a contest to be instituted by an elector the omission of the contestant to aver on the face of the record that he is an elector, is fatal.

Interpretation of statutes.

Cited in *Nevada Nat. Bank v. Dodge*, 56 C. C. A. 145, 119 Fed. 59; *Re Johnson*, 98 Cal. 536, 21 L.R.A. 381, 33 Pac. 460; *Sires v. Melvin*, 135 Iowa, 472, 113 N. W. 106; *Opinion of Justices*, 66 N. H. 657, 33 Atl. 1076; *Lynip v. Buckner*, 22 Nev. 440, 30 L.R.A. 357, 41 Pac. 762,—holding the general scope, object, and purpose of the law should be kept in view rather than its mere letter; *Hicks v. Krigbaum*, 13 Ariz. 241, 108 Pac. 482, to the point that spirit of law and intention of makers must be diligently sought after and letter of statute must bend to these.

Cited in notes (14 Eng. Rul. Cas. 831) on rules for interpretation of statute; (30 Am. St. Rep. 265) on construction of statutes.

13 L. R. A. 765, *ROBINSON v. OREGON SHORT LINE & U. N. R. CO.* 7 Utah, 493, 27 Pac. 689.

Negligence; acts inviting trespass of children.

Cited in *Ryan v. Towar*, 128 Mich. 477, 55 L. R. A. 315, 92 Am. St. Rep. 481, 87 N. W. 644, holding manufacturer not liable for injury to child trespassing in pump house containing water-wheel; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 413, 54 L. R. A. 321, 39 S. E. 82, holding railroad maintaining ditch 7 feet deep on grounds 28 feet from place children accustomed to gather not bound to guard same to avoid injury to trespassing children; *Kaumeier v. City Electric R. Co.* 116 Mich. 313, 40 L. R. A. 387, 72 Am. St. Rep. 525, 74 N. W. 481, holding street railway company leaving flat car 14 feet long on side track, without being guarded or brakes set to prevent children moving it, not negligent; *Atchison, T. & S. F. R. Co. v. Slattery*, 57 Kan. 502, 46 Pac. 941, holding railroad not negligent in leaving push car in yard safe distance from track, and blocked in usual way, from which position boys pushed it near track, causing accident.

Cited in footnotes to *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street, after loosening brake; *Parker v. Pennsylvania Co.* 23 L. R. A. 552, which holds wilfulness not shown by mere failure to provide for protection of possible trespasser in archway over railroad tracks; *Kopplekon v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Cited in notes (19 L.R.A.(N.S.) 1138) on attractive nuisance; (26 L.R.A.(N.S.) 721) on proximate cause of injury from car or engine set in motion by third person.

13 L. R. A. 767, *FAIRFIELD COUNTY BAR ex rel. FESSENDEN v. TAYLOR*, 60 Conn. 11, 22 Atl. 441.

Disbarment of attorneys.

Cited in *Re Westcott*, 66 Conn. 587, 34 Atl. 505, holding superior court has

jurisdiction to try charges for disbarment of attorney; State *ex rel.* Walker v. Mullins, 129 Mo. 237, 31 S. W. 744, holding disbarment proceedings for professional misconduct may be instituted on relation of attorney general; Re Durant, 80 Conn. 148, 67 Atl. 497, 10 A. & E. Ann. Cas. 539, holding an attorney who is charged with misconduct which unfits him to continue in the practice of his profession is entitled to a fair and dispassionate hearing and to a reasonable exercise of judicial discretion; State *ex rel.* Dill v. Martin, 45 Wash. 84, 87 Pac. 1054, holding proceedings for the disbarment of an attorney at law may be instituted on the information or relation of the bar association composed of attorneys who are members of the bar of the county; Re O'Sullivan, 122 App. Div. 534, 107 N. Y. Supp. 462 (dissenting opinion), as to admissibility of judgment for conversion against attorney in disbarment proceedings.

Cited in footnotes to People *ex rel.* Atty. Gen. v. MacCabe, 19 L. R. A. 231, which holds anonymous advertisement as to obtaining divorce ground for disbarment; Re Kirby, 39 L. R. A. 856, which authorizes disbarment for receiving stolen government property with intent to convert to own use; Re Lentz, 50 L. R. A. 415, which denies right to disbar attorney for single wrongful appropriation without actual intent to defraud, for which full restitution has been made; Re Evans, 53 L. R. A. 952, which authorizes disbarment of attorney for champerty; Re Thompson, 40 L. R. A. 194, which holds disbarment not precluded by attorney's resignation pending disbarment proceedings; People *ex rel.* Deneen v. Gilmore, 69 L.R.A. 701, which holds that license to practice law secured by fraudulent concealment of a conviction of embezzling funds from client in another state will be revoked.

Cited in notes (45 Am. St. Rep. 81) on grounds for disbarment of attorneys; (19 L.R.A.(N.S.) 416) on disbarment or suspension of attorney for withholding client's money or property.

Necessity of the confidence of community in attorney.

Cited in Re Applicants for License, 143 N. C. 27, 10 L.R.A.(N.S.) 301, 55 S. E. 635, 10 A. & E. Ann. Cas. 187; Re Ebbs, 150 N. C. 60, 19 L.R.A.(N.S.) 900, 63 S. E. 190, 17 A. & E. Ann. Cas. 592 (dissenting opinion); O'Brien's Petition, 79 Conn. 53, 63 Atl. 777,—as to necessity of attorney possessing confidence of community.

Officers; removal from office.

Cited in State *ex rel.* Reiley v. Chatfield, 71 Conn. 112, 40 Atl. 922, holding power of removal from office implied, at will of appointing power, where power of appointment conferred in general terms without restriction.

13 L. R. A. 770, LOVEJOY v. MICHELS, 88 Mich. 15, 49 N. W. 901.

Unlawful trade combinations.

Cited in Jackson v. Stanfield, 137 Ind. 611, 23 L. R. A. 595, 36 N. E. 345, holding combination of retail lumber merchants to suppress competition of dealers not owning yards unlawful; Cleland v. Anderson, 66 Neb. 264, 5 L.R.A.(N.S.) 143, 92 N. W. 306, holding an association of retail dealers in lumber organized, as stated by its constitution, to prevent its members from being subjected to competition by wholesalers, which requires a certain amount of stock continually carried, to entitle a dealer to membership, and levies and collects from wholesale dealers a penalty in case they sell to consumers direct, or to retail dealers not eligible to membership in the association, unlawful.

Cited in footnotes to Texas Standard Cotton Oil Co. v. Adoue, 15 L. R. A. 598, which holds combination to fix prices of cotton seed and seed cotton void; State v. Phipps, 18 L. R. A. 658, which holds combination by foreign companies to

increase rates of insurance unlawful; *Ford v. Chicago Milk Shipper's Asso.* 27 L. R. A. 298, which holds that corporation and its members may constitute unlawful combination to fix price of merchandise; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent and maintain agreed prices; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *Nester v. Continental Brewing Co.* 24 L. R. A. 247, which holds combination of brewers to stifle competition within specified place void; *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; *National Harrow Co. v. Hench*, 39 L. R. A. 299, which holds agreement by owner of patent with corporation organized by rival manufacturers, to sell no harrow for less than schedule price, invalid; *Dennehy & Co. v. McNulta*, 41 L. R. A. 609, which denies right of one voluntarily dealing with corporation constituting monopoly, to retain goods purchased, and sue for return of any part of purchase price; *Herriman v. Menzies*, 35 L. R. A. 318, which sustains association of master stevedores fixing minimum prices, with stipulation again unauthorized discounts; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not within statute for suppression of conspiracies; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 62 L. R. A. 632, which holds valid plan for sale of proprietary medicines by manufacturers at fixed prices with rebate only to concerns which may be relied on to maintain selling price; *Slaughter v. Thacker Coal & Coke Co.* 65 L.R.A. 343, which holds void contract by different coal mining companies giving exclusive right to sell entire output at uniform prices to corporation organized as their regular sales agent.

Damages for breach of contract.

Cited in *Johnson-Brinkman Commission Co. v. Wabash R. Co.* 64 Mo. App. 595, holding carrier having knowledge that purpose of shipment is to take advantage of market price on particular day liable in damages based on market price, as distinguished from market value; *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 107, 114 S. W. 1049, holding in a proceeding in probate court to establish a claim against an estate for the value of a casket and other articles furnished for funeral of deceased, the reasonable market value was the proper measure of recovery, and by market value is meant prices such articles commonly brought at the time; *S. F. Bowser & Co. v. Marks*, 96 Ark. 115, 32 L.R.A.(N.S.) 434, 131 S. W. 334, Ann. Cas. 1912 B, 357, to the point that in executory contract where no price of articles is fixed, vendor can recover from buyer for not accepting them, their reasonable value; *Carey Lithograph Co. v. Magazine & Book Co.* 70 Misc. 542, 127 N. Y. Supp. 300, to the point that market price is price fixed by buyer and seller in open market in usual course of lawful trade and competition.

Cited in footnote to *Jonas v. Noel*, 36 L. R. A. 862, which holds measure of damages for failure to deliver building to tenant difference between agreed rent and rental value.

Cited in note (32 L.R.A.(N.S.) 430) on necessity of meeting of minds as to price on sale of personalty.

Charge to jury.

Cited in *Sterling v. Callahan*, 94 Mich. 539, 54 N. W. 495, holding comment upon evidence in charge of court to jury, error.

13 L. R. A. 779, *HAMILTON v. JACKSON*, 144 Pa. 34, 23 Atl. 53.

Corporations; right to question existence of, in private action.

Cited in *Gilkey v. How*, 105 Wis. 46, 49 L. R. A. 485, 81 N. W. 120, holding town cannot set up defective character of incorporation in defense to action on warrants; *Bergeron v. Hobbs*, 96 Wis. 648, 65 Am. St. Rep. 85, 71 N. W. 1056 (dissenting opinion), majority holding failure to record certificate of organization within meaning of statute renders stockholders individually liable to creditors; *Harrison v. Philadelphia Contributionship*, 171 Fed. 184, holding under law of Pennsylvania the validity of a corporate charter or of a particular power apparently conferred thereby cannot be inquired into collaterally; *Chicago City R. Employees' Mut. Aid Asso. v. Hogan*, 124 Ill. App. 451, holding an organization known by a name importing corporate existence, and executing contracts in manner as a corporation executes contracts, is estopped to deny its corporate existence, especially where at the time of the suit it has actually become a corporation.

Enforcement of stockholder's liability.

Cited in *Lexow v. Pennsylvania Diamond Drill Co.* 5 Pa. Dist. R. 494, holding bill in equity in behalf of plaintiff and all other creditors who may come in, proper proceeding for enforcement of stockholder's liability for unpaid subscription.

Consolidation of corporations.

Cited in *Chevra Bnai Israel v. Chevra Bikur Cholim*, 24 Misc. 190, 52 N. Y. Supp. 712, holding attempted consolidation of corporations, without legislative authority, invalid.

Cited in note (52 L. R. A. 390, 391) on right of corporations to consolidate.

13 L. R. A. 785, *SCHLAWIG v. DE PEYSTER*, 83 Iowa, 323, 32 Am. St. Rep. 308, 49 N. W. 843.

Service of process.

Cited in *Wolf v. Shenandoah Nat. Bank*, 84 Iowa, 140, 50 N. W. 561, holding substituted service of original notice upon absconding debtor, who has left his family and never returned, will not give jurisdiction; *Massillon Engine & Threshing Co. v. Hubbard*, 11 S. D. 329, 77 N. W. 588, holding leaving copy of summons at house of defendant's son-in-law, where wife temporarily stopping, not sufficient within statute permitting service by leaving copy at defendant's dwelling house; *Des Moines Sav. Bank v. Kennedy*, 142 Iowa, 278, 120 N. W. 742, holding under statute providing that personal actions must be brought in county in which defendant actually resides service on a resident must be made in county of actual residence and to justify substituted service by leaving copy with a member of his family he must have been an actual resident at that time.

Cited in note ((21 L.R.A.(N.S.) 348) as to where process may be served under statutes providing for service by leaving at usual place of abode, etc.

Power of trial court to modify decree after appeal.

Cited in *Swan v. Harvey*, 123 Iowa, 194, 98 N. W. 641, holding trial court has jurisdiction to extend time to redeem from tax deed after appeal taken.

Conclusiveness of findings on appellee.

Distinguished in *Clark v. Lancaster County*, 69 Neb. 729, 96 N. W. 593, holding on an appeal in equity the appellee is not concluded as to any matter directly involved in the questions raised by appellant.

Residence.

Cited in *McCord v. Rosene*, 39 Wash. 2, 80 Pac. 793, holding man's residence

not necessarily controlled by residence of his family; *State v. Savre*, 129 Iowa, 124, 3 L.R.A.(N.S.) 457, 113 Am. St. Rep. 452, 105 N. W. 387, as to determination of residence of man with a family; *Grant v. Lawrence*, 37 Utah, 455, 108 Pac. 931, Ann. Cas. 1912 C, 280, holding that presumption that man's place of abode is where his family lives is one of fact and may be overcome by evidence to contrary.

13 L. R. A. 786, *KUMMEL v. GERMANIA SAV. BANK*, 127 N. Y. 488, 28 N. E. 398.

Banks; liability for unauthorized payment of deposit.

Cited in *Kress v. East Side Sav. Bank*, 50 N. Y. S. R. 275, 21 N. Y. Supp. 652; *Abramowitz v. Citizens' Sav. Bank*, 17 Misc. 298, 40 N. Y. Supp. 385; *Gearns v. Bowery Sav. Bank*, 135 N. Y. 562, 32 N. E. 249,—holding bank not justified in paying deposit to person in possession of pass book, if proper care not shown in view of circumstances brought to its notice, exciting suspicion; *Clark v. Saugerties Sav. Bank*, 62 Hun, 349, 17 N. Y. Supp. 215, holding payment to depositor's husband, who had possession of bank book, sufficient evidence of negligence to submit question to jury; *Tobin v. Manhattan Sav. Institution*, 6 Misc. 112, 26 N. Y. Supp. 14, holding payment to person in possession of pass book, upon forged draft with signature showing "marked" and "striking" dissimilarity to that of depositor, sufficient evidence of negligence for submission to jury; *Kelly v. Buffalo Sav. Bank*, 88 App. Div. 379, 84 N. Y. Supp. 642, denying savings bank's liability for money paid out on forged signatures, where difference from genuine not marked; *Ladd v. Augusta Sav. Bank*, 96 Me. 515, 58 L. R. A. 291, 52 Atl. 1012, holding sufficient diligence not shown, where signature of depositor not preserved for comparison before payment to person in possession of pass book; *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 578, 39 N. Y. Supp. 840, and *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 250, 19 N. Y. Supp. 194, holding that failure to ask all of test questions of person in possession of pass book who answers correctly those asked, does not render bank liable though it was put on guard by discrepancies between signatures; *Chase v. Waterbury Sav. Bank*, 77 Conn. 300, 69 L.R.A. 337, 59 Atl. 37, 1 A. & E. Ann. Cas. 96, holding savings bank liable for payment made on a forged order of one who had fraudulently obtained possession of deposit book; *Clark v. Saugerties Sav. Bank*, 62 Hun, 350, 17 N. Y. Supp. 215, holding a savings bank by-law declaring that all payments made to persons presenting a passbook shall be valid does not release the bank from obligation of exercising due care in ascertaining authority of one presenting passbook of another; *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 178, 69 L.R.A. 325, 105 Am. St. Rep. 720, 72 N. E. 995, holding saving's bank being ignorant of death of depositor not liable where his bank book was produced and draft presented, purporting to bear his signature, which was paid by bank which used ordinary care in making the payment; *Hough Ave. Sav. & Bkg. Co. v. Anderson*, 78 Ohio St. 347, 18 L.R.A.(N.S.) 434, 125 Am. St. Rep. 707, 85 N. E. 498, 14 A. & E. Ann. Cas. 479, holding bank paying money to person other than depositor upon presentation of deposit book and forged order liable if it does not act in good faith and use reasonable care.

Cited in notes (69 L.R.A. 318, 319, 330, 340) on liability of savings bank for payments to fraudulent claimants; (105 Am. St. Rep. 744, 746, 749) on duties of savings banks towards depositors.

Withdrawal of deposit without pass book.

Cited in *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 250, 19 N. Y. Supp. 194, holding depositor entitled to withdraw deposit, notwithstanding inability to

produce pass book; *Mills v. Albany Exch. Sav. Bank*, 28 Misc. 253, 59 N. Y. Supp. 149, holding bank cannot refuse payment of deposit because of loss of pass book, although by-law provides bank may decide in such case to whom payment shall be made.

13 L. R. A. 788, *GALWAY v. METROPOLITAN ELEV. R. CO.* 128 N. Y. 132, 28 N. E. 479.

Followed without discussion in *Macy v. Metropolitan Elev. R. Co.* 128 N. Y. 624, 28 N. E. 485, and *Knox v. Metropolitan Elev. R. Co.* 128 N. Y. 625, 28 N. E. 485.

Limitation of action for continuing trespass.

Followed without special discussion in *Doyle v. Manhattan R. Co.* 128 N. Y. 494. 28 N. E. 495.

Cited in *Cheney v. Syracuse, O. & N. Y. R. Co.* 8 App. Div. 620, 40 N. E. 1103, holding lapse of time or inaction of abutting owner not bar to action for damages for maintenance of unlawful structure in highway, unless time sufficient to change title; *Andrews v. Delhi & S. Teleph. Co.* 36 Misc. 26, 72 N. Y. Supp. 50, holding statute of limitations not applicable to abutter's action of ejectment against telephone corporation erecting poles and wires in public highway, outside city or village.

Distinguished in *Boll v. New York & H. R. Co.* 33 Misc. 43, 68 N. Y. Supp. 139, upholding defense, in action to restrain continuing trespass to real property, that cause of action did not accrue within ten years.

Disapproved in *Williams v. Southern P. R. Co.* 150 Cal. 627, 89 Pac. 599, holding the fact that a complaint in an action against a railroad company for trespass prays also for an injunction, does not change the action from trespass to one governed by some other period of limitation.

Ten-year statute of limitation.

Cited in *Peck v. Diskin*, 41 Misc. 477, 84 N. Y. Supp. 1094, holding judgment creditor's right to examine third person as to debtor's property barred in ten years after execution returned; *Peck v. Disken*, 41 Misc. 477, 84 N. Y. Supp. 1094, as to object of statute of.

Estoppel by laches and acquiescence.

Cited in *Kenyon v. National Life Asso.* 39 App. Div. 294, 57 N. Y. Supp. 60, questioning existence of equitable doctrine of laches, as distinguished from statute of limitations; *Coombs v. Salt Lake & Ft. D. Co.* 9 Utah, 327, 34 Pac. 248, and *Jackson v. Slate Belt Electric Street R. Co.* 7 Northampton Co. Rep. 295, holding mere delay in asserting rights will not prevent landowner from maintaining action to enjoin trespass upon land by street railway; *Ackerman v. True*, 175 N. Y. 362, 67 N. E. 629, holding silence of adjacent owner during construction and continuation of bay window encroaching on street, for less than twenty years, does not defeat right to mandatory injunction; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 168, 22 N. Y. Supp. 321, holding action by owner of fee to enjoin occupation by railway not of such exclusively equitable nature as is subject to doctrine of laches, and upholding right of action though brought after seventeen years' occupancy by railway; *Kremer v. Chicago, M. & St. P. R. Co.* 51 Minn. 21, 38 Am. St. Rep. 468, 52 N. W. 977, upholding ejectment against railroad, by subsequent grantee of land, where action brought twenty years after construction of road under license from former owner; *Blashfield v. Empire State Teleg. & Teleph. Co.* 18 N. Y. Supp. 254, holding right of action for damage to abutting owner from construction of telephone poles and wires in highway not lost by acquiescence; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 586, 26 L. R. A. 429,

38 Pac. 147, upholding action of lower riparian owner to enjoin diversion of stream by water company, after delay of nine years, during which time expensive improvements erected; *Sebald v. Mulholland*, 6 Misc. 354, 26 N. Y. Supp. 913, holding anchoring of front extension to party wall not such additional burden as equity will enjoin on complaint of party, remaining silent until wrong completed; *First Nat. Bank v. New York C. & H. R. R. Co.* 85 Hun, 166, 32 N. Y. Supp. 604, holding laches to defeat action for conversion of freight by railroad not presumed from delay of sixty days before presenting bill of lading; *West Hartford v. Water Comrs.* 68 Conn. 334, 36 Atl. 786, holding water company construing charter for thirty years as obligating it to furnish water in certain territory estopped from denying obligation; *Woodbridge v. Bockes*, 59 App. Div. 521, 69 N. Y. Supp. 417, holding beneficiary procuring trustee to give control of trust estate to husband, and giving release from all liability for doing so, estopped after lapse of twenty-five years from asking for accounting; *Rogers v. Van Nortwick*, 87 Wis. 430, 58 N. W. 757, holding equitable action to compel transfer of stock in corporation, not maintainable against one purchasing in behalf of plaintiff, after delay of three years; *Cox v. Stokes*, 156 N. Y. 511, 51 N. E. 316, holding bondholders' right of action for relief from breach by corporation of reorganization agreement not forfeited by laches, where action was seasonably brought by one bondholder in behalf of all; *Verdolite v. Richards*, 7 Northampton Co. Rep. 121, holding lessor not precluded, by acquiescence in continuing breach of covenant of lessee to mine soapstone only, from maintaining action to enjoin further violation; *Chace v. Warsaw Waterworks Co.* 79 Hun, 155, 29 N. Y. Supp. 729, holding patron of water company not estopped, on ground of acquiescence, from complaining of diversion of water from creek, where company's water supply taken from several sources; *West Pub. Co. v. Edward Thompson Co.* 169 Fed. 886, as to distinction between defenses of "laches" and "estoppel;" *Ackerman v. True*, 175 N. Y. 362, 67 N. E. 629, holding injunctive relief against encroachment by adjoining owner into street not barred by any acquiescence short of prescriptive period; *Spring City v. Montgomery & C. Electric Co.* 35 Pa. Super. Ct. 541, holding mere indulgence and delay do not amount to laches when the other party is not prejudiced.

Cited in notes (36 L.R.A.(N.S.) 834, 835), on abutter's right to compensation for railroads in streets; (36 L. ed. U. S. 721) on laches as defense; (1 Eng. Rul. Cas. 448) on right to open long settled account.

— As fact question.

Cited in *Treadwell v. Clark*, 190 N. Y. 60, 82 N. E. 505, holding finding of court on issue of laches by acquiescence was irreviewable fact finding.

Title by adverse possession.

Cited in *American Bank Note Co. v. New York Elev. R. Co.* 129 N. Y. 264, 29 N. E. 302, holding entry by corporation upon private property may be adverse, although charter may provide that compensation shall be made for property taken; *Hindley v. Manhattan R. Co.* 185 N. Y. 352, 78 N. E. 276, holding occupancy by elevated railroad under grant by city of part of street may ripen into possession adverse to abutting owner's easement of light and air.

Injunction against continuing trespass.

Cited in *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 161, 22 N. Y. Supp. 321, holding abutting owner may maintain equitable action to restrain occupancy of street by steam railroad without compensation; *Gray v. York State Teleph. Co.* 41 Misc. 113, 83 N. Y. Supp. 920, holding abutter may enjoin unlawful placing of telephone poles in highway; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475, 61 U. S. App. 13, 89 Fed. 773, holding riparian owner entitled to enjoin diversion of waters of stream to his injury; *Gallagher v.*

Kingston Water Co. 25 App. Div. 84, 49 N. Y. Supp. 250, holding, where injury from diversion of waters of creek from mill dam continuous, owner entitled to injunction, unless water company elects to pay fee damage; Carmichael v. Texarkana, 94 Fed. 574, holding equity will enjoin city from maintaining sewer system so as to discharge contents upon lands of complainant, and near residence; Dimick v. Shaw, 36 C. C. A. 349, 94 Fed. 268, holding trespasser may be enjoined from mining ore upon land adjudged to belong to plaintiff; Barbee v. Shannon, 1 Ind. Terr. 213, 40 S. W. 584, holding entry upon lands and erection of fences thereon, and threatening to turn cattle upon same to graze, may be enjoined in equity; McMillian v. Lauer, 24 N. Y. Supp. 954, holding injunction proper remedy to prevent city building stone pier in mill race, to damage of abutting owners, without compensation; Gray v. York State Teleph. Co. 41 Misc. 113, 83 N. Y. Supp. 920, granting injunction restraining construction where a telephone company attempted to construct poles and wires along county highway without consent or payment of compensation to abutting owners.

Alternative relief in cases of continuing trespass.

Cited in Eggers v. Manhattan R. Co. 27 Abb. N. C. 469, 18 N. Y. Supp. 181; Blumenthal v. New York Elev. R. Co. 42 N. Y. S. R. 684, 17 N. Y. Supp. 481; Taber v. Manhattan R. Co. 14 Misc. 191, 35 N. Y. Supp. 465,—holding, in action for injunctive relief against trespass of elevated railway upon easements of air, light, and access, payment of fee damage as alternative relief not right of either party; Taber v. Manhattan R. Co. 14 Misc. 194, 35 N. Y. Supp. 465, holding condemnation proceedings and payment of award terminates previous action for injunctive relief against trespass upon easements of air, light, and access by elevated railway; Mitchell v. White Plains, 91 Hun, 192, 36 N. Y. Supp. 204, holding unlawful appropriation of land for highway and sewer purposes does not give owner right of action to compel purchase by trespasser at price fixed by court; Schuster v. Milwaukee Electric R. & Light Co. 142 Wis. 586, 126 N. W. 26, as to when equity will retain jurisdiction to assess damages and when relegate plaintiff to relief in law.

Damages for continuing trespass.

Cited in Inderlied v. Whaley, 85 Hun, 66, 32 N. Y. Supp. 640, holding decree awarding injunction against pollution of stream bar to subsequent action for damages for same cause; Reisert v. New York, 69 App. Div. 309, 74 N. Y. Supp. 673, holding successive actions for damages from removal of waters appurtenant to premises maintainable so long as trespass continues; Wilson v. New York Elev. R. Co. 9 Misc. 659, 30 N. Y. Supp. 547, holding, in estimating damage to building fronting on three streets, from maintenance of elevated railway on one street, building regarded as entire structure.

Distinguished in Rumsey v. New York & N. E. R. Co. 133 N. Y. 82, 15 L. R. A. 619, 28 Am. St. Rep. 600, 30 N. E. 654, Reversing 63 Hun, 205, 17 N. Y. Supp. 672, holding measure of damage for cutting off of abutter's access to water front is diminished rental or usable value of property in manner enjoyed by owner at time road constructed.

Release of easement; rights of subsequent purchaser.

Cited in Ward v. Metropolitan Elev. R. Co. 152 N. Y. 44, 46 N. E. 319, Affirming 82 Hun, 549, 31 N. Y. Supp. 527, holding notice to purchaser, of release, by his grantor, of easements of light, air, and access to elevated railway in front of premises, arising from its possession, not avoided by presumption that original trespass continued.

Reference.

Cited in Doyle v. Metropolitan Elev. R. Co. 136 N. Y. 512, 32 N. E. 1008, hold-

ing compulsory reference of action to enjoin maintenance of elevated railway, and to recover damage to abutting property, unauthorized.

13 L. R. A. 796, *TEEL v. YOST*, 128 N. Y. 387, 28 N. E. 353.

Judgments; how far conclusive in another state.

Cited in *Van Norman v. Gordon*, 172 Mass. 578, 44 L. R. A. 840, 70 Am. St. Rep. 304, 53 N. E. 267, holding judgment by confession, under warrant of attorney in court of competent jurisdiction in another state, conclusive in absence of fraud; *Re Bruyn*, 17 Misc. 483, 41 N. Y. Supp. 414, holding decree of divorce obtained in another state against resident of this state, who appeared in action, not subject to collateral attack; *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 17, 64 N. E. 525, holding judgment of foreign court having jurisdiction of parties and subject-matter not collaterally assailable; *Trebileox v. McAlpine*, 62 Hun. 320, 17 N. Y. Supp. 221, holding confessed foreign judgment on note under warrant of attorney open to defense that note was obtained by duress and without consideration; *Re Raymor*, 165 Mich. 265, 130 N. W. 594, holding that judgment entered without service of process in another state is invalid although valid in such other state, because of failure to show that attorney confessed same; *Hodge v. International Registry Co.* 54 Misc. 443, 105 N. Y. Supp. 1067, holding in an action on a foreign judgment of a court of general jurisdiction, jurisdiction over the person of defendant is presumed; *Benedict v. Clarke*, 139 App. Div. 243, 123 N. Y. Supp. 964, holding that allegation that judgment was "duly rendered" in court of another state is sufficient averment of jurisdiction against general demurrer.

Cited in footnotes to *First Nat. Bank v. Garland*, 33 L. R. A. 83, which sustains judgment entered on warrant of attorney without issuing process; *Crim v. Crim*, 54 L. R. A. 502, which holds judgment, valid where rendered, against nonresident on judgment note, with power of attorney, entitled to full faith elsewhere.

Cited in notes (28 L. R. A. 634) on what entry or record is necessary to complete judgment or order; (3 L.R.A.(N.S.) 450) on effect in other states, of judgment confessed on warrant of attorney.

Enforcement of rights acquired under laws of another state.

Cited in *First Nat. Bank v. Garland*, 109 Mich. 519, 33 L. R. A. 85, 63 Am. St. Rep. 597, 67 N. W. 559, holding confession of judgment, upon warrant of attorney authorizing "any attorney" to appear in "any court of record," entered in state where power executed, valid; *Van Norman v. Gordon*, 172 Mass. 580, 44 L. R. A. 841, 70 Am. St. Rep. 304, 53 N. E. 267, holding warrant of attorney authorizing appearance by "any attorney of any court of record," and in "any of the states or territories of the United States," justifies judgment upon appearance of attorney not named; *Cross v. United States Trust Co.* 131 N. Y. 348, 15 L. R. A. 611, 27 Am. St. Rep. 597, 30 N. E. 125, holding bequest creating trust in personal property, by will of nonresident made in foreign state, where same valid, enforceable, though in contravention of local law against perpetuities, and trustee and beneficiaries reside here; *Bath Gaslight Co. v. Rowland*, 84 App. Div. 567, 82 N. Y. Supp. 841, denying sureties' liability on lease *ultra vires* under common law of state where executed, as declared by its courts.

Cited in footnote to *Re Wagoner*, 32 L. R. A. 766, which holds valid, bond with warrant of attorney, to be delivered on donor's death.

Judgment by confession under warrant of attorney

Cited in *Cuykendall v. Doe*, 129 Iowa, 464, 3 L.R.A.(N.S.) 455, 113 Am. St. Rep. 472, 105 N. W. 698; *Anderson v. Shutts*, 114 App. Div. 311, 99 N. Y. Supp.

893,—holding purpose of statutory provision requiring defendant in confession to state nature and circumstances of the indebtedness is to protect creditors from judgments fraudulently confessed; *Hazel v. Jacobs*, 78 N. J. L. 463, 27 L.R.A. (N.S.) 1068, 75 Atl. 903, 20 Ann. Cas. 260; *Hutchinson v. Palmer*, 147 Ala. 520, 40 So. 339,—holding where one executes a note with a power of attorney, authorizing a confession of judgment on failure to pay at maturity, it is a waiver of process, and judgment rendered in accordance with the authority without notice to maker is valid.

13 L. R. A. 804, *STATE v. GEER*, 61 Conn. 144, 3 Inters. Com. Rep. 732, 22 Atl. 1012.

Exercise of police power as to game, etc.

Cited in *State v. Dow*, 70 N. H. 288, 53 L. R. A. 316, 47 Atl. 734, holding statute prohibiting persons engaging in business of catching certain kinds of fish for sale valid exercise of police power; *State v. Rodman*, 58 Minn. 401, 59 N. W. 1098, upholding validity of statute making possession, five days after close of season, of game lawfully killed during open season, penal offense.

Cited in footnotes to *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during close season fish previously caught not an offense; *People v. Buffalo Fish Co.* 52 L. R. A. 803, which holds void, act prohibiting possession of certain fish during close season; *State v. Schuman*, 47 L. R. A. 153, which sustains statute prohibiting sale, or keeping for sale, of trout; *Selkirk v. Stevens*, 40 L. R. A. 759, which holds game killed by Indians on reservation, and sold to other Indian, subject to game laws of state after taken from reservation.

Application of state police power to interstate commerce.

Cited in footnotes to *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood; *State ex rel. Corcoran v. Chapel*, 32 L. R. A. 131, which holds statute against shipping beer, etc., to any commission merchant valid.

— As to fish and game.

Cited in *Organ v. State*, 56 Ark. 271, 19 S. W. 840, holding statute prohibiting exportation of fish and game from state not violation of commerce clause of Federal Constitution; *State v. Northern P. Exp. Co.* 58 Minn. 405, 59 N. W. 1100, holding statute prohibiting carrier receiving, during open season, for transportation out of state, fish unlawfully caught within state, lawful exercise of legislative power; *Dickhaut v. State*, 85 Md. 464, 36 L. R. A. 767, 60 Am. St. Rep. 332, 37 Atl. 21, holding statute prohibiting killing or having in possession rabbits between dates named not applicable to possession of rabbits imported from another state.

Cited in footnotes to *People v. O'Neil*, 33 L. R. A. 696, which upholds act prohibiting sale of game or fish during closed season as to articles imported from other states; *State v. Harrub*, 15 L. R. A. 761, which holds statute prohibiting shipment of oysters in shells from state not interference with commerce; *State v. Swett*, 29 L. R. A. 714, which denies liability of carrier ignorant that barrels received for shipment contained short lobsters.

Revision of statutes.

Cited in *Stapleberg v. Stapleberg*, 77 Conn. 36, 58 Atl. 233, holding revisers not presumed to have changed the law; *Ross v. Crofutt*, 84 Conn. 377, 80 Atl. 90, Ann. Cas. 1912 C, 1295, holding that change in words by revisers of law will not be deemed to change law unless such was intention.

13 L. R. A. 806, *SPENCER v. ALLERTON*, 60 Conn. 410, 22 Atl. 778.

Liability of indorsers of note.

Cited in *Oley v. Miller*, 74 Conn. 309, 50 Atl. 744, holding statutes making negotiable demand note overdue four months after date, and providing blank indorsement of non-negotiable note should import contract of ordinary indorsement, do not make non-negotiable demand note overdue in four months; *Smith v. Myers*, 207 Ill. 130, 69 N. E. 858, as to Connecticut rule governing liability of indorser of note.

Parol evidence to explain indorsement.

Cited in footnote to *Young v. Schon*, 62 L. R. A. 499, which holds parol evidence admissible to show extent of liability of promisee and another indorsing non-negotiable note.

13 L. R. A. 811, *WULLENWABER v. DUNIGAN*, 30 Neb. 877, 47 N. W. 420.

Failure of representation inducing issue of bonds to railroad.

Cited in *Nash v. Baker*, 37 Neb. 729, 56 N. W. 376, enjoining delivery of bonds voted railroad, for failure of representation that road would be independent of another railroad.

Validity of bonds for internal improvement.

Cited in *Fullerton v. School District*, 41 Neb. 600, 59 N. W. 896, holding petition of voters suggesting erection of schoolhouse, as required by statute, condition precedent to valid election upon issue of bonds; *Hoxie v. Scott*, 45 Neb. 201, 63 N. W. 387, holding county commissioners without jurisdiction to order election upon issue of bonds to railroad, without petition of electors as required by statute; *Morton v. Carlin*, 51 Neb. 211, 70 N. W. 966, holding bonds in aid of railroad, voted by city organized as single precinct contrary to law, invalid; *Chilton v. Gratton*, 82 Fed. 876, holding bonds in aid of railroad not invalid in hands of innocent purchaser, because of insufficiency of petition calling for election; *Van Horn v. State*, 51 Neb. 235, 70 N. W. 941, holding person not freeholder, or beneficially interested, save as stockholder in corporation, not entitled to mandamus to compel construction of drainage ditch.

Parties to action for failure of railroad company to comply with provisions of railway aid bonds.

Distinguished in *Lincoln Twp. v. Kansas City & O. R. Co.* 77 Neb. 81, 108 N. W. 140, doubting the right of a township to maintain action to recover the value of bonds voted by electors of township to aid in construction of railroad.

13 L. R. A. 817, *McKEE v. CHICAGO, R. I. & P. R. CO.* 83 Iowa, 616, 50 N. W. 209.

Duty of master as to safety of appliances and place to work.

Cited in *Stockwell v. Chicago & N. W. R. Co.* 106 Iowa, 67, 75 N. W. 665, holding railroad not negligent in failing to discover and repair stem of valve to automatic lubricator on engine; *McCarthy v. Mulgrew*, 107 Iowa, 79, 77 N. W. 527, holding master not liable for injury to baker thrown against rollers of "brake" through sudden stoppage of trow because of obstruction on floor; *Branco v. Illinois C. R. Co.* 119 Iowa, 214, 93 N. W. 97, denying railroad's liability to employee on work train injured by the tie jarred from pile in car; *Cleveland, C. C. & St. L. R. Co. v. Haas*, 35 Ind. App. 632, 74 N. E. 1003, holding railroad not negligent which builds a bridge of standard width leaving a space of over two feet between bridge and widest portion of train; *Baltimore & O. S. W. R. Co. v. McOsker*, 44 Ind. App. 260, 88 N. E. 950, holding that railroad is not

guilty of negligence in maintaining bridge whose pillars are four feet eleven inches from rail.

Cited in notes (41 L. R. A. 57, 59) on knowledge as element of employer's liability to injured servant; (6 L.R.A.(N.S.) 605) on different forms of stating general rule with respect to master's duty as to places and appliances; (33 Am. St. Rep. 767) on master's duty to furnish safe place and appliances.

Distinguished in *Keist v. Chicago G. W. R. Co.* 110 Iowa, 37, 81 N. W. 181, holding railroad negligent in constructing stock chute so near track as to leave insufficient space for brakeman ascending ladder on side of car.

Master's liability for nonobservance of rules.

Cited in note (43 L. R. A. 324, 326) on duties of master and servant as to rules promulgated for safe conduct of business.

Contributory negligence of and assumption of risk by injured servant.

Cited in *Haggerty v. Chicago, St. P. & K. C. R. Co.* 90 Iowa, 408, 57 N. W. 896, holding car accountant injured through contact with switch-stand, while hanging on ladder of moving freight car to take number on seal, negligent; *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 463, 45 N. E. 651, holding locomotive engineer injured from contact with stock chute 13 inches from cab window, while watching for signals, negligent; *Pennsylvania Co. v. Finney*, 145 Ind. 558, 42 N. E. 816, holding brakeman descending ladder on side of car, without looking to avoid water crane near track, negligent; *Cowles v. Chicago, R. I. & P. R. Co.* 102 Iowa, 510, 71 N. W. 580, holding helper about railway round-house continuing in employment after hole made in plank of turntable, without complaint or promise of repair, assumes risk; *Quinn v. Chicago, R. I. & P. R. Co.* 107 Iowa, 716, 77 N. W. 464, holding brakeman injured from having foot caught in defective switch, condition of which should have been known to him, assumed risk; *Box v. Chicago, R. I. & P. R. Co.* 107 Iowa, 668, 78 N. W. 694, holding brakeman continuing in service of railroad using different kinds of drawbars or bumpers, making coupling of cars dangerous, assumes risk; *Galveston, H. & S. A. R. Co. v. Slinkard*, 17 Tex. Civ. App. 589, 44 S. W. 35, holding brakeman injured from falling into open pit of cattle guard in yard limits not precluded from recovering because placed in position where he might have gained knowledge of danger; *Potter v. Detroit, G. H. & M. R. Co.* 122 Mich. 196, 81 N. W. 80 (dissenting opinion), majority holding brakeman not bound to make such close inspection of distance of telegraph pole from track as to enable him to discover same few inches too near track to permit operation of trains in ordinary way.

Cited in footnote to *Coyle v. Griffing Iron Co.* 47 L. R. A. 147, which holds servant assumes obvious risk from using machine from which bolt missing.

Distinguished in *Harker v. Burlington, C. R. & N. R. Co.* 88 Iowa, 415, 45 Am. St. Rep. 242, 55 N. W. 316, holding whether conductor of freight train negligent in climbing ladder on side of car, without looking to avoid awning over station platform, question for jury; *Bryce v. Chicago, M. & St. P. R. Co.* 103 Iowa, 670, 72 N. W. 780, holding brakeman injured from contact with bolt in bridge truss, while descending ladder on side of freight car, in line of duty, entitled to recover damages.

Disapproved in *Murphy v. Wabash R. Co.* 115 Mo. 121, 21 S. W. 862, holding negligence of railroad constructing cattle guard 6 to 16 inches from outside tender, causing injury to locomotive engineer while tightening nut at water tank, while train in motion, question for jury.

Evidence of knowledge of danger.

Cited in *Hall v. Chicago, R. I. & P. R. Co.* 140 Iowa, 32, 116 N. W. 113, hold-

ing evidence of usual construction and filling track admissible on question of ordinary care of injured brakeman; *Keim v. Ft. Dodge*, 126 Iowa, 29, 101 N. W. 443, holding in action by pedestrian against city for injuries caused by alleged defective gutter apron, evidence that apron in question was similar to those in other parts of city admissible to show plaintiff's knowledge and contributory negligence.

13 L. R. A. 824, *JACQUES v. GREAT FALLS MFG. CO.* 66 N. H. 482, 22 Atl. 552.

Nonsuit.

Cited in *Lebargé v. Berlin Mills Co.* 68 N. H. 373, 44 Atl. 533, holding nonsuit properly ordered in action by servant for personal injury, where evidence shows accident due to negligence of fellow servant.

Master's duty as to appliances and place to work.

Cited in *Story v. Concord & M. R. Co.* 70 N. H. 368, 48 Atl. 288, holding railroad not relieved of duty to furnish safe track for locomotive fireman by using track of another corporation; *McLaine v. Head & D. Co.* 71 N. H. 295, 58 L. R. A. 464, 93 Am. St. Rep. 522, 52 Atl. 545, holding duty of master to furnish safe appliances and place to work not applicable where inspection and repair incident to work; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548, holding it duty of employer to make stairway constituting only exit from factory reasonably safe; *Clavin v. William Tinkham Co.* 29 R. I. 602, 132 Am. St. Rep. 836, 73 Atl. 392; *Hatch v. Pike Mfg. Co.* 73 N. H. 522, 63 Atl. 306,—holding negligence of fellow servant in making repairs no defense to action by servant injured by defective appliance.

Fellow servants and their negligence.

Cited in *Cadden v. American Steel Barge Co.* 88 Wis. 420, 60 N. W. 800, holding "riveter" using scaffold on side of vessel not fellow servant to scaffold builders; *McLaine v. Head & D. Co.* 71 N. H. 295, 58 L. R. A. 463, 93 Am. St. Rep. 522, 52 Atl. 545, holding laborer engaged in tamping earth in trench fellow servant with foreman of gang; *Lintott v. Nashua Iron & Steel Co.* 69 N. H. 632, 44 Atl. 98, holding master liable for injury to servant assigned to duty by superior without instructions as to liability of belt to crawl toward pulley; *Galvin v. Pierce*, 72 N. H. 82, 54 Atl. 1014, denying master's liability for injury to employee through foreman's negligent direction to engineer to start hoisting crane; *Wallace v. Boston & M. R. Co.* 72 N. H. 513, 57 Atl. 913, holding railroad liable to brakeman injured through train despatcher's negligence; *Lapelle v. International Paper Co.* 71 N. H. 349, 31 Atl. 1068, holding master's duty to instruct servant as to dangers devolves upon person assigning employee to certain work; *Olney v. Boston & M. R. Co.* 71 N. H. 430, 52 Atl. 1097, holding railroad liable for negligence of foreman of repair shop in failing to repair engine.

Cited in footnote to *Palmer v. Michigan C. R. Co.* 17 L. R. A. 63, which holds assistant roadmaster not fellow servant of gang of men working under him.

Cited in note (54 L. R. A. 39, 81, 158) on vice principalship as determined with reference to character of act which caused injury.

13 L. R. A. 826, *CONNECTICUT RIVER LUMBER CO. v. OLCOTT FALLS CO.* 65 N. H. 290, 21 Atl. 1090.

What streams navigable.

Cited in *Concord Mfg. Co. v. Robertson*, 66 N. H. 5, 18 L. R. A. 682, 25 Atl. 718, holding fresh water navigable, if reasonably capable of valuable use as public way in natural condition.

Cited in footnote to *Heyward v. Farmers' Min. Co.* 28 L. R. A. 42, which holds navigable capacity test of navigability.

Cited in note (126 Am. St. Rep. 727) on what waters are navigable.

Distinguished in *King v. Muller*, 73 N. J. Eq. 43, 67 Atl. 380, holding right of public to navigate lake proper did not extend to adjoining swamp on its being flooded and public was without right to navigate channel dredged by complainants across it.

Franchise as public property.

Cited in *State v. Manchester & L. R.* 69 N. H. 51, 38 Atl. 736, sustaining charter provision for payment to state of excess of railroad's net annual receipts over 10 per cent of total expenditure.

Infringing public and private easements.

Cited in *State v. Sunapee Dam Co.* 70 N. H. 460, 59 L. R. A. 61, 50 Atl. 108, holding state grant of right to lower level of public lake for manufacturing purposes, if reasonably exercised, affords no ground for complaint by public; *Ladd v. Granite State Brick Co.* 68 N. H. 187, 37 Atl. 1041, holding use of land near dwelling house for manufacture of brick not unreasonable use justifying injunction; *Dana v. Craddock*, 66 N. H. 596, 32 Atl. 757, holding diminution of value of right of riparian owner to build wharf, through construction of bridge, included in damages awarded for laying out of highway; *Roberts v. Claremont R. & Lighting Co.* 74 N. H. 219, 124 Am. St. Rep. 962, 66 Atl. 485, holding adjacent riparian owners entitled to partition of water power though one of them was not yet using his share; *Trullinger v. Howe*, 53 Or. 222, 22 L.R.A.(N.S.) 546, 97 Pac. 548, holding riparian owner on floatable stream may maintain dam which does not materially reduce its utility for floating.

Cited in footnote to *Smith v. Atkins*, 53 L. R. A. 790, which denies right of one navigating stream to fasten booms to trees on bank.

Cited in notes (41 L. R. A. 377, 379) on right to use stream for floating logs; (59 L. R. A. 51, 61, 62, 73) on right to obstruct or destroy rights of navigation; (50 L. R. A. 845) on rights acquired in artificial condition of body of water.

Effect of reservation in deed.

Cited in *Smith v. Furbish*, 68 N. H. 127, 47 L. R. A. 229, 44 Atl. 398, holding conveyance of land described as bordering on river, without reservation, gives title to river bed to middle of stream; *Smith v. Furbish*, 68 N. H. 144, 47 L. R. A. 237, 44 Atl. 398, holding reservation in deed of right to build dam, together with right of flowage of land of grantor, gives perpetual easement; *Smith v. Furbish*, 68 N. H. 131, 47 L. R. A. 231, 44 Atl. 398, holding forfeiture of right to timber reserved in deed does not result from neglect to remove it for unreasonable time.

Cited in note (61 L. R. A. 872) on construction and operation of canals; *State v. Sunapee Dam Co.* 72 N. H. 116, 55 Atl. 899, as to jurisdiction of equity to assess damages for unreasonable exercise of right of flowage.

Mode of trial on bill in equity.

Cited in *State ex rel. Rhodes v. Saunders*, 66 N. H. 89, 18 L. R. A. 657, 25 Atl. 588, holding, in proceedings for injunction against liquor nuisance, question of illegal use of premises may be tried to jury; *Shapira v. D'Arcy*, 180 Mass. 378, 62 N. E. 412, holding constitutional right of trial by jury not applicable to suit in equity for specific performance of contract; *Richmond v. Atwood*, 17 L. R. A. 620, 2 C. C. A. 611, 5 U. S. App. 151, 52 Fed. 25, holding on appeal from decree enjoining infringement of patent, and ordering accounting, if injunction dissolved, court may direct dismissal of bill; *State v. Boston & M. R.*

Co. 75 N. H. 337, 74 Atl. 542, to the point that attorney general is proper party to proceedings in equity to restrain public nuisances and kindred wrongs.

Release of public right.

Cited in *New London v. Davis*, 73 N. H. 74, 59 Atl. 369, holding release of the public right in a highway involved in its discontinuance is a legislative and not a judicial function which may be performed by the legislative agents of the state.

13 L. R. A. 838, *GRESHAM v. EQUITABLE LIFE & ACCI. INS. CO.* 87 Ga. 497, 27 Am. St. Rep. 263, 13 S. E. 752.

Cause of death or injury of insured.

Cited in *Travelers Ins. Co. v. Wyness*, 107 Ga. 589, 34 S. E. 113, holding killing of assured by assault, which as to him was unexpected and without fault on his part, is accidental within policy; *Supreme Lodge, K. P. v. Crenshaw*, 129 Ga. 201, 13 L.R.A.(N.S.) 266, 121 Am. St. Rep. 216, 58 S. E. 628, 12 A. & E. Ann. Cas. 307, holding killing of insured by husband while former was attempting to have sexual intercourse with latter's wife was not death caused or superinduced in violation of criminal law within terms of policy.

Cited in footnote to *Burt v. Union Cent. L. Ins. Co.* 59 L. R. A. 393, which denies right to recover on policy on life of innocent person executed after conviction of capital offense.

Cited in notes (30 L. R. A. 208) on what constitutes an accident within meaning of accident insurance policy; (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy; (60 Am. St. Rep. 163) on death of insured in known violation of law.

Distinguished in *Coles v. New York Casualty Co.* 87 App. Div. 45, 83 N. Y. Supp. 1063, holding exception in accident policy of injuries resulting from fighting does not cover injuries to bartender assaulted by customer ordered out of saloon.

Mutual combat.

Cited in *Findley v. State*, 125 Ga. 583, 54 S. E. 106, holding manual blows not necessary to make combat.

13 L. R. A. 841, *MILES v. WORCESTER*, 154 Mass. 511, 26 Am. St. Rep. 264, 28 N. E. 676.

Nuisance; liability of municipal corporation.

Cited in *Vernon v. Wedgeworth*, 148 Ala. 493, 42 So. 749, as to liability of municipality for nuisance; *Fitzgerald v. Sharon*, 143 Iowa, 732, 121 N. W. 523, holding that city is liable for nuisance consisting of water and filth distributed on land of abutter caused by construction of culverts in streets.

Cited in footnotes to *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Long v. Elberton*, 46 L. R. A. 428, which denies liability of city to neighboring property owners for election of prison within city limits, unless so negligently maintained as to constitute nuisance; *Duncan v. Lynchburg*, 48 L. R. A. 331, which denies city's liability for nuisance by pollution of water in unauthorized operation of rock quarry outside city limits.

Liability of municipal corporation for negligence of agents.

Cited in *Johnson v. Somerville*, 195 Mass. 374, 10 L.R.A.(N.S.) 717, 81 N. E. 268, holding municipal corporation not liable for injury to adjoining property caused by act of one employed and paid by it to collect ashes in dumping them into a water course so as to fill it up and cause water to flow into such adjoining

property; *Moynihan v. Todd*, 188 Mass. 306, 108 Am. St. Rep. 473, 74 N. E. 367, as to liability for agents acts.

Cited in footnote to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in note (30 Am. St. Rep. 397) on liability of cities for negligence and other misconduct of officers and agents.

Distinguished in *Rosenblit v. Philadelphia*, 28 Pa. Super. Ct. 598, holding fall of defective plastering of which school authorities knew was not actionable by injured scholar against city.

Nuisance.

Cited in *Waller v. Ross*, 100 Minn. 10, 12 L.R.A.(N.S.) 726, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715, as to person being liable for injuries done by falling wall upon principal of nuisance; *Alabama Western R. Co. v. Wilson*, 1 Ala. App. 318, 55 So. 932 holding that railroad embankment so constructed that deposit of sand found its way from embankment over adjoining land is nuisance.

13 L. R. A. 843, *FRANKLIN v. FRANKLIN*, 154 Mass. 515, 26 Am. St. Rep. 266, 28 N. E. 681.

What constitutes valid marriage.

Cited in *Lee v. State*, 44 Tex. Crim. Rep. 368, 61 L. R. A. 911, 72 S. W. 1005 (dissenting opinion), majority holding sham ceremony, followed by carnal intercourse without matrimonial cohabitation, not constitute common-law marriage.

Jurisdiction of actions for divorce.

Cited in *Clark v. Clark*, 191 Mass. 132, 77 N. E. 702, holding every state has jurisdiction to decree a divorce for a proper cause in favor of its own citizens for the purpose of determining the status of the citizen even though the other party to the marriage is a nonresident.

Cited in notes (83 Am. St. Rep. 871, 873) on validity and effect of separation agreements; (53 Am. St. Rep. 183) on jurisdiction over absent citizens.

13 L. R. A. 844, *ROBERTS v. LOUISVILLE*, 92 Ky. 95, 17 S. W. 216.

Equitable interference with action of municipal corporations.

Cited in *State ex rel. Rose v. Superior Court*, 105 Wis. 678, 48 L. R. A. 829, footnote, p. 819, 81 N. W. 1046, holding discretion of city council in passage of ordinance granting street railway franchise cannot be controlled by injunction; *Wabaska Electric Co. v. Wymore*, 60 Neb. 203, 82 N. W. 626, holding mayor and council, but not city, may be enjoined from passing ordinance in violation of contract with electric lighting company; *Trading Stamp Co. v. Memphis*, 101 Tenn. 186, 47 S. W. 136, holding city council may be enjoined from passing ordinance imposing privilege tax upon trading stamp company, and upon merchants using tax, and making violation misdemeanor; *Sherburne v. Portsmouth*, 72 N. H. 540, 58 Atl. 38, holding taxpayer may have injunction against illegal administrative act of city council; *Ramsey v. Shelbyville*, 119 Ky. 184, 68 L.R.A. 300, 83 S. W. 116, holding if act of council creating an obligation on part of city was beyond power of council to pass the taxpayers may maintain action to have it declared invalid; *Chicago, R. I. & P. R. Co. v. Lincoln*, 85 Neb. 735, 124 N. W. 142, as to right to enjoin municipal corporation against passing unauthorized ordinance; *Woodall v. South Covington & C. Street R. Co.* 137 Ky. 524, 124 S. W. 843 (dissenting opinion), on right of taxpayer to enjoin unlawful exercise of municipal power.

Cited in footnote to *Stevens v. St. Mary's Training School*, 18 L. R. A. 832,

which denies injunction to prevent illegal contract or appropriation by county commissioners.

Cited in note (2 L.R.A.(N.S.) 152) on power to enjoin passage of municipal ordinance.

Public and private property of municipal corporations.

Cited in *Huron Waterworks Co. v. Huron*, 7 S. D. 26, 30 L. R. A. 856, 58 Am. St. Rep. 817, 62 N. W. 975, holding waterworks constructed and owned by city cannot be sold and conveyed by city, except by special legislative authority; *Owensboro v. Com.* 105 Ky. 355, 44 L. R. A. 205, 40 S. W. 320, holding city parks and property used by fire department within constitutional provision exempting "public property" from taxation; *Carrollton Furniture Mfg. Co. v. Carrollton*, 104 Ky. 529, 47 S. W. 885, holding city as lessor of public wharf not liable for personal injury from negligent operation of wharf boat; *Murray v. Allegheny*, 69 C. C. A. 65, 136 Fed. 60, holding municipal corporation has no implied power to convey away for private purposes property dedicated to or held by it for the public use on water front; *Com. v. Louisville*, 133 Ky. 847, 119 S. W. 161, holding repurchase of waterfront property after the same had been unwisely alienated by the public authority reinstated the public right in such property so that it was as such exempt from taxation.

Cited in footnotes to *Reighard v. Flinn*, 43 L. R. A. 502, which holds invalid, lease by city of part of public landing to private person; *St. Paul v. Chicago, M. & St. P. R. Co.* 34 L. R. A. 184, which denies power of legislature to give any part of levee as permanent site for freight warehouse.

Cited in note (40 L. R. A. 645) on right to erect wharves.

Injunction after discontinuance of acts complained of.

Cited in *State v. Minneapolis & St. L. R. Co.* 115 Minn. 122, 131 N. W. 1075, holding that injunction should be granted restraining illegal tariff by carrier although operation of tariff was discontinued at time of trial.

13 L. R. A. 848, *COLE v. ROWEN*, 88 Mich. 219, 50 N. W. 138.

Railroads; regulation of solicitors of patronage in or about depot grounds.

Cited in *Lucas v. Herbert*, 148 Ind. 66, 37 L. R. A. 377, 47 N. E. 146, holding railroad may designate place in depot grounds where vehicles of competing omnibus lines shall stand; *Cosgrove v. Augusta*, 103 Ga. 840, 42 L. R. A. 714, 68 Am. St. Rep. 149, 31 S. E. 445, holding city ordinance prohibiting hackmen from entering union depot to solicit patronage, notwithstanding consent of railroad, invalid; *Hedding v. Gallagher*, 72 N. H. 390, 64 L. R. A. 819, 57 Atl. 225, holding railroad may grant exclusive right to solicit baggage on station grounds; *Hot Springs v. Demby*, 90 Ark. 576, 134 Am. St. Rep. 43, 119 S. W. 1126, holding railroad having contract with a hackman could give him the best position at its station and exclude all others.

Cited in footnotes to *New York N. H. & H. R. Co. v. Scovill*, 42 L. R. A. 157; *Kates v. Atlanta Baggage & Cab Co.* 46 L. R. A. 431; *Donovan v. Pennsylvania Co.* 61 L. R. A. 140,—which sustains railroad company's right to give exclusive privilege of soliciting passengers or baggage on trains or on station grounds; *Boston & A. R. Co. v. Brown*, 52 L. R. A. 418, which holds driver of public carriage entering railroad grounds to get passenger ordering carriage, a trespasser on soliciting other passengers; *Godbout v. St. Paul Union Depot Co.* 47 L. R. A. 532, which authorizes discrimination by carrier between hackmen within, but not outside of, depot; *Norfolk & Western R. Co. v. Old Dominion Baggage Transfer Co.* 50 L. R. A. 722, which upholds special privilege to baggage transfer company to

enter depot to solicit business; Indianapolis Union R. Co. v. Dohn, 45 L. R. A. 427, which holds unlawful, grant of exclusive right to stand hacks on area; Pittsburgh, Ft. W. & C. R. Co. v. Cheevers, 24 L. R. A. 156, which denies right of company to enjoin congregation of hotel runners, etc., in front of station; Pennsylvania Co. v. Chicago, 53 L. R. A. 223, which denies carrier's power to prevent others than lessee occupying hack stands in street; Lindsey v. Anniston, 27 L. R. A. 436, which holds ordinance excluding hackmen from depots at train time not limited by prior contract between carrier and hackmen; Barrington v. Commercial Dock Co. 33 L. R. A. 116, which denies power to discriminate between similar vessels using wharf for landing place; State ex rel. Sheets v. Union Depot Co. 68 L.R.A. 792, which sustains right of union depot company to grant transfer company exclusive right to use specified part of depot grounds for hacks and vehicles and soliciting patronage of passengers; Hedding v. Gallagher, 64 L.R.A. 811, which sustains right of railroad company to give exclusive right to one teamster to enter on its grounds, if reasonable requirements of passengers are fully met.

Cited in notes (16 L.R.A. 449) on regulation as to admission of passenger to train house; (15 L.R.A.(N.S.) 716) on right of state or municipality to forbid solicitation of patronage at railway stations; (16 L.R.A.(N.S.) 782) on right to discriminate between solicitors of patronage at depots, wharves, etc.

Distinguished in State v. Reed, 76 Miss. 222, 43 L. R. A. 136, 71 Am. St. Rep. 528, 24 So. 308, holding railroad without authority to give hackman exclusive privilege of entering inclosed grounds to solicit patronage.

13 L. R. A. 851, WABASH v. CARVER, 129 Ind. 552, 29 N. E. 25.

Followed without discussion in Board of Commissioners of Vermillion County v. Chipps, 131 Ind. 59, 16 L. R. A. 228, 29 N. E. 1066.

Negligence; when question for jury.

Cited in footnote to Hardin County v. Coffman, 48 L. R. A. 455, which holds question for jury whether bridge may properly be used for passing of traction engine drawing water tank.

Pleading; general allegation overcome by averment of specific facts.

Cited in Allen County v. Creviston, 133 Ind. 43, 32 N. E. 735, holding averment of plaintiff's freedom from contributory negligence sufficient, unless overcome by specific averments of fact showing negligence; Clark County v. Brod, 3 Ind. App. 591, 29 N. E. 430, holding allegation that plaintiff was without fault not overcome by specific averment that he attempted to cross bridge with steam threshing-machine engine; Louisville, E. & St. L. Consol. R. Co. v. Hanning, 131 Ind. 536, 31 Am. St. Rep. 443, 31 N. E. 187, holding specific averment of freedom from negligence not overcome by allegation that placing of signal flags was necessary to avoid danger, without averring decedent made personal investigation whether signals displayed; Indianapolis, D. & W. R. Co. v. Wilson, 134 Ind. 96, 33 N. E. 793, holding averment that complainant watched detached engine cross highway, and then started across track, "not knowing or observing, and not having time or opportunity to know or observe," that portion of train was following, shows contributory negligence; Stewart v. Pennsylvania Co. 130 Ind. 246, 29 N. E. 916, holding allegation of alighting from train on side where other trains were liable to be passing shows contributory negligence, although alleging that decedent looked and listened for train, and embankment on opposite side afforded no place to alight; De Ruiter v. De Ruiter, 28 Ind. App. 13, 91 Am. St. Rep. 107, 62 N. E. 100, holding in complaint to set aside fraudulent conveyance, allegation of insolvency is overcome by averment that defendant, at time of action, is possessed of

large sum of money and bonds; *Columbian Enameling & Stamping Co. v. Burke*, 37 Ind. App. 522, 117 Am. St. Rep. 337, 77 N. E. 409, holding general allegation of want of knowledge of danger from crated ear-boys of acid not overcome by specific allegations as to nature of crates and mode of handling; *Knoefel v. Atkins*, 40 Ind. App. 450, 81 N. E. 600 (dissenting opinion), on specific statements controlling general ones.

Bridges; construction and control.

Cited in *New Albany v. Iron Substructure Co.* 141 Ind. 506, 40 N. E. 44, holding city has power to build bridge, in its discretion, especially when necessary to make street passable and safe to public; *Daviness County v. State*, 141 Ind. 196, 40 N. E. 686, holding city may build bridge of any kind, or at any cost, but cannot compel county to build bridge according to plans prescribed by city.

Cited in footnotes to *Vermillion County v. Chipps*, 16 L. R. A. 228, which holds county officers not negligent in accepting defective bridge which expert believes sufficient; *Thomas v. Flint*, 47 L. R. A. 499, which holds mere existence of defect in bridge for two or three days not constructive notice to city; *Templeton v. Linn County*, 15 L. R. A. 730, which holds county not liable for injury from defect in bridge or highway; *Clulow v. McClelland*, 17 L. R. A. 650, which holds township officer's ignorance of defect of bridge not disclosed by examination by one intending to take traction engine over not negligence.

Distinguished in *Reinhart v. Martin County*, 9 Ind. App. 573, 37 N. E. 38, holding complaint for damages from giving way of bridge spanning ditch for drainage of surface water not sufficient to show county bridge.

Verdict; when excessive.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 378, 37 N. E. 150, holding verdict for \$9,400 for wrongful killing of farmer, having expectancy of thirty-eight years, not excessive; *Indianapolis Traction & Terminal Co. v. Beckman*, 40 Ind. App. 104, 81 N. E. 82, holding \$1,000 for death of seven year old child not excessive.

13 L. R. A. 854, *DEMAREST v. GRANT*, 128 N. Y. 205, 28 N. E. 645.

Pleading special defense.

Cited in *Kuechenmeister v. Brown*, 13 Misc. 142, 34 N. Y. Supp. 180, holding evidence that maintenance of coal hole in sidewalk was with municipal consent admissible under general denial of allegation that same was "wrongfully" and "unlawfully" maintained; *Kiers v. Rathjen*, 60 Misc. 106, 111 N. Y. Supp. 599, holding general denial in action for wrong done by defendant's servant will admit proof that some one did it for whom defendant is not responsible.

Evidence of incorporation.

Cited in *Owen v. Shepard*, 8 C. C. A. 248, 19 U. S. App. 336, 59 Fed. 749, holding adoption of corporate name and feigned compliance with incorporation laws of state not sufficient evidence to show fact of incorporation.

Validity of defense of incorporation, for court.

Cited in *Werner v. Hearst*, 177 N. Y. 67, 69 N. E. 221, holding submission to jury of question whether articles of incorporation were mere forms to avoid liability, error; *State ex rel. Brown Contracting & Bldg. Co. v. Cook*, 181 Mo. 603, 80 S. W. 929, holding question whether corporation was organized in another state for purpose of evading law of this state was one of law for court.

Validity of incorporation.

Cited in *Lancaster v. Amsterdam Improv. Co.* 140 N. Y. 583, 24 L. R. A. 329, 35 N. E. 964, Affirming on this point 72 Hun, 22, 25 N. Y. Supp. 309, holding

validity of foreign corporation not affected by fact that residents of state went into another state to incorporate; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 542, 38 N. E. 729, holding deception in procuring record of papers of incorporation not defense to action by foreign corporation; *Duke v. Taylor*, 37 Fla. 75, 31 L. R. A. 487, 53 Am. St. Rep. 232, 19 So. 172, holding corporation obtaining charter in one state cannot complete organization by electing officers and issuing stock in another.

Cited in note (17 L. R. A. 550) on partnership liability of stockholders in case of defective or illegal incorporation.

Recognition of foreign corporation.

Cited in *O'Reilly v. Greene*, 18 Misc. 426, 41 N. Y. Supp. 1056, Affirming 17 Misc. 303, 40 N. Y. Supp. 360, holding expired foreign corporation permitted to sue, when law of state of organization permits continuance for collection of assets; *Indiana River Mfg. Co. v. Wooten*, 55 Fla. 769, 46 So. 185, holding under comity the courts of this state will entertain a suit in chancery brought by a foreign corporation where the question presented by the bill is the right of such a corporation to protect its real estate from trespass; *Stephenson v. Dodson*, 11 North Co. Rep. 54, holding that members of unregistered foreign corporation having office and doing business here are not liable as partners upon bonds issued under corporate seal.

Cited in footnote to *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639, which holds that recognition will not be denied foreign corporation by courts of state because composed exclusively of its own citizens.

Cited in note (24 L. R. A. 292) on recognition or exclusion of foreign corporations.

Distinguished in *Cumberland Teleg. & Teleph. Co. v. Louisville Home Teleph. Co.* 114 Ky. 897, 72 S. W. 4, holding when foreign corporation had spent large sums of money in erection of telephones in the state it had a right to sue in courts of state to protect its rights; *Re Avery*, 45 Misc. 539, 92 N. Y. Supp. 974, holding it against policy of laws of state against foreign corporations for them to act as executors and general recognition of foreign corporations yields thereto.

Supervision of foreign corporations.

Cited in *Novelty Mfg. Co. v. Connell*, 88 Hun, 256, 34 N. Y. Supp. 717, holding statute requiring foreign corporation to obtain certificate of secretary of state as condition to right to sue not applicable to action on contract made outside state; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun, 322, 33 N. Y. Supp. 482, holding foreign corporation without certificate entitled to enforce contract made prior to act of 1892; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun, 322, 33 N. Y. Supp. 482, holding act 1892, requiring foreign corporation to obtain certificate from secretary of state, not applicable to contract of corporation made before, but completed after, passage of act; *Neuchatel Asphalt Co. v. New York*, 9 Misc. 378, 30 N. Y. Supp. 252, holding statute requiring foreign corporations to obtain certificate of secretary of state, as condition to doing business within state, valid.

Distinguished in *Williams v. Gold Hill Min. Co.* 96 Fed. 461, holding state law requiring mortgage by corporation to be ratified by two thirds of capital stock applicable to mortgage by foreign corporation.

Individual liability of agents of corporation.

Cited in *Van Antwerp v. Linton*, 89 Hun, 419, 35 N. Y. Supp. 318, holding agents of corporation not liable for negligent performance of duties.

13 L. R. A. 859, *WESTERN U. TELEG. CO. v. ROGERS*, 68 Miss. 748, 24 Am. St. Rep. 300, 9 So. 823.

Damages for mental anguish.

Followed in *Duncan v. Western U. Teleg. Co.* 93 Miss. 503, 47 So. 552, holding damages not recoverable for mental anguish caused by negligent transmission of telegraph message.

Cited in *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 466, 43 S. W. 965; *Francis v. Western U. Teleg. Co.* 58 Minn. 263, 25 L. R. A. 412, 49 Am. St. Rep. 507, 57 N. W. 1078; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 443; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 447, 21 L. R. A. 815, 14 So. 148, —holding sender of telegram cannot recover for mental pain and suffering from failure of telegraph company to make delivery; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, 6 C. C. A. 451, 13 U. S. App. 317, 57 Fed. 478; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 76, 54 L. R. A. 850, footnote p. 846, 60 N. E. 674, *Affirming* 26 Ind. App. 219, 59 N. E. 416; *Summerfield v. Western U. Teleg. Co.* 87 Wis. 8, 41 Am. St. Rep. 17, 57 N. W. 973; *Chapman v. Western U. Teleg. Co.* 88 Ga. 765, 17 L. R. A. 431, 30 Am. St. Rep. 183, 15 S. E. 901; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 283, 126 Fed. 297, —holding addressee of telegram not entitled to damages for mental pain and suffering from failure to deliver message announcing illness or death of relative; *Connell v. Western U. Teleg. Co.* 116 Mo. 42, 20 L. R. A. 176, 38 Am. St. Rep. 575, 22 S. W. 345, holding telegraph company not liable in damages to addressee for mental pain and suffering from failure to receive message that "child is dying;" *Kester v. Western U. Teleg. Co.* 55 Fed. 604, holding addressee cannot recover damages for mental anguish from failure to deliver message announcing death of father, whereby he was prevented from attending funeral, and consoling mother; *Butner v. Western U. Teleg. Co.* 2 Okla. 239, 4 Inters. Com. Rep. 772, 37 Pac. 1087, holding addressee cannot recover for mental pain and suffering from failure to deliver message announcing death of daughter, when relationship not shown on face of message; *Crawson v. Western U. Teleg. Co.* 47 Fed. 546, holding damages for mental suffering recoverable only in cases of gross negligence in delay of message, indicating wantonness or malicious purpose; *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 95, holding mental anguish caused by delay alone will not support recovery; *Western U. Teleg. Co. v. Chouteau*, 28 Okla. 680, — L.R.A.(N.S.) —, 115 Pac. 879, holding that damages are not recoverable for mental distress alone caused by negligence in delivering telegram; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 658, 142 S. W. 775, holding that damages cannot be allowed for mental suffering unconnected with physical injury; *Beaulieu v. Great Northern R. Co.* 103 Minn. 55, 19 L.R.A.(N.S.) 570, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, holding in absence of wilful or malicious misconduct on part of railway company it is not liable for damages for mental anguish caused by negligence in transportation of a corpse; *Koerber v. Patek*, 123 Wis. 465, 68 L.R.A. 961, 102 N. W. 40, holding plaintiff being entitled to custody of body of his deceased mother could recover for damages for mental anguish against one wilfully mutilating the same; *Cumberland Teleph. & Teleg. Co. v. Jackson*, 95 Miss. 84, 48 So. 614, to the point that mental suffering alone will not support award of damages for negligence in operation of telephone.

Cited in footnotes to *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804, which denies recovery for mental anguish from nonperformance of contract; *Connelly v. Western U. Teleg. Co.* 56 L. R. A. 663, which denies liability for mere mental suffering from delay in delivering telegram; *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398, which sustains recovery for mental anguish for failure to promptly deliver telegram announcing serious illness of grandchild; *Simmons v. Western*

U. Teleg. Co. 57 L. R. A. 607, which sustains statute rendering telegraph companies liable for delay in delivering messages; *Hale v. Bonner*, 14 L. R. A. 336, which allows damages for mental distress for delay in transporting corpse of husband; *Cowan v. Western U. Teleg. Co.* 64 L.R.A. 546, which holds that mental suffering will not sustain an action for breach of a contract promptly to transmit telegram; *Barnes v. Western U. Teleg. Co.* 65 L.R.A. 666, which sustains right to damages for mental anguish from failure to deliver telegram, though unaccompanied by physical suffering; *Green v. Western U. Teleg. Co.* 67 L.R.A. 985, which sustains liability of telegraph company for mental anguish of 16 year old girl in being compelled to drive two miles in strange city after midnight with a strange driver due to its failure to deliver telegram; *Western U. Teleg. Co. v. Reid*, 70 L.R.A. 289, which denies father's right to recover for mental anguish in witnessing suffering of child because of telegraph company's failure promptly to deliver telegram summoning physician; *Hancock v. Western U. Teleg. Co.* 69 L.R.A. 403, which denies right to damages for mere disappointment and regret from failure of telegraph company promptly to deliver a death message.

Cited in notes (30 L.R.A.(N.S.) 1138) on right of addressee of telegram to sue for delay in delivery; (117 Am. St. Rep. 310) on elements of damages recoverable for failure to transmit and deliver telegrams.

Distinguished in *Magouirk v. Western U. Teleg. Co.* 79 Miss. 637, 89 Am. St. Rep. 663, 31 So. 206, holding telegraph company liable for mental suffering caused by injury to reputation of woman, in whose name operator sent forged message to man; *Western U. Teleg. Co. v. Watson*, 82 Miss. 103, 33 So. 76, holding exemplary damages recoverable from telegraph company for negligence amounting to wilfulness in transmitting message to wife announcing husband's death.

Disapproved in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 756, 28 L. R. A. 73, 57 Am. St. Rep. 294, 62 N. W. 1, holding addressee prevented from attending funeral of mother, by reason of negligent delay in delivery of message, may recover damages for mental anguish; *Green v. Western U. Teleg. Co.* 136 N. C. 505, 67 L.R.A. 992, 103 Am. St. Rep. 955, 49 S. E. 165, 1 A. & E. Ann. Cas. 349, holding damages recoverable for mental anguish on account of negligence in failure to deliver telegram.

13 L. R. A. 864, *CERVENY v. CHICAGO DAILY NEWS CO.* 139 Ill. 345, 28 N. E. 692.

Libelous publications.

Cited in *Lewis v. Daily News Co.* 81 Md. 473, 29 L. R. A. 60, 32 Atl. 246, holding it libelous to falsely publish of one that he would be an anarchist if he thought it would pay; *Kenney v. Illinois State Journal Co.* 64 Ill. App. 44, holding publication charging one with obtaining subscriptions to book by false representations as to organization behind enterprise libelous; *Pfitzinger v. Dubs*, 12 C. C. A. 404, 24 U. S. App. 376, 64 Fed. 700, holding publication comparing minister of gospel to rotten egg libelous *per se*; *Herrick v. Tribune Co.* 108 Ill. App. 248, holding written language tending to bring plaintiff into disgrace actionable *per se*; *Dowie v. Priddle*, 116 Ill. App. 196, holding an action for libel may be sustained for words published, which tend to bring the plaintiff into public hatred, contempt and ridicule, even though the same words spoken would not have been actionable; *Morse v. Times-Republican Printing Co.* 124 Iowa, 716, 100 N. W. 867, holding it not necessary that a crime be imputed to plaintiff to constitute a libel.

Cited in footnote to *Hollenbeck v. Hall*, 39 L. R. A. 734, which holds publication that trader dishonest in pleading statute of limitations not libelous.

Cited in notes (116 Am. St. Rep. 804) on what words are libelous per se; (9 Eng. Rul. Cas. 15) on distinction between libel and slander.

Effect of default.

Cited in *Chicago v. English*, 198 Ill. 218, 64 N. E. 976, Affirming 97 Ill. App. 601, holding default admits every material and traversable fact alleged in declaration; *Scottish Nat. Bank v. Adams*, 122 Ill. App. 474, holding same.

L. R. A. CASES AS AUTHORITIES.

CASES IN 14 L. R. A.

14 L. R. A. 33, *TILDEN v. GREEN*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880.

Indefiniteness as affecting gifts.

Followed as *res judicata* in *Bigelow v. Tilden*, 52 App. Div. 398, 65 N. Y. Supp. 140, and *Bigelow v. Tilden*, 18 Misc. 691, 43 N. Y. Supp. 858, holding devise in trust for "charitable and educational objects, as executors deem most beneficial to mankind," void.

Approved in *Gross v. Moore*, 68 Hun, 414, 22 N. Y. Supp. 1019, holding will giving estate to executor to be distributed "according to instructions given him by me" void for indefiniteness.

Cited in *Beecher v. Yale*, 45 N. Y. Supp. 624, holding will bequeathing money for erection of soldiers' monument, no one being named to execute trust, void; *Re Jackson*, 47 N. Y. S. R. 444, 20 N. Y. Supp. 380, holding legacies to executors for "promotion of Christianity and welfare of mankind" void; *Fairchild v. Edson*, 154 N. Y. 212, 61 Am. St. Rep. 609, 48 N. E. 541, holding will bequeathing estate to "such religious societies and in such amounts as executors and friend of testatrix may designate" void; *Wilcox v. Gilchrist*, 85 Hun, 12, 32 N. Y. Supp. 608, holding clear intention and ascertained beneficiary elements of valid trust; *Allen v. Stevens*, 161 N. Y. 137, 55 N. E. 568, *Reversing* 33 App. Div. 485, 54 N. Y. Supp. 8, holding enactment of Laws 1893, chap. 701, makes valid, devises previously void for indefiniteness of beneficiary; *Re Mullen*, 25 Misc. 254, 55 N. Y. Supp. 432, holding alternative bequest to Sister Superior of Home sufficient designation of beneficiary; *Hull v. Pearson*, 36 App. Div. 235, 55 N. Y. Supp. 324, upholding gift to orphanage not existing at testator's death, under provision of Laws 1893, chap. 701; *Jessup v. Pringle Memorial Home*, 27 Misc. 430, 59 N. Y. Supp. 207, upholding remainder over to home for invalids to be formed after testator's death; *Damert v. Osborn*, 140 N. Y. 43, 35 N. E. 407, holding Laws 1893, chap. 101, regulating charitable gifts, indicate intention of legislature to uphold gifts, previously void; *Mount v. Tuttle*, 40 Misc. 460, 82 N. Y. Supp. 655, holding bequest to Bishop of Utah and successor in office, to be used within his Episcopal jurisdiction, void; *Murray v. Miller*, 178 N. Y. 321, 70 N. E. 870, *Affirming* 85 App. Div. 421, 83 N. Y. Supp. 591, holding devise to treasurer of unincorporated religious association for its benefit void; *Re Compton*, 72 Misc. 293, 131 N. Y. Supp. 183, holding that bequest to individual to be used "for the Lord's work" does not sufficiently indicate charitable purpose to authorize court to administer it; *Re Mullen*, 2 Gibbons, Sur. Rep. 585, holding that it is sufficient if beneficiary is so described that he can be ascertained and known when right to legacy accrues; *Filkins v. Severn*, 127 Iowa, 739, 104 N. W. 346, holding devise in trust which designates no beneficiary of trust void; *Re Shattuck*, 193 N. Y. 449, 86 N. E. 455, holding

devise to executor in trust to collect rents and profits and pay same to "religious, eleemosynary or educational" institutions as in his judgment shall be advisable, void; *Mount v. Tuttle*, 99 App. Div. 435, 91 N. Y. Supp. 195, holding prior to act of 1893 to regulate gifts for charitable purposes in order to constitute a valid trust provision for charity there must be a beneficiary capable of being designated and who could enforce the trust provision; *Loch v. Mayer*, 50 Misc. 446, 100 N. Y. Supp. 837, as to doctrine of cy pres having on place in law of New York; *Re Jackson*, 1 Power, 243, holding a bequest of residuary real and personal estate to executors, "to be expended by them for benevolent and charitable purposes as they, or survivor of them, shall, in their or his good judgment, deem wise and best for the promotion of Christianity and the welfare of mankind in the world," is void, there being no certain designated beneficiary; *St. James v. Bagley*, 138 N. C. 397, 70 L.R.A. 166, 50 S. E. 841, as to courts endeavoring to sustain charitable trusts although uncertain and attempting to prevent a failure of benevolent intention of donor.

Cited in footnotes to *Re John*, 36 L. R. A. 242, which sustains bequest for maintenance of free public schools; *Harrington v. Pier*, 50 L. R. A. 307, which holds bequest for promotion of temperance work in certain city not fatally indefinite; *Woman's Foreign Missionary Soc. v. Mitchell*, 53 L. R. A. 711, which holds legacy to Board of Managers of Foreign Missionary Society of M. E. Church properly paid to Woman's Foreign Missionary Society; *Thompson v. Brown*, 62 L.R.A. 398, which upholds devise of fund to be distributed by executor "to the poor" in his discretion.

Cited in notes (14 L.R.A.(N.S.) 65, 73, 74, 83, 86, 87, 117, 119, 131, 138, 140, 142) on enforcement of general bequest for charity or religion; (64 Am. St. Rep. 758, 760, 772) on certainty and unity required in charitable trusts; (5 Eng. Rul. Cas. 577) on invalidity of charitable bequest for indefiniteness.

Distinguished in *Atwater v. Russell*, 49 Minn. 85, 51 N. W. 629, sustaining provision in trust deed for maintenance of hospital; *Keith v. Scales*, 124 N. C. 516, 32 S. E. 809, upholding devise for erection of church and school and maintenance of same; *Auten v. City Electric Street R. Co.* 104 Fed. 399, denying that statute of uses renders conveyance from equitable owner necessary to pass title, when legal title in another as trustee; *Ross v. Ross*, Rap. Jud. Quebec 2 C. S. 21, holding a bequest in following words "I hereby will and bequeath all my property, assets or means of any kind to my brother Frank who will use one half of them for public Protestant charities in Quebec and Carluké, say Protestant Hospital Home, French Canadian Mission and amongst poor relatives as he may judge best," is not void for uncertainty.

Disapproved in effect in *Harrington v. Pier*, 105 Wis. 519, 50 L. R. A. 321, 76 Am. St. Rep. 922, 82 N. W. 345, upholding bequest to trustees to expend proceeds in temperance work; *Hoeffler v. Clogan*, 171 Ill. 471, 40 L. R. A. 732, 63 Am. St. Rep. 241, 49 N. E. 527, upholding devise to church in trust, proceeds to be expended for masses.

Gifts as affected by discretion of trustee.

Cited in *Spalding v. St. Joseph's Industrial School*, 107 Ky. 403, 54 S. W. 200, holding devise to brother for charitable objects, to be "expended according to his discretion," void; *Wheelock v. American Tract Soc.* 109 Mich. 144, 63 Am. St. Rep. 578, 66 N. W. 955, holding devise to executors in trust for benefit of such "worthy poor girls as they select" void; *Butler v. Parochial Fund*, 92 Hun, 99, 36 N. Y. Supp. 562, holding bequest in trust for "support of clergyman, and such other church purposes as trustee thinks advisable," void; *People v. Powers*, 147 N. Y. 109, 35 L. R. A. 504, 41 N. E. 432, holding trust to be disposed among "charitable institutions as trustee may select" void; *Johnson v. Johnson*, 92

Tenn. 569, 22 L. R. A. 181, footnote p. 179, 36 Am. St. Rep. 104, 23 S. W. 114, holding devise to trustees for charity, "preference to those of educational nature," too indefinite; *Kemp v. Kemp*, 36 Misc. 88, 72 N. Y. Supp. 617, holding power of appointment, left to discretion of donee, unenforceable.

Cited in footnotes to *Crerar v. Williams*, 21 L. R. A. 454, which holds arbitrary powers not given trustees of charity by authority to set aside amount of income to pay expenses; *People v. Powers*, 35 L. R. A. 502, which holds void for indefiniteness, trust to dispose of property among charitable and benevolent institutions as trustee shall choose; *Thompson v. Brown*, 62 L. R. A. 398, holding devise of fund to be distributed by executor "to poor," in his discretion, valid.

Distinguished in *Re Perkins*, 68 Misc. 258, 124 N. Y. Supp. 998, holding that bequest of remainder of personalty to be disposed of by two persons named therein, "as they think best, we having advised with them thereof" passed remainder to legatees absolutely.

Disapproved in effect in *St. James Orphan Asylum v. Shelby*, 60 Neb. 809, 83 Am. St. Rep. 553, 84 N. W. 273, upholding devise of property to trustee in trust, to apply income "to some charity according to his judgment."

Method of construing will.

Cited in *Eldred v. Meek*, 183 Ill. 38, 75 Am. St. Rep. 86, 55 N. E. 536, holding testator's intention determined by considering will in entirety, not portion by portion; *Re Hammond*, 74 App. Div. 550, 77 N. Y. Supp. 783; *Herzog v. Title Guarantee & T. Co.* 177 N. Y. 92, 69 N. E. 283; *Karstens v. Karstens*, 29 App. Div. 235, 51 N. Y. Supp. 795,—holding court will reconstruct will to determine testator's intention, not to devise new scheme; *Re Van Horne*, 25 Misc. 392, 55 N. Y. Supp. 651, and *Starr v. Starr*, 132 N. Y. 158, 30 N. E. 384, upholding authority of courts to transport or reject words to determine testator's intention; *Re Whiting*, 33 Misc. 277, 68 N. Y. Supp. 733, holding failure to dispose of residue no bar to taking by general legatee, will disclosing such intention; *Marks v. Halligan*, 61 App. Div. 181, 70 N. Y. Supp. 444, holding void and valid parts of will may be considered to determine character of estate given to child; *Chileott v. Hart*, 23 Colo. 48, 35 L. R. A. 47, 45 Pac. 391, holding valid provisions of will upheld, if separable from void directions as to distribution of income; *Tilley v. Ellis*, 119 N. C. 246, 26 S. E. 29 (dissenting opinion), majority holding refusal to submit to jury question as to which church testator intended to devise property, error; *Eidt v. Eidt*, 142 App. Div. 737, 127 N. Y. Supp. 680, holding that rule permitting moulding of words to ascertain testator's intent does not permit construction of disposition in way not reasonably justified by will; *Starr v. Starr*, 132 N. Y. 158, 30 N. E. 384, holding in construing will courts may transpose, reject or supply words, so that it will express intention of testator; *Leggett v. Stevens*, 185 N. Y. 77, 77 N. E. 874; *Simpson v. Trust Co. of America*, 129 App. Div. 203, 113 N. Y. Supp. 370; *Stebbens v. Turner*, 55 Misc. 591, 105 N. Y. Supp. 945; *Re Pearce*, 53 Misc. 220, 104 N. Y. Supp. 469,—holding duty of court is to interpret and not to construct a will; *Catt v. Catt*, 118 App. Div. 750, 103 N. Y. Supp. 740, as to invalid provisions of will being resorted to in order to determine intention of testator; *Re McCoy*, 51 Misc. 445, 101 N. Y. Supp. 539; *Re Gilman*, 65 Misc. 411, 121 N. Y. Supp. 909; *Re Poppleton*, 34 Utah, 295, 131 Am. St. Rep. 842, 97 Pac. 138; *Schell v. Carpenter*, 50 Misc. 406, 100 N. Y. Supp. 554,—holding intention paramount rule of construction; *Re Pilsbury*, 50 Misc. 379, 99 N. Y. Supp. 62, as to construction to be given will.

Cited in note (106 Am. St. Rep. 509) on necessity for all parts of will to be considered.

Void parts of will as affecting valid.

Cited in *Becker v. Becker*, 13 App. Div. 345, 43 N. Y. Supp. 17, upholding part of trust as to support of children as separable from part contravening power of alienation; *Re Fair*, 132 Cal. 541, 84 Am. St. Rep. 70, 60 Pac. 442, holding invalid trust to convey vitiates valid trust for children; *Dresser v. Travis*, 39 Misc. 362, 79 N. Y. Supp. 924, holding trust to divide income among children for life, inseparable from illegal provision for accumulation, void; *Lawrence v. Smith*, 163 Ill. 164, 45 N. E. 259, and *Brandt v. Brandt*, 13 Misc. 434, 34 N. Y. Supp. 684, holding failure of main provision of will under statute against perpetuities invalidates dependent portions; *Lyons v. Bradley*, 168 Ala. 522, 53 So. 244, to the point that where several trusts are created which are independent of each other, the illegal may be cut off and legal ones permitted to stand; *Reid v. Voorhees*, 216 Ill. 247, 74 N. E. 804, 3 A. & E. Ann. Cas. 946, holding where a general scheme for the division of testator's property was set aside because part thereof offended the rule against perpetuities the rejection of the provisions of the will constituting such scheme did not require other valid, independent requests to be set aside; *White v. Allen*, 76 Conn. 190, 56 Atl. 519; *Phillips v. Heldt*, 33 Ind. App. 399, 71 N. E. 520; *Sheppard v. Fisher*, 206 Mo. 247, 103 S. W. 989; *Walter v. Walter*, 60 Misc. 390, 113 N. Y. Supp. 465; *Re Dewitt*, 113 App. Div. 792, 99 N. Y. Supp. 415; *Rong v. Haller*, 109 Minn. 198, 26 L.R.A.(N.S.) 829, 123 N. W. 471,—holding where a legal and illegal trust are created by will, and so connected as to constitute one general scheme, so that it must fail if the one be retained and other rejected, the legal trust falls with illegal one.

Cited in notes (64 Am. St. Rep. 640) on severability of perpetuities and forbidden trusts; (120 Am. St. Rep. 740) on entire invalidity of will partially void.

Distinguished in *Brown v. Richter*, 76 Hun, 472, 27 N. Y. Supp. 1094, upholding trust during lives of children, although remainder over void.

Suspension of power of alienation.

Cited in *Re Williams*, 1 Misc. 444, 1 Power, 418, 23 N. Y. Supp. 150, holding will bequeathing property to church conference in trust to pay income for support of church void as suspending power of alienation; *Danforth v. Oshkosh*, 119 Wis. 305, 97 N. W. 258 (dissenting opinion), majority sustaining grant of land to city to be perpetually used for library site, subject to revert when not so used; *Casgrain v. Parkinson*, 134 Mich. 433, 104 Am. St. Rep. 610, 96 N. W. 510, holding real estate conveyed to a trustee under a trust void as to perpetuity on death of grantor was subject to disposition as intestate estate; *St. John v. Andrews Institute*, 191 N. Y. 267, 83 N. E. 981, 14 A. & E. Ann. Cas. 708, holding property may be given by a will to a corporation to be formed after testator's death, if it is there provided that the corporation be formed and the property not within the lives of two persons, or life of survivor in being when will was executed; *Gueutal v. Gueutal*, 113 App. Div. 313, 98 N. Y. Supp. 1002, holding trust having no fixed limit of duration void; *St. John v. Andrews Institute*, 117 App. Div. 715, 102 N. Y. Supp. 808, as to rule of perpetuities under laws of 1893 as regards gifts to charitable uses.

Penitentiary as charitable institution.

Cited in *State v. Laramie County*, 8 Wyo. 130, 55 Pac. 451, holding penitentiary included among "charitable institutions" exempt from special taxation.

Action in equity to construe will.

Cited in *Endress v. Willey*, 52 Misc. 393, 102 N. Y. Supp. 71, as to who may bring equitable action to construe will.

Conveyance by trustee.

Cited in *Davidson v. Mantor*, 45 Wash. 662, 89 Pac. 167, holding where trustee is clothed with legal title and not restrained by terms of trust a conveyance by him carries the legal title.

Trust or personal gift.

Cited in *Appleby v. Appleby*, 100 Minn. 433, 10 L.R.A.(N.S.) 601, 117 Am. St. Rep. 709, 111 N. W. 305, 10 A. & E. Ann. Cas. 563, holding gift for manifest purpose of keeping up a homestead for surviving husband who was to be life tenant could not be treated as personal gift to him.

Charitable trust.

Cited in *Re Kavanaugh*, 143 Wis. 106, 28 L.R.A.(N.S.) 477, 126 N. W. 672 (dissenting opinion), as to charitable trust incapable of being enforced being void.

14 L. R. A. 52, *Re THOMPSON*, 127 N. Y. 463, 28 N. E. 389.

Proof of measure of damages.

Cited in *Latimer v. Burrows*, 163 N. Y. 9, 57 N. E. 95, holding evidence that defaulting vendor resold undelivered lumber at contract price inadmissible; *Bull v. Bath Iron Works*, 75 App. Div. 386, 78 N. Y. Supp. 181, holding proof that vessel failed to obtain time charter objectionable as involving comparison in value with others; *The Oceanica*, 156 Fed. 308, holding purchase price of an article is incompetent to prove value of another article although other article is similar.

— For property condemned.

Cited in *San Luis Obispo v. Brizzolara*, 100 Cal. 436, 34 Pac. 1083, holding report of commissioners showing payments for other land taken inadmissible as to value of property condemned; *Re New York*, 142 App. Div. 667, 127 N. Y. Supp. 379, holding that in condemnation proceedings one may not establish value of his land by showing what was paid for another parcel similarly situated; *Simons v. Mason City & Ft. D. R. Co.* 128 Iowa, 151, 103 N. W. 129; *Manhattan R. Co. v. Stuyvesant*, 126 App. Div. 850, 111 N. Y. Supp. 222; *Oregon R. & Nav. Co. v. Eastlack*, 54 Or. 202, 102 Pac. 1011,—holding evidence of what party seeking condemnation paid for other property for use in same enterprise, incompetent.

Distinguished in *Langdon v. New York*, 133 N. Y. 639, 4 Silv. St. App. 283, 31 N. E. 98, holding evidence admissible as to price paid by city for other property of same character.

Disapproved in effect in *Markowitz v. Kansas City*, 125 Mo. 490, 46 Am. St. Rep. 498, 28 S. W. 642, admitting evidence as to sales of similar property in vicinity, showing value of lots prior to grading street.

— For construction of railroads.

Followed in *Colton v. New York Elev. R. Co.* 7 Misc. 627, 28 N. Y. Supp. 149, denying admissibility of evidence as to rentals and sales of other property than that in suit.

Cited in *Lyons v. New York Elev. R. Co.* 26 App. Div. 59, 49 N. Y. Supp. 610; and *Douglas v. New York Elev. R. Co.* 14 App. Div. 472, 43 N. Y. Supp. 847, denying admissibility of evidence as to sums paid for other property as showing measure of damages for erection of elevated line; *Hart v. Brooklyn Elev. R. Co.* 89 Hun, 83, 35 N. Y. Supp. 41, and *Jamieson v. Kings County Elev. R. Co.* 147 N. Y. 325, 41 N. E. 693, holding difference in rental value improper measure of damages for construction of elevated road; *Robinson v. New York Elev. R. Co.* 175 N. Y. 222, 67 N. E. 431, holding evidence of sales and rentals of

other pieces of property inadmissible in trial for damages; *Odell v. Metropolitan Elev. R. Co.* 3 Misc. 337, 22 N. Y. Supp. 737, raising, without deciding, admissibility of evidence as to difference in rental value before and after erection of road; *Rourke v. Holmes Street R. Co.* 221 Mo. 63, 133 Am. St. Rep. 468, 119 S. W. 1094, holding in action for damages for construction of an elevated street railroad, evidence of rentals of other property situate on another street a block from that of plaintiff's, inadmissible.

Cited in footnotes to *Hine v. Manhattan R. Co.* 15 L. R. A. 591, which holds private offers of third persons inadmissible to show value; *Peoria Gaslight & Coke Co. v. Peoria Terminal R. Co.* 21 L. R. A. 373, which holds prices paid to other owners for right of way incompetent to show value.

Cited in note (26 L. R. A. 385) on power of appellate court to interfere with verdict for excessive damages.

Right of commissioners to rely on their own views.

Cited in *Syracuse v. Stacey*, 45 App. Div. 260, 61 N. Y. Supp. 165, upholding right of commissioners to rely on their own judgment as to value of property, disregarding opinions of experts.

14 L. R. A. 55, *BOIES v. BENHAM*, 127 N. Y. 620, 40 N. Y. S. R. 421, 28 N. E. 657.

Priority of liens.

Cited in *Kennedy v. Babcock*, 19 Misc. 91, 43 N. Y. Supp. 832, holding equitable lien created by execution of deed continues, till mortgage taken back, superior to lien of prior mortgage executed after deed; *Schmertz v. Hammond*, 47 W. Va. 547, 35 S. E. 945, holding defective trust deed given as security creates equitable lien; *Collier v. Miller*, 62 Hun, 107, 16 N. Y. Supp. 633 (dissenting opinion), majority upholding agreement as to priority of synchronous mortgages; *Kimble v. Wotring*, 48 W. Va. 423, 37 S. E. 606, subrogating vendee to rights of lienor, having paid lien as part consideration for fraudulent deed, subsequently set aside.

Cited in note (40 L.R.A.(N.S.) 277) on priority as between mortgage to vendor and simultaneous or prior mortgage to third person.

14 L. R. A. 59, *HULBERT v. CLARK*, 128 N. Y. 295, 28 N. E. 638.

Statute of limitations as affecting obligation.

Cited in *Spicer v. Raplee*, 4 App. Div. 478, 38 N. Y. Supp. 806, holding statute of limitations acts upon remedy, leaving obligation unimpaired; *Maxwell v. Cottle*, 72 Hun, 533, 25 N. Y. Supp. 635, holding attorney's lien on client's funds in his hands not barred by statute of limitations; *Drake v. Wetmore*, 67 Hun, 80, 21 N. Y. Supp. 1117, upholding right of holder of matured note to enforce claim against dividend applicable thereto, though action on note barred by statute; *Braekenbridge v. Cummings*, 18 Pa. Super. Ct. 70, and *Dinniny v. Gavin*, 4 App. Div. 300, 39 N. Y. Supp. 485, upholding statute as defense to action upon covenant in mortgage to pay balance of debt, although remedy on note barred; *Simonson v. Nafis*, 36 App. Div. 474, 55 N. Y. Supp. 449, denying that statute operates against right to foreclose mortgage during absence of mortgagor from state; *Adams v. Fassett*, 73 Hun, 432, 26 N. Y. Supp. 447, holding statute of limitations began to operate at last payment of interest on notes; *Nehasane Park Asso. v. Lloyd*, 167 N. Y. 438, 60 N. E. 741, holding Laws 1885, chap. 448, as to conclusiveness of tax sales, must be pleaded when relied on as statute of limitations; *Re Moench*, 39 Misc. 483, 80 N. Y. Supp. 222, holding that Laws 1899, chap. 737, against limitations as defense to transfer tax applies to claim for tax arising in 1893 and enforced in 1902; *Re Guttroff*, 39 Misc.

484, 80 N. Y. Supp. 219, holding that judgment barred by statute cannot be revived by amendment; *Gmaehle v. Rosenberg*, 83 App. Div. 342, 82 N. Y. Supp. 366, holding right of action for injuries from defective appliances dependent upon service of notice of accident; *Piper v. Hayward*, 71 Misc. 43, 127 N. Y. Supp. 240, holding that lien on property as security for debt, is not impaired by fact that remedy at law for recovery of debt is barred; *Green v. Frick*, 25 S. D. 344, 126 N. W. 579, holding that foreclosure of mortgage is not barred by running of statute against indebtedness; *Heburn v. Reynolds*, 73 Misc. 77, 132 N. Y. Supp. 460, to the point that mortgage may be foreclosed although notes representing debt are outlawed; *Brooklyn Bank v. Barnaby*, 197 N. Y. 226, 27 L.R.A.(N.S.) 852, 90 N. E. 834, as to effect of statute of limitations on debt on security; *People ex rel. Eckerson v. Board of Edu.* 126 App. Div. 421, 110 N. Y. Supp. 769, holding removal of bar of statute not taking property without due process of law; *Leask v. Hoagland*, 64 Misc. 158, 118 N. Y. Supp. 1055, holding statute of limitations bars remedy only and affords no presumption of payment of demand; *Lightfoot v. Davis*, 198 N. Y. 264, 29 L.R.A.(N.S.) 122, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747, as to statute of limitations merely acting upon remedy; *House v. Car*, 185 N. Y. 458, 6 L.R.A.(N.S.) 513, 113 Am. St. Rep. 936, 78 N. E. 171, 7 A. & E. Ann. Cas. 185, holding equity will not restrain a sale under a power of sale in a mortgage although limitations have run against the mortgage; *Greenley v. Greenley*, 114 App. Div. 643, 100 N. Y. Supp. 114, holding where as consideration for a deed, the grantee promised to pay certain notes of grantor, an action by the holder of the notes against grantee was not barred merely because statute of limitations had run against notes; *People ex rel. Atty. Gen. v. Michigan C. R. Co.* 145 Mich. 148, 108 N. W. 772, holding where contract between railroad company and state provided for a lien for taxes an action might be brought to collect taxes within time which an action could be brought to foreclose mortgage although action on contract was barred; *Burstein v. Levy*, 49 Misc. 470, 98 N. Y. Supp. 853, holding twenty year limitation applies to action on instrument under seal; *Re Pirie*, 198 N. Y. 216, 91 N. E. 587, holding mere attachment of a seal to a promissory note does not make it a sealed instrument and the six years statute of limitations applies thereto.

Cited in notes (21 L. R. A. 553) on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust concerning same; (45 L. R. A. 613) on vested right in defense of statute of limitations; (95 Am. St. Rep. 664) on effect of bar of statute of limitations.

Distinguished in *Re Stalker*, 123 Fed. 965, holding decision against preference for local assessments not affected by subsequent statute against limitations as defense.

Presumption of payment.

Cited in *People v. Freeman*, 110 App. Div. 608, 97 N. Y. Supp. 343, holding the presumption of payment arising from lapse of time is rebuttable.

14 L. R. A. 62, *STATE, NORTH ORANGE BAPTIST CHURCH, PROSECUTOR, v. ORANGE*, 54 N. J. L. 111, 22 Atl. 1004.

Bribery by gift to public.

Cited in *Barr v. New Brunswick*, 67 Fed. 403, denying that promise of railroad company to pay expense for opening street without repayment, invalidates action of council in proceedings to open such street; *Illinois C. R. Co. v. Swalm*, 83 Miss. 639, 36 So. 147, holding a judgment of a county board of supervisors for laying out a public road is not rendered void by a proviso therein that the petitioners pay all expenses of laying out road and maintaining it for three years; *Electric Plaster Co. v. Blue Rapids City Twp.* 77 Kan. 586, 96 Pac.

68, holding agreement between owners of mills operated by water power and officers of a township that if township bonds should be voted by the electors and proceeds thereof used in rebuilding an important highway, convenient for public, and which would restore water power to mill owners, the mill dam owners would pay an amount equal to interest on bonds for ten years, not against public policy.

Cited in footnotes to *Ayres v. Moan*, 15 L. R. A. 501, which holds donation to secure location of county seat, bribery; *Lund v. Chippewa County*, 34 L. R. A. 131, which sustains donation by county to secure site for state institution for feeble-minded; *Doane v. Chicago City R. Co.* 35 L. R. A. 588, which holds purchase for special consideration of abutter's consent to laying of street railway illegal.

Distinguished in *Black v. Atlantic County*, 80 N. J. L. 33, 76 Atl. 339, holding that board of chosen free-holders, appointed under statute have no power to contract for improvement of highway upon which trolley line is operated provided trolley line will bear part of expense.

Requirements as to use of English.

Approved in *Rasmussen v. Baker*, 7 Wyo. 144, 38 L. R. A. 780, footnote p. 773, 50 Pac. 819, holding provision requiring ability to read Constitution as qualification of elector means to read in English.

Cited in *State, City Publishing Co., Prosecutor, v. Jersey City*, 54 N. J. L. 438, 24 Atl. 571, holding that where statute directs publication of notice it will be presumed that language generally spoken in state is to be used; *Connors v. Lowell*, 209 Mass. 119, 95 N. E. 412, Ann. Cas. 1912 B, 627, holding that publication of tax sale required by statute, in English language in newspaper in that language renders sale invalid.

Cited in footnote to *State ex rel. Goebel v. Chamberlain*, 40 L. R. A. 843, which denies validity of publication of delinquent tax list in English in newspaper otherwise printed in German.

Distinguished in *Tappan v. Dayton*, 51 N. J. Eq. 262, 28 Atl. 1, holding notice of administrator's sale, published in German paper, must be in English.

Judicial power over eminent domain.

Cited in note (22 L.R.A.(N.S.) 13, 82, 88, 89) on judicial power over eminent domain.

14 L. R. A. 65, *FERGUSON v. McBEAN*, 91 Cal. 63, 27 Pac. 518.

Contract as affecting license.

Cited in footnote to *Bruley v. Garvin*, 48 L. R. A. 839, which holds license to cut timber revoked *pro tanto* by written contract for sale of undivided interest to another.

Privileged communications.

Cited in *Phillips v. Chase*, 201 Mass. 449, 131 Am. St. Rep. 406, 87 N. E. 755, holding objection that communication to attorney is privileged may be impliedly waived by client.

Cited in footnote to *Koeber v. Somers*, 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged.

Cited in notes (67 L.R.A. 924) on admissibility of communications to persons serving in judicial capacity; (66 Am. St. Rep. 226) on attorneys as witnesses.

Liability of undisclosed principal.

Cited in *McKee v. Cunningham*, 2 Cal. App. 688, 84 Pac. 260; *Bergtholdt v.*

Porter Bros. Co. 114 Cal. 689, 46 Pac. 738,—holding where one sells goods to agent supposing him to be principal he may, upon discovering him to be agent, resort to principal for payment.

14 L. R. A. 69, DAILEY v. NEW HAVEN, 60 Conn. 314, 22 Atl. 945.

Powers of municipal corporation.

Cited in *Croft v. Danbury*, 65 Conn. 300, 32 Atl. 365, holding city without power to appropriate funds as rewards for conviction of incendiaries; *Fair Haven & W. R. Co. v. New Haven*, 77 Conn. 497, 59 Atl. 737, holding they are only such powers as have been conferred upon it expressly or by necessary implication.

— To act as trustee.

Cited in *New Haven v. New Haven & D. R. Co.* 62 Conn. 258, 18 L. R. A. 259, footnote p. 256, 25 Atl. 316, denying city's authority to enter into contract with railroad company for protection of private owners; *Burr v. Boston*, 208 Mass. 538, 34 L.R.A.(N.S.) 144, 95 N. E. 208, holding that devise of property to municipal corporation in trust to devote income to maintenance of parks is valid charitable gift.

Cited in footnotes to *Maysville v. Wood*, 39 L. R. A. 93, which denies right of city to hold title as trustee of land dedicated for church lot; *Clayton v. Hallett*, 59 L. R. A. 407, which sustains city's power to take property in trust for education of poor white male orphans.

Cited in note (16 L. R. A. 695) on authority of legislature to remove municipality from trusteeship.

Injunction against passage of ordinance.

Cited in *Smith v. Buffalo*, 51 Misc. 218, 99 N. Y. Supp. 986, holding injunction should not issue to prevent mayor of a city from approving a franchise alleged to have been granted by common council without complying with certain formalities required by law, there being no showing that he intended to approve it.

Cited in notes (13 L. R. A. 845) on injunction to prevent passage of municipal ordinance.

Effect of refusal to accept trust.

Cited in *State v. Blake*, 69 Conn. 70, 36 Atl. 1019, holding refusal of state to accept trust bars injunction against payment to substituted legatees.

Jurisdiction of equity and superior courts.

Cited in *Union Transp. Co. v. Bassett*, 118 Cal. 610, 50 Pac. 754, holding equity cannot interfere with harbor commissioners as to regulation of vessels in dock; *Hall v. Pierson*, 63 Conn. 350, 28 Atl. 544, holding probate court has concurrent equitable jurisdiction with superior court over dower; *Lackland v. Walker*, 151 Mo. 249, 52 S. W. 414, holding equity will remedy defects in administration of charitable trusts, following purpose of donor as nearly as possible; *Woodruff v. Marsh*, 63 Conn. 136, 38 Am. St. Rep. 346, 26 Atl. 846, raising, without deciding, as to power of superior court to deal with charitable trusts.

— To appoint trustee.

Cited in *Mack's Appeal*, 71 Conn. 135, 41 Atl. 242, upholding power of probate court to appoint another trustee, one named in will refusing to act; *Conklin v. Davis*, 63 Conn. 383, 28 Atl. 537, holding equity will appoint trustee, if church deacons without power to accept gift to poor; *Re John*, 30 Or. 529, 36 L. R. A. 253, 47 Pac. 341, holding equity will preserve trust, person authorized to name trustee failing to act.

Distinguished in Yale College's Appeal, 67 Conn. 243, 34 Atl. 1036, denying that refusal of state to accept trust allows probate court to appoint trustee, will otherwise disposing of unaccepted bequests; Eliot's Appeal, 74 Conn. 598, 51 Atl. 558, sustaining gift to society made competent by statute to act as trustee.

Validity of gifts.

Cited in *Re John*, 30 Or. 520, 36 L. R. A. 251, 47 Pac. 341, denying that provision by law for support of schools invalidates bequest in trust for same purpose; Strong's Appeal, 68 Conn. 531, 37 Atl. 395, holding bequest for relief of poor, although benefiting taxpayers, works no change in its charitable nature; *Duggan v. Slocum*, 83 Fed. 246, denying that failure of testator to provide another trustee to act upon death of one named invalidates gift.

Cited in note (14 L.R.A.(N.S.) 109, 112) on enforcement of general bequest for charity or religion.

14 L. R. A. 75, *WESTERN MARYLAND R. CO. v. HEROLD*, 74 Md. 510, 22 Atl. 323.

Contributory negligence as question of law.

Cited in *Jones v. Baltimore & O. R. Co.* 21 D. C. 359, holding act of jumping from car moving at low speed not contributory negligence, as matter of law; *United R. & Electric Co. v. Weir*, 102 Md. 290, 62 Atl. 588; *United R. & Electric Co. v. Rosik*, 107 Md. 145, 68 Atl. 511,—holding same.

Cited in notes (22 L.R.A.(N.S.) 756) on negligence of passenger in getting on or off moving train; (33 L.R.A.(N.S.) 585) on contributory negligence of intending passenger entering car prematurely; (37 L.R.A.(N.S.) 45) on care required in sudden emergency.

Liability of carrier for act of stranger.

Cited in notes (22 L.R.A. 306) on liability of railroad for accidents caused by wrongful act of stranger; (3 L.R.A.(N.S.) 320) on liability for injury to passenger by wrongful act of stranger directed against cars or passengers therein.

14 L. R. A. 78, *UNITED STATES v. SIMMONS*, 47 Fed. 575.

Public policy as affecting indemnities.

Cited in *Leary v. United States*, 107 C. C. A. 27, 184 Fed. 437, to the point that contract to indemnify bail in criminal case is unenforceable; *Essig v. Turner*, 60 Wash. 176, 110 Pac. 998, to the point that persons who have been indemnified by accused, should not be accepted as bail for one convicted of embezzlement, pending appeal; *United States v. Greene*, 163 Fed. 443, holding the law will not imply an agreement or obligation on the part of the principal in a bail bond in a criminal case to indemnify his surety; *United States v. Lee*, 170 Fed. 614, holding it is within the discretion of a court or magistrate to refuse to accept a proffered criminal recognizance signed by a surety who has been fully indemnified against loss by third parties.

Cited in footnote to *Harrington v. Crawford*, 35 L. R. A. 477, which holds invalid, bond to indemnify sheriff against liability for failure to execute final process.

Cited in note (20 L.R.A.(N.S.) 58) on validity of agreement to indemnify bail in criminal case.

Distinguished in *Belond v. Guy*, 20 Wash. 161, 54 Pac. 995, sustaining action for contribution against cosurety on penal bond; *Carr v. Davis*, 64 W. Va. 526, 20 L.R.A.(N.S.) 64, 63 S. E. 326, 16 A. & E. Ann. Cas. 1031, holding a bond

of indemnity given by a person under charge of felony to indemnify his bail in a recognizance for his appearance to answer the charge, is not void as against public policy.

Criticized in *Maloney v. Nelson*, 12 App. Div. 548, 42 N. Y. Supp. 418, affirming 16 Misc. 480, 39 N. Y. Supp. 930, holding bond and mortgage executed by one indicted for felony, to indemnify surety, not void as against public policy.

14 L. R. A. 80, *DROWN v. FORREST*, 63 Vt. 557, 22 Atl. 612.

Amount of damages as affecting jurisdiction.

Cited in *Bickford v. Travelers Ins. Co.* 67 Vt. 426, 32 Atl. 230, holding motion for dismissal for lack of jurisdiction of amount involved properly denied, when suit brought in good faith; *Mellen v. United States Health & Acci. Ins. Co.* 83 Vt. 249, 75 Atl. 273, holding that county court is not ousted of jurisdiction because of smallness of amount in controversy, unless it is shown that plaintiff did not act in good faith in bringing action in that court.

Contracts in restraint of business.

Cited in footnotes to *Dills v. Doeblor*, 20 L. R. A. 432, which denies injunction to prevent resumption of dentistry practice without paying sum agreed on; *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639, which holds contract preventing manufacturer of oleomargarine engaging in business for five years not unreasonable; *Wilkinson v. Colley*, 26 L. R. A. 114, which holds injunction against violating agreement against practising medicine not prevented by naming penalty.

14 L. R. A. 82, *THOMAS v. CARTER*, 63 Vt. 609, 22 Atl. 720.

Right of creditor to sue insolvent.

Cited in *Barton Nat. Bank v. Atkins*, 72 Vt. 44, 47 Atl. 176, upholding right of creditor to maintain action during insolvency proceedings to ascertain liability; *Smith v. St. Paul German F. Ins. Co.* 56 Minn. 208, 57 N. W. 475, holding creditor filing claim with assignee not precluded from suing insolvent upon same claim.

14 L. R. A. 85, *LARSON v. CHASE*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238.

Rights as to disposition of corpse.

Cited in *Enos v. Snyder*, 131 Cal. 70, 53 L.R.A. 222, 82 Am. St. Rep. 330, 63 Pac. 170, holding personal representative not entitled to custody of body; *Burney v. Children's Hospital*, 169 Mass. 60, 38 L.R.A. 415, 61 Am. St. Rep. 273, 47 N. E. 401, holding father entitled to possession of child's body for burial; *Keyes v. Konkel*, 119 Mich. 551, 44 L.R.A. 243, 75 Am. St. Rep. 423, 78 N. W. 649, holding action in replevin not maintainable for corpse, under statute for taking chattels; *Lindh v. Great Northern R. Co.* 99 Minn. 408, 7 L.R.A.(N.S.) 1019, 109 N. W. 823, holding action ex delicto for damages may be maintained for mutilation of corpse.

Cited in footnotes to *Choppin v. Dauphin*, 33 L. R. A. 133, which denies right of owner of tomb to require removal of remains of dead; *Thompson v. State*, 51 L. R. A. 83, which holds attempt to make unauthorized sale of dead body of human being a misdemeanor; *Wright v. Hollywood Cemetery Corp.* 52 L. R. A. 621, which sustains right of grandmother of orphan child living with her, to determine place of burial; *McEntee v. Bonacum*, 60 L. R. A. 440, which holds next of kin of unmarried person entitled to custody of body, and to decide on place of burial; *Koerber v. Patek*, 68 L.R.A. 956, which holds that legal right to

bury corpse vests in nearest relative of decedent so situated as to be able and willing to perform the duty.

Cited in notes (31 L. R. A. 540) on power of coroner to order post-mortem examination; (42 L. R. A. 721, 723) on liability for disinterment of dead bodies, and acts relating thereto; (75 Am. St. Rep. 425, 428) on rights in and to dead bodies and remedies for their enforcement.

— **Of surviving spouse.**

Cited in *Re Richardson*, 29 Misc. 369, 60 N. Y. Supp. 539; *Neighbors v. Neighbors*, 112 Ky. 163, 65 S. W. 607,—upholding widow's right to choose husband's burial place; *Foley v. Phelps*, 1 App. Div. 556, 37 N. Y. Supp. 471, holding widow may recover damages for unauthorized dissection of husband's remains; *O'Donnell v. Slack*, 123 Cal. 290, 43 L.R.A. 390, 55 Pac. 906, and *Foley v. Phelps*, 1 App. Div. 554, 37 N. Y. Supp. 471, upholding widow's right to possession of husband's body before interment; *Doxtator v. Chicago & W. M. R. Co.* 120 Mich. 597, 45 L.R.A. 536, 79 N. W. 922, holding railroad company not liable for failure to deliver to widow parts of husband's limbs amputated by surgeon; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 656, 142 S. W. 775; *Darcy v. Presbyterian Hospital*, 202 N. Y. 262, 95 N. E. 695,—holding that right to possession of dead body for purpose of burial belongs to surviving husband or wife or next of kin; *Butterworth & Sons v. Teale*, 54 Wash. 18, 102 Pac. 768, to the point that right of wife to body of deceased husband is same as right of husband to that of his wife; *Philipps v. Montreal General Hospital*, Rap. Jud. Quebec, 33 C. S. 488, holding that unauthorized autopsy of deceased person is tort to widow and action lies for damages therefor; *Pettigrew v. Pettigrew*, 207 Pa. 316, 64 L.R.A. 181, 99 Am. St. Rep. 795, 56 Atl. 878, holding right is in surviving spouse and then in next of kin in order of relationship; *Mutual L. Ins. Co. v. Griesa*, 156 Fed. 401, holding widow has control of body of deceased husband; *Litteral v. Litteral*, 131 Mo. App. 312, 111 S. W. 872, holding widow, if present, has right to bury body of deceased husband, in preference of right of husband's kinsmen; *Louisville & N. R. Co. v. Wilson*, 123 Ga. 66, 51 S. E. 24, 3 A. & E. Ann. Cas. 128, holding widow has right of possession of remains of husband; *Medical College v. Rushing*, 1 Ga. App. 469, 57 S. E. 1083, holding husband has right of possession of remains of deceased wife, and right of action for their mutilation.

Cited in footnotes to *Hackett v. Hackett*, 19 L. R. A. 558, which holds widow entitled to control husband's burial; *Thompson v. Deeds*, 35 L. R. A. 56, which denies widow's right to remove husband's body from lot owned by daughter, though sustaining right to erect monument thereon; *Pettigrew v. Pettigrew*, 64 L.R.A. 179, which sustains widow's right to control interment of intestate husband's corpse.

— **Right of action for disinterring remains.**

Cited in *Anderson v. Acheson*, 132 Iowa, 748, 9 L.R.A.(N.S.) 219, 110 N. W. 335, holding right of action exists for unnecessary disturbance or wanton violation of burial place; *Wilson v. Read*, 74 N. H. 326, 16 L.R.A.(N.S.) 335, 122 Am. St. Rep. 973, 68 Atl. 37, holding next of kin have right of action for wilful disturbance of remains; *Cohen v. Congregation Shearith Israel*, 85 App. Div. 67, 82 N. Y. Supp. 918, on right of action for disintering remains.

Lot owners' interest in cemetery.

Cited in *Brown v. Maplewood Cemetery Asso.* 85 Minn. 513, 89 N. W. 872, holding that private owners of cemetery lots may compel trustees to apply, on improvements, money from sales.

Mental suffering as element of damages.

Cited in *Hickey v. Welch*, 91 Mo. App. 12, holding mental suffering due to violent conduct properly considered in aggravation of damages for trespass; *Watson v. Dilts*, 116 Iowa, 252, 57 L. R. A. 561, 93 Am. St. Rep. 239, 89 N. W. 1068, holding one liable for causing nervous prostration by trespassing in nighttime; *Bucknam v. Great Northern R. Co.* 76 Minn. 377, 79 N. W. 98, holding abusive language used by agent to husband gives wife no right of action against company for mental pain; *Sanderson v. Northern P. R. Co.* 88 Minn. 166, 60 L. R. A. 405, 97 Am. St. Rep. 509, 92 N. W. 542, denying recovery for fright resulting in physical injury in absence of contemporaneous injury; *Gibney v. Lewis*, 68 Conn. 396, 36 Atl. 799, holding admission of evidence of mental anguish on account of arrest not error; *Lonergan v. Small*, 81 Kan. 54, 25 L.R.A.(N.S.) 979, 105 Pac. 27, holding damages for mental suffering recoverable for assault without battery; *Bouillon v. Laclede Gaslight Co.* 148 Mo. App. 469, 129 S. W. 401, holding that in negligence actions no recovery can be had for mental suffering not resulting from physical injury, unless under circumstances of malice, insult or inhumanity directed against plaintiff.

Cited in footnotes to *Hale v. Bonner*, 14 L. R. A. 336, which allows for mental distress for delay in transporting corpse of husband; *Louisville & N. R. Co. v. Hull*, 57 L. R. A. 771, which authorizes consideration of mental anguish in assessing damages for breach of contract to transport corpse.

Cited in note (30 Am. St. Rep. 712) on damages for mental anguish.

Distinguished in *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 335, holding fright, unaccompanied by immediate physical injury, no basis for damages.

— For negligent delivery of telegram.

Cited in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 765, 28 L. R. A. 76, 57 Am. St. Rep. 294, 62 N. W. 1, upholding right to damages for mental suffering for nondelivery of message announcing funeral of mother; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 386, 64 L. R. A. 551, 101 Am. St. Rep. 268, 98 N. W. 281, holding mental anguish element of damages in action for negligent transmission of telegram; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 83, 54 L. R. A. 852, 60 N. E. 1080 (dissenting opinion), majority holding no recovery for mental suffering due to nondelivery of telegram; *Francis v. Western U. Teleg. Co.* 58 Minn. 262, 25 L. R. A. 412, 49 Am. St. Rep. 507, 59 N. W. 1078, denying recovery for mental pain alone, for failure to deliver message; *Rowan v. Western U. Teleg. Co.* 149 Fed. 553, holding damages for mental suffering, unaccompanied by physical injury, cannot be recovered against telegraph company for mere neglect in delivering death message preventing attendance at funeral.

— For wrong in respect to corpse or burial.

Cited in *Beaulieu v. Great Northern R. Co.* 103 Minn. 51, 19 L.R.A.(N.S.) 568, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, on right of action against carrier for mental anguish caused by delay in transporting corpse causing delay in funeral; *Kyles v. Southern R. Co.* 147 N. C. 398, 16 L.R.A.(N.S.) 407, 61 S. E. 278, holding damages for mental anguish from mutilation of dead body recoverable; *Wright v. Beardsley*, 46 Wash. 19, 89 Pac. 172, holding damages for mental anguish from failure to properly bury deceased child recoverable; *Koerber v. Patek*, 123 Wis. 459, 68 L.R.A. 959, 102 N. W. 40, holding mental anguish element of damage for wilful mutilation of corpse.

14 L. R. A. 89, *COM. v. McMANUS*, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761.

Specific charge to jury.

Cited in *Walbert v. Trexler*, 156 Pa. 118, 32 W. N. C. 489, 27 Atl. 65, and *Kroegher v. McConway & T. Co.* 149 Pa. 456, 23 Atl. 341, holding court not bound to charge in exact language requested; *Gallagher v. Philadelphia*, 4 Pa. Super. Ct. 69, and *Com. v. Clark*, 3 Pa. Super. Ct. 148, upholding court's right to charge jury in own words, clearly stating law; *Hand v. Central Pennsylvania Teleph. & Supply Co.* 1 Lack. Legal News, 362, holding specific charge properly denied, question of duty to repair being covered by general charge; *Brubaker v. Lebanon*, 14 Pa. Dist. R. 586, 22 Lanc. L. Rev. 70, holding a court is not bound to affirm a point in the exact phrase asked for even if the legal proposition is correct.

Jurors as judges of law and fact.

Followed in *Com. v. Costello*, 1 Pa. Dist. R. 747, holding jurors no longer judges of law separately from facts in criminal cases.

Cited in *State v. Dickey*, 48 W. Va. 330, 37 S. E. 695; *Sparf v. United States*, 156 U. S. 85, 39 L. ed. 355, 15 Sup. Ct. Rep. 273, holding it duty of jury to receive law from court, applying it as instructed; *Com. v. Goldberg*, 4 Pa. Super. Ct. 148, holding charge that jurors may disregard instructions of court as to law, error; *State v. Heacock*, 106 Iowa, 201, 76 N. W. 654, holding it duty of court to instruct jury as to law in libel suit; *Com. v. McMurray*, 198 Pa. 61, 82 Am. St. Rep. 787, 47 Atl. 952, holding charge of prisoner's guilt of murder in second degree no error, such conclusion being undisputed; *Com. v. Brown*, 17 Pa. Dist. R. 94, holding same; *Oakes v. State*, 98 Miss. 93, 33 L.R.A.(N.S.) 215, 54 So. 79, holding that court may require jury to consider only the law given in its charge in libel suit; *Com. v. Ellis*, 46 Pa. Super. Ct. 78, holding that it is duty of jury to take judge's instructions as best evidence of law; *Com. v. Havrilla*, 38 Pa. Super. Ct. 298, holding court cannot direct a verdict of guilty in criminal case; *Com. v. Devine*, 31 Pa. Co. Ct. 112, 14 Pa. Dist. R. 4, holding jury are not judges of the law in any case, civil or criminal; *State v. Daley*, 54 Or. 519, 103 Pac. 502, holding under statute jury have power to disregard instructions and acquit accused.

Cited in footnotes to *State v. Burbee*, 19 L. R. A. 145, which holds jury in criminal case not judges of law; *State v. Main*, 36 L. R. A. 623, which upholds power to limit by statute right of court to instruct jury as to constitutionality of a statute.

Cited in notes (33 L.R.A.(N.S.) 208) on effect of provision that jury shall determine law and facts in libel cases; (42 Am. St. Rep. 294) on jury as judges of law and fact.

14 L. R. A. 95, *GRAY v. WESTERN U. TELEG. CO.* 87 Ga. 350, 27 Am. St. Rep. 259, 13 S. E. 562.

Damages for violation of public duty or contract.

Cited in *Conyers v. Postal Teleg. Cable Co.* 92 Ga. 620, 44 Am. St. Rep. 100, 19 S. E. 253, upholding sender's right to sue connecting company for penalty for delay in delivering telegram; *Southern Bell Teleph. & Teleg. Co. v. Beach*, 8 Ga. App. 722, 70 S. E. 137, holding that telephone company is liable for refusal to render service to member of community, without lawful excuse; *Glenn v. Western U. Teleg. Co.* 1 Ga. App. 831, 58 S. E. 83, holding it error to sustain a general demurrer to, and dismiss a petition setting forth a breach of contract implied from a public duty on the part of the defendant telegraph company and which if proved would entitle the plaintiff to recover at least nominal

damages; *Stewart, M. & Co. v. Postal Telegr. Cable Co.* 131 Ga. 35, 18 L.R.A. (N.S.) 694, 127 Am. St. Rep. 205, 61 S. E. 1045, holding a sendee of a telegram who acts on the faith of a message negligently altered by servants of the telegraph company in its transmission, and thereby sustains damage, may maintain an action in tort against telegraph company for breach of public duty; *Louisville v. Wehmhoff*, 116 Ky. 843, 79 S. W. 201, as to duty of company in sending illegal or immoral message; *Cordell v. Western U. Telegr. Co.* 149 N. C. 409, 22 L.R.A. (N.S.) 543, 63 S. E. 71, holding if a message is tendered to a telegraph company with the requisite lawful charges, it is obligated to receive the same for the transmission; *Western U. Telegr. Co. v. Greer*, 115 Tenn. 373, 1 L.R.A. (N.S.) 527, 89 S. W. 327, holding clause in contract exempting telegraph company from damages or statutory penalties unless the claim is presented within a certain time after transmission of message applies to actions for statutory penalties as well as action for damages.

Cited in note (17 L.R.A. (N.S.) 837) on right to refuse telegraph message because of its character.

When acts illegal.

Cited in *Gist v. Western U. Telegr. Co.* 45 S. C. 367, 55 Am. St. Rep. 763, 23 S. E. 143, holding complaint failing to state facts required by Rev. Stat. § 1859, insufficient to sustain recovery for nondelivery of telegram relating to "cotton futures;" *Crystal Ice Co. v. Wylie*, 65 Kan. 109, 68 Pac. 1086, holding use of ice by persons selling liquors illegally, no defense to action for breach of contract to deliver.

Cited in footnote to *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday.

14 L. R. A. 97, *Re SPAIN*, 3 Inters. Com. Rep. 738, 47 Fed. 208.

Exercise of police power.

Cited in footnote to *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

— Regulating trade with residents.

Cited in footnotes to *Brownback v. North Wales*, 49 L. R. A. 446, which holds valid, as to residents, ordinance requiring license for sale of goods on street or by soliciting orders from house to house; *Smith v. Jackson*, 47 L. R. A. 416, which holds agent collecting garments and sending them to laundry outside of state, and redelivering to owners, not engaged in commerce; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax; *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though vendors of own products exempt; *Com. v. Harmel*, 27 L. R. A. 388, which authorizes regulation of peddling separate articles after original package broken; *Williams v. Fears*, 50 L. R. A. 685, which sustains license tax on emigrant agent; *South Bend v. Martin*, 29 L. R. A. 531, which holds ordinance imposing license on peddlers not interference with commerce as to peddling of chairs imported before employment begun.

Cited in notes (18 L.R.A. (N.S.) 135) on sale by foreign corporation of goods
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stored in state as intrastate business; (19 L.R.A.(N.S.) 311) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise as violating the commerce clause; (46 L. ed. U. S. 785) on peddlers and drummers as related to interstate commerce.

— **Regulating trade with nonresidents.**

Cited in *State v. Lichtenstein*, 44 W. Va. 102, 28 S. E. 753, holding statute requiring license to solicit orders for liquors unconstitutional as to agents of nonresidents; *Re Tinsman*, 95 Fed. 651, holding ordinance prohibiting persons from soliciting orders for manufacturers in another state, without license, void; *Huntington v. Mahan*, 142 Ind. 697, 51 Am. St. Rep. 200, 42 N. E. 463, holding ordinance prohibiting peddling without license unlawful as to agent of non-resident publisher distributing books to fill orders previously taken; *Re Tyerman*, 48 Fed. 167, and *Re Nichols*, 48 Fed. 166, 48 Phila. Leg. Int. 474, holding ordinance requiring license fee void as to agent soliciting orders for books to be sent from another state; *Havens & G. Co. v. Diamond*, 93 Ill. App. 567, holding foreign manufacturers sending drummers into Illinois to solicit orders for clothing, and shipping goods to purchasers, not within statute regulating trade; *State v. Eckenrode*, 148 Iowa, 192, 127 N. W. 56, holding that agent opening box and delivering packages contained therein to customers is not liable for violation of pure food law of state, where original was set into state for distribution by him; *Kinsley v. Dyerly*, 79 Kan. 5, 19 L.R.A.(N.S.) 407, 98 Pac. 228; *State v. Trotman*, 142 N. C. 665, 55 S. E. 599,—holding foreign dealer who solicits orders through agent and ships to agent for delivery to purchaser is engaged in interstate commerce and not subject to local license ordinance.

Cited in footnotes to *Gunn v. White Sewing Mach. Co.* 18 L. R. A. 206, which holds as interstate commerce, contract by resident for sale of machines of foreign corporation; *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages, act requiring marking on package of year in which seed grown; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered, and taking other orders, not a peddler; *Com. v. Myers*, 31 L. R. A. 379, which holds void, license tax on peddlers which exempts manufacturers who have paid tax on capital; *Carrollton v. Bazzette*, 31 L. R. A. 522, which holds ordinance requiring license from itinerant merchants purchasing bankrupt stocks wherever possible not regulation of commerce; *State v. Scott*, 36 L. R. A. 461, which holds soliciting of pictures to be enlarged outside of state, interstate commerce preventing imposition of privilege tax; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil; *French v. State*, 52 L. R. A. 160, which holds agent of nonresident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 52 L. R. A. 108, which holds interstate commerce, delivery of portraits and frames by agent previously taking order for nonresident manufacturer.

Cited in note (24 L. R. A. 313, 314) on exclusion of foreign corporations as interference with interstate commerce.

Annotation in 14 L. R. A. 97, referred to particularly in *State v. Coop*, 52 S. C. 513, 41 L. R. A. 503, footnote p. 501, 30 S. E. 609 (dissenting opinion), majority holding purchase of picture frame in accordance with option in order for making portrait in another state not within statute against peddling.

Distinguished in *State v. Gorham*, 115 N. C. 728, 25 L. R. A. 812, footnote p. 810, 44 Am. St. Rep. 494, 20 S. E. 179, holding license tax on business of

erecting lightning rods not tax an interstate commerce as to one putting up rods sold by himself only.

Federal control of interstate commerce.

Cited in *Ex parte Martin*, 180 Fed. 213, to the point that Federal court is vested with discretion to entertain jurisdiction of alleged violation of state regulations for licensing peddlers; *Wilcox v. People*, 46 Colo. 383, 104 Pac. 408; *Smith v. Farr*, 46 Colo. 370, 104 Pac. 401,—holding Congress has sole power to regulate commerce between states and interstate commerce cannot be taxed by state.

14 L. R. A. 100, *TITUSVILLE v. BRENNAN*, 143 Pa. 642, 3 Inters. Com. Rep. 735, 24 Am. St. Rep. 580, 22 Atl. 893.

Reversed in 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

Regulations affecting trade.

Cited in *Lowry v. Tile, Mantel & Grate Asso.* 106 Fed. 44, holding combination of dealers in fire-place fixtures, providing no dealer should purchase except from member, in restraint of trade.

License for right to do business.

Cited in *North Wales v. Brownback*, 10 Pa. Super. Ct. 230, 44 W. N. C. 260, 49 L. R. A. 447, footnote p. 446, Reversing 7 Pa. Dist. R. 326, 16 Lanc. L. Rev. 151, 14 Montg. Co. L. Rep. 81, holding valid as to residents, ordinance requiring license for sale of goods on street or soliciting orders from house to house; *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 135, holding borough has power to require agents selling teas from house to house to procure license; *Com. v. Harmel*, 166 Pa. 95, 27 L. R. A. 389, 5 Inters. Com. Rep. 89, 30 Atl. 1036, holding peddling separate articles after packages in which sent from another state are broken subject to police regulation; *South Bethlehem v. Hackett, C. & Co.* 12 Lanc. L. Rev. 200, holding statute authorizing city to impose license fee on transient retail dealers, but excepting permanent dealers does not allow tax upon nonresidents having permanent business place out of state; *Lancaster ex rel. Board of Health v. Reese*, 22 Lanc. L. Rev. 38, 14 Pa. Dist. R. 447, holding a city ordinance requiring all milk dealers to take out a license and pay a registration fee and imposing a limited penalty for failure to comply therewith, a valid exercise of police power.

Cited in footnote to *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax.

Cited in note (129 Am. St. Rep. 278) on constitutional limitations on power to impose license or occupation taxes.

Interference with interstate commerce.

Cited in footnote to *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages, act requiring marking on package of year in which seed grown.

Cited in note (46 L. ed. U. S. 785) on peddlers and drummers as related to interstate commerce.

Disapproved in *Altoona City v. Patterson*, 33 Pa. Co. Ct. 130, 16 Pa. Dist. R. 557; *State v. Glasby*, 50 Wash. 603, 21 L.R.A.(N.S.) 799, 97 Pac. 734,—holding license tax on persons taking orders for goods by sample applying to persons taking orders for goods without state to be shipped in original packages, void.

—License matters.

Cited in *Sayre v. Phillips*, 148 Pa. 488, 30 W. N. C. 197, 16 L. R. A. 50, 33

Am. St. Rep. 842, 24 Atl. 76, holding ordinance fixing nonresident peddler's license at price intended as prohibitive, void; *State ex rel. Selliger v. O'Connor*, 5 N. D. 632, 67 N. W. 824, holding arrest for violating ordinance taxing persons selling, by samples, goods to be shipped from another state illegal; *Densmore v. Erie*, 20 Pa. Co. Ct. 519, 7 Pa. Dist. R. 359, holding ordinance requiring bicycle riders to display license tag not proper exercise of police power; *Com. ex rel. Overfield v. Walker*, 14 Pa. Co. Ct. 587, 3 Pa. Dist. R. 535, 12 Lanc. L. Rev. 211, and *Re Tinsman*, 95 Fed. 651, holding ordinance prohibiting persons from soliciting orders for manufacturers in another state, without license, void.

Cited in footnotes to *State v. Scott*, 36 L. R. A. 461, which holds soliciting of pictures to be enlarged outside of the state, interstate commerce preventing imposition of privilege tax; *State v. Coop*, 41 L. R. A. 501, which holds purchase of frame in accordance with option included in order for making portrait in other state not within statute against peddling; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil; *State v. Gorham*, 25 L. R. A. 810, which holds license tax on business of putting up lightning rods not tax on interstate commerce as to one putting up rods sold by himself only; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivered from wagon goods previously ordered, and taking other orders, not a peddler.

Cited in note (19 L.R.A.(N.S.) 304) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample, or otherwise, as violating the commerce clause.

14 L. R. A. 103, LAW'S ESTATE, 144 Pa. 499, 22 Atl. 831.

Liability for trust funds — Of executor or trustee.

Cited in *Stong's Estate*, 160 Pa. 16, 28 Atl. 480, holding executor liable for neglect to reduce bonds to judgment before failure of obligor; *Evans's Estate*, 7 Pa. Super. Ct. 144, 9 Kulp, 224, holding trustee liable for loss from bank's failure, when funds left on deposit four years; *Seager's Estate*, 6 Pa. Dist. R. 108, charging administrator with funds deposited to his own credit, and lost by bank's failure; *Re Kohler*, 15 Wash. 617, 55 Am. St. Rep. 904, 47 Pac. 30, holding executor depositing trust funds in solvent bank not liable for loss by bank's failure; *Re Seamans*, 2 Lack. Legal News, 273, holding executor continuing deposit made by testator in bank not liable for loss by bank's failure; *Re Wood*, 159 Cal. 470, 36 L.R.A.(N.S.) 253, 114 Pac. 992, holding that measure of care in regard to funds, required of trustee in such as would be exercised by man of ordinary prudence and skill in management of his own business; *Re Clark*, 39 Pittsb. L. J. N. S. 194, holding that accountant is liable for loss of funds when it appears that he kept them in bank of which he was director for over eight months, or until it failed.

Cited in notes (7 L.R.A.(N.S.) 618) on liability of executor or administrator for loss of bank deposit; (89 Am. St. Rep. 293, 297, 298; 21 L.R.A.(N.S.) 400) on liability of guardian for loss of bank deposit; (98 Am. St. Rep. 372) on deposit in trust fund in bank by executors or administrators.

— Of public officer.

Cited in *School District v. Stoner*, 16 Montg. Co. L. Rep. 108, holding collector not liable for loss of school funds deposited in solvent bank; *State v. Gramm*, 7

Wyo. 345, 40 L. R. A. 695, 52 Pac. 533, holding state treasurer not insurer of public funds, and not liable for moneys deposited in banks and lost by failure.

Distinguished in *Fairchild v. Hedges*, 14 Wash. 124, 31 L. R. A. 854, 44 Pac. 125, holding treasurer accountable by statute for public funds deposited in banks and lost by failure.

— **Affected by nature of deposit.**

Approved in *State v. McFetridge*, 84 Wis. 515, 20 L. R. A. 237, 54 N. W. 1, holding deposit of state funds in banks not investments prohibited by statute.

Cited in *Bardsley v. Sternberg*, 18 Wash. 625, 52 Pac. 251, holding deposit of public funds by city treasurer in bank for safe keeping not loan; *State v. Hill*, 47 Neb. 532, 66 N. W. 541, holding deposit of public funds in bank for safe keeping, treasurer retaining control, not loan within Crim. Code, § 124; *Allibone v. Ames*, 9 S. D. 79, 33 L. R. A. 588, 58 N. W. 165, and *Nebraska v. First Nat. Bank*, 88 Fed. 950, holding money left with bank subject to check, security given and interest paid, constitutes deposit; *Officer v. Officer*, 120 Iowa, 391, 98 Am. St. Rep. 365, 94 N. W. 947, holding general deposit by executor not entitle him or *cestui que trust* to preference; *Hunt v. Hopley*, 120 Iowa, 699, 95 N. W. 205, holding general deposit of funds of school district by treasurer in representative capacity not a loan; *Re Curtis*, 26 R. I. 582, 60 Atl. 240, as to temporary deposit subject to call although some interest is received not being investment of money; *Coreoran v. Kostrometinoff*, 21 L.R.A.(N.S.) 402, 91 C. C. A. 619, 164 Fed. 688, holding guardian personally liable for loss of funds deposited with a bank for a fixed period of time on a certificate of deposit without security; *Clark's Estate*, 39 Pa. Super. Ct. 448, 39 Pittsb. L. J. N. S. 193, holding guardian who opens a bank account for wards, in a bank in which he is a director, and where he has his own and his firm's accounts, such amount bearing interest at four per cent and subject to check without notice, cannot be surcharged because he kept his ward's money in bank for eight months without investing it.

Cited in note (16 L. R. A. 517) as to when deposit in bank is special so that title remains in depositor.

Distinguished in *Glassburner's Estate*, 40 Pa. Super. Ct. 136, holding testamentary guardian authorized by will to invest such money as comes into his hands, in such manner as will, in his opinion, be for the interest of the ward, and guardian in good faith deposits the money in a bank on an open account at four per cent interest, cannot be held liable for loss resulting from failure of bank.

Interest on public funds.

Cited in *Baker v. Williams*, Bkg. Co. 42 Or. 223, 70 Pac. 711, denying public officer's right to interest on public funds, lost by deposit in insolvent bank, until he has reimbursed treasury.

Parol evidence to show nature of deposit.

Cited in *State ex rel. Carroll v. Corning State Sav. Bank*, 136 Iowa, 81, 113 N. W. 500, holding where a certificate of deposit is given parol evidence is admissible to show transaction a loan.

"Deposit."

Cited in *Com. ex rel. Atty. Gen. v. State Bank*, 32 Pa. Co. Ct. 55, holding the word "deposit" should be given its popular rather than technical meaning; *Warren v. Nix*, 97 Ark. 382, 135 S. W. 896, to the point that deposit is where sum of money is left with banker for safe keeping, subject to order and payable not in specific money deposited, but in equal sum.

Cited in note (33 Am. St. Rep. 226) on general and special deposits.

14 L. R. A. 107, *COM. v. NORTHERN ELECTRIC LIGHT & P. CO.* 145 Pa. 105, 22 Atl. 839.

What constitutes manufacturing corporation.

Cited in *Com. v. National Oil Co.* 157 Pa. 518, 33 W. N. C. 138, 27 Atl. 374, holding part of capital used in mining and transporting raw petroleum taxable, part used in refining exempt; *Com. v. Juniata Coke Co.* 157 Pa. 508, 33 W. N. C. 133, 27 Atl. 373 (finding of court below), holding company manufacturer as to coke produced, taxable as to coal mined; *Com. v. American Car & Foundry Co.* 203 Pa. 304, 52 Atl. 326, Affirming 26 Pa. Co. Ct. 607, holding exempt so much of capital stock of foreign corporation manufacturing cars as is used in Pennsylvania; *Perkins v. Coffin*, 84 Conn. 309, 79 Atl. 1070, Ann. Cas. 1912 C, 1188 (dissenting opinion), as to what constitutes "manufacturing corporation" under statutes; *Re Charles Town Light & Power Co.* 183 Fed. 164, to the point that business of impounding and supplying of natural gas for fuel is not manufacturing business; *Re Hudson River Electric Power Co.* 173 Fed. 941, holding gas company not principally engaged in manufacturing within meaning of bankruptcy act; *Re Rutland Realty Co.* 157 Fed. 297, holding corporation engaged in building houses a manufacturing corporation; *Com. v. Cover*, 29 Pa. Super. Ct. 414, holding fact that leather is cut in store into various sizes and pieces, but not manufactured into any complete article, does not exempt from taxation the leather thus treated, on the ground that it was manufactured into articles for sale.

Cited in footnotes to *Com. v. Pottsville Iron & Steel Co.* 22 L. R. A. 228, which holds exemption of manufacturing company not lost by possessing power of mining; *Com. v. Juniata Coke Co.* 22 L. R. A. 232, which holds exemption of manufacturing company not lost by possessing power to mine its own coal; *Cowling v. Zenith Iron Co.* 33 L. R. A. 508, which holds stockholders of iron ore mining corporation exempt from double liability; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 41 L. R. A. 228, which denies exemption as manufacturing company to corporation buying, slaughtering, and selling sheep and lambs; *Columbia Ironworks v. National Lead Co.* 64 L. R. A. 645, holding building, sale, and repairing of vessels within statute permitting involuntary bankruptcy proceedings against manufacturing company.

Cited in notes (57 L. R. A. 44) on taxation of corporate franchises; (58 L. R. A. 604) on taxation of capital stock of corporations in United States; (64 L. R. A. 34, 35, 40, 42, 58, 60) on taxation of manufacturing corporations in United States.

Distinguished in *Com. v. Keystone Bridge Co.* 156 Pa. 503, 32 W. N. C. 480, 27 Atl. 1, holding company buying raw materials and finishing them for use, manufacturing company within act of June 1, 1889.

— Companies producing electricity.

Followed in *Com. v. Edison Electric Light Co.* 145 Pa. 139, 27 Am. St. Rep. 683, 22 Atl. 845, and *Com. v. Edison Electric Light & P. Co.* 170 Pa. 232, 32 Atl. 419, Affirming 1 Dauphin Co. Rep. 128, holding corporation producing and selling electricity not exempt from taxation as manufacturing company.

Cited in *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 604, 36 L. R. A. 132, footnote p. 130, 136 Atl. 362; *Com. ex. rel. McCormick v. Keystone Electric Light, H. & P. Co.* 2 Dauphin Co. Rep. 7, 4 Lack. Legal News, 359, holding electric corporation supplying light, heat, and power not manufacturing corporation; *Williams v. Park (Williams v. Warren)* 72 N. H. 314, 64 L. R. A. 49, 56 Atl. 463, holding plant for collection and distribution of electricity for power and light not exempt from taxation; *State v. New Orleans R. & Light Co.* 116 La.

150, 40 So. 597, 7 A. E. Ann. Cas. 724, holding electric light company is not a "manufacturer" in the sense of the exemption clause of the constitution authorizing legislature to impose license taxes.

Distinguished in *Com. ex rel. McCormick v. Keystone Electric Light, H. & P. Co.* 193 Pa. 249, 44 Atl. 326, holding purchasers at sheriff's sale of electric light company's rights authorized by act of May 25, 1878, P. L. 145, to reorganize: *Bates Mach. Co. v. Trenton, & N. B. R. Co.* 70 N. J. L. 688, 103 Am. St. Rep. 811, 58 Atl. 935, holding production and control of electric power by mechanical means and its adaptation for use upon a trolley system is a "manufacturing purpose," with mechanics' lien law.

Disapproved in effect in *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 555, 14 L. R. A. 711, footnote p. 708, 29 N. E. 808, including electric light company among manufacturing corporations exempt from state tax.

Classification for taxation.

Cited in *Knisely use of Com. v. Cotterel*, 3 Dauphin Co. Rep. 124, holding dealers in goods, wares, and merchandise may be classified as wholesalers and retailers, and taxed at different rates.

Construction of statutes.

Cited in *Likins's Petition*, 223 Pa. 465, 72 Atl. 858, 37 Pa. Super. Ct. 635, holding a general and comprehensive, rather than a strained, technical, or specific meaning is ordinarily to be adopted.

14 L. R. A. 114, *BOARD OF HEALTH v. VAN HOESEN*, 87 Mich. 533, 49 N. W. 894.

Right to condemn property.

Cited in *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 106, 61 L. R. A. 133, 99 Am. St. Rep. 855, 43 S. E. 194, holding corporation authorized to develop and use water power to generate electricity for general use not entitled to condemn private property; *St. James African M. E. Church v. Baltimore & O. R. Co.* 114 Md. 448, 79 Atl. 35, holding that railroad company has right to condemn for its use unoccupied part of private cemetery owned by religious corporation; *Shasta Power Co. v. Walker*, 149 Fed. 570; *Minnesota Canal & Power Co. v. Koochieching*, 97 Minn. 449, 5 L.R.A.(N.S.) 649, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182,—holding a use is not public unless under proper regulations the public has the right to resort to the property for the use for which it was acquired independently of the will or caprice of the corporation in which the title of the property vests upon condemnation; *Howard Mills Co. v. Schwartz Lumber & Coal Co.* 77 Kan. 609, 18 L.R.A.(N.S.) 362, 95 Pac. 559, holding a private corporation, owning a mill operated by steam power and having for its purpose the manufacture and sale of feed and flour cannot exercise right of eminent domain for purpose of improving and enlarging its business; *Brown v. Gerald*, 100 Me. 376, 70 L.R.A. 484, 109 Am. St. Rep. 526, 61 Atl. 785, holding manufacturing generating, selling, distributing and supplying electricity for power for manufacturing or mechanical purposes, is not a public use for which private property may be taken against will of owner; *State ex rel. Tacoma Industrial Co. v. White River Power Co.* 39 Wash. 668, 2 L.R.A.(N.S.) 849, 82 Pac. 150, 4 A. & E. Ann. Cas. 987; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 53, 103 Am. St. Rep. 438, 94 N. W. 379,—holding land cannot be taken by a corporation under eminent domain, unless, after it is taken it is to be devoted to the use of the public independent of the will of the corporation; *Cozard v. Kanawha Hardwood Co.* 139 N. C. 292, 1 L.R.A.(N.S.) 975, 111 Am. St. Rep. 779, 51 S. E. 932, holding right of eminent domain

cannot be conferred to secure a right of way for private railway to transport timber to market; *Alfred Phosphate Co. v. Duck River Phosphate Co.* 120 Tenn. 273, 22 L.R.A.(N.S.) 705, 113 S. W. 410, holding if condemnation is not for a public use the right of eminent domain cannot be conferred upon either private or public corporation.

Judicial power over eminent domain.

Cited in *United States Gypsum Co. v. Kent* Circuit Judge, 150 Mich. 672, 114 N. W. 666, holding if preliminary objections in condemnation proceedings are overruled and an order appointing commissioners or jury is made jurisdictional questions are reviewable by certiorari.

Cited in notes (22 L.R.A.(N.S.) 7, 24, 25, 28, 39, 40, 41, 42, 45, 51, 55, 89, 171) on judicial power over eminent domain; (88 Am. St. Rep. 929, 935) on existence of public use as question for courts.

14 L. R. A. 117, *EVANS v. FOSTER*, 80 Wis. 509, 50 N. W. 410.

Liability for legacy and debts.

Cited in *Merton v. O'Brien*, 117 Wis. 442, 94 N. W. 340, holding that action to enforce legacy against devise chargeable with payment may be barred by limitations; *Pym v. Pym*, 118 Wis. 669, 96 N. W. 429, holding part of estate not exempt chargeable with payment of testator's debts; *Painter v. Kaiser*, 27 Nev. 431, 65 L.R.A. 675, 103 Am. St. Rep. 772, 76 Pac. 747, 1 A. & E. Ann. Cas. 765, as to personal liability of executors for payment of legacies upon their implied promise to pay same; *Re Bouck*, 133 Wis. 174, 113 N. W. 452, as to liability of one accepting bequest charged with a debt.

Cited in footnote to *Case v. Hall*, 25 L. R. A. 766, which holds acceptance of devise, with direction to pay legacies, renders devisee personally liable.

14 L. R. A. 120, *BROWN v. VAILES*, 16 Colo. 462, 27 Pac. 945.

Limitation upon right to contest election.

Cited in *Gillespie v. Dion*, 18 Mont. 194, 33 L. R. A. 707, 44 Pac. 954, holding election contest statement failing to allege contestant's qualifications cannot be amended after lapse of time to begin proceedings; *Lowry v. Stotts*, 138 Ky. 254, 127 S. W. 789, holding that petition to contest election is not valid if filed on following Monday, where last day for filing falls on Sunday.

Computation of time.

Cited in footnote to *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for appearance.

Cited in notes (15 L.R.A.(N.S.) 687) on first and last days in computation of time; (38 L.R.A.(N.S.) 1162) on limitation of actions: rule as to first and last days in computation of time; (78 Am. St. Rep. 377, 380), on computation of time.

— When Sunday or holiday included.

Cited in *American Tobacco Co. v. Strickling*, 88 Md. 510, 41 Atl. 1083, holding statute providing for performance of act within seven days includes Sunday; *Johnston v. New Omaha Thompson-Houston Electric Light Co.* 86 Neb. 173, 125 N. W. 153, 20 Ann. Cas. 1314, holding that under section 895 of code where act is to be done within specified time and last day falls on Sunday, act may be done on following day; *Geneva Cooperage Co. v. Brown*, 124 Ky. 24, 124 Am. St. Rep. 388, 98 S. W. 279, holding statute providing that if any proceeding is directed by law to take place on a particular day of the month if the day happen to be Sunday, the proceeding shall take place the next day does not ex-

tend to the provisions of the statute of limitations; *Johnston v. New Omaha Thompson-Houston Electric Light Co.* 86 Neb. 169, 125 N. W. 153, holding where an act is to be done or permitted to be done within a specified time and the last day is Sunday it shall be excluded.

Cited in footnotes to *Hirshfield v. Ft. Worth Nat. Bank*, 15 L. R. A. 639, which holds note falling due on Sunday payable on Monday; *Hanover F. Ins. Co. v. Shrader*, 30 L. R. A. 498, which denies right to exclude Sunday, although last of thirty days for filing application for writ of error; *Merritt v. Gate City Nat. Bank*, 38 L. R. A. 749, which holds Sunday before term of court beginning on Monday not excluded in determining whether action triable; *Morris v. Union Nat. Bank*, 50 L. R. A. 182, which denies bank's liability for failure to protest in due season note falling due on holiday, under honest mistake as to proper time; *Occumpaugh v. Norton*, 68 L.R.A. 272, which holds that aggregate of half holidays shall be added in computing time for taking appeals under statute excluding holidays from number of days specified; *American Tobacco Co. v. Strickling*, 69 L.R.A. 909, which holds that Sundays cannot be excluded in computing time for signing bills of exception.

Cited in notes (49 L. R. A. 204, 248) on rule as to computing time when Sunday or holiday is first or last day; (23 L.R.A.(N.S.) 760) on day of grace for payment of insurance premium or assessment, where date of payment or expiration of such period falls on Sunday or holiday.

Distinguished in *Denver v. Londoner*, 33 Colo. 111, 80 Pac. 117, holding under city charter requiring the board of public works before ordering an improvement to publish notice for twenty days, Sunday was to be included though it was the last day of the publication.

14 L. R. A. 123, *DONAHUE v. HUBBARD*, 154 Mass. 537, 26 Am. St. Rep. 271, 28 N. E. 909.

Tenancy by entirety.

Cited in *Morris v. McCarty*, 158 Mass. 12, 32 N. E. 938, holding deed creates no estate in entirety when grantees not husband and wife; *Phelps v. Simons*, 159 Mass. 417, 38 Am. St. Rep. 430, 34 N. E. 657, holding husband may assign gift of bank stock made to husband and wife, subject to wife's survivorship; *Pease v. Whitman*, 182 Mass. 364, 65 N. E. 795, holding, before enactment of Stat. 1885, chap. 237, husband could not deed whole estate conveyed to husband and wife; *McLaughlin v. Rice*, 185 Mass. 214, 102 Am. St. Rep. 339, 70 N. E. 52, holding conveyance to husband and wife created an estate by entireties; *Mardt v. Scharmach*, 65 Misc. 126, 119 N. Y. Supp. 449, holding a conveyance by a husband to his wife of his interest in land as tenant by entirety is valid.

Cited in footnote to *Re Albrecht*, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife.

Cited in note (30 L. R. A. 329) on tenancy by entireties.

14 L. R. A. 125, *BALCH v. PICKERING*, 154 Mass. 363, 28 N. E. 293.

Interpretation of will.

Cited in *Niles v. Almy*, 161 Mass. 31, 36 N. E. 582, holding will dividing among "others" property left by life tenants without issue means surviving children of testator.

Distinguished in *Lawrence v. Phillips*, 186 Mass. 322, 71 N. E. 541, holding under will providing that share of child dying without issue shall go to surviving children issue of deceased child surviving at death of one of the children without issue cannot share in estate.

14 L. R. A. 126, SANDWICH MFG. CO. v. ROBINSON, 83 Iowa, 567, 49 N. W. 1031.

Property subject of mortgage.

Cited in *Thompson v. Anderson*, 94 Iowa, 558, 63 N. W. 355, holding chattel mortgage covering increase of hogs valid as to increase; *Riddle v. Dow*, 98 Iowa, 17, 32 L. R. A. 814, 66 N. W. 1066, holding mortgage by lessor upon undivided interest in crop raised by tenant paramount to garnishment of tenant; *Davis v. Pitcher*, 97 Iowa, 15, 59 Am. St. Rep. 392, 65 N. W. 1005; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 262, 39 Am. St. Rep. 181, 35 N. E. 756; *Lawrence v. McKenzie*, 88 Iowa, 440, 55 N. W. 505,—holding book accounts subject of mortgage; *Dyer v. Schneider*, 106 Minn. 275, 20 L.R.A.(N.S.) 507, 130 Am. St. Rep. 615, 118 N. W. 1011, holding chattel mortgage void, at least as to creditors without notice, which purports to assign, to secure a specific debt, all future earnings of a threshing machine, therein described, also of any other threshing machine operated by mortgagor and crew which may accrue for threshing during ensuing two years within three designated townships.

Cited in notes (18 L. R. A. 303) on efficacy of mortgage on chattels to be manufactured or acquired as independent articles, and not as articles or fruits of existing property; (20 L.R.A.(N.S.) 506) on chattel mortgage of future earnings of threshing outfit.

Book accounts as personal property.

Cited in *Lawrence v. McKenzie*, 88 Iowa, 437, 55 N. W. 505, holding book accounts not personal property within Code, § 1923, requiring record of mortgages, when property retained by mortgagor.

What is assignable.

Cited in footnotes to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded; *Dolan v. Hughes*, 40 L. R. A. 735, which holds valid, assignment of wages for year by person then working under contract; *Graham Paper Co. v. Pembroke*, 44 L. R. A. 632, which sustains assignment of accounts; *Mallin v. Wenham*, 65 L.R.A. 602, which upholds assignment of wages to be earned in future under existing contract; *O'Neil v. Helmke*, 70 L.R.A. 338, which holds neither legal transfer of nor lien on proceeds of milk to be delivered by producer to cheese manufacturer effected by order directing latter to direct to third person proceeds of all milk delivered by producer at factory in future.

Cited in note (18 L.R.A.(N.S.) 194) on assignability of insurance agent's right to commissions on renewal premiums.

Mortgagor's right to mortgaged property before default.

Cited in *Swan v. Thurman*, 112 Mich. 417, 70 N. W. 1023, holding chattel mortgagor may sue before default, on account covered, when mortgage allows use of property till default.

Creditors' rights in debtor's personal services.

Cited in note (21 L. R. A. 624) on rights of creditors in personal services of debtor.

Description as affecting mortgage.

Cited in *Funk v. Mercantile Trust Co.* 89 Iowa, 268, 56 N. W. 496, holding mortgage upon "income, issue, and profits" of coal mine valid as against attaching creditor; *Reynolds v. Strong*, 10 N. D. 83, 88 Am. St. Rep. 680, 85 N. W. 987, holding mortgage covering future earnings of threshing outfit, giving description, owner, and place of operation, omitting names of future debtors, valid; *Davis v. Pitcher*, 97 Iowa, 16, 59 Am. St. Rep. 392, 65 N. W. 1005, holding mortgage con-

veying stock of goods and "book accounts and notes kept in above building" sufficiently describes property to protect mortgage; *Lawrence v. McKenzie*, 88 Iowa, 440, 55 N. W. 505, holding chattel mortgage on "book accounts for goods sold" insufficient description; *Taylor v. Gilbert*, 92 Iowa, 592, 61 N. W. 203, holding recital in mortgage naming cattle as those "recorded in American Hereford Herd Book" insufficient as to subsequent mortgage.

14 L. R. A. 128, *Ex parte McKnight*, 48 Ohio St. 588, 28 N. E. 1034.

Habeas corpus as remedy to obtain discharge.

Cited in *Ex parte McKnight*, 3 Ohio N. P. 255, dismissing petition for writ of habeas corpus for retention beyond two terms without trial; *Re Betts*, 36 Neb. 285, denying writ of habeas corpus to correct errors in drawing grand jury which indicted prisoner; *Com. v. Wright*, 158 Mass. 152, 19 L. R. A. 208, 35 Am. St. Rep. 475, 33 N. E. 82, holding question of prisoner's right to return to state surrendering him may be raised by petition; *McGorry v. Sutter*, 80 Ohio St. 408, 24 L.R.A.(N.S.) 171, 131 Am. St. Rep. 715, 89 N. E. 10, holding a resort to habeas corpus by a witness who has been committed to jail by order of trial court for refusing to testify is a collateral attack upon the order of commitment, and plaintiff assumes burden of showing it void.

Trial for crime other than one on which extradition was obtained.

Cited in note (15 L. R. A. 177) on abduction or wrongful bringing of criminal into jurisdiction as defense to prosecution.

Distinguished in *Re Donahue*, 4 Ohio N. P. 296, denying that dismissal upon charge of illegal voting precludes prosecution for fraudulent registration at same election; *Lascelles v. State*, 90 Ga. 368, 35 Am. St. Rep. 216, 16 S. E. 945, holding fugitive surrendered by foreign country under treaty stipulation may be tried for offenses not embraced in application.

Disapproved in effect in *Com. v. Wright*, 158 Mass. 152, 19 L. R. A. 208, footnote p. 206, 35 Am. St. Rep. 475, 33 N. E. 82, and *People ex rel. Post v. Cross*, 64 Hun, 352, 19 N. Y. Supp. 271, holding one surrendered by foreign state on charge of larceny may be subsequently indicted for robbery; *Knox v. State*, 164 Ind. 230, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539, holding a fugitive from justice, extradited on a charge of a specific crime, may be tried on another and different criminal charge without being afforded an opportunity to return to state from which he was extradited; *Re Brophy*, 2 Ohio N. P. 231, 4 Ohio S. & C. P. Dec. 392, holding under decision of United States Supreme Court fugitive who has been returned by interstate rendition may be tried for other offenses than that for which his extradition was demanded.

14 L. R. A. 133, *REINING v. NEW YORK*, L. & W. R. CO. 128 N. Y. 157, 28 N. E. 640.

Injury to abutter's rights in highway.

Cited in *Brown v. San Francisco*, 124 Cal. 281, 57 Pac. 82, denying that constitutional provision forbidding damage to property without compensation applies to diminution in value by closing end of street; *Culver v. Yonkers*, 80 App. Div. 311, 80 N. Y. Supp. 1034, holding city liable for improvements in private road partially destroying abutter's access to property; *Re Grade Crossing*, 6 App. Div. 339, 40 N. Y. Supp. 520, and *Re Grade Crossing*, 154 N. Y. 560, 49 N. E. 127, Affirming 17 App. Div. 59, 44 N. Y. Supp. 844, upholding abutter's right to damages under city charter for injury to property by construction of grade crossing; *Brewster v. J. & J. Rogers Co.* 169 N. Y. 80, 58 L. R. A. 498, 62 N. E. 164, holding riparian owner entitled to damages for injury to saw mill by discharge of water

from dam into river used as highway; *Potter v. Interborough Rapid Transit Co.* 54 Misc. 430, 105 N. Y. Supp. 1071, as to easements of abutting owners in street; *Champlain Stone & Sand Co. v. State*, 66 Misc. 467, 123 N. Y. Supp. 546 (dissenting opinion), as to easements of light, air and access to abutting lots bring property; *McMillan v. Klaw & E. Constr. Co.* 107 App. Div. 413, 95 N. Y. Supp. 365, holding a municipal ordinance authorizing, on the payment of a specified fee, the issuance of permits for the construction of ornamental projections beyond building line is unconstitutional as depriving other owners abutting on street of property without due process of law; *Warner v. State*, 132 App. Div. 612, 117 N. Y. S. 108, holding owner of lot abutting highway has no remedy for injury to his property caused by lawful change of grade of street.

Cited in note (15 L.R.A.(N.S.) 55) on cutting off access to highway as a taking.

Distinguished in *Manhattan R. Co. v. New York*, 89 Hun, 435, 35 N. Y. Supp. 505, holding city chargeable with expense of altering elevated road by constructing intersecting viaduct; *Sauer v. New York*, 206 U. S. 553, 51 L. ed. 1184, 27 Sup. Ct. Rep. 686, holding an abutting owner is not deprived of his property without due process of law by the erection by a municipality in a city street under authority of statute which makes no provision for compensation of an elevated iron viaduct for public use.

— Injury by railroad.

Followed in *Strasser v. New York, L. & W. R. Co.* 128 N. Y. 623, 28 N. E. 640, holding abutters entitled to compensation for closing street for ordinary traffic by erection of railroad embankment under municipal authority.

Cited in *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 115, 14 L. R. A. 385, 29 N. E. 95, Affirming 70 App. Div. 422, 75 N. Y. Supp. 476, holding abutting owner deprived of light, air, and access to premises by erection of railroad embankment entitled to damages; *Willamette Iron Works v. Oregon R. & Nav. Co.* 26 Or. 229, 29 L. R. A. 91, 46 Am. St. Rep. 620, 37 Pac. 1016, holding erection of approach to toll bridge owned by private corporation, cutting off access, entitles abutter to damages; *Peck v. Schenectady R. Co.* 170 N. Y. 306, 63 N. E. 357, Affirming 67 App. Div. 360, 73 N. Y. Supp. 794, holding occupation of street by electric railway imposes additional burden upon fee entitling abutters to damages; *Fulton Light, Heat & P. Co. v. State*, 65 Misc. 289, 121 N. Y. Supp. 536, as to easements of light, air and access appurtenant to abutting lots constituting property rights protected by constitution, where state has authorized the construction of an elevated railroad in a public highway; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 592, 30 L.R.A.(N.S.) 237, 95 Pac. 224, 100 Pac. 1110, holding an abutting owner whose means of access to his property has been cut off or materially interrupted by the building of a railway upon the street in front of said property may recover damages therefor; *Bernhard v. Rochester*, 127 App. Div. 879, 112 N. Y. Supp. 229, holding under statute if common council merely permitted a railroad to change grade of street without making compensation to abutting owners and did not supervise the change if the change was permitted for benefit of railroad, the city would be liable for damages to abutting owner; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 524, 90 Pac. 889, holding where a railroad company, after an ordinance had been passed vacating a street in a city, enters upon the strip of land formerly embraced in the street and appropriates the same or a portion thereof for its right of way without consent of adjacent owner, such company is liable for damages for any depreciation of the property of owner; *Sauer v. New York*, 180 N. Y. 35, 70 L.R.A. 721, 72 N. E. 579 (dissenting opinion), as to right of abutting owner to recover.

Cited in footnote to *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad.

Cited in notes (14 L. R. A. 382) on injury to abutter's easement by railroad in street; (36 L.R.A.(N.S.) 774, 801) on abutter's right to compensation for railroads in streets; (31 Am. St. Rep. 733) on occupation of city streets by railroads.

Distinguished in *Rauenstein v. New York, L. & W. R. Co.* 136 N. Y. 531, 18 L. R. A. 769, footnote p. 768, 32 N. E. 1047, Reversing 47 N. Y. S. R. 140, 19 N. Y. Supp. 833, denying liability to abutter for embankment changing grade, necessitated by railroad embankment intersecting street; *Pratt v. New York C. & H. R. R. Co.* 90 Hun. 86, 35 N. Y. Supp. 557, denying abutter's right to enjoin railroad company's excavation in street under direction of police power; *Talbot v. New York & H. R. Co.* 151 N. Y. 161, 45 N. E. 382, Affirming 78 Hun, 477, 29 N. Y. Supp. 187, denying liability to abutting owner for change in street grade by bridge erected under legislative authority; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 488, 51 N. E. 402, denying liability for construction of railroad at place never opened or used as street; *Dolan v. New York & H. R. Co.* 74 App. Div. 437, 77 N. Y. Supp. 815; *Fries v. New York & H. R. Co.* 169 N. Y. 284, 62 N. E. 358, denying liability of railroad company to abutting owner for erection of viaduct under statutory order; *Smith v. Boston & A. R. Co.* 181 N. Y. 137, 73 N. E. 679, holding statute providing that a municipal corporation may acquire or condemn land necessary to abolish grade crossings does not impose upon the town liability to pay an abutter damages resulting from change of grade of highway.

— Injury by telephone.

Cited in *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 140, 25 L. R. A. 644, 38 N. E. 202, denying that public easement in rural highway entitles telephone company to exclusive appropriation of portion for poles; *Castle v. Bell Teleph. Co.* 49 App. Div. 445, 63 N. Y. Supp. 482 (dissenting opinion), majority denying that maintenance of conduit for telephone wires beneath street imposes additional burden entitling abutters to damages.

— Injury by electric light company.

Cited in *Brown v. Asheville Electric Co.* 138 N. C. 536, 69 L.R.A. 633, 107 Am. St. Rep. 554, 51 S. E. 62, holding electric light company appropriating any of rights of abutting owner must compensate him therefor.

14 L. R. A. 138, *AUSTIN v. VROOMAN*, 128 N. Y. 229, 28 N. E. 477.

Liability of public officers.

Cited in *Noyes v. Edgerly*, 71 N. H. 502, 53 Atl. 311, holding imprisonment by sheriff on process issued by court without jurisdiction of subject-matter, presumptively unlawful.

Cited in footnote to *Lowe v. Conroy*, 66 L.R.A. 907, which holds health officer individually liable for destruction of private property by mistake in attempt to preserve public health.

— Of judicial officers generally.

Cited in *Brunner v. Downs*, 43 N. Y. S. R. 827, 17 N. Y. Supp. 633, holding recorder not liable for false imprisonment in granting warrant for violation of building ordinance; *Bryan v. Stewart*, 123 N. C. 98, 31 S. E. 286, dismissing complaint for false imprisonment, because clerk issuing warrant acting in judicial capacity; *Wright v. Jones*, 14 Tex. Civ. App. 430, 38 S. W. 249, holding members

of commissioners' court not liable for property taken by collector upon tax levied under misconstruction of law.

Cited in note (39 L. R. A. 459) on decision against constitutional right as nullity subject to collateral attack.

— **Of presiding municipal officer.**

Cited in footnotes to *Boutte v. Emmer*, 15 L. R. A. 63, which holds mayor not liable for brief imprisonment unless action arbitrary; *Guild v. Goodwin*, 27 L. R. A. 660, which holds mayor not liable for malicious prosecution in attempting to enforce void ordinance; *Scott v. Fishplate*, 30 L. R. A. 696, which denies liability of mayor to civil action for imprisonment for contempt; *Tillman v. Beard*, 46 L. R. A. 215, which denies liability of village president for procuring arrest for violating void ordinance.

— **Of judge.**

Cited in *Calhoun v. Little*, 106 Ga. 341, 43 L. R. A. 632, footnote p. 630, 71 Am. St. Rep. 254, 32 S. E. 86, holding municipal judge convicting one for violating ordinance passed without authority not liable for false imprisonment; *Root v. Rose*, 6 N. D. 583, 72 N. W. 1022, holding judge not liable for malicious prosecution on ground that evidence did not warrant conviction; *Robertson v. Parker*, 99 Wis. 659, 67 Am. St. Rep. 889, 75 N. W. 423, holding complaint alleging municipal judge without authority to commit persons charged with neglect to support family states cause of action.

Cited in footnotes to *Williamson v. Lacey*, 25 L. R. A. 506, which holds justice not personally liable for excluding spectators; *Glazer v. Hubbard*, 39 L. R. A. 210, which holds police judge guilty of false imprisonment in committing person, without other warrant for his arrest than telegram from chief of police; *Webb v. Fisher*, 60 L. R. A. 791, which holds judge not subject to private action for corruptly entering decree disbaring attorney; *Rush v. Buckley*, 70 L.R.A. 464, which holds magistrate not liable to civil action for erroneously deciding that he has jurisdiction over particular offense of which complaint is made to him and issuing warrant for arrest of accused.

Cited in notes (62 L.R.A. 721) on effect of bad motive to make actionable what would otherwise not be; (15 Eng. Rul. Cas. 53) on civic liability of judges.

— **Justice of the peace.**

Approved in *Handshaw v. Arthur*, 9 App. Div. 178, 41 N. Y. Supp. 61, dismissing complaint against justice for granting plaintiff judgment and execution after adjournment on failure of parties to appear.

Cited in *People ex rel. Devery v. Jerome*, 36 Misc. 257, 73 N. Y. Supp. 306, denying writ prohibiting justice from proceeding on criminal complaint when application made on ground of bias; *Jones v. Foster*, 43 App. Div. 38, 59 N. Y. Supp. 738, holding justice acting in good faith not liable for arrest upon incomplete information, offender having plead guilty; *Steinert v. Sobey*, 14 App. Div. 510, 44 N. Y. Supp. 146, raising, without deciding question as to immunity from suit in case justice without jurisdiction; *People v. Mackenzie*, 69 Misc. 543, 125 N. Y. Supp. 1020, to the point that it was duty of justice to try person charged with section 24 of Forest, Fish and Game Law, though demand was made for bail to appear before grand jury; *McIntosh v. Bullard*, 95 Ark. 232, 129 S. W. 85, holding that justice of peace is not liable for erroneous decisions made in good faith in exercise of jurisdiction; *McVeigh v. Ripley*, 77 Conn. 141, 58 Atl. 701, holding if justice of peace in exercising a jurisdiction which does belong to him issues an illegal order, it is not to be treated as so absolutely void as to afford him no protection for what he has done under it; *Kraft v. de Verneuil*,

105 App. Div. 45, 94 N. Y. Supp. 230, as to the liability of justices of the peace.

Cited in footnotes to *Banister v. Wakeman*, 15 L. R. A. 201, which holds justice of the peace liable for issuing mittimus after appeal; *Marks v. Sullivan*, 20 L. R. A. 590, which holds magistrate issuing warrant within jurisdiction not liable for false imprisonment; *Thompson v. Jackson*, 27 L. R. A. 92, which denies justice of the peace jurisdiction over nonresidents without service in township where suit brought.

Distinguished in *McCarg v. Burr*, 106 App. Div. 280, 94 N. Y. Supp. 675, holding where warrant was in excess of the justices jurisdiction to issue and was void, the act of the justice in trying, sentencing and imprisoning the accused upon such warrant, over the latter's objection to justice's want of jurisdiction, constituted false imprisonment for which justice was civilly liable.

False imprisonment.

Cited in *Noyes v. Edgerly*, 71 N. H. 502, 53 Atl. 311, as to false imprisonment upon process without jurisdiction.

14 L. R. A. 147, *CROWN POINT IRON CO v. ÆTNA INS. CO.* 127 N. Y. 608, 28 N. E. 653.

Cancellation of policy.

Cited in *Birnstein v. Stuyvesant Ins. Co.* 83 App. Div. 442, 82 N. Y. Supp. 140, and *Ikeller v. Hartford F. Ins. Co.* 24 Misc. 138, 53 N. Y. Supp. 323, holding return of policy and receipt by agent works cancellation; *Insurance Commissioner v. People's F. Ins. Co.* 68 N. H. 53, 44 Atl. 82, holding insurance may be terminated without previous notice, under terms of policy; *Knowles v. American Ins. Co.* 66 Hun, 224, 21 N. Y. Supp. 50, holding company issuing prior insurance may cancel policy without notice, as to property not owned by assignee; *Farmers' Mut. Ins. Co. v. Phoenix Ins. Co.* 65 Neb. 16, 90 N. W. 1000, holding that demand for cancellation of policy takes effect at time of receipt by company; *Wells v. Vermont L. Ins. Co.* 28 Ind. App. 625, 63 N. E. 578, holding one paying three annual premiums in advance entitled to cancellation of policy and issuance of paid-up policy; *Parsons v. Northwestern Nat. Ins. Co.* 133 Iowa, 535, 110 N. W. 907, holding under terms of policy the return of the unearned premium was not a condition precedent to cancellation of policy; *Ohio Farmers Ins. Co. v. Hunter*, 38 Ind. App. 13, 77 N. E. 951, holding whether return of policy to agent by assured was a cancellation depended upon intent with which it was returned; *Boutwell v. Globe & Rutgers F. Ins. Co.* 117 App. Div. 906, 102 N. Y. Supp. 1127 (dissenting opinion), as to right of insured to cancel policy; *Boutwell v. Globe & Rutgers F. Ins. Co.* 193 N. Y. 326, 85 N. E. 1087, holding upon request of assured no formal action necessary on part of company to cancel policy; *Ætna Ins. Co. v. Stambaugh-Thompson Co.* 76 Ohio St. 156, 118 Am. St. Rep. 834, 81 N. E. 173, holding act of surrendering one policy and accepting another in its stead implied both a request and a direction that the first should be cancelled.

Cited in notes (13 L.R.A.(N.S.) 807) on cancellation of insurance by return of policy; (39 L.R.A.(N.S.) 831) on time from which notice of cancellation of fire insurance becomes effective.

Distinguished in *Hickey v. Hartford F. Ins. Co.* 92 Hun, 193, 36 N. Y. Supp. 329, holding delivery of policy to agent to issue corrected one, no cancellation of former till new one issued; *Martin v. Manufacturers' Acci. Indemnity Co.* 60 Hun, 541, 15 N. Y. Supp. 309, holding wife, as beneficiary, has vested interest in insurance certificate making her consent necessary to surrender.

Effect of depositing matter in mail.

Cited in *Peabody v. Satterlee*, 166 N. Y. 177, 52 L. R. A. 958, 59 N. E. 818, hold-

ing deposit of proofs of loss in mail on sixtieth day, reaching agents on sixty-second, not compliance with policy; *Fink v. Fink*, 171 N. Y. 623, 64 N. E. 506, holding letters mailed before, but received after, death of insured, insufficient to authorize change in beneficiary; *Zeltner v. Irwin*, 21 Misc. 14, 46 N. Y. Supp. 852, holding contract for purchase of "futures" completed where letters containing proposition received and acceptance mailed; *Wester v. Casein Co.* 140 App. Div. 445, 125 N. Y. Supp. 335, holding that where termination of contract depends upon notice, it is receipt of notice and not mailing of it which operates to terminate contract; *Kavanaugh v. Security Trust & L. Ins. Co.* 117 Tenn. 44, 7 L.R.A. (N. S.) 260, 96 S. W. 499, 10 A. & E. Ann. Cas. 680, holding in absence of statute or express terms of policy making mailing of notice of maturity of a premium sufficient it must be received before it can operate as notice and work a forfeiture of policy; *Skillings v. Royal Ins. Co.* 6 Ont. L. Rep. 405, Affirming 4 Ont. L. Rep. 129, holding notice of cancelation, if given by mail, must be received before loss by the party entitled thereto or by his agent authorized to receive the same, otherwise there is no cancelation.

Cited in footnote to *Dailey v. Preferred Masonic Mut. Acci. Asso.* 26 L. R. A. 171, which holds mailing accident insurance policy a delivery.

What law governs.

Cited in *Wilson v. Lewiston Mill Co.* 150 N. Y. 322, 55 Am. St. Rep. 680, 44 N. E. 959, holding contract for sale of cotton by New York broker to Maine manufacturer controlled by Maine statute of frauds.

When notice complete.

Cited in *McCord v. Masonic Casualty Co.* 201 Mass. 475, 88 N. E. 6, holding policy required delivery of notice at the office within specified time.

Insurance broker.

Cited in *Marrian v. Robbins*, 102 App. Div. 216, 92 N. Y. Supp. 654, holding insurance broker agent of assured and not company.

14 L. R. A. 151, *BONETTI v. TREAT*, 91 Cal. 223, 27 Pac. 612.

Covenants as affecting assignee of lease.

Approved in *Edmonds v. Mounsey*, 15 Ind. App. 401, 44 N. E. 196, 18 Mor. Min. Rep. 38, holding the assignee is answerable for rent during his ownership of the term under the assignment without reference to any obligation assumed by him in contract of assignment.

Cited in *Baker v. J. Maier & Z. Brewery*, 140 Cal. 534, 74 Pac. 22, holding new tenant attorning to lessor with first tenant's consent liable for rent as assignee of lease; *Northern P. R. Co. v. McClure*, 9 N. D. 78, 47 L. R. A. 151, 81 N. W. 52, holding covenant to save lessor harmless from loss by fire enforceable by lessor's assignee; *Jordan v. Indianapolis Water Co.* 159 Ind. 350, 64 N. E. 680, holding lessee not relieved from express covenant to pay rent by lessor's consent to assignment of lease; *Summerville v. Kelliher*, 144 Cal. 160, 77 Pac. 889, holding purchaser of leasehold interest bound on covenants for payment of rent; *Chancey v. Ohio & I. Oil Co.* 32 Ind. App. 198, 69 N. E. 477, holding assignee of lessee not liable to lessor, there being no privity of estate.

Cited in footnotes to *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.* 33 L. R. A. 607, which holds railroad company operating other company's road under agreement to pay certain charges out of revenue, and any surplus, not bound by covenants in lease to such other company; *Consolidated Coal Co. v. Peers*, 38 L. R. A. 624, which holds personal obligation not imposed on assignee of lease taking it subject to agreements in lease; *Louisville Trust Co. v. Gaertner*, 45 L. R. A. 513, which upholds statutory lien for rent on property of assignee of

lease; *Springer v. De Wolf*, 56 L. R. A. 465, which denies assignee's power to absolve himself from liability to lessor for rent by assigning lease to third person.

Cited in notes (34 L. R. A. 62) on effect of assignment of oil and gas lease; (15 L.R.A. 755) on assignment of lease.

What constitutes surrender of leased premises.

Cited in footnote to *Gray v. Kaufman Dairy & Ice Cream Co.* 49 L. R. A. 580, which denies right to recover rent of landlord reletting after tenant's abandonment, notwithstanding unanswered letter that premises will be leased at tenant's risk.

Cited in notes (13 L.R.A.(N.S.) 408) on remedy of landlord upon abandonment of premises; (114 Am. St. Rep. 717) on rights of landlord on abandonment of premises by tenant.

14 L. R. A. 157, *MORSE v. UNION STOCK YARDS*, 21 Or. 289, 28 Pac. 2.

Implied warranty.

Cited in *Wadhams v. Balfour*, 32 Or. 326, 51 Pac. 642, holding warranty implied that wheat, when delivered, will correspond with sample; *Stanford v. National Drill & Mfg. Co.* 28 Okla. 444, 114 Pac. 734, holding that there was no implied warranty that well-drilling outfit would bore in specified area to a certain depth; *Puritan Mfg. Co. v. Westermire*, 47 Or. 562, 84 Pac. 797, holding where goods are sold by description there is an implied warranty that the articles delivered shall substantially correspond in their entirety to representations of vendor in respect to their quality.

Cited in note (102 Am. St. Rep. 609) on implied warranty of quality.

Distinguished in *Wilkinson v. Stettler*, 46 Pa. Super. Ct. 409, holding that statement by vendor of horse, that horse is "solid, sound, all right and would work any place," does not constitute warranty, although vendor knew horse was to be used on delivery wagon.

— As to fitness.

Cited in *Coyle v. Baum*, 3 Okla. 715, 41 Pac. 389, holding warranty implied that oats sold for feeding purposes contain no poisonous substance; *McCormick Harvesting Mach. Co. v. Nicholson*, 17 Pa. Super. Ct. 193, holding purchase of rope upon representation of cables "as good as any" implies warranty of fitness; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 279, 41 Am. St. Rep. 599, 58 N. W. 320 (dissenting opinion), majority holding warranty not implied that refrigerator constructed for butchers would preserve meats; *Davis Calyx Drill Co. v. Mallory*, 69 L.R.A. 976, 69 C. C. A. 662, 137 Fed. 335, holding no implied warranty that a machine tool or article is suitable to accomplish a particular purpose or do a specific work arises where vendor orders of manufacturer or purchases of the dealer a specific described or definite machine, tool or article; *Bunch v. Weil*, 72 Ark. 347, 65 L.R.A. 82, 80 S. W. 582, holding implied warranty that goods sold to be delivered, bought for purpose of resale are merchantable and reasonably fit for the purpose of trade for which they are purchased; *Conkling v. Standard Oil Co.* 138 Iowa, 606, 116 N. W. 822, as to implied warranty of fitness by manufacturer; *Mine Supply Co. v. Columbia Min. Co.* 48 Or. 394, 86 Pac. 789; *Lenz v. Blake*, 44 Or. 573, 76 Pac. 256,—holding where goods are sold by description for a particular purpose known to the seller there is an implied warranty that they are as represented, and suitable for the intended purpose.

Cited in notes (17 L. R. A. 210) on promise to give full satisfaction subject to judgment of promisee; (22 L. R. A. 187, 18) on implied warranty of fitness of

property bought for special purpose; (35 L.R.A.(N.S.) 267, 273) on effect of sale with particular description of kind or quality.

14 L. R. A. 160, *BROOKS v. WOODSON*, 87 Ga. 379, 13 S. E. 712.

Attestation of will.

Followed in *Smith v. Ryan*, 136 Iowa, 339, 112 N. W. 8; *Lane v. Lane*, 125 Ga. 387, 114 Am. St. Rep. 207, 54 S. E. 90, 5 A. & E. Ann. Cas. 462,—holding witnesses to a will must subscribe their names as witnesses after the will is signed by testator.

Cited in *Marshall v. Mason*, 176 Mass. 217, 79 Am. St. Rep. 305, 57 N. E. 340, holding witnesses must attest after signature of testator; *Lacey v. Dobbs*, 63 N. J. Eq. 338, 55 L. R. A. 586, footnote p. 580, 92 Am. St. Rep. 667, 50 Atl. 497, Reversing 61 N. J. Eq. 583, 47 Atl. 481, denying probate of will signed by testatrix immediately after attestation by witnesses.

Cited in notes (114 Am. St. Rep. 234) on attestation and witnessing of wills; (26 L.R.A.(N.S.) 1126) on signature of witness to will before testator signs; (38 L.R.A.(N.S.) 161) on wills; necessity that witnesses see testator sign, or that they see his signature.

14 L. R. A. 161, *WILLIAMS v. FARRAND*, 88 Mich. 473, 50 N. W. 446.

Use of similar name or mark.

Cited in *Supreme Lodge, K. of P. v. Improved Order, K. of P.* 113 Mich. 136, 38 L. R. A. 661, 71 N. W. 470, holding name "Improved Order, Knights of Pythias" may be taken by members withdrawing from Knights of Pythias; *Kyle v. Perfection Mattress Co.* 127 Ala. 48, 50 L. R. A. 631, 85 Am. St. Rep. 78, 28 So. 545, sustaining injunction against sale of goods named "Kyle's Perfection Mattress" by one previously making "Perfection Mattress;" *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 563, 16 L. R. A. 459, 33 Am. St. Rep. 72, 52 N. W. 595, holding words "Fish Bros. & Co." may be used by firm withdrawing from corporation employing same terms, when no agreement to contrary; *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 120 Mich. 163, 44 L. R. A. 844, 78 N. W. 1072, sustaining injunction against use of word "Lamb" by company doing like business under similar corporate name; *Supreme Lodge, K. of P. v. Improved Order, K. of P.* 113 Mich. 137, 38 L. R. A. 662, 71 N. W. 470, holding motive and circumstances surrounding choice of new name determine duty of court to interfere.

Cited in note (85 Am. St. Rep. 106) on what words or phrases may constitute a valid trademark.

— By transferee.

Cited in *Bagby & R. Co. v. Rivers*, 87 Md. 423, 40 L. R. A. 635, 67 Am. St. Rep. 357, 40 Atl. 171, sustaining injunction against use of retiring partner's name by corporation as transferee of rights of remaining partner; *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 132, 52 N. E. 487, Affirming 76 Ill. App. 587, holding transfer of business carries exclusive right to trade-marks and name; *Mills-paugh Laundry v. First Nat. Bank*, 120 Iowa, 5, 94 N. W. 262, holding that mortgagee purchasing plant named "Mills-paugh Laundry" may use name "National Laundry, formerly conducted by Mills-paugh;" *Falk v. American West Indies Trading Co.* 180 N. Y. 450, 1 L.R.A.(N.S.) 712, 105 Am. St. Rep. 778, 73 N. E. 239, 2 A. & E. Ann. Cas. 216, holding where trade mark is transferred detached from the business in which it has been used the transferee cannot injoin its use or sue for damages for its use.

Cited in footnote to *Slater v. Slater*, 61 L. R. A. 796, holding partnership name an asset to be sold by executor.

Cited in note (1 L.R.A.(N.S.) 709, 716) on sale of trademark.

Partnership "good will."

Cited in *Webster v. Webster*, 180 Mass. 315, 62 N. E. 383, holding that expiration of partnership by limitation entitles each partner to solicit trade from former customers; *Vonderbank v. Schmidt*, 44 La. Ann. 268, 15 L. R. A. 466, 32 Am. St. Rep. 336, 10 So. 616, defining good will as favor won from public, and probability of return of former customers; *Moyer v. Elzey*, 25 Mortg. Co. L. Rep. 68, holding that vendor of good will of business cannot hold himself out as continuing former business; *Vinall v. Hendricks*, 33 Ind. App. 420, 71 N. E. 682, holding although mortgage foreclosed included good will of business the mortgagee could not prevent mortgagor's wife from carrying on business in her own name through her husband as agent; *White v. Trowbridge*, 216 Pa. 20, 64 Atl. 662, holding mere transfer by one partner of his interest in the good will of the business to his copartners, does not preclude him from entering into a similar business in same town; *Rowell v. Rowell*, 122 Wis. 20, 99 N. W. 473, holding so far as firm name consists merely of the names of existing individuals, there is no such property in it as to prevent surviving or out going partners, after a sale of the business and good will from using their names in a similar business, so long as they do not convey idea of their identity with or succession to the old concern; *Read v. Mackay*, 47 Misc. 437, 95 N. Y. Supp. 935, holding firm name not necessarily part of good will.

Cited in notes (19 L.R.A.(N.S.) 767) on sale of business and good will as limitation upon right of vendor to compete; (40 Am. St. Rep. 570) on rights of partners as to good will after dissolution; (96 Am. St. Rep. 614) on good will of partnership as means of making it productive on dissolution; (19 Eng. Rul. Cas. 681) on rights of vendors of partnership good will.

Contract in restraint of trade.

Cited in *Palmer v. Toms*, 96 Wis. 369, 71 N. W. 654, holding agreement by vendors of funeral business not to engage in similar trade for five years valid; *Kyle v. Perfection Mattress Co.* 127 Ala. 48, 85 Am. St. Rep. 78, 28 So. 545, holding vendor of business may re-engage in same trade, subject to rights of vendee.

Distinguished in *Reber v. Pearson*, 155 Mich. 597, 119 N. W. 897, holding under contract between partners one of partners could not enter competing business.

14 L. R. A. 184, *STEPHENS v. ST. LOUIS & S. F. R. CO.* 47 Fed. 530.

Residence of corporation for purpose of jurisdiction.

Cited in *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 368, denying jurisdiction of Massachusetts circuit court over action by resident alleging defendant to be resident of Connecticut.

Cited in footnotes to *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L. R. A. 109, which authorizes suit for appointment of railroad receiver in either Federal district in which road extends; *Gilbert v. New Zealand Ins. Co.* 15 L. R. A. 125, which holds foreign corporation within term "inhabitant" in § 1 of judiciary act; *Missouri P. R. Co. v. Meeh*, 30 L. R. A. 250, which denies Federal jurisdiction of action by citizen against consolidated railway organized under statutes of state where suit brought, and adjoining states.

Cited in notes (15 L. R. A. 82) on consolidated interstate corporation as domestic corporation of one of states; (23 L. R. A. 501) on who may be served with process in suit against foreign corporation; (69 L.R.A. 432) on situs, for taxing

purposes, of tangible personalty of domestic corporations; (24 L.R.A.(N.S.) 769) on state authority over consolidated interstate corporation.

Removal of causes.

Cited in Chicago, R. I. & P. R. Co. v. Stone, 70 Kan. 710, 79 Pac. 655, holding party cannot defeat removal to federal court by amendment of pleading after bond and petition for removal have been filed.

Cited in footnote to Debnam v. Southern Bell Teleph. & Teleg. Co. 65 L.R.A. 915, which holds that foreign corporation complying with statutory requirements as to doing business in state becomes a domestic corporation so as not to be able to remove into Federal court action against it by a citizen of the state.

14 L. R. A. 188, LEVENS v. BRIGGS, 21 Or. 333, 28 Pac. 15.

Conditions affecting negotiability.

Cited in footnote to Dorsey v. Wolff, 18 L. R. A. 428, which holds negotiability not destroyed by stipulation for 10 per cent attorney's fees.

Validity of agreement to pay interest on interest.

Cited in note (33 L.R.A.(N.S.) 297, 301) on validity of agreement before interest due to pay interest on interest.

Validity of stipulations for attorney's fees.

Cited in footnote to Dorr v. Camden, 65 L.R.A. 348, which holds that contract for contingent fee must, in order to be sustained be shown to have been entered into by the client after full knowledge of the facts and circumstances justifying such contract.

Cited in note (55 Am. St. Rep. 445) on validity of stipulations for attorneys' fees.

14 L. R. A. 190, MARKS v. MILLER, 21 Or. 317, 28 Pac. 14.

Effect of failure to file lien.

Followed in Davis v. Bowman, 25 Or. 199, 35 Pac. 264, and Marguam v. Sengfelder, 24 Or. 12, 32 Pac. 676, holding unrecorded lien created by lease raises presumption of fraud.

Approved in Meier v. Hess, 23 Or. 603, 32 Pac. 755, holding unrecorded mortgage without change of possession creates rebuttable presumption of fraud.

Cited in Fisher v. Kelly, 30 Or. 15, 46 Pac. 146, holding secret chattel mortgage, executed with intent to defraud creditors, void; Pierce v. Kelly, 25 Or. 101, 34 Pac. 963, holding instruction that mortgage as to creditors without notice void, unless filed, harmless when creditor has notice.

Cited in footnote to Ruggles v. Cannedy, 46 L. R. A. 371, which holds chattel mortgage not promptly filed void as against subsequent creditors.

Cited in note (23 L. R. A. 477) on sale or mortgage of future crops.

Attaching creditor as bona fide purchaser.

Cited in Jennings v. Lentz, 50 Or. 487, 29 L.R.A. (N.S.) 585, 93 Pac. 327, holding under statute an attaching creditor in order to obtain rights of bona fide purchaser is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.

14 L. R. A. 192, QUARLES v. STATE, 55 Ark. 10, 17 S. W. 269.

Sunday labor.

Cited in Hill v. Hite, 29 C. C. A. 551, 56 U. S. App. 403, 85 Fed. 270, holding notes and chattel mortgage executed on Sunday, acknowledged on another day, void; State v. Nesbit, 8 Kan. App. 109, 54 Pac. 326, affirming conviction of barber shaving on Sunday in violation of statute; Lyric Theater v. State (Carrell v.

State) 98 Ark. 440, 33 L.R.A.(N.S.) 327, 136 S. W. 174, holding that theatrical performances on Sunday are criminal and may become public nuisance; Topeka v. Crawford, 78 Kan. 591, 17 L.R.A.(N.S.) 1160, 96 Pac. 862, 16 A. & E. Ann. Cas. 403, holding keeping open theater is violation of ordinance prohibiting Sunday labor; Moore v. Owen, 58 Misc. 339, 109 N. Y. Supp. 585, holding statute prohibiting Sunday labor prohibits entertainments in theaters on Sunday.

Cited in footnotes to *Cortesy v. Territory*, 19 L. R. A. 349, which holds selling liquor on Sunday, unlawfully engaging in "labor;" *People v. Bellet*, 22 L. R. A. 696, which upholds prohibition of business of barber on Sunday under greater penalties than those imposed on other business; *Van Winkle v. Satterfield*, 23 L. R. A. 853, which denies right to discharge clerk employed for definite time, for refusal to tend store on Sunday; *State v. Collect*, 64 L.R.A. 204, which holds repairing of belt in factory on Sunday so as to prevent two hundred hands from losing work on the following day.

Cited in notes (22 L. R. A. 723) on constitutionality of Sunday laws; (17 L.R.A.(N.S.) 1157) on open theater as violation of Sunday laws; (48 L. ed. U. S. 153) on validity of legislation regulating hours of labor on Sunday.

— **Work of necessity or charity.**

Cited in footnotes to *Com. v. Matthews*, 18 L. R. A. 761, which holds selling Sunday newspapers not work of necessity or charity; *First M. E. Church v. Donnell*, 46 L. R. A. 858, which sustains subscription to church indebtedness made on Sunday; *Ex parte Kennedy*, 51 L. R. A. 270, which holds work of barber on Sunday not a work of necessity; *Arnheiter v. State*, 58 L. R. A. 392, which holds sale of meat by butcher to customers on Sunday not work of necessity or charity.

Cited in note (18 L.R.A.(N.S.) 618) on sale and delivery of food stuffs on Sunday as work of necessity.

14 L. R. A. 196, *CONWAY v. GRANT*, 88 Ga. 40, 30 Am. St. Rep. 145, 13 S. E. 803.

Liability for injuries by vicious animals.

Cited in *Harvey v. Buchanan*, 121 Ga. 385, 49 S. E. 281, holding owner of mule not liable for value of kid which it killed, where unaware of mule's vicious propensities.

Cited in footnotes to *Bormann v. Milwaukee*, 33 L. R. A. 652, which holds risk of injury by animals *feræ naturæ* assumed by employee; *Morgan v. Hudnell*, 27 L. R. A. 862, which holds owner liable for injuries committed by vicious animal while trespassing, without regard to owner's knowledge of propensity.

Cited in notes (3 Eng. Rul. Cas. 119) on validity for injury inflicted by mischievous animal; (2 Brit. Rul. Cas. 27) on liability of keeper of dangerous animal in absence of negligence on his part.

— **Dogs.**

Cited in *Speckmann v. Kreig*, 79 Mo. App. 381, holding knowledge of vicious propensity of dog renders owner liable for injury to boy; *Sanders v. O'Callaghan*, 111 Iowa, 579, 82 N. W. 969, holding owner's knowledge of vicious character of dog, element in common-law action for injuries.

Cited in footnotes to *Delisle v. Bourriague*, 54 L.R.A. 420, which holds owner liable for injury by savage dogs to one invited on premises; *Martinez v. Bernhard*, 55 L. R. A. 671, which denies liability for bite by dog not known to bite before; *Crowley v. Groomell*, 55 L. R. A. 876, which holds owner liable for assault by dog, due to known playful propensity; *Shultz v. Griffith*, 40 L. R. A. 117, which holds traveler bitten by dog while going to livery yard to get articles from buggy not precluded as trespasser from recovery; *Peck v. Williams*, 61 L. R. A. 351, which holds owner

liable to one bitten by dog while attempting to climb on owner's cart without leave.

Cited in note (24 L.R.A.(N.S.) 460) on scienter necessary to owner's liability for injury by dog.

14 L. R. A. 198, *MANNING v. BECK*, 129 N. Y. 1, 29 N. E. 90.

Fraudulent motive as affecting transfers.

Cited in *Manning v. Beck*, 155 N. Y. 580, 50 N. E. 278, upholding creditor's action to set aside bill of sale, with proof of actual fraud; *White v. Benjamin*, 3 Misc. 504, 23 N. Y. Supp. 981, affirming decree setting aside judgment and transfer to wife, made with knowledge of insolvency and with intent to defraud; *Spelman v. Freedman*, 130 N. Y. 429, 29 N. E. 765, holding complaint sufficient which alleges confession of judgment by debtor and issuing of execution in fraud of assignment; *Galle v. Tode*, 148 N. Y. 280, 42 N. E. 673, holding transfer by insolvent to corporation organized to receive property in violation of creditors' rights void; *Shotwell v. Dixon*, 163 N. Y. 49, 57 N. E. 178, Affirming 22 App. Div. 261, 48 N. Y. Supp. 984, holding evidence must show creditor's knowledge of contemplated assignment and purpose of transfer to invalidate preference; *Delaney v. Valentine*, 154 N. Y. 699, 49 N. E. 65, upholding chattel mortgage by insolvent debtor, executed and received in good faith for valid claims; *Groetzinger v. Wyman*, 105 Iowa, 587, 75 N. W. 512, holding mortgage, which it was agreed would not be filed unless mortgagor unable to secure extensions, not invalidated as to creditors extending payment; *New York County Nat. Bank v. American Surety Co.* 69 App. Div. 158, 74 N. Y. Supp. 692, upholding bona fide creditor's right to damages for conversion of property covered by chattel mortgage executed by insolvent to defraud creditors; *New York C. & H. R. R. Co. v. Reeves*, 41 Misc. 499, 85 N. Y. Supp. 28, holding mere allegations of malicious conspiracy among ticket brokers to buy and resell nontransferable passenger tickets, insufficient where only lawful acts are shown to have been committed.

Cited in note (58 Am. St. Rep. 87, 99) on fraudulent assignments for creditors.

Criticized in *Abegg v. Bishop*, 66 Hun, 9, 20 N. Y. Supp. 810, holding fraudulent intent on part of insolvent invalidates transfer of book accounts to creditor.

Preferential transfers.

Followed without discussion in *Otis v. Bertholf*, 129 N. Y. 675, 30 N. E. 66; *Thalheimer v. Klapetzky*, 129 N. Y. 647, 29 N. E. 1031; *Maass v. Falk*, 146 N. Y. 42, 65 N. Y. S. R. 765, 40 N. E. 504, Affirming 54 N. Y. S. R. 160, 24 N. Y. Supp. 448,—upholding transfer to bank by insolvent of stock and fixtures as security for notes not yet due.

Cited in *Blair State Bank v. Stewart*, 57 Neb. 66, 77 N. W. 372, upholding mortgage, void in inception, executed by insolvent less than thirty days prior to assignment; *Cutter v. Pollock*, 4 N. D. 213, 25 L. R. A. 381, 50 Am. St. Rep. 644, 59 N. W. 1062, holding execution of chattel mortgages on entire stock, preventing continuance of business, not void as assignment under Comp. Laws, § 4660; *Beall v. Cowan*, 21 C. C. A. 271, 44 U. S. App. 505, 75 Fed. 139, denying that Hill's Laws, chap. 28, § 3173, invalidates trust deed to secure certain creditors, effecting distribution of whole estate as under assignment; *Smith v. Baker*, 5 Okla. 335, 49 Pac. 61, upholding bill of sale executed by insolvents in payment of a bona fide loan used in conducting business; *Sandwich Mfg. Co. v. Max*, 5 S. D. 139, 24 L. R. A. 530, 58 N. W. 14, sustaining bill of sale and deed executed by insolvent merchants in payment of bona fide debt; *Jones v. Cullen*, 100 Tenn. 16, 42 S. W. 873, denying that fictitious character of one claim secured by trust deed invalidates deed as to bona fide claims; *Lassiter v. Hoes*, 11 Misc. 2, 31 N. Y. Supp.

850, upholding transfer by insolvent husband to wife made in good faith in payment of honest debt; *Central Nat. Bank v. Seligman*, 138 N. Y. 442, 34 N. E. 196, upholding judgments by confession of valid debts made before, but entered after, assignment; *Tompkins v. Hunter*, 149 N. Y. 124, 43 N. E. 532, Affirming 65 Hun, 445, 20 N. Y. Supp. 355, holding transfer to one debtor, by insolvent, of property at full value in payment of honest claim, not preference; *Dintruff v. Tuthill*, 62 Hun, 595, 17 N. Y. Supp. 556, holding affidavit in attachment not alleging transfer by insolvent to pay invalid debt, or for less than market value, insufficient; *Colt v. Sears Commercial Co.* 20 R. I. 325, 38 Atl. 1056, holding sale of goods by assignee subject to mortgage given by insolvent, election to ratify transfer; *Johnson v. Rapalyea*, 1 App. Div. 477, 37 N. Y. Supp. 540 (dissenting opinion), majority holding preferred creditors entitled to share with general creditors as to portion of claims unpaid; *H. B. Claffin Co. v. Arnheim*, 87 Hun, 239, 33 N. Y. Supp. 1037, sustaining injunction against sheriff's paying to another, proceeds of execution in violation of insolvent's agreement to give prior lien; *Vietor v. Levy*, 72 Hun, 265, 25 N. Y. Supp. 644, holding judgments by confession in favor of preferred creditors properly set aside as part of fraudulent scheme; *Young v. Stone*, 61 App. Div. 371, 70 N. Y. Supp. 558, holding transfer by insolvent of entire assets to one creditor in trust for all constitutes assignment and must be executed according to statute.

Cited in footnotes to *Re Fixen*, 50 L.R.A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business an unlawful preference; *Tatman v. Humphrey*, 63 L. R. A. 738, which holds insolvent mortgagor's permitting mortgagee to take possession of mortgaged chattels under unrecorded mortgage an act of bankruptcy; *George M. Hill Co.* 66 L.R.A. 68, which holds forbidden transfer not affected by bank's appropriation of balance of bankrupt's deposit account in payment of his indebtedness to it after knowledge of bankruptcy.

Cited in notes (37 L. R. A. 481) on effect of insolvency statutes on mortgage or sale of preferring creditors; (34 Am. St. Rep. 857) on preferences in assignments for creditors.

14 L. R. A. 203, *STREET v. JOHNSON*, 80 Wis. 455, 27 Am. St. Rep. 42, 50 N. W. 395.

Statement libelous per se.

Cited in *Robinson v. Eau Claire Book & Stationery Co.* 110 Wis. 372, 85 N. W. 983, holding letters containing warning to "beware of these untruthful adventurers" libelous per se; *Seofield v. Milwaukee Free Press Co.* 126 Wis. 85, 2 L.R.A.(N.S.) 694, 105 N. W. 227, holding editorial charging participation in use of money by candidate for United States senate to promote his candidacy libelous.

Liability of vendor of newspapers.

Cited in note (9 Eng. Rul. Cas. 38) on liability of innocent seller of libelous newspaper.

Libel of class of persons.

Cited in notes (70 Am. St. Rep. 757) on libel or slander of a class or number of persons; (23 L.R.A.(N.S.) 731), on right of one not specially named to maintain action for defamation based on charges against a class or group.

14 L. R. A. 205, *STATE v. BLACK*, 109 N. C. 856, 13 S. E. 877.

Errors reviewable on appeal.

Cited in *Hinson v. Powell*, 109 N. C. 538, 14 S. E. 301, holding general assign-

ment of error not considered on appeal; *Cameron-Barkley Co. v. Thornton Light & P. Co.* 137 N. C. 102, 49 S. E. 76, holding plaintiff entitled to writ of certiorari to have exceptions, and assignment of errors relating to exceptions, given or refused, made part of case, judge to consider case again with reference to assignment.

Officer's right to detain prisoner illegally arrested.

Distinguished in *State v. Rollins*, 113 N. C. 733, 18 S. E. 394, holding officer making illegal arrest guilty of affray by holding prisoner against rescuers.

Rights and duties of officer as respects property in his custody.

Cited in *State v. Scott*, 142 N. C. 583, 9 L.R.A.(N.S.) 1149, 55 S. E. 69, on rights and duties of sheriff with respect to property in his custody by virtue of levy under attachment.

Right to use force to recover possession of personality.

Cited in note in (3 L.R.A.(N.S.) 254) on right to use force to recover possession of personality.

14 L. R. A. 206, *STATE v. DAVIS*, 109 N. C. 809, 13 S. E. 883.

Act constituting forcible entry or trespass.

Followed in *State v. Lawson*, 123 N. C. 742, 68 Am. St. Rep. 844, 31 S. E. 667, defining forcible trespass as referring to realty, forcible entry to personality.

Cited in *State v. Lawson*, 123 N. C. 743, 68 Am. St. Rep. 844, 31 S. E. 667, holding demonstration of force creating apprehension of fear sufficient to constitute offense; *State v. Woodward*, 119 N. C. 838, 25 S. E. 868, holding one guilty of forcible entry by using force in demolishing mill, exciting fear of owner; *State v. Webster*, 121 N. C. 587, 28 S. E. 254, Affirming conviction of one committing assault while removing machinery of another.

Distinguished in *State v. Leary*, 136 N. C. 580, 48 S. E. 570, holding one who merely unlocks lock on premises, takes it off and puts his own lock on, doing no violence, is not guilty of forcible entry, where adverse party was in possession only by sufferance.

14 L. R. A. 208, *SANBORN v. COLE*, 63 Vt. 590, 22 Atl. 716.

Proof of attested instruments.

Cited in notes (35 L. R. A. 326, 334, 350) on necessity of calling subscribing witness to prove attested instruments; (44 L. R. A. 146) on proof of signature when attesting witnesses are dead, or cannot remember transaction.

Proof of agency.

Cited in *Cooledge v. Continental Ins. Co.* 67 Vt. 26, 30 Atl. 798, raising, without deciding, question of competency of husband to prove agency by own testimony; *Hawkins v. Windhorst*, 77 Kan. 676, 17 L.R.A.(N.S.) 222, 127 Am. St. Rep. 445, 96 Pac. 48, holding where issue is whether husband is general agent of wife for purpose of signing checks, proof that husband had signed his wife's name to checks drawn on her account, with her knowledge and consent, is admissible.

Payments barring operation of limitations.

Cited in *Rowell v. Lewis*, 72 Vt. 167, 47 Atl. 783, holding payments on note by sale of coal to creditor operate to remove bar of limitations; *McDowell v. McDowell*, 75 Vt. 405, 98 Am. St. Rep. 831, 56 Atl. 98, holding that creditor may apply payments upon claim whether barred by statute or not.

Cited in notes (96 Am. St. Rep. 51) on application of payments; (16 Eng. Rul. Cas. 205) on running of limitations against open account.

Disapproved in *Wilden v. McAllister*, 91 Mo. App. 453, holding creditor's ap-

propriations of payments by debtor do not revive debt; *McBride v. Noble*, 40 Colo. 375, 90 Pac. 1037, 13 A. & E. Ann. Cas. 1202, holding creditor's application of general undirected payment by debtor, to barred debt does not take unpaid portion thereof out of statute of limitations.

Proof of handwriting.

Cited in *State v. Kent*, 83 Vt. 31, 26 L.R.A.(N.S.) 991, 74 Atl. 389, 20 Ann. Cas. 1334, on proof of handwriting by comparison with other writings or characters.

14 L. R. A. 211, *WALDEN NAT. BANK v. BIRCH*, 130 N. Y. 221, 29 N. E. 127.

Ultra vires as defense.

Cited in *Anderson v. First Nat. Bank*, 5 N. D. 456, 67 N. W. 821, holding national bank cannot plead *ultra vires* as justification for violation of trust.

Liability of surety for acts of bank employees.

Cited in *Westervelt v. Mohrenstecher*, 34 L. R. A. 481, footnote p. 477, 22 C. C. A. 99, 40 U. S. App. 221, 76 Fed. 124, holding judgments upon notes taken by cashier for misappropriations no bar to action on bond.

Cited in footnote to *Lieberman v. First Nat. Bank*, 48 L. R. A. 514, which denies release of surety on bank teller's bond for unauthorized statements by cashier.

Res judicata.

Cited in *Crompton & K. Loom Works v. Brown*, 27 Misc. 321, 57 N. Y. Supp. 823, holding judgment upon first of series of notes, adjudication precluding maker setting up against second, defense existing against first; *Lampkin v. Peoples' Nat. Bank*, 98 Mo. App. 242, 71 S. W. 715, holding compromise of suit by trustee in bankruptcy to disaffirm sale no bar to action to recover money paid as preference.

Acquisition of its own stock by corporation.

Cited in *Dacovich v. Canizas*, 152 Ala. 293, 44 So. 473, holding title to its own stock passes to corporation by purchase thereof, with funds of company; *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 551, holding unlawful acquisition of shares of its own stock by bank is not a nullity absolving bank from reporting fact to Comptroller; *Meholin v. Carlson*, 17 Idaho, 761, 134 Am. St. Rep. 286, 107 Pac. 755, holding foreclosure of pledge of its own stock to bank cannot be defeated by pledgor by pleading statute prohibiting bank to accept its own stock as collateral or purchase the same, where bank insolvent and in receiver's hands.

14 L. R. A. 215, *STEWART v. STONE*, 127 N. Y. 500, 28 N. E. 595.

Onus as to proof of negligence.

Cited in *Liberty Ins. Co. v. Central Vermont R. Co.* 19 App. Div. 516, 46 N. Y. Supp. 576, holding burden of proof of negligence in destruction of warehouse by fire upon one alleging it; *Spencer v. Citizens' Mut. L. Ins. Asso.* 3 Misc. 461, 23 N. Y. Supp. 179, holding onus of showing breach of application for renewal of lapsed policy remains upon company during trial; *Kaiser v. Latimer*, 9 App. Div. 38, 41 N. Y. Supp. 94, holding onus on bailor to prove collapse of warehouse due to negligence of warehouseman; *Ballston Refrigerating Storage Co. v. Eastern States Refrigerating Co.* 142 App. Div. 139, 126 N. Y. Supp. 857 (dissenting opinion), on burden of proof as upon bailor to show negligence of bailee; *O'Rourke v. Bates*, 70 Misc. 416, 133 N. Y. Supp. 392, holding that burden of proving bailee's negligence is on bailor; *Campbell v. Klein*, 52 Misc. 124, 101 N. Y. Supp. 577, holding one engaged in dyeing business, who received gown and waist to be dyed, not liable for loss thereof by theft, in absence of proof of

negligence; *Polack v. O'Brien*, 114 App. Div. 369, 100 N. Y. Supp. 385, holding bailor of bristle upon which bailee brush manufacturer was to perform work, has burden of proof of negligence, where goods are lost or unaccounted for by carrier to whom bailee delivers them for transportation to bailor; *Clarke v. Koeppel*, 119 App. Div. 459, 104 N. Y. Supp. 65, holding building contractor seeking to recover for part performance of contract on ground he is excused from performance by destruction of building by fire while in possession of owner because of owner's negligence has burden of showing fire was due to owner's negligence.

— **Creating presumption.**

Cited in *Waterman v. American Pin Co.* 19 Misc. 639, 44 N. Y. Supp. 410, and *Trimble v. New York C. & H. R. Co.* 39 App. Div. 412, 57 N. Y. Supp. 437, holding failure to deliver sample trunk in good condition renders carrier prima facie liable; *Kafka v. Levensohn*, 18 Misc. 207, 41 N. Y. Supp. 368, holding prima facie negligence overcome by showing loss occasioned by accident beyond control of bailee; *Rowan v. Wells, F. & Co.* 80 App. Div. 34, 80 N. Y. Supp. 226, holding destruction of package by burning of car raises no presumption of carrier's negligence; *Hoffmann v. Coughlin*, 26 Misc. 26, 55 N. Y. Supp. 600, holding evidence showing lack of care in preventing burglary creates question for jury; *Simpson v. New York, N. H. & H. R. Co.* 16 Misc. 614, 38 N. Y. Supp. 341, holding carrier liable for failure to deliver trunk; *Aaronson v. Pennsylvania R. Co.* 23 Misc. 669, 52 N. Y. Supp. 95, holding carrier liable as warehouseman for nondelivery of valise; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 524, 43 N. E. 162, holding jury may infer loss of trunk from failure of carrier to explain nondelivery; *Dobson v. Central R. Co.* 38 Misc. 586, 78 N. Y. Supp. 82, holding delivery by carrier of goods in wet condition insufficient to prove negligence; *Clarke v. Koeppel*, 119 App. Div. 459, 104 N. Y. Supp. 65, holding mere occurrence of fire does not permit presumption it was due to negligence; *Yazoo & M. Valley R. Co. v. Hughes*, 94 Miss. 251, 22 L.R.A. (N.S.) 982, 47 So. 662, holding defendant railroad company not prima facie negligent, where baggage stored in its station was destroyed by fire; *Cramer v. Klein*, 127 App. Div. 147, 111 N. Y. Supp. 469, holding presumption of negligence arising from proof of delivery of scarf to defendant to be cleaned and failure to return it on demand, might be rebutted by showing loss occurred by reason of fire.

Performance of contract; when nonperformance excusable.

Cited in *Hayes v. Gross*, 9 App. Div. 15, 40 N. Y. Supp. 1098, holding owner liable for work done and materials furnished when further performance impossible by burning of building; *Rhodes v. Hinds*, 79 App. Div. 382, 79 N. Y. Supp. 437, upholding right of sawyer to recover for services in sawing and piling lumber burned before direction for delivery by owner; *Kafka v. Levensohn*, 18 Misc. 208, 41 N. Y. Supp. 368, upholding right to recover for services in making coats from material furnished, when garments stolen after work completed; *Herter v. Mullen*, 159 N. Y. 44, 44 L. R. A. 709, 70 Am. St. Rep. 517, 53 N. E. 700, denying that failure to surrender premises at expiration of term on account of sickness permits landlord to continue lease for another year; *Dixon v. Breon*, 22 Pa. Super. Ct. 348, holding performance of contract to cut and manufacture certain kind of timber excused by destruction of timber by forest fires; *Pearson v. McKinney*, 160 Cal. 655, 117 Pac. 919, holding that when contract is to sell specified article when it grows to specified size, sale and delivery depends upon happening of precedent condition; *Pacific Sheet Metal Works v. Californian Canneries Co.* 91 C. C. A. 108, 164 Fed. 985, on release from performance of contract by damage by elements, or unavoidable casualty.

Cited in footnotes to *Genet v. Delaware & H. Canal Co.* 19 L. R. A. 127, which holds agreement implied that lessee will not wilfully incapacitate itself to take out more than minimum quantity of coal per year; *Remy v. Olds*, 21 L. R. A. 645, which denies right to recover on contract, performance of which prevented by act of God; *Pengra v. Wheeler*, 21 L. R. A. 726, which holds lessor released from covenant to repair leased dams within specified time, by impossibility of making repair; *Lorillard v. Clyde*, 24 L. R. A. 113, which holds dissolution of corporation a defense to guaranty of dividends for term of years; *Pinkham v. Libby*, 49 L. R. A. 693, which denies right to recover amount paid for fruitless service of stallion under agreement for return, prevented by its death; *Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co.* 53 L. R. A. 681, which denies liability for failure to deliver specified quantity of fruit contracted for, from failure of crop due to unusual climatic conditions; *Floyd v. Cook*, 63 L.R.A. 450, which holds claimant giving forthcoming bond and retaining possession of property not liable for failure to produce same, where same officer has ceded and sold the property under a special lien; *Krause v. Crothersville School Trustees*, 65 L.R.A. 111, which holds covenant to repair building and construct annex thereto discharged by destruction by lightning of main building when work is practically completed.

Cited in notes (16 L. R. A. 858) on recovery for services on contract interrupted by sickness or death; (15 L.R.A.(N.S.) 833) on liability of contractor to replace bridge destroyed by unprecedented flood; (33 L.R.A.(N.S.) 701) on effect upon contract obligation of failure of third person to take action essential to performance; (40 L. ed. U. S. 517) on act of God as excuse for nonperformance of obligation; (1 Eng. Rul. Cas. 348) on inevitable accident as excuse for nonperformance of express contract; (6 Eng. Rul. Cas. 613) on impossibility as excuse for nonperformance of contract.

Distinguished in *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 58 Wash. 234, 28 L.R.A.(N.S.) 1013, 108 Pac. 621, holding where contract is to deliver lumber and shingles within reasonable time, inability to ship within reasonable time owing to lack of cars, does not relieve from duty to ship.

— **When not excusable.**

Cited in *Pregenzer v. Burleigh*, 6 Misc. 142, 26 N. Y. Supp. 35, affirming liability of one failing to perform unconditional contract to furnish cargo for boat; *Stiles v. Benjamin*, 92 Hun, 106, 36 N. Y. Supp. 910, denying that agreement of mortgagee to assign bond and mortgage to another is defense for breach of contract to assign to one making advances; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* 165 N. Y. 254, 51 L. R. A. 955, footnote p. 951, 59 N. E. 5, Affirming 32 App. Div. 542, 53 N. Y. Supp. 17, denying right to rescind land contract for vendor's breach of agreement to operate street cars "as usually run," due to unusual snow drifts; *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.* 37 Misc. 557, 75 N. Y. Supp. 1008, sustaining liability of one leasing fire extinguishers and agreeing to reimburse lessor in case of loss, for destruction of property without negligence; *Rowe v. Peabody*, 207 Mass. 232, 93 N. E. 604, holding that one who contracts to do certain thing which is lawful is not to be excused for non-performance merely because performance originally was or has become impossible.

Cited in footnotes to *Anderson v. May*, 17 L. R. A. 555, which holds partial destruction of crop by early frosts no excuse for nonperformance of contract to sell specified quantity; *Fisher v. Walsh*, 43 L. R. A. 810, which holds employee quitting service in breach of contract because of strikers' threats liable for resulting injury to employer; *Smith v. North American Transp. & Trading Co.* 44 L. R. A. 557, which holds steamer company abandoning trip to Dawson re-

quired to bring passenger back without charge; *Angus v. Scully*, 49 L. R. A. 562, which sustains right to recover under contract to move building destroyed by fire before work completed; *Eppens, S. & W. Co. v. Littlejohn*, 52 L. R. A. 811, which holds unreasonable delay in delivering goods not excused by vendor's inability to procure them from personal disadvantages peculiar to him; *Board of Education v. Townsend*, 52 L. R. A. 868, which holds blowing down of school-house does not excuse from contract to remove and rebuild.

Rights as to bailment.

Cited in *Sattler v. Hallock*, 160 N. Y. 298, 46 L. R. A. 681, 73 Am. St. Rep. 686, 54 N. E. 667, Affirming 15 App. Div. 500, 44 N. Y. Supp. 543, holding delivery of farm produce to another, to be made into pickles, and profits divided, bailment, entitling bailor to property as against manufacturer's assignee; *Labowitz v. Frankfort*, 4 Misc. 278, 23 N. Y. Supp. 1038, denying liability of tailor for loss by fire of goods left to be made into garments; *Jaminet v. American Storage & Moving Co.* 109 Mo. App. 265, 84 S. W. 128, holding private carrier for hire not liable for injury to portrait, by mischievous act of boy who passed while portrait was being prepared for carriage in van; *Wilson v. Wyckoff*, 133 App. Div. 95, 117 N. Y. Supp. 783 (dissenting opinion), on liability of bailee guilty of negligence in respect to property in his custody.

Cited in footnote to *SeEVERS v. Gabel*, 27 L. R. A. 733, which holds hirer of personal property not liable for loss by fire without his fault.

Cited in note (94 Am. St. Rep. 217) on bailments.

Implied conditions.

Cited in *Clough v. Stillwell Meat Co.* 112 Mo. App. 191, 86 S. W. 580, holding warehouse company entitled to remuneration upon quantum meruit for insuring property destroyed by fire while in storage and for collecting insurance money and turning it over to bailor.

14 L. R. A. 220, *WILLIAMS v. WILLIAMS*, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98.

Grounds for limited divorce.

Approved in *Simon v. Simon*, 6 App. Div. 470, 39 N. Y. Supp. 573, Affirming 15 Misc. 518, 37 N. Y. Supp. 1121, denying separation in absence of voluntary abandonment with intention not to return.

Cited in *Deisler v. Deisler*, 59 App. Div. 208, 69 N. Y. Supp. 326, holding refusal of wife to cease association with alleged paramour justified husband's neglect to support; *People ex rel. Public Charities & C. Comrs. v. Cullen*, 153 N. Y. 639, 44 L. R. A. 424, 47 N. E. 894, holding judicial separation at suit of wife exempts husband from liability for desertion; *Tirrell v. Tirrell*, 72 Conn. 570, 47 L. R. A. 752, footnote p. 750, 45 Atl. 153, holding mere payment of allowance to abandoned wife under order of court no bar to divorce for desertion; *Dignan v. Dignan*, 17 Misc. 269, 40 N. Y. Supp. 320, denying tender of cohabitation by wife upon one condition sufficient to convict husband of abandonment if rejected.

Cited in footnotes to *Hardie v. Hardie*, 25 L. R. A. 697, which holds divorce for desertion not authorized by wife receiving blow from husband leaving house without intent to remain away permanently; *Danforth v. Danforth*, 31 L. R. A. 608, which authorizes divorce for wife's desertion, though husband visited and slept in same bed with her for a few days during statutory period.

Cited in notes (13 L.R.A.(N.S.) 223) on relations between one spouse and relatives of other as affecting question of desertion or cruelty; (86 Am. St. Rep.

341; 119 Am. St. Rep. 618; 138 Am. St. Rep. 147, 151) on desertion as ground for divorce.

Proof of desertion.

Cited in *Brokaw v. Brokaw*, 66 Misc. 315, 123 N. Y. Supp. 17, holding closing of house by husband and referring wife to attorney and other acts constituted abandonment, though husband continued to make wife weekly allowances; *Heyman v. Heyman*, 119 App. Div. 183, 104 N. Y. Supp. 227, holding action for separation based wholly on charge of wilful abandonment not maintainable by wife who left home because husband absent one night on business where rent of home for current month was paid, home furnished and wife and child supported therein; *Dennison v. Dennison*, 52 Misc. 40, 102 N. Y. Supp. 621, holding charge of abandonment not sustained, where parties expected to live separately at time of marriage and pre-nuptial agreement was made releasing man from all claims upon him as husband by woman; *Kupka v. Kupka*, 132 Iowa, 193, 109 N. W. 610, holding evidence insufficient to establish charge of desertion.

Distinguished in *People v. Crouse*, 86 App. Div. 354, 83 N. Y. Supp. 812, holding husband's settlement in New York, where he was followed by wife who offered to live with him, not proof of desertion within statute rendering husband liable for arrest.

Effect of foreign divorce.

Cited in *Atherton v. Atherton*, 155 N. Y. 134, 40 L. R. A. 294, 63 Am. St. Rep. 650, 49 N. E. 933, Affirming 82 Hun, 179, 31 N. Y. Supp. 977, denying that wife's action for limited divorce in New York is barred by husband's absolute divorce in state without jurisdiction over wife; *Bell v. Bell*, 4 App. Div. 531, 40 N. Y. Supp. 443, denying judgment of Pennsylvania court binding on wife, barring action for divorce; *People v. Karlsioe*, 1 App. Div. 573, 37 N. Y. Supp. 481, and *Re Kimball*, 155 N. Y. 72, 49 N. E. 331, holding judgment of divorce entered in sister state, against resident of New York, without personal service or appearance, void; *Strong v. New York, L. E. & W. R. Co.* 86 Hun, 394, 33 N. Y. Supp. 502, denying that judgment of divorce in another state, without appearance, changes status of husband as to distribution of wife's estate; *Re Swales*, 60 App. Div. 601, 70 N. Y. Supp. 220, denying right to administer estate as widow after obtaining divorce in another state against husband in New York; *McCreery v. Davis*, 44 S. C. 223, 28 L. R. A. 665, 51 Am. St. Rep. 794, 22 S. E. 178, denying that divorce granted wife without jurisdiction of husband destroys her dower in his property.

Cited in notes (16 L. R. A. 498) on domicile of wife for purpose of divorce suit; (19 L. R. A. 814) on validity of decree of divorce obtained on publication service out of state, where defendant did not appear; (59 L. R. A. 170) on conflict of laws on subject of divorce; (2 L.R.A.(N.S.) 326) on effect, in third state, of decree upholding foreign divorce; (5 Eng. Rul. Cas. 724) on validity of judgment dissolving marriage by court of country where husband is domiciled; (53 Am. St. Rep. 183; 8 Eng. Rul. Cas. 50) on effect of foreign divorce.

Distinguished in *Campbell v. Campbell*, 90 Hun, 236, 35 N. Y. Supp. 280, upholding judgment annulling marriage at suit of wife in state having jurisdiction of both parties.

Criticized in *Davis v. Davis*, 2 Misc. 550, 22 N. Y. Supp. 191, annulling marriage contracted after divorce at suit of former wife in state without jurisdiction over husband.

Disapproved in effect in *Felt v. Felt*, 59 N. J. Eq. 613, 83 Am. St. Rep. 612, 49 Atl. 1071 (dissenting opinion), majority sustaining decree of divorce granted by foreign court, service being made on wife according to rule of such court.

Decree of divorce as evidence.

Cited in *Munson v. Munson*, 60 Hun, 196, 14 N. Y. Supp. 692, holding record of husband's divorce in California not conclusive on courts of this state as to jurisdiction.

Distinguished in *Starbuck v. Starbuck*, 173 N. Y. 508, 93 Am. St. Rep. 631, 66 N. E. 193, Reversing 62 App. Div. 440, 71 N. Y. Supp. 104, holding decree of divorce obtained by wife in another state, on grounds not recognized here, admissible in action for dower in subsequently acquired property.

14 L. R. A. 223, *EVANS v. LAKE SHORE & M. S. R. CO.* 88 Mich. 442, 50 N. W. 386.

Reliance on observation of rules.

Cited in *Shufelt v. Flint & P. M. R. Co.* 96 Mich. 343, 55 N. W. 1013 (dissenting opinion), majority holding failure to stop, look, and listen before crossing tracks, bars recovery; *Dawe v. Flint & P. M. R. Co.* 102 Mich. 308, 60 N. W. 838, denying that failure to close gates allows recovery to one failing to look and listen; *Rohde v. Chicago & N. W. R. Co.* 86 Wis. 312, 56 N. W. 872, holding complaint alleging injury at crossing from failure of company to lower gates as usual sufficient; *Baltimore & O. R. Co. v. Stumpf*, 97 Md. 94, 54 Atl. 978, sustaining recovery by traveler who entered through open safety gates without stopping to look or listen, and was struck by train; *Montgomery v. Missouri P. R. Co.* 181 Mo. 501, 79 S. W. 930, holding that it is duty of flagman to warn travelers about to cross of approach of train, and if he is present and gives no signal, traveler may conclude that it is safe to cross; *Chicago, R. I. & P. R. Co. v. Hamilton*, 92 Ark. 403, 123 S. W. 379, holding failure to look and listen before attempting to cross tracks where gates raised, not negligence as matter of law; *Koch v. Southern C. R. Co.* 148 Cal. 688, 4 L.R.A.(N.S.) 527, 113 Am. St. Rep. 332, 84 Pac. 176, 7 A. & E. Ann. Cas. 795 (dissenting opinion), on right to rely on absence of such warnings of danger as it is customary for railroad company to give; *Sights v. Louisville & N. R. Co.* 117 Ky. 442, 78 S. W. 172, on reliance upon flagman's performance of his duties; *Northern C. R. Co. v. State*, 100 Md. 413, 108 Am. St. Rep. 439, 60 Atl. 19, 3 A. & E. Ann. Cas. 445, holding jury entitled to believe defendant guilty of negligence where there was evidence that boy waited until gate was raised and gateman beckoned him to come across tracks, took horse by head, started across, and was struck by engine.

Cited in footnotes to *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds failure to look and listen on dark night not prevent recovery for injury by engine running backward; *Betts v. Lehigh Valley R. Co.* 45 L. R. A. 261, which sustains right of person approaching crossing where train is receiving or discharging passengers to rely on rule requiring other train to stop; *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which sustains traveler's right to rely on watchman's absence from crossing.

Cited in note (33 L.R.A.(N.S.) 990) on railroads: duty as to operation of safety gates at crossings.

Distinguished in *Poulin v. Canadian P. R. Co.* 17 L. R. A. 803, 3 C. C. A. 23, 6 U. S. App. 298, 152 Fed. 197, holding passenger knowingly boarding train with void ticket guilty of negligence barring recovery for expulsion, though person in charge of office said he thought it was all right.

Question for jury.

Cited in *Grand Trunk R. Co. v. Ives*, 144 U. S. 432, 36 L. ed. 494, 12 Sup. Ct. Rep. 679, holding question for jury as to decedent's negligence in driving onto track after failing to look and listen; *Baltimore & O. R. Co. v. Connell*, 69 C. C.

A. 570, 137 Fed. 13, holding question whether person killed at crossing guilty of contributory negligence properly left to jury, where safety gates on both sides of crossing were standing up and flagman was asleep in signal tower at time of accident.

14 L. R. A. 226, VOSBURG v. PUTNEY, 80 Wis. 523, 27 Am. St. Rep. 47, 50 N. W. 403.

Acts constituting assault.

Cited in Vosburg v. Putney, 86 Wis. 279, 56 N. W. 480, holding one liable for damages resulting from kick upon leg; Degenhardt v. Heller, 93 Wis. 664, 57 Am. St. Rep. 945, 68 N. W. 411, denying recovery for assault when revolver discharged to cause fright, without intending to harm.

Cited in footnotes to Markley v. Whitman, 20 L. R. A. 55, which holds student liable for assault made in sport; Perkins v. Stein, 20 L. R. A. 862, which holds negligently driving over person not assault; Carr v. State, 20 L. R. A. 863, which holds assault involved in administering poison; Laidlaw v. Sage, 44 L. R. A. 216, which holds one drawing another in front of him as shield against threatened explosion not liable for injuries from explosion.

Cited in notes (57 L. R. A. 675) on liability of infant for torts; (45 L. R. A. 695) on self-defense set up by accused who began conflict.

Hypothetical questions.

Cited in Selleck v. Janesville, 100 Wis. 163, 41 L. R. A. 565, 69 Am. St. Rep. 906, 75 N. W. 975, holding hypothetical questions, partly based on physician's examination, proper; Nichols v. Oregon Short Line R. Co. 25 Utah, 246, 70 Pac. 996, holding that hypothetical question as to cause of miscarriage must include every proven fact.

Distinguished in Zoldoske v. State, 82 Wis. 607, 52 N. W. 778, holding hypothetical question not omitting any facts absolutely essential to enable expert to form intelligent opinion not improper.

Measure of damages in actions for tort.

Cited in Chicago, B. & Q. R. Co. v. Spirk, 51 Neb. 178, 70 N. W. 926, holding compensation for direct result of act, measure of damages in actions *ex delicto*.

Intent as element of assault.

Cited in Walbridge v. Walbridge, 80 Kan. 569, 103 Pac. 89, holding person guilty of assault answerable for all injuries which are natural or probable consequences of his act without regard to his intent; Mohr v. Williams, 95 Minn. 271, 1 L.R.A.(N.S.) 445, 111 Am. St. Rep. 462, 104 N. W. 12, 5 A. & E. Ann. Cas. 303, holding physician who performed operation on ear of patient other than that to which patient had consented while patient was under influence of anaesthetics, liable in civil action for assault and battery; Donner v. Graap, 134 Wis. 526, 115 N. W. 125, holding definition of assault and battery adopted by Wisconsin court implies wrongful intent; Luttermann v. Romey, 143 Iowa, 235, 121 N. W. 1040, holding instruction erroneous which made finding of intent to obtain sexual intercourse with woman essential to right of recovery for assault and battery upon her.

Cited in note (67 L.R.A. 566) on mistaken identity as justification for assault.

Liability of infant for torts.

Cited in Briese v. Maechtle, 146 Wis. 90, 35 L.R.A.(N.S.) 576, 130 N. W. 893, Ann. Cas. 1912 C, 176, holding that infant is liable in compensatory damages for his tortious acts.

14 L. R. A. 230, FLYNN v. DOUGHERTY, 91 Cal. 669, 27 Pac. 1080.

Specifying points for nonsuit.

Cited in *White v. Rio Grande Western R. Co.* 22 Utah, 141, 61 Pac. 568, and *Idaho Mercantile Co. v. Kalanquin*, 7 Idaho, 298, 62 Pac. 925, holding party moving for nonsuit must call attention of court and adversary to particular points; *Ferguson v. Ingle*, 38 Or. 44, 62 Pac. 760, holding appellate courts refuse to review motion for nonsuit, not naming grounds.

Statute of frauds as affecting contracts.

Cited in *Lewis v. Evans*, 108 Iowa, 299, 79 N. W. 81, holding contract for sale of corn to be shelled, within statute of frauds; *Williams-Hayward Shoe Co. v. Brooks*, 9 Wyo. 437, 64 Pac. 342, holding contract with vendor and manufacturer for shoes to be made and delivered, within statute of frauds.

Cited in footnotes to *Mighell v. Dougherty*, 17 L. R. A. 755, which holds oral sale of growing grain, to be delivered, within statute of frauds; *Greenwood v. Law*, 19 L. R. A. 688, which holds parol agreement to assign mortgage void; *Heintz v. Burkhard*, 31 L. R. A. 508, which holds oral contract to make and furnish ironwork for particular brick building not within statute of frauds; *Forsyth v. Mann Bros.* 32 L. R. A. 788, which holds oral contract to manufacture monument not within statute of frauds.

Cited in note (30 L.R.A.(N.S.) 319, 323) on purchase of property to be manufactured, adapted, or grown, as within Statute of Frauds.

Contract for labor.

Cited in note (94 Am. St. Rep. 234) on contract for labor.

14 L. R. A. 234, GERARD v. McCORMICK, 130 N. Y. 261, 29 N. E. 115.

Payment of agent's debt with principal's funds.

Cited in *Huie v. Allen*, 87 Hun, 519, 34 N. Y. Supp. 577, holding brokers receiving corporate check in payment of manager's losses in speculation must repay corporation; *Lamson v. Beard*, 45 L. R. A. 827, 36 C. C. A. 64, 94 Fed. 37, denying that payees are bona fide holders of drafts drawn by president on corporate deposit for margins in "futures;" *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 App. Div. 4, 67 N. Y. Supp. 397, holding bank liable to reimburse corporation for checks drawn by president in payment of individual debts; *Empire State Surety Co. v. Nelson*, 141 App. Div. 851, 126 N. Y. Supp. 453, holding that ward may recover from person receiving money paid out of estate by guardian in payment of guardian's individual debt; *Hathaway v. Delaware County*, 185 N. Y. 373, 13 L.R.A.(N.S.) 277, 113 Am. St. Rep. 909, 78 N. E. 153, on absence of authority in trustee to dispose of trust property in payment of his own debt; *Winslow Bros. & Co. v. Station*, 150 N. C. 268, 63 S. E. 950, on set-off of debt due from agent to purchaser in purchase of property of principal through agent, also citing annotation on this point.

Cited in footnotes to *Commercial Bank v. Hurt*, 19 L. R. A. 701, which holds factor has no implied authority to pledge goods for own use; *Milton v. Johnson*, 47 L. R. A. 529, which denies power of subagent to apply proceeds of debt collected, to payment of claim due him from principal agent; *Tomsecek v. Travelers' Ins. Co.* 57 L. R. A. 455, which denies insurance agent's implied authority to accept as payment of premium, agreement to give him credit on account, to be traded out with insured.

Cited in note (52 L. R. A. 792) on liability of bank or other depository, or of drawee for taking deposit of agent, fiduciary, or other representative to pay his own debt.

Annotation in 14 L. R. A. 234, referred to with approval in *Dorrah v. Hill*, 73

Miss. 801, 32 L. R. A. 635, 19 So. 961 (dissenting opinion), majority upholding principal's right to be subrogated to trust deed to agent paid by money procured by loan of principal's funds, to debtor, and discharged by agent.

Distinguished in *Loeb v. Selig*, 120 La. 199, 45 So. 100, where facts were not sufficient to put defendants upon inquiry in dealing with agents; *Interstate Nat. Bank v. Claxton*, 97 Tex. 578, 65 L.R.A. 826, 104 Am. St. Rep. 885, 80 S. W. 604, holding bank paying checks drawn by factors on deposit consisting of funds realized from sale of live stock for their principal not liable for amount of such checks to principal, though it knew factors were insolvent when deposit was made.

Notice of incapacity.

Followed in *Rochester & C. Turnp. Road Co. v. Paviour*, 164 N. Y. 286, 52 L. R. A. 797, 58 N. E. 114, holding payee receiving corporate checks for debt not owed by corporated chargeable with notice of treasurer's lack of authority.

Cited in *Geyser-Marion Gold-Min. Co. v. Stark*, 53 L. R. A. 688, 45 C. C. A. 470, 106 Fed. 563, holding actionable negligence for corporation to transfer stock upon signature of trustee, without inquiry as to assent of beneficiary; *American Preserves Co. v. Columbia Invest. Co.* 7 Misc. 510, 28 N. Y. Supp. 782, holding failure to make inquiries upon receipt of corporate check in payment of manager's stock charges investment company with constructive notice; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 468, 42 L. R. A. 145, 51 N. E. 398, holding pledgee receiving stock certificates of trust estate chargeable with notice of trust conditions; *Marshall v. de Cordova*, 26 App. Div. 619, 50 N. Y. Supp. 294, holding receipt by brokers of check signed by drawer as trustee, and repayment to trustee, who immediately redeposited proceeds with brokers, sufficient evidence of notice; *Kelsey v. Bank of Mansfield*, 85 App. Div. 336, 83 N. Y. Supp. 281, sustaining receiver's right to recover proceeds of check wrongfully appropriated with knowledge of bank; *Cohnfeld v. Tanenbaum*, 176 N. Y. 130, 98 Am. St. Rep. 653, 68 N. E. 141, holding check drawn by guardian, notice to payee that funds belong to ward; *Re Troy & C. Shirt Co.* 136 Fed. 431, on notice of incapacity of officer or agent to issue paper given by fact it is obligation of corporation made payable to himself; *Squire v. Ordemann*, 194 N. Y. 397, 87 N. E. 435, holding check signed "Estate of A———" with signatures of executors underneath notice it was payable from trust funds; *Ward v. City Trust Co.* 192 N. Y. 69, 84 N. E. 585, reversing 117 App. Div. 148, 102 N. Y. Supp. 50, holding payment of personal debt by check made out to corporation and indorsed for it by debtor as president is notice of apparent misuse of corporate funds; *Havana C. R. Co. v. Knickerbocker Trust Co.* 135 App. Div. 317, 119 N. Y. Supp. 1035, holding trust company which received checks of plaintiff corporation payable to treasurer thereof and signed by such treasurer, and placed amount of checks to credit of treasurer individually, who afterwards checked same out for his own purposes, liable to plaintiff for amount of checks drawn by treasurer upon plaintiff's account; *Manhattan Web Co. v. Aquidneck Nat. Bank*, 133 Fed. 77, holding where treasurer of corporation draws and uses its funds for private purposes in absence of circumstances giving rise to inference of authority to do so, bank is put upon inquiry; *Hazeltine v. Keenan*, 54 W. Va. 603, 102 Am. St. Rep. 953, 46 S. E. 609, holding purchaser put on inquiry by fact note is payable to person as attorney.

Cited in footnote to *Baldwin v. Tucker*, 57 L. R. A. 451, which holds purchaser from agent bound to know latter's lack of authority to take purchase money note payable to himself.

Cited in notes (18 L.R.A. 667) on extent of authority conferred on traveling L.R.A. Au. Vol. II.—73.

salesmen; (20 L.R.A. (N.S.) 355, 367) on circumstances sufficient to put purchaser of negotiable paper on inquiry.

Distinguished in *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 68, 34 L. R. A. 73, 55 Am. St. Rep. 646, 44 N. E. 701, denying corporate note bearing signature of maker, as president, sufficient to charge bona fide holder with notice of invalidity; *Shaffer v. Bacon*, 35 App. Div. 250, 54 N. Y. Supp. 796, holding executor's knowledge of invalidity of will tendered for probate by attorney insufficient to justify recovery back from attorney money paid for legal services.

Defective service by publication.

Cited in *Farmers' Loan & T. Co. v. Essex*, 66 Kan. 106, 71 Pac. 268, holding judgment rendered upon service by publication against "Farmers' Loan and Trust Company" not binding on such company as trustee.

14 L. R. A. 238, *DOLLARD v. ROBERTS*, 130 N. Y. 269, 29 N. E. 104.

Landlord's liability for injuries.

Cited in *Harris v. Boardman*, 68 App. Div. 439, 73 N. Y. Supp. 963, holding landlord liable to lessee of store for damage caused by bursting of closet used by tenants.

Cited in footnote to *Hart v. Cole*, 16 L. R. A. 557, which holds risk of unsafe outside steps in tenement building assumed by one attending wake.

Distinguished in *Harkin v. Crumby*, 20 Misc. 571, 46 N. Y. Supp. 453, denying recovery from landlord for injury to tenant's caller from slipping on ice; *Schwartz v. Apple*, 21 Misc. 514, 48 N. Y. Supp. 253, denying liability of landlord for injury to tenant from fall of plastering in room under control of tenant.

— From defects of building in his control.

Cited in *Lewin v. Pauli*, 19 Pa. Super. Ct. 450, upholding tenant's right to recover for injuries resulting from defective stairway used in common; *Wilber v. Follansbee*, 97 Wis. 581, 72 N. W. 741, upholding tenant's recovery against landlord for injuries caused by stumbling over rubbish left in hallway by one repairing stairs; *McGinley v. Alliance Trust Co.* 168 Mo. 265, 56 L. R. A. 337, footnote p. 334, 66 S. W. 153, holding lessor of apartment house, retaining control of stairway, liable for injury to tenants from lack of repair of railing; *Muller v. Minken*, 5 Misc. 445, 26 N. Y. Supp. 801, holding failure of landlord to light hall lamp insufficient to create liability to child from falling down stairs; *Canavan v. Stuyvesant*, 7 Misc. 118, 27 N. Y. Supp. 413, holding landlord liable for injury to child falling in open air shaft while playing in yard; *Golob v. Pasinsky*, 72 App. Div. 178, 76 N. Y. Supp. 388, holding that complaint alleging landlord reserved control of ceilings implies no duty to repair; *Capen v. Hall*, 21 R. I. 366, 43 Atl. 847, sustaining demurrer to complaint of tenant's caller for injuries received in hallway, due to insufficient lighting; *Lenz v. Aldrich*, 6 App. Div. 184, 39 N. Y. Supp. 1022 (dissenting opinion), majority denying landlord's liability for injury to tenant's child from falling of decayed clothespole; *Levine v. Baldwin*, 87 App. Div. 154, 84 N. Y. Supp. 92, holding landlord liable for damages due to leak in water pipe; *Golob v. Pasinsky*, 178 N. Y. 461, 70 N. E. 973, holding complaint alleging injuries to tenant from fall of plastering from part of premises under landlord's control not demurrable; *Weingartner v. Pomp*, 10 North. Co. Rep. 147, holding that owner of business building leased to different tenants is liable to one of them for negligence in failing to repair portion of building not demised to him; *Herdt v. Koenig*, 137 Mo. App. 595, 119 S. W. 56, holding landlord under duty of exercising ordinary care to maintain fence reasonably safe for purpose of protection of tenants and their guests from danger of falling into quarry adjacent to yard used in common by tenants; *Whitcomb v.*

Mason, 102 Md. 282, 4 L.R.A. (N.S.) 567, 62 Atl. 749, holding landlord not bound to keep entrances to office building open on Sunday so as to permit removal of desk and large articles of furniture in case of fire threatening building; Schwartz v. Monday, 49 Misc. 528, 97 N. Y. Supp. 978, holding testimony that witness saw slats on roof loose and notified landlord of the fact insufficient to charge landlord with knowledge of particular defective slat which caused injury; landlord's duty to keep roof in reasonably safe condition discharged by having premises including roof and wash deck examined monthly by carpenter; Peters v. Kelly, 129 App. Div. 292, 113 N. Y. Supp. 357, holding landlord retaining control of stairway and landing under duty to exercise reasonable care to keep them in suitable repair for use; Burner v. Higman & S. Co. 127 Iowa, 590, 103 N. W. 802, holding landlord and tenant both liable for injury of person on premises by invitation of tenant through negligence in guarding elevator over which both had partial control.

Annotation cited in *Marcheck v. Klute*, 133 Mo. App. 286, 113 S. W. 654, on duty of landlord to keep in reasonably safe condition for use, parts of premises he retains control of intending them for use by tenants to whom other parts are let.

Cited in footnotes to *Fellows v. Gilhuber*, 17 L. R. A. 578, which holds lessor of hotel not liable for injury to guest by defective awning; *Gleason v. Boehm*, 32 L. R. A. 645, which holds landlord not required to furnish light at night in common halls and stairways of rented buildings; *Railton v. Taylor*, 39 L. R. A. 246, which holds landlord not exempt from liability for damage resulting from negligence in use of heating apparatus remaining under his own control; *Kuhn v. Sol Heavenrich Co.* 60 L. R. A. 585, which denies implied contract obligation of one leasing building in sections, to keep in repair part remaining in his possession.

Cited in notes (15 L. R. A. 162) on liability for injuries caused by absence of fire escapes on buildings; (23 L. R. A. 158) on liability of landlord as to condition of part of premises not controlled by tenant; (34 L. R. A. 832) on landlord's liability for injury to tenant from defect in premises; (1 Brit. Rul. Cas. 110) on landlord's duty to light common hall or stairway; (9 Eng. Rul. Cas. 458; 3 L.R.A. (N.S.) 317) on liability of landlord for injury in common passageway.

Distinguished in *Walsh v. Frey*, 116 App. Div. 528, 101 N. Y. Supp. 774, where tenant while making use of balcony without consent of landlord, was injured by reason of rail giving way; *Rogers v. Sorell*, 14 Manitoba L. Rep. 455, holding landlord not liable to tenant of ground floor for injury to tenant's property caused by rain entering open fanlight at head of stairway where defect existed at time of lease; *Cooper v. Lawson*, 139 Mich. 632, 103 N. W. 168, where damage to tenant's property was caused by fire resulting from explosion of coal gas generated from burning soft-coal soot in inside of chimney which tenant could clean without becoming trespasser.

Notice imputable to principal.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

Contributory negligence.

Cited in *Kaiser v. Washburn*, 55 App. Div. 162, 66 N. Y. Supp. 764, holding previous knowledge of defective chimney not contributory negligence, as matter of law; *Morrissey v. Smith*, 67 App. Div. 190, 73 N. Y. Supp. 673, holding child injured by falling into hole in street not guilty of negligence, as matter of law; *Wesener v. Smith*, 89 App. Div. 213, 85 N. Y. Supp. 837, holding tenant's previous knowledge of existence of rubbish in yard not proof of negligence barring re-

covery for injuries due to falling over it; *Keating v. Mott*, 92 App. Div. 158, 86 N. Y. Supp. 1041, holding tenant falling by catching foot in holes in oilcloth in dark hallway not guilty of negligence in not remembering location of holes; *Rashkoff v. Erie R. Co.* 141 App. Div. 629, 126 N. Y. Supp. 489, to the point that person is not guilty of contributory negligence in going upon dangerous premises in performance of duty, unless he knew or ought to have known of danger; *Schell v. German Flats*, 54 Misc. 453, 104 N. Y. Supp. 116, holding it a jury question whether wheelman was guilty of contributory negligence who, as result of collision, was thrown over side of bridge where bridge rail was absent; *Bartley v. New York*, 102 App. Div. 27, 92 N. Y. Supp. 82, holding plaintiff not guilty of contributory negligence as matter of law, where upon bidding good bye to friend with whom she was chatting, she turned to go and fell into hole in sidewalk directly behind her; *Wood v. New York C. & H. R. R. Co.* 184 N. Y. 298, 77 N. E. 27 (dissenting opinion), as to what is contributory negligence as matter of law.

Question for jury.

Cited in *Collier v. Collins*, 58 App. Div. 553, 69 N. Y. Supp. 94, holding liability of landlord for injury to tenant from tilting of grating at entrance to yard, question for jury.

14 L. R. A. 243, *WICKS v. MONIHAN*, 130 N. Y. 232, 29 N. E. 139.

Limitation of rights.

Cited in *Sanford v. Commercial Travelers' Mut. Acci. Asso.* 86 Hun, 381, 33 N. Y. Supp. 512, holding provision in insurance certificate for settlement of disputes before referee void, as denying jury trial; *Wells v. Monihan*, 33 N. Y. S. R. 495, 13 N. Y. Supp. 156, denying that revocation of charter affects right to sue on note for money loaned; *State Council J. O. U. A. M. v. Emery*, 219 Pa. 467, 15 L.R.A. (N.S.) 340, 68 Atl. 1023, 12 A. & E. Ann. Cas. 810, holding state council of unincorporated beneficial association which revoked charter of local council is not entitled to fund raised by and for benefit of sick members of local body and for burial expenses, where the state council had nothing to do with control and administration of such fund; *State Council, J. O. U. A. M. v. Enterprise Council No. 6*, 75 N. J. Eq. 252, 72 Atl. 19, holding that state council of beneficiary order cannot by its own act work forfeiture of property of subordinate council's which had remained faithful to national council, from which state council had separated.

Cited in footnote to *Reno Lodge No. 99, I. O. O. F. v. Grand Lodge I. O. O. F.* 26 L. R. A. 98, which denies right to enjoin assessments on subordinate lodges before exercise of right of appeal to grand lodge.

Cited in note (15 L.R.A.(N.S.) 336) on right, upon dissolution of benefit association, or local branch, to funds accumulated by branch solely for benefit of its members.

14 L. R. A. 245, *MUNRO v. TOUSEY*, 129 N. Y. 38, 29 N. E. 9.

Infringement by similarity of name.

Followed without discussion in *Munroe v. Tousey*, 129 N. Y. 619, 29 N. E. 10.

Cited in *Charles S. Higgins Co. v. Higgins Soap Co.* 71 Hun, 104, 24 N. Y. Supp. 801, holding use of word "Higgins" on label of soap manufacturer no bar to use of same word on different label; *Cooke & C. Co. v. Miller*, 169 N. Y. 478, 62 N. E. 582, holding "Favorite Letter and Invoice File" no infringement on label "Improved Favorite Letter and Invoice File, Best;" *Outcault v. Lamar*, 135 App. Div. 118, 119 N. Y. Supp. 930, holding state courts have jurisdiction to protect

trade names and trade marks notwithstanding fact they are used in connection with copyright or patent; *Frohman v. Morris*, 68 Misc. 465, 123 N. Y. Supp. 1090, holding that word "Chantecler" as applied to play will be protected as trade-name.

Cited in footnotes to *Schmidt v. Brieg*, 22 L. R. A. 790, which holds words "Sarsaparilla and Iron" not claimable as trade-mark; *P. C. Wiest Co. v. Weeks*, 34 L. R. A. 172, which holds trade-mark in letters "P. C. W." not infringed by letters "W. H. W."

Cited in note (85 Am. St. Rep. 114) on what words or phrases may constitute a valid trademark.

14 L. R. A. 248, *UNION BLDG. ASSO. v. ROCKFORD INS. CO.* 83 Iowa, 647, 32 Am. St. Rep. 323, 49 N. W. 1032.

Forfeiture of policy.

Cited in *Moore v. Rockford Ins. Co.* 90 Iowa, 638, 57 N. W. 597, holding company not liable on policy when premium unpaid.

Cited in footnotes to *Stewart v. Union Mut. L. Ins. Co.* 42 L. R. A. 147, which holds provision against policy taking effect till first premium paid ineffectual, where premium note given, though unpaid; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default, without notice of any condition affixed.

Cited in note (18 L.R.A.(N.S.) 204) on effect of breach of insurance policy by mortgagor on rights of mortgagee.

Distinguished in *Trundle v. Providence-Washington Ins. Co.* 54 Mo. App. 195, denying that failure to remit vitiates policy, when insured credited with unearned premium, and no demand made for balance.

Sufficiency of assignment of error.

Cited in *Manatt v. Scott*, 106 Iowa, 209, 68 Am. St. Rep. 293, 76 N. W. 717, holding assignment of error showing wherein court erred in overruling objection sufficient; *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 368, 55 N. W. 496, holding assignments of error failing to suggest wherein verdict contrary to law insufficient.

14 L. R. A. 251, *McKENZIE v. MOORE*, 92 Ky. 216, 17 S. W. 483.

Effect of withdrawal of bill from governor.

Cited in *State ex rel. Dawson v. Sessions*, 84 Kan. 866, 115 Pac. 641, Ann. Cas. 1912 A, 1796, holding that governor has full period of three days to consider bill that has been withdrawn from his hands and again presented to him for approval.

Mandamus as to enactment of statute.

Cited in note (22 L.R.A.(N.S.) 1090) on mandamus to compel delivery of copy or to require promulgation of statute.

14 L. R. A. 253, *STATE ex rel. FLEMING v. CRAWFORD*, 28 Fla. 441, 10 So. 118.

Mandamus.

Cited in *State ex rel. Atty. Gen. v. Johnson*, 30 Fla. 498, 18 L. R. A. 419, 11 So. 845, holding mandamus proper remedy to compel suspended tax collector to deliver tax rolls to successor; *Florida C. & P. R. Co. v. State*, 31 Fla. 504, 20 L. R. A. 421, 34 Am. St. Rep. 30, 13 So. 103, holding mandamus not remedy to compel railroad company to construct station; *Norris v. Cross*, 25 Okla. 311, 105 Pac. 1000, holding that mandamus lies to compel secretary of state to file ref-

erendum petition when presented; *State ex rel. Sunday v. Richards*, 50 Fla. 288, 39 So. 152, denying writ of mandamus to compel tax assessor to assess lands alleged to have been sold to state by illegal tax sales.

Cited in footnote to *State ex rel. Miller v. Barber*, 27 L. R. A. 45, which holds secretary subject to mandamus to compel affixing of great seal to commission used by governor.

Cited in notes (58 L.R.A. 853) on original jurisdiction of court of last resort in mandamus case; (125 Am. St. Rep. 498, 499) on duties, performance of which may be compelled by mandamus; (16 Eng. Rul. Cas. 787) on right to mandamus against a public officer.

Distinguished in *State ex rel. Walker v. Stewart*, 49 Fla. 262, 38 So. 600, holding mandamus will not lie to compel clerk of board of county commissioners to carry out provisions of resolution which board had no authority to pass.

Right of governor to sue in name of state.

Cited in *State ex rel. Haskell v. Huston*, 21 Okla. 789, 97 Pac. 982, holding governor may sue in name of state for writ of prohibition forbidding judge to entertain jurisdiction of suit against foreign corporation and forbidding attorney general to further prosecute same.

14 L. R. A. 264, *CHILDS v. MERRILL*, 63 Vt. 463, 22 Atl. 626.

Actionable fraud.

Cited in *Shanks v. Whitney*, 66 Vt. 410, 29 Atl. 367, holding misrepresentation as to existence of claim and assignment of mortgage actionable; *Phillips v. Hebden*, 28 R. I. 1, 65 Atl. 266, as to whether deceit will lie for obtaining credit by fraudulent representations as to solvency or pecuniary responsibility; *Rowell v. Ricker*, 79 Vt. 555, 66 Atl. 569, holding discharge in bankruptcy no bar to action for obtaining property by fraudulent representations.

Cited in footnotes to *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L. R. A. 417, which holds sale rendered fraudulent by concealment of insolvency without reasonable expectation of paying; *Swift v. Rounds*, 33 L. R. A. 561, which holds purchase of goods on credit with intent not to pay therefor, ground for action of deceit.

14 L. R. A. 268, *CRAWFORDSVILLE v. BRADEN*, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. 849.

Powers of municipal corporation.

Cited in *Champer v. Greencastle*, 138 Ind. 351, 24 L. R. A. 773, 46 Am. St. Rep. 390, 35 N. E. 14, holding ordinance forbidding maintenance of obstruction obscuring view into interior of saloon void; *Adams v. Shelbyville*, 154 Ind. 495, 49 L. R. A. 808, 77 Am. St. Rep. 484, 57 N. E. 114, holding ordinance assessing abutters for improvements purely ornamental unauthorized by statute; *Rosedale v. Hanner*, 157 Ind. 392, 61 N. E. 792, sustaining ordinance prohibiting use of gates swinging outward upon walk; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 581, 15 L. R. A. 324, 28 N. E. 853, upholding right of municipality to regulate gas rate; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 543, 41 N. E. 1033, sustaining injunction against gas company which uses streets for pipes, from charging consumer higher rate; *State ex rel. Indianapolis v. Indianapolis Union R. Co.* 160 Ind. 57, 60 L. R. A. 836, 66 N. E. 163, denying power of city of Indianapolis, under charter, to require elevation of railroad tracks; *Asher v. Hutchinson Water, Light & P. Co.* 66 Kan. 500, 61 L. R. A. 58, 71 Pac. 813, holding that city and water company may modify contract by ordinance so as to require removal of water mains from certain streets; *Jack v. Grangeville*, 9 Idaho, 315, 74 Pac. 969, holding contract for water supply for village within powers of village au-

thorities; *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 624, holding city expressly empowered to construct sewers may borrow money to construct sewerage plant; *Indianapolis v. Consumers' Gas Trust Co.* 75 C. C. A. 442, 144 Fed. 646, holding city authorized to construct and establish gas works impliedly authorized to purchase natural gas plant; *Scott v. Laporte*, 162 Ind. 47, 68 N. E. 278, holding statute giving city power to furnish city with water and to authorize private corporation to construct works, taken in connection with general grants of power, authorizes city to obtain water for its inhabitants.

Cited in footnote to *Rippe v. Becker*, 22 L. R. A. 857, which denies power of state to own and operate grain elevator.

— **To operate electric light and water plants.**

Cited in *Ellinwood v. Reedsburg*, 91 Wis. 134, 64 N. W. 885, upholding city's right to issue bonds to construct waterworks and electric light plant; *Mitchell v. Negaunee*, 113 Mich. 367, 38 L. R. A. 160, footnote p. 157, 67 Am. St. Rep. 468, 71 N. W. 646, and *State v. Hiawatha*, 53 Kan. 479, 36 Pac. 1119, upholding city's power to purchase electric light plant; *Christensen v. Fremont*, 45 Neb. 164, 63 N. W. 364, and *Rochebrandt v. Madison*, 9 Ind. App. 229, 53 Am. St. Rep. 348, 36 N. E. 444, upholding power of city to contract for materials used in erection of lighting plant; *Seward v. Liberty*, 142 Ind. 552, 42 N. E. 39, denying injunction restraining town from making lighting contract because of high price; *Gosport v. Pritchard*, 156 Ind. 401, 59 N. E. 1058, holding it unnecessary to allege facts showing power of town to make electric light contract, to recover for lighting streets; *Lake County Water & Light Co. v. Walsh*, 160 Ind. 43, 98 Am. St. Rep. 264, 65 N. E. 530, holding purchase of electric light and water plants for public and private use, a public purpose; *Fawcett v. Mt. Airy*, 134 N. C. 129, 63 L. R. A. 872, 101 Am. St. Rep. 825, 45 S. E. 1029, sustaining power of municipal corporation to incur expense of erecting and operating water and electric light plants for public and private use; *Overall v. Madisonville*, 125 Ky. 691, 12 L.R.A. (N.S.) 436, 102 S. W. 278, holding if city is empowered to light its streets and precise method is not expressly provided, it may either hire another to furnish lights, or furnish them itself.

Cited in footnote to *Fawcett v. Mt. Airy*, 63 L.R.A. 870, which upholds power of municipality to procure a plant for lighting its streets.

Cited in note (15 L.R.A.(N.S.) 711) on power of municipality to own electric light plant.

Distinguished in *Mayo v. Washington*, 122 N. C. 11, 40 L. R. A. 165, footnote p. 163, 29 S. E. 343, holding municipality without power to create debt for purchase of electric light plant; *Parker, W. & Co. v. Austin*, 156 Mich. 580, 23 L.R.A.(N.S.) 269, 121 N. W. 322, holding city not authorized to adopt ordinance requiring sealer of weights and measures to test computing devices on scales for determining cost of article weighed.

— **To supply private persons.**

Cited in *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 267, 30 L. R. A. 544, footnote p. 540, 51 Am. St. Rep. 24, 18 So. 677, upholding city's power to manufacture electric light for private residences and business places; *Mealey v. Hagerstown*, 92 Md. 754, 48 Atl. 746, raising, without deciding, question as to power of city to supply light to private citizens; *Baker v. Cartersville*, 127 Ga. 225, 56 S. E. 249, on right of city to supply its inhabitants with light; *Cary v. Blodgett*, 10 Cal. App. 467, 102 Pac. 668, sustaining right of city to sell electric light to its inhabitants; *Overall v. Madisonville*, 125 Ky. 690, 12 L.R.A.(N.S.) 436, 102 S. W. 278, holding city has power to install light plant to furnish public lighting, and incidentally, to furnish light to its inhabitants.

Cited in footnotes to Opinion of Justices, 15 L. R. A. 809, which holds purchase of fuel by municipality and resale to inhabitants not a public purpose; *Linn v. Chambersburg*, 25 L. R. A. 217, which upholds borough's right to supply electricity for borough and its inhabitants.

Criticized in *Christensen v. Fremont*, 45 Neb. 165, 63 N. W. 364, holding power to provide lights for streets gives city no authority to supply private buildings.

Resolution and ordinance distinguished.

Cited in *McGavock v. Omaha*, 40 Neb. 82, 58 N. W. 543, holding council may act by resolution as to change of street grade, charter not directing course; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 527, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 286, holding city may contract by resolution for construction of water plant, statute not requiring ordinance.

Cited in footnotes to *Mullan v. State*, 34 L. R. A. 262, which holds concurrent resolution of legislature ratifying appointment by governor not "express authority of law;" *Swindell v. State*, 35 L. R. A. 50, which denies power to repeal by mere majority vote, rule being fixed by ordinance as to requirements in passage of ordinance.

Judicial notice.

Cited in note (124 Am. St. Rep. 32) on facts of which courts will take judicial notice.

14 L. R. A. 273, *LOMBARD v. MORSE*, 155 Mass. 136, 29 N. E. 205.

Parties plaintiff.

Cited in *Burke v. Burke*, 170 Mass. 501, 49 N. E. 753, holding suit to recover possession of land maintainable by infant; *Taylor v. Lovering*, 171 Mass. 305, 50 N. E. 612, holding petition by guardian for writ of error to reverse judgment should be brought in name of ward; *Frankel v. Frankel*, 173 Mass. 216, 73 Am. St. Rep. 266, 53 N. E. 398, holding wife may maintain bill in equity against husband to recover property obtained by fraud; *Brook v. Rogers*, 184 Mass. 546, 69 N. E. 334, denying power of guardian to maintain in own name suit for false representations whereby he was induced to exchange property; *Campbell v. Fichter*, 168 Ind. 652, 81 N. E. 661, 11 A. & E. Ann. Cas. 1089, holding guardian of minor without power to maintain action to contest will; *Mee v. Fay*, 190 Mass. 40, 76 N. E. 229, holding ward alone can maintain action to recover possession of part of ward's estate, held by another; *Nolin v. Pearson*, 191 Mass. 288, 4 L.R.A.(N.S.) 648, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding married woman may maintain action for persuading her husband to commit adultery, refuse performance of his marital obligations, and abandon home and wife.

Infant legatee's right to compel transfer.

Cited in *Wirth v. Wirth*, 183 Mass. 532, 67 N. E. 657, dismissing bill to compel trustee to transfer business to infant legatees to be conducted by them or their guardians.

Amendment of pleadings.

Cited in *Bigelow v. Draper*, 6 N. D. 160, 69 N. W. 570, holding action by receiver to condemn property may be amended by inserting name of corporation; *Benson v. San Diego*, 100 Fed. 160, holding substitution of mortgage trustees for bondholders of water company in action to enjoin reduction in rates, no error.

Equitable remedy against spouse.

Cited in *Patterson v. Patterson*, 197 Mass. 117, 83 N. E. 364, holding where husband holds property of wife against her will, equity will grant wife relief on bill brought by her against husband; *Cogswell v. Hall*, 185 Mass. 457, 70 N.

E. 461, holding wife advancing money to husband to purchase real estate, such money not being a gift, may establish resulting trust in her favor by bill in equity against him; *Heckman v. Heckman*, 215 Pa. 207, 114 Am. St. Rep. 953, 64 Atl. 425, holding wife may maintain bill in equity against her husband to cancel deed and for reconveyance where husband wrongfully procures conveyance of her separate property to him through third person; *James v. Gray*, 1 L.R.A.(N.S.) 326, 65 C. C. A. 385, 131 Fed. 405, holding wife who loans to partnership of which her husband is member, money vesting in her in accordance with statute, may prove her claim therefor against partnership estate in bankruptcy.

Cited in notes (73 Am. St. Rep. 271, 276) on suit in equity between husband and wife; (134 Am. St. Rep. 928) on suits in equity against married women.

Distinguished in *Atkins v. Atkins*, 195 Mass. 129, 11 L.R.A.(N.S.) 276, 122 Am. St. Rep. 221, 80 N. E. 806, where husband sought to compel wife to pay money to him or reconvey, under executory contract which was nullity because between husband and wife.

14 L. R. A. 276, *REDIGAN v. BOSTON & M. R. CO.* 155 Mass. 44, 31 Am. St. Rep. 520, 28 N. E. 1133.

Duty to licensee.

Cited in *Moffatt v. Kenny*, 174 Mass. 316, 54 N. E. 850, denying liability of owner of premises on private way for injuries to one falling into pit; *Pelton v. Schmidt*, 97 Mich. 237, 56 N. W. 689, denying liability to truckman falling through trap door behind desk; *Kennedy v. Chase*, 119 Cal. 642, 63 Am. St. Rep. 153, 52 Pac. 33, denying recovery to one leaving work on lighter, and injured by falling into hatchway while on deck to hang up coat; *Grundel v. Union Iron Works*, 141 Cal. 567, 75 Pac. 184, denying liability for death of one "having business on vessel," and killed by slipping of insecure gang plank; *Stevens v. Nichols*, 155 Mass. 474, 15 L. R. A. 461, 29 N. E. 1150, denying recovery to one injured by driving over curbstone while going through private way; *Cowen v. Kirby*, 180 Mass. 506, 62 N. E. 968, denying liveryman's liability for falling of carriage hoist upon one leaving horse and wagon in stable; *Fairplay Hydraulic Min. Co. v. Weston*, 29 Colo. 128, 67 Pac. 160, holding that bare licensee enters upon premises at his own risk; *Foster v. Portland Gold Min. Co.* 52 C. C. A. 394, 114 Fed. 614, holding mining company erecting dwellings and inviting public to enter liable to one falling down unguarded shaft; *Chavez v. Torlina*, 15 N. M. 67, 99 Pac. 690, holding that owner is not liable to trespasser or licensee for negligence of himself or servants; *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 92, 102 N. W. 89, holding firemen had no right to rely on insulation of electric wires near premises where fire occurred; *Monroe v. Atlantic Coast Line R. Co.* 151 N. C. 376, 27 L.R.A.(N.S.) 194, 66 S. E. 315, holding owner of vacant lot not liable to person injured by fall into pit therein, while crossing lot for his own convenience; *Krause v. Lewis*, 144 Mich. 556, 108 N. W. 417, holding verdict for defendant properly instructed in action to recover for injuries received by falling into open area way opening upon platform in alleyway adjoining defendant's premises, where no invitation extended to plaintiff to use platform; *Glaser v. Rothschild*, 106 Mo. App. 428, 80 S. W. 332, holding plaintiff was mere licensee, where in going to toilet in basement of defendant's premises, he fell into open elevator pit, permission to use toilet having been given him at his own request and that defendant owed him no duty to keep premises reasonably safe.

Cited in footnotes to *Gibson v. Leonard*, 17 L. R. A. 588, which holds fire insurance patrolman entering burning building to save property a mere licensee; *Ryer-*

son v. Bathgate, 57 L. R. A. 308, which denies liability of owner for injury to one using premises for purpose not authorized by invitation.

Cited in notes (26 L.R.A. 689) on liability for dangerous condition of private grounds lying open beside highway or frequented path; (17 L.R.A.(N.S.) 921) on duty of owner of premises to protect licensee against hidden dangers; (31 Am. St. Rep. 525) on owner's liability to persons coming on his premises; (31 Am. St. Rep. 713) on nature and revocation of parol licenses.

Distinguished in Herzog v. Hemphill, 7 Cal. App. 119, 93 Pac. 899, holding no cause of action exists against one in possession of premises for death of licensee caused by his falling over unprotected precipice, while undertaking to guide friend to urinal on premises.

— Of railroad company.

Cited in Leonard v. Boston & A. R. Co. 170 Mass. 319, 49 N. E. 621, denying company's liability to one stealing ride, and injured by brakeman's uncoupling cars; Schreiner v. Great Northern R. Co. 86 Minn. 247, 58 L. R. A. 77, 90 N. W. 400, denying company's liability to one walking on track, and injured by being pushed against train by cattle trespassing through failure to build fence; Illinois C. R. Co. v. Arnola, 78 Miss. 788, 84 Am. St. Rep. 645, 29 So. 768, holding that one taking short cut and injured by one painting water tank assumes risk; Manlove v. Cleveland C. C. & St. L. R. Co. 29 Ind. App. 699, 65 N. E. 212, denying railroad company's liability to licensee injured while walking on track used as footway; Lingenfelter v. Baltimore & O. S. W. R. Co. 154 Ind. 53, 55 N. E. 1021, denying company's liability to one falling into pit while crossing right of way; Sullivan v. Boston & A. R. Co. 156 Mass. 379, 31 N. E. 128, denying company's liability for death of boy by contact with electric wires while on roof looking for ball; Matthews v. Seaboard Air Line R. Co. 67 S. C. 510, 65 L. R. A. 292, 46 S. E. 335, holding railroad liable for death of one killed by falling into cut along footpath; Hillman v. Boston Elev. R. Co. 207 Mass. 484, 32 L.R.A.(N.S.) 200, 93 N. E. 653, to the point that mere licensee on tracks of railroad cannot recover simply because servants tolerate practice of public walking on tracks; Baltimore & O. R. Co. v. Miller, 37 App. D. C. 228, holding that person using railroad station platform, which is frequently used by public as pathway is licensee and is entitled to care as such; Means v. Southern California R. Co. 144 Cal. 481, 77 Pac. 1001, 1 A. & E. Ann. Cas. 206, holding no recovery can be had by licensee for personal injuries sustained through bursting of tank of sulphuric acid in freight house of railroad company and citing annotation also on this point; Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 623, holding railroad company, lessor of building, not liable to plaintiff injured by having bucket drop upon her from building, where declaration showed no duty owed by company to plaintiff; Creeden v. Boston & M. R. Co. 193 Mass. 284, 79 N. E. 344, 9 A. & E. Ann. Cas. 1121, holding railroad company not liable for causing death of officer, who boarded train for purpose of apprehending persons suspected of being criminals, and, upon leaving train, walked upon defective bridge, whence he was thrown to street below and killed; Burke v. Boston & M. R. Co. 195 Mass. 183, 80 N. E. 695, holding workman engaged in repair of building of lessee of railroad company, who stood on staging near track, whence he was thrown by moving car and injured, mere licensee of company at best; Quantz v. Southern R. Co. 137 N. C. 139, 49 S. E. 79, holding person, who in passing over open space near depot on railroad company's right of way, used by public with company's permission, steps aside and falls through door, cannot recover from railroad company.

Cited in footnotes to Manning v. Chesapeake & O. R. Co. 16 L. R. A. 271, which holds one making friendly call on telegraph operator a mere voluntary licensee;

Benson v. Baltimore Traction Co. 20 L. R. A. 714, which denies recovery to student falling into uncovered vat, while class inspecting power house under permission; *Herrman v. Great Northern R. Co.* 57 L. R. A. 390, which holds railroad liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver.

— **Of manufacturer.**

Cited in *Buch v. Amory Mfg. Co.* 69 N. H. 260, 76 Am. St. Rep. 163, 44 Atl. 809, holding manufacturer owes no duty to child injured by machinery while in mill at request of workman; *Berlin Mills Co. v. Croteau*, 32 C. C. A. 129, 50 U. S. App. 419, 88 Fed. 862, denying recovery to one entering mill to collect debt and crushed between lumber trucks; *Blackstone v. Chelmsford Foundry Co.* 170 Mass. 322, 49 N. E. 635, denying builder's liability for injury to servant of owner slipping on uncompleted stairway; *Bowler v. Pacific Mills*, 200 Mass. 366, 21 L.R.A.(N.S.) 978, 128 Am. St. Rep. 432, 86 N. E. 767, holding members of public, while on private way, much used by public, have only rights of licensees; *Hutchinson v. Cleveland-Cliffs Iron Co.* 141 Mich. 349, 104 N. W. 698, holding workman engaged in covering pipes in one part of mill, not justified in going to find foreman in another part, where he fell through open hatchway and was injured.

Question for jury.

Cited in *Keene v. New England Mut. Acci. Asso.* 161 Mass. 150, 36 N. E. 891, holding it question for jury whether crossing railroad at point used by public without opposition, "voluntary exposure to unnecessary danger," defeating policy.

Trespasser.

Cited in *Driscoll v. Clark*, 32 Mont. 189, 80 Pac. 1, holding one operating unguarded endless chain not liable for injury of child trespasser sustained by being caught therein; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 253, 19 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 503, 83 N. E. 66, 11 A. & E. Ann. Cas. 981, holding railroad company not liable for injury of boy sustained while playing at turntable with companions; *Davis v. Joslin Mfg. Co.* 29 R. I. 108, 59 Atl. 65, denying recovery for death of child trespasser drowned in open trench near defendant's mill, crossed by bridge, led up to by path used by defendant's employees and others in connection with defendant's business.

View by jury.

Approved in *Davis v. Joslin Mfg. Co.* 29 R. I. 109, 59 Atl. 65 holding question of defendant's negligence may be raised though jury viewed premises.

14 L. R. A. 278, *NEW YORK L. INS. CO. v. IRELAND* (Tex.) 17 S. W. 617.

Interest of beneficiary in insurance policy.

Cited in *Perry v. Tweedy*, 128 Ga. 403, 119 Am. St. Rep. 393, 57 S. E. 782, 11 A. & E. Ann. Cas. 46, holding where wife is beneficiary of ordinary life policy on life of husband, and dies before husband, her interest constitutes part of her estate; *Haerther v. Mohr*, 114 Iowa, 638, 87 N. W. 692, holding beneficiary's interest in endowment policy is vested and does not cease at beneficiary's death before that of assured where latter's death occurs before policy becomes payable under endowment clause.

— **Distribution.**

Cited in *Re Crane*, 47 La. Ann. 903, 17 So. 431, holding where policy is payable to wife and children, all take equal shares of proceeds; *United States Casualty Co. v. Kacer*, 169 Mo. 312, 58 L.R.A. 440, 92 Am. St. Rep. 461, 69 S. W. 370, on distribution of property where persons entitled thereto in alternative perish in common disaster.

14 L. R. A. 281, EAST TENNESSEE, V. & G. R. CO. v. MARKENS, 88 Ga. 60, 13 S. E. 855.

Imputing negligence.

Cited in *Roach v. Western & A. R. Co.* 93 Ga. 788, 21 S. E. 67, holding negligence of driver of vehicle causing collision with locomotive not imputable to one riding by invitation; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 389, 26 L. R. A. 560, 44 Am. St. Rep. 145, 20 S. E. 550, holding husband's negligence in intrusting child to care of incompetent servant not imputable to wife, by virtue of conjugal relation; *Field v. Spokane, P. & S. R. Co.* 64 Wash. 450, 117 Pac. 228, holding that negligence of stage driver in failing to stop, look and listen at railroad crossing cannot be imputed to passengers; *Sluder v. St. Louis Transit Co.* 189 Mo. 143, 5 L.R.A.(N.S.) 210, 88 S. W. 648, holding in action for personal injuries caused by collision of street car with livery carriage in which plaintiff was riding, in absence of evidence tending to show contributory negligence, tender of such issue to jury in any other way than by instruction driver's negligence not imputable to plaintiff was properly declined.

Cited in footnotes to *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hirer of team and driver bound to check latter's attempt to cross track without stopping and listening for train; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look when within 30 feet of track not prevent recovery.

Cited in notes (8 L.R.A.(N.S.) 624) on imputed negligence of driver to passenger; (110 Am. St. Rep. 279, 290, 294) on imputed negligence.

Duty of railroad company upon approaching crossing.

Cited in *Central R. Co. v. Hall*, 109 Ga. 369, 34 S. E. 605, holding charge that railroad company bound to check speed of train when near crossing, no error; *Atlantic Coast Line R. Co. v. Locklear*, 9 Ga. App. 345, 71 S. E. 683, holding that railroad was negligent as matter of law if speed of train was not checked upon approaching city street so that train might be stopped if person was on crossing; *Bryson v. Southern R. Co.* 3 Ga. App. 409, 59 S. E. 1124, on application of crossing statute.

Question for jury.

Cited in footnote to *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 L. R. A. 684, which holds negligence of one riding with another when injured at railroad crossing, question for jury.

Necessary legal conclusions as questions of law.

Cited in *Western U. Teleg. Co. v. Harris*, 6 Ga. App. 269, 64 S. E. 1123, holding statement of necessary legal conclusion arising from undisputed facts not erroneous; *Southern R. Co. v. Chitwood*, 119 Ga. 29, 45 So. 706, holding where only issue was as to whether stock were killed at night or in morning, jury were properly instructed plaintiff was entitled to recover if killing took place in morning, such statement being one of necessary legal conclusion; *Shields v. Georgia R. & Electric Co.* 1 Ga. App. 175, 57 S. E. 980, holding consideration of amendment alleging acts of negligence other than those set up in declaration properly withdrawn from jury, where amendment was entirely unsupported by evidence, and negligence charged therein had nothing to do with causing injuries.

14 L. R. A. 283, WRIGHT v. SUPREME COMMANDERY, K. G. R. 87 Ga. 426, 13 S. E. 564.

Reinstatement of policy.

Cited in *Beatty v. Mutual Reserve Fund Life Asso.* 21 C. C. A. 235, 44 U. S.

App. 527, 75 Fed. 73, holding levy of assessment with knowledge of prior delinquency waives forfeiture of policy.

Cited in footnotes to *Carlson v. Supreme Council*, A. L. of H. 35 L. R. A. 643, which holds right to reinstatement after forfeiture by nonpayment lost by member's death without payment, during time allowed for reinstatement; *John Hancock Mut. L. Ins. Co. v. Dick*, 43 L. R. A. 566, which holds suit for cancellation of receipt renewing lapsed life policy, obtained by fraud, within jurisdiction of equity.

Cited in notes (52 Am. St. Rep. 573) on preservation of validity of benefit certificate by payment of assessment after death of member; (2 Brit. Rul. Cas. 193) on validity of payment of premium or assessment during agreed extension but after insured's death.

14 L. R. A. 285, *PEOPLE v. CUMMINGS*, 88 Mich. 249, 50 N. W. 310.

Statutes limiting governor's powers.

Cited in *Rich v. Chamberlain*, 104 Mich. 441, 27 L. R. A. 575, footnote p. 573, 62 N. W. 584, holding power of governor over pardons not infringed by statute creating board to investigate facts stated in petitions; *State v. Page*, 60 Kan. 667, 57 Pac. 514, holding statute conferring on prison board right to grant paroles and absolute releases to offenders serving indefinite terms constitutional; *Miller v. State*, 149 Ind. 629, 40 L. R. A. 115, footnote p. 109, 49 N. E. 894 (dissenting opinion), majority upholding statute for indeterminate sentences of criminals; *Re Convicts*, 73 Vt. 425, 56 L. R. A. 661, footnote p. 658, 51 Atl. 10, holding statute empowering board to grant parole after expiration of minimum sentence unconstitutional; *Ellis v. Daboll*, 90 Mich. 273, 51 N. W. 280, holding order in habeas corpus proceedings to discharge prisoner not reviewable when judge has jurisdiction; *Re Pikulik*, 81 Wis. 159, 51 N. W. 261, raising, without deciding, question as to validity of statute conferring judicial powers upon state board; *Re Ridley*, 3 Okla. Crim. Rep. 356, 26 L.R.A.(N.S.) 112, 106 Pac. 549, holding act creating board of pardons unconstitutional as being an attempt to confer pardoning power on state officers other than governor.

Cited in footnotes to *Senate of Happy Home Club v. Alpena County*, 23 L. R. A. 144, which holds "jag cure act" unconstitutional; *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations on pardoning power of governor.

Cited in note (34 L. R. A. 254) on legislative power to grant pardon or amnesty.

Criticized in *Fuller v. State*, 122 Ala. 41, 45 L. R. A. 502, footnote p. 502, 82 Am. St. Rep. 17, 26 So. 146, upholding statute authorizing summary arrest and remandment to prison, of convict violating parole.

Disapproved in effect in *Murphy v. Com.* 172 Mass. 275, 43 L. R. A. 159, 70 Am. St. Rep. 266, 52 N. E. 505, holding determination of term of imprisonment not taken from courts, or uncertain, when left to prison board.

Modification of sentence.

Cited in *Re Prout*, 12 Idaho, 501, 5 L.R.A.(N.S.) 1067, 86 Pac. 275, 10 A. & E. Ann. Cas. 199, holding prisoner not detainable after expiration of sentence, though he has violated his parole during time of his release thereon; *State ex rel. Davis v. Hunter*, 124 Iowa, 572, 104 Am. St. Rep. 361, 100 N. W. 510, on course to be pursued when prisoner conditionally pardoned is guilty of breach of conditions imposed; *Fite v. State*, 114 Tenn. 653, 1 L.R.A.(N.S.) 523, 88 S. W. 941, 4 A. & E. Ann. Cas. 1108, holding law authorizing workhouse commissioners to deduct for good behavior portion of time of sentence imposed or portion of

fine, unconstitutional because providing no specific credits and therefore being delegation of legislative power; Opinion of the Justices, 201 Mass. 612, 24 L.R.A. (N.S.) 802, 89 N. E. 174, holding governor cannot, by warrant issued in response to demand from another state, take prisoner upon whom sentence is being executed in state prison, out of custody of law of state and send him away to another state; *Re Kenney*, 147 Mich. 680, 111 N. W. 189, on imposition of sentence for longer time than court is authorized to impose.

Cited in footnotes to *State ex rel. O'Connor v. Wolfer*, 19 L. R. A. 783, which denies right to rearrest convict conditionally pardoned; *People ex rel. Bradley v. Illinois State Reformatory*, 23 L. R. A. 139, which holds lawful, committal of infants to reformatory with maximum sentence, subject to reduction; *People ex rel. Forsyth v. Monroe County Court*, 23 L. R. A. 856, which holds valid, act authorizing court to suspend sentence; *Re Webb*, 27 L. R. A. 356, which denies authority to suspend sentence already pronounced; *State v. Crook*, 29 L. R. A. 260, which holds power of court after suspension of sentence not lost by committing for refusal to pay costs as ordered; *Ex parte Hawkins*, 30 L. R. A. 736, which holds pardon on condition of convict leaving state forever not prohibited by provision against exile; *Weber v. State*, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term; *Neal v. State*, 42 L. R. A. 190, which holds void, attempt to suspend execution of sentence after pronouncing it; *Miller v. Evans*, 56 L. R. A. 101, which denies defendant's right to relief for failure to execute mittimus under judgment sentencing to imprisonment in failure to pay fine, until lapse of time of imprisonment; *People ex rel. Boenert v. Barrett*, 63 L.R.A. 82, which denies power of court indefinitely to suspend sentence after conviction or to release on a parol.

Cited in notes (34 L.R.A. 510) on reduction of prisoner's term by allowance for good behavior; (1 L.R.A.(N.S.) 522) on constitutionality of statutory credits for good behavior.

Indeterminate sentence.

Cited in *Re Lambrecht*, 137 Mich. 456, 100 N. W. 606, affirming, in habeas corpus proceedings, sentence for minimum term, though trial court erroneously imposed sentence under indeterminate sentence law taking effect subsequent to commission of offense; *Re Campbell*, 138 Mich. 600, 101 N. W. 826, holding that under indeterminate sentence law of 1903, court is not required to fix maximum sentence where statute fixes maximum term; *People v. Cook*, 147 Mich. 131, 110 N. W. 514, on constitutionality of indeterminate sentence law.

Distinguished in *Re Manaca*, 146 Mich. 702, 110 N. W. 75, holding indeterminate sentence law constitutional under provision authorizing passage of such law; *Ughbanks v. Armstrong*, 208 U. S. 485, 52 L. ed. 583, 28 Sup. Ct. Rep. 372, holding Michigan indeterminate sentence law of 1903 not to violate Federal constitution.

Disapproved in *People ex rel. Bettram v. Flynn*, 55 Misc. 24, 105 N. Y. Supp. 551; *People v. Madden*, 120 App. Div. 344, 105 N. Y. Supp. 554,—holding statute authorizing sentence of prisoner without fixing term of imprisonment constitutional.

14 L. R. A. 293, *JONES v. KNAPPEN*, 63 Vt. 391, 22 Atl. 630.

Vested remainder.

Cited in *Burton v. Provost*, 75 Vt. 201, 54 Atl. 189, holding vested remainder created under devise to widow for life, then "reversionary interest" to be divided among daughters; *Warner v. Bronson*, 81 Vt. 130, 69 Atl. 655, holding title to

estate vested in devisee upon death of testator where devised upon condition subsequent.

Cited in notes (33 L.R.A.(N.S.) 18, 28) on time for ascertaining who take under gift over to testator's "heirs," "next of kin," etc.; (10 Eng. Rul. Cas. 820) as to when remainder is vested.

Effect of widow's election to take against will.

Cited in *Latta v. Brown*, 96 Tenn. 348, 31 L. R. A. 842, footnote p. 840, 34 S. W. 417, upholding right of disappointed devisee to take life estate devised to widow, who elected to take dower instead; *Shreve v. Shreve*, 176 Mass. 459, 57 N. E. 686, holding equity will sequester portion of income refused by widow, for benefit of disappointed legatee; *Pittman v. Pittman*, 81 Kan. 648, 27 L.R.A.(N.S.) 607, 107 Pac. 235, on carrying out intention of testator as nearly as possible notwithstanding widow's election to take under law of descents and distributions, also referring to annotation on this point.

Cited in notes (18 L.R.A.(N.S.) 276, 277) on acceleration of gift over by widow's election against will giving life estate; (27 L.R.A.(N.S.) 603) on effect of spouse's election to take against, upon rest of, will.

Early vesting of estates.

Cited in *Harris v. Harris*, 82 Vt. 205, 72 Atl. 912, holding rule that law favors early vesting of estates is subordinate only to rule that intention of testator is to govern.

14 L. R. A. 297, *WILHELM v. EAVES*, 21 Or. 194, 27 Pac. 1053.

Liquidated damages or penalty.

Cited in *Kelly v. Fejervary*, 111 Iowa, 697, 83 N. W. 791, holding burden on contractor to show penalty intended in contract providing for daily forfeit as liquidated damages for noncompletion of building; *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 667, 46 L. ed. 380, 22 Sup. Ct. Rep. 240, holding stipulation of sum to be paid for nonperformance of covenant to return boat conclusive on parties; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 127, footnote, p. 122, 45 C. C. A. 351, 106 Fed. 393, holding stipulation for sum as damages for failure to remove building, penalty, when actual damages easily assessable; *Bilz v. Powell*, 50 Colo. 488, 38 L.R.A.(N.S.) 851, 117 Pac. 344, holding that sum to be reserved from commissions of sales agent and retained by principal on default of agent will be regarded as liquidated damages; *Saunders v. McKim*, 138 Iowa, 124, 115 N. W. 917, holding recital in bond that sum therein named is agreed upon as liquidated damages is not necessarily controlling as to its legal effect; *Mercia v. Burget*, 36 Ind. App. 463, 75 N. E. 1083, holding whether sum named is liquidated damages or penalty may be decided by determining intention of partner from whole case and tenor of contract, aided by principles by which such intention is inferred; *Brunswick v. Aetna Indemnity Co.* 4 Ga. App. 726, 62 S. E. 475, holding bond whereby makers stand bound in sum named unless principal therein shall perform each and every covenant assumed, provides penalty.

Cited in footnotes to *Wallis Iron Works v. Monmouth Park Asso.* 19 L. R. A. 456, which holds as liquidated damages amount expressly fixed as damages for default in completing grand stand; *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per hundred feet for logs not delivered by specified date, one for liquidated damages; *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time, liquidated damages; *Krutz v. Robins*, 28 L. R. A. 676, which holds agreement for greater rate of interest on default

in paying principal, interest, etc., a penalty; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, a penalty.

Cited in notes (108 Am. St. Rep. 57) on agreements purporting to liquidate damages; (6 Eng. Rul. Cas. 561) as to when stipulation in contract is for a penalty and when for liquidated damages.

14 L. R. A. 300, *CADWALADER v. BAILEY*, 17 R. I. 495, 23 Atl. 20.

Interest in land.

Cited in *McCotter v. New Shoreham*, 21 R. I. 47, 41 Atl. 572, holding assignee of grant conveying right to operate mines entitled to be heard on question of laying out highway; *Detroit Citizens' Street R. Co. v. Detroit*, 124 Mich. 453, 83 N. W. 104, holding right to operate street railway in highway, interest in land; *Moline Water Power Co. v. Cox*, 252 Ill. 356, 96 N. E. 1044, to the point that profit prendre in interest is land itself; *Whittelsey v. Porter*, 82 Conn. 104, 72 Atl. 593, holding no interest in land carried by attempted assignments of water-privilege; *Blanchard v. Maxson*, 84 Conn. 433, 80 Atl. 206, holding that right of way will never be presumed to be personal when it can fairly be construed to be appurtenant to land; *Smith v. Garbe*, 86 Neb. 96, 124 N. W. 921, holding easement in grass is not presumed where grantor and grantee both know lands are to be used as necessary appurtenance to land and mill to which it is contiguous.

Cited in footnote to *Mitchell v. D'Olier*, 59 L. R. A. 949, which holds rights and privileges in waters of lake pass under deed as appurtenant to upland, and not in gross.

Cited in notes (136 Am. St. Rep. 683, 685) on creation and conveyance of easements appurtenant; (10 Eng. Rul. Cas. 15) on right to claim easement only as accessory to, and for benefit of, a tenant.

Extinguishment of easement.

Cited in *Baker v. Kenney*, 145 Iowa, 643, 139 Am. St. Rep. 456, 124 N. W. 901, to the point that restriction on building to obstruct view of sea from certain premises is extinguished if severed from premises for benefit of which it was made.

14 L. R. A. 305, *WIMBERLEY v. MAYBERRY*, 94 Ala. 240, 10 So. 157.

Priority of liens.

Cited in *Christian & C. Grocery Co. v. Kling*, 121 Ala. 295, 25 So. 629, upholding right of material man to subject to lien, improvements upon property after mortgage; *Church v. Smithea*, 4 Colo. App. 177, 35 Pac. 267, holding lien for construction of building on unimproved property superior, as to structure, to prior trust deed; *Raisin Fertilizer Co. v. Bell*, 107 Ala. 264, 18 So. 168, holding creditor with judgment subsequent to mortgage entitled to decree of sale, applying surplus on judgment; *Threefoot Bros. v. Hillman*, 130 Ala. 256, 89 Am. St. Rep. 39, 30 So. 513, holding junior mortgagor cannot enforce senior mortgage to pay lien with surplus, till maturity of debt; *De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.* 6 C. C. A. 275, 13 U. S. App. 465, 57 Fed. 114, holding failure to make all lienors parties to foreclosure of mechanic's lien leaves question of priority undetermined; *Real Estate Invest. Co. v. Haseltine*, 53 Mo. App. 318, holding failure to make prior mortgagee party to foreclosure of mechanic's lien makes judgment prima facie evidence as to priority; *Climax Lumber Co. v. Bay City Mach. Works*, 163 Ala. 656, 50 So. 935, holding where increased value of property as result of materials furnished and work done by lienor exceeds

amount due lienor, his lien is, to that extent, prior to encumbrance of mortgage outstanding when lien was created; *Graham v. Magann Fawke Lumber Co.* 118 Ky. 195, 80 S. W. 799, 4 A. & E. Ann. Cas. 1026, on validity of statute securing to employes of manufacturing establishments liens for wages superior to prior mortgage liens, when such liens are created subsequent to enactment of statute.

Cited in footnotes to *Miller v. Stoddard*, 16 L. R. A. 288, which holds mechanic's lien inferior to prior unrecorded mortgage; *Green v. Williams*, 19 L. R. A. 478, which holds that purchaser takes premises subject to lien subsequently filed within time allowed; *Bell v. Cassem*, 29 L. R. A. 571, which holds lien of judgment under dramshop act inferior to pre-existing mortgage; *Oriental Hotel Co. v. Griffiths*, 30 L. R. A. 765, which holds inception of liens is time to which they relate in giving them effect as against mortgage; *Fisher v. Wineman*, 52 L. R. A. 192, which holds void, judgment giving preference to labor debt over pre-existing lien without making lienor party; *Kirkman v. Bird*, 58 L. R. A. 670, which sustains, as to prior obligations, statute exempting wages for sixty days preceding levy; *St. Mary's Mach. Co. v. National Supply Co.* 64 L.R.A. 845, which holds that claims for labor do not take precedence of lien of chattel mortgage on appointment of receiver who took possession after condition broken.

Distinguished in *Spengler v. Stiles-Tull Lumber Co.* 94 Miss. 812, 48 So. 966, holding where no lien is given materialman by statute right of assignee of building contractor under assignment by latter of amount due him from owner of building is superior to that of materialman acquired after the assignment.

Disapproved in effect in *James River Lumber Co. v. Danner*, 3 N. D. 475, 57 N. W. 343, holding mechanic's lien for repairs subject to prior recorded mortgage.

Adjustment of priorities and equities.

Cited in *Anniston Pipe Works v. Williams*, 106 Ala. 335, 54 Am. St. Rep. 51, 18 So. 111, holding equity will annul deed and restore property to owner, after void sale by sheriff; *Enslen v. Wheeler*, 98 Ala. 206, 13 So. 473, holding equity will enforce lien of judgment when court of law without power; *Birmingham Bldg. & L. Asso. v. May & T. Hardware Co.* 99 Ala. 278, 13 So. 612, holding material man and mortgagee may come into equity to determine priority of claims; *Sheffield City Co. v. Tradesmans Nat. Bank*, 131 Ala. 188, 32 So. 598, holding lien conferred by statute upon purchaser at tax sale exists only for taxes of year property assessed; *Randolph v. Builders & Painters Supply Co.* 106 Ala. 507, 17 So. 721, holding unconstitutional, law conferring rights in body of act not suggested by title; *Birmingham Bldg. & L. Asso. v. Boggs*, 116 Ala. 590, 67 Am. St. Rep. 147, 22 So. 852, raising, without deciding, question as to right to equitable relief.

Cited in footnotes to *International Bldg. & L. Asso. v. Hardy*, 24 L. R. A. 284, which denies legislative power to change remedy for enforcing trust deed; *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit, without extending period of limitations.

"Improvements."

Cited in *Douglaston Realty Co. v. Hess*, 124 App. Div. 509, 108 N. Y. Supp. 1036, construing word "improvements" in lease as meaning changes or betterments in existing building or structure demised.

Statutory liens.

Cited in *Leahart v. Deedmeyer*, 158 Ala. 299, 48 So. 371, holding attorney's lien on cause given by statute inapplicable to causes of action in progress when statute became effective; *Ward v. Yarnelle*, 173 Ind. 551, 91 N. E. 7, holding that object of mechanics' lien statutes is to place all claimants to property on equal basis.

Cited in footnote to *Miners' & Merchants' Bank v. Snyder*, 68 L.R.A. 312, which holds corporate creditor's contract rights not impaired by statute requiring all creditors to unite in one suit against all stockholders for equitable distribution of liability fund among creditors.

14 L. R. A. 317, *KIRBY v. FOSTER*, 17 R. I. 437, 22 Atl. 1111.

Right to retake property.

Cited in *Stone v. Coreoran*, 17 R. I. 759, 24 Atl. 781, holding wrongful taking and fresh pursuit necessary to warrant recapture of horse by force; *Miller-Brent Lumber Co. v. Stewart*, 166 Ala. 665, 51 So. 943, 21 Ann. Cas. 1149, holding that one entitled to right of way across another's is not authorized to enforce right by assault and battery; *Birmingham R. Light & P. Co. v. Norris*, 2 Ala. App. 613, 56 So. 739, holding that assault upon street car conductor by superior officer is not justified by fact that conductor failed to ring up fares; *Stanley v. Payne*, 78 Vt. 240, 3 L.R.A.(N.S.) 255, 112 Am. St. Rep. 911, 62 Atl. 495, 6 A. & E. Ann. Cas. 501, holding owner of property not justified in using force to obtain it from one holding it because of doubt as to who is real owner.

Cited in footnote to *State v. Black*, 14 L. R. A. 205, which holds assault on pound keeper not justified by his retaining animals taken under illegal ordinance.

Cited in note (3 L.R.A.(N.S.) 254) on right to use force to recover possession of personalty.

14 L. R. A. 320, *JANIN v. LONDON & S. F. BANK*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100.

Relation of bank to depositor.

Cited in *Smith's Cash Store v. First Nat. Bank*, 149 Cal. 34, 5 L.R.A.(N.S.) 872, 84 Pac. 663, holding relation between general depositor and bank in which deposit is made is that of debtor and creditor.

Cited in notes (33 Am. St. Rep. 226) on relation of bank to depositor; (86 Am. St. Rep. 777) on title of bank to money deposited with or collected by it.

Duty as to checks.

Cited in *People v. Wilson*, 117 Cal. 243, 49 Pac. 135, and *State v. Franklin County Sav. Bank & T. Co.* 74 Vt. 255, 52 Atl. 1069, holding deposit of money in bank implies promise to repay as demanded by depositor's checks; *Garthwaite v. Bank of Tulare*, 134 Cal. 241, 66 Pac. 326, holding that payment of check upon forged indorsement gives drawee no right to retain same or demand reimbursement from purchaser; *Pratt v. Union Nat. Bank*, 79 N. J. L. 122, 75 Atl. 313, holding that depositor's delay in giving notice to bank of forged indorsement of check will not be defense, unless bank was injured by delay; *Pullen v. Placer County Bank*, 138 Cal. 178, 94 Am. St. Rep. 19, 71 Pac. 83 (dissenting opinion), on rights and duties of bank as to checks by its depositor; *Heaton v. Holmes*, 97 Cal. 213, 31 Pac. 1131, holding bank which pays check upon forged indorsement of payee has no right to charge depositor's account with amount thereof; *First Nat. Bank v. Bremer*, 7 Ind. App. 688, 52 Am. St. Rep. 461, 34 N. E. 1012, holding bank paying its certificates of deposit upon forged indorsements of depositor, from whom they were stolen, is still liable to depositor for its debt to him though certificates pass through hands of other banks before reaching issuing bank; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 164, 114 Am. St. Rep. 595, 77 N. E. 693, holding depositor not bound to investigate to see whether indorsements are forgeries upon return of pass books with checks; also that delay in giving notice of forgery after its discovery cannot be used as estoppel against depositor by bank, without proof of injury by delay; *Jordan Marsh Co. v.*

National Shawmut Bank, 201 Mass. 408, 22 L.R.A.(N.S.) 254, 87 N. E. 740, holding only negligence of depositor which is effectual as defence of unauthorized payment of check by banker is negligence which is direct and proximate cause of such payment; also discussing duty of depositor as to examination of account when checks are returned to him with account stated; Devine v. Bank of Baldwin, 91 Wis. 74, 64 N. W. 589, holding whether holder of certificate of deposit upon which bank makes unauthorized payment is negligent in not making such payment known to bank is mixed question of law and fact.

Cited in footnote to Iron City Nat. Bank v. Ft. Pitt Nat. Bank, 23 L. R. A. 615, which denies right of recovery by payer of forged check.

Cited in notes (27 L.R.A. 427) on duty of depositor as to forged checks charged to him by bank; (20 L.R.A.(N.S.) 80) on loss or prejudice from negligent failure to give prompt notice of forgery of check as condition of bank's exoneration from liability.

Sufficiency of evidence.

Cited in *Re Nelson*, 132 Cal. 194, 64 Pac. 294, holding instruction as to undue influence properly refused when evidence insufficient; *Goldstone v. Merchants' Ice & Cold Storage Co.* 123 Cal. 627, 56 Pac. 776, holding nonsuit error, when evidence creates presumption sufficient to prove case; *Davis v. Pacific Teleph. & Teleg. Co.* 127 Cal. 320, 57 Pac. 764, holding discharge of prisoner in police court for wilfully cutting telegraph wires insufficient to establish want of probable cause; *Gwin v. Gwin*, 5 Idaho, 291, 48 Pac. 295, holding instruction that testator labored under delusion, error, when no evidence to that effect; *Re Daly*, 15 Cal. App. 331, 114 Pac. 789, holding that if plaintiff's evidence makes out prima facie case, motion for nonsuit at close of his evidence should be denied; *Hercules Oil Ref. Co. v. Hocknell*, 5 Cal. App. 707, 91 Pac. 341, holding evidence insufficient to show misappropriation by president of corporation of moneys belonging to it; *Re Calkins*, 112 Cal. 306, 44 Pac. 577, holding instruction erroneous which was inapplicable to the evidence and which in effect, told jury they might find will was executed by reason of undue influence, though there was no direct evidence of the fact and positive evidence to contrary; *Devine v. Bank of Baldwin*, 91 Wis. 75, 64 N. W. 589, holding bank relying upon negligence of holder of certificate of deposit in not notifying it of improper payment thereon as defence to such payment cannot make out its case by mere possibility, conjecture or surmise that it was prejudiced by such failure to notify; *Non-Refillable Bottle Co. v. Robertson*, 8 Cal. App. 105, 96 Pac. 324; *Union Ice Co. v. Doyle*, 6 Cal. App. 294, 92 Pac. 112,—holding nonsuit properly denied where prima facie case in support of material allegations of complaint made out; *Archibald Estate v. Matteson*, 5 Cal. App. 445, 90 Pac. 723, holding nonsuit will be sustained unless evidence establishes prima facie case; *Bush v. Wood*, 8 Cal. App. 651, 97 Pac. 709, holding nonsuit properly ordered in action for personal injuries sustained through defendant's negligence, where plaintiff's testimony showed injuries would not have been sustained but for his own negligence.

Estoppel.

Distinguished in *Shade v. Sisson Mill & Lumber Co.* 115 Cal. 366, 47 Pac. 135, applying principle of estoppel as to account stated to case of employer and employee between whom salary account was stated.

14 L. R. A. 325, *COM. v. PERRY*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126.

Constitutionality of statutes affecting contracts or liberty.

Followed in *Com. v. Potomska Mills Corp.* 155 Mass. 123 note, 28 N. E. 1128, without discussion.

Cited in *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 534, 58 L. R. A. 751, 91 Am. St. Rep. 934, 90 N. W. 1098, declaring unconstitutional, statute prohibiting discharge of employee for membership in union; *State v. Julow*, 129 Mo. 175, 29 L. R. A. 259, footnote p. 257, 50 Am. St. Rep. 443, 31 S. W. 781, holding unlawful, statute prohibiting employer requiring as condition of employment that employee shall not join union; *Ruhrstrat v. People*, 185 Ill. 140, 49 L. R. A. 183, 76 Am. St. Rep. 30, 57 N. E. 41, denying police power extends to prohibition of national flag for advertising purposes; *Waters v. Wolf*, 162 Pa. 169, 34 W. N. C. 416, 42 Am. St. Rep. 815, 29 Atl. 646, declaring unconstitutional, statute providing contractor may bind owner, as agent, for materials, contrary to contract; *Dennis v. Moses*, 18 Wash. 592, 40 L. R. A. 314, 52 Pac. 333 (dissenting opinion), majority declaring void, statute prohibiting deficiency judgments; *Johnson v. Goodyear Min. Co.* 127 Cal. 14, 47 L. R. A. 342, 78 Am. St. Rep. 17, 59 Pac. 304, declaring void statute making wages lien on property of domestic corporations; *State v. Smiley*, 65 Kan. 284, 69 Pac. 199 (dissenting opinion), majority holding anti-competitive trade agreements, void; *Com. v. Brown*, 8 Pa. Super. Ct. 355, 43 W. N. C. 75, declaring act requiring weighing of bituminous coal before screening, unconstitutional; *Toney v. State*, 141 Ala. 124, 67 L.R.A. 287, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319, holding act purporting to prohibit employee and renter to make contract of the kind he may have abandoned, except under certain conditions and making such act misdemeanor unconstitutional; *Wyeth v. Board of Health (Wyeth v. Thomas)* 200 Mass. 478, 25 L.R.A.(N.S.) 150, 128 Am. St. Rep. 439, 86 N. E. 925, holding refusal to grant license as undertaker, because applicant unlicensed as embalmer, illegal; *Mutual Loan Co. v. Martell*, 200 Mass. 484, — L.R.A.(N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916, on balancing constitutional right of individual to personal liberty, against right of state to legislate in exercise of police power; *State v. Ramseyer*, 73 N. H. 36, 58 Atl. 958, 6 A. & E. Ann. Cas. 445, holding statute prohibiting use of trading stamps by merchants invalid as not within police power of state; *House v. Mayes*, 227 Mo. 654 (dissenting opinion), on interference by state with private contracts; *State v. Feingold*, 77 Conn. 331, 59 Atl. 211, on violation of equality in rights and right of protection to property by legislation restrictive of right to contract.

Cited in footnotes to *Griswold v. Illinois C. R. Co.* 24 L. R. A. 647, which holds prohibition against carriers exempting themselves from liability inapplicable to contract relieving it from liability for loss by fire of warehouse placed on its property; *Harding v. People*, 32 L. R. A. 445, which holds act requiring weighing of coal hoisted from mines, whose product is shipped by rail or water, invalid; *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, which denies right to prevent transfer of property in payment of debt while solvent; *State v. Wilson*, 47 L. R. A. 71, which sustains statute against screening coal mined at quantity rates before weighing and crediting to employees; *Re Preston*, 52 L. R. A. 523, which holds void, statute against screening coal before weighing and crediting to miner; *Toney v. State*, 67 L.R.A. 286, which holds void, statute making it a misdemeanor for one under contract to labor to enter into new contract with third person without former employer's consent and a sufficient excuse.

Cited in notes (21 L.R.A. 789) on constitutionality of statutes restricting contracts and business; (37 Am. St. Rep. 213) on statute regulating relations of master and servant; (62 Am. St. Rep. 179) on protection of corporations from special and hostile legislation respecting employes; (78 Am. St. Rep. 244) on acts as to employment which legislature may declare criminal.

— Of hours of employment.

Cited in *Ritchie v. People*, 155 Ill. 104, 29 L. R. A. 82, 46 Am. St. Rep. 315, 40

N. E. 454, declaring unconstitutional, act prohibiting employment of females in factory, exceeding eight hours daily; *Low v. Rees Printing Co.* 41 Neb. 139, 24 L. R. A. 707, footnote p. 702, 43 Am. St. Rep. 670, 59 N. W. 362, holding exception of farm and domestic labor from eight-hour law, unconstitutional; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 222, 59 L. R. A. 782, 93 Am. St. Rep. 670, 65 N. E. 885, declaring void, act limiting hours of daily service of workmen employed upon public work; *Re Morgan*, 26 Colo. 433, 47 L. R. A. 60, 77 Am. St. Rep. 269, 58 Pac. 1071, holding unlawful, statute regulating hours of employment in mines and smelting works.

Cited in note (19 L. R. A. 143) on statutory limitation of hours of labor.

Distinguished in *State v. Cantwell*, 179 Mo. 274, 78 S. W. 569, sustaining validity of law establishing eight hour day for mine workers.

— Of payment of wages.

Cited in *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L. R. A. 342, footnote p. 340, 37 Am. St. Rep. 206, 35 N. E. 62, holding statute requiring certain corporations to pay weekly, unconstitutional; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 423, 23 L. R. A. 270, footnote p. 264, 41 Am. St. Rep. 109, 25 S. W. 75, upholding statute requiring payment of wages, without discount, on discharge of employee by corporation; *Opinion of Justices*, 163 Mass. 594, 28 L. R. A. 346, 40 N. E. 713, upholding statute requiring manufacturers to pay wages weekly; *People ex rel. Rodgers v. Coler*, 166 N. Y. 18, 52 L. R. A. 822, 82 Am. St. Rep. 605, 59 N. E. 716, denying right of legislature to fix rate of wages for city labor; *Fraser v. People*, 141 Ill. 183, 16 L. R. A. 496, footnote p. 492, 31 N. E. 395, holding statute prohibiting employers in certain kinds of business selling goods to workmen, void; *State v. Loomis*, 115 Mo. 316, 21 L. R. A. 792, 22 S. W. 350, holding void, statute forbidding, under penalty, persons engaged in manufacturing or mining to pay wages with non-negotiable paper or unredeemable orders; *Luman v. Hitchens Bros. Co.* 90 Md. 27, 46 L. R. A. 396, 44 Atl. 1051, declaring void, statute forbidding railroad and mining corporations from bartering goods to employees; *Street v. Varney Electrical Supply Co.* 160 Ind. 346, 61 L. R. A. 160, 98 Am. St. Rep. 325, 66 N. E. 895, holding statute fixing minimum wage to be paid unskilled laborers employed on public works, void; *State v. Peel Splint Coal Co.* 36 W. Va. 857, 17 L. R. A. 401, footnote p. 385, 15 S. E. 1000 (dissenting opinion), majority holding regulation of payment of wages to employees valid exercise of police power; *State v. Missouri Tie & Lumber Co.* 181 Mo. 563, 65 L.R.A. 594, 103 Am. St. Rep. 614, 80 S. W. 933, 2 A. & E. Ann. Cas. 119, holding act prohibiting issue of paper or other evidence of indebtedness in payment for wages not negotiable and redeemable at its face value in lawful money of the United States invalid; *Jordan v. State*, 51 Tex. Crim. Rep. 535, 11 L.R.A.(N.S.) 606, 103 S. W. 633, 14 A. & E. Ann. Cas. 616, holding statute making it unlawful to issue in payment for labor tickets, checks or writings obligatory redeemable or payable in goods or merchandise invalid.

Cited in footnote to *Ramsey v. People*, 17 L. R. A. 853, which holds statute as to computing wages of coal miners unconstitutional.

Cited in notes (28 L. R. A. 274) on validity and effect of statutes requiring wages to be paid in lawful money; (28 L. R. A. 344) on validity and effect of statutes regulating time and payment of wages; (139 Am. St. Rep. 874) on constitutionality of statutes relating to wages.

Strikers' interference with employees.

Cited in *Temple Iron Co. v. Carmanoskie*, 10 Kulp, 39, 7 Northampton Co. Rep. 260, granting injunction against strikers interfering with miners; *Vegelehn v. Guntner*, 167 Mass. 97, 35 L. R. A. 723, 57 Am. St. Rep. 443, 44 N. E. 1077,

granting injunctive relief against strikers intimidating those seeking employment; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 121, 23 L.R.A.(N.S.) 1244, 85 N. E. 897, enjoining imposition or threat of fine to prevent persons entering employ of plaintiff, or remaining therein.

14 L. R. A. 329, *ROBB v. CARNEGIE BROS. & CO.* 145 Pa. 324, 27 Am. St. Rep. 694, 22 Atl. 649.

Liability for nuisance.

Followed in *Lentz v. Carnegie Bros.* 145 Pa. 625, 27 Am. St. Rep. 717, 23 Atl. 219, holding one engaged in manufacturing coke from coal mined elsewhere, responsible to riparian owner for pollution of stream by washing slack.

Cited in *Weston Paper Co. v. Pope*, 155 Ind. 401, 56 L. R. A. 902, 57 N. E. 719, upholding right to damages for pollution of stream by discharge of waste matter from paper mill; *Neal v. Atlantic Ref. Co.* 16 Pa. Co. Ct. 243, 4 Pa. Dist. R. 50, denying refining company's liability for destruction of tug by coming into contact with inflammable mass in river, mingled with oil from refinery; *Austin v. Augusta Terminal R. Co.* 108 Ga. 712, 47 L. R. A. 772, 34 S. E. 852 (dissenting opinion), majority denying damages for diminution in value of property due to operation of railroad; *Gavigan v. Atlantic Ref. Co.* 3 Lack. Legal News, 374, same case on prior appeal, 2 Lack. Legal News, 241, upholding right to damages for injury to property by operation of refining plant; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 374, 20 L. R. A. 644, footnote p. 642, 32 W. N. C. 47, 34 Am. St. Rep. 710, 26 Atl. 644, holding company liable for nuisance due to escape of oil; *Campbell v. Bessemer Coke Co.* 23 Pa. Super. Ct. 379, sustaining right to damages for injury to property from acid fumes from coke ovens; *Vautier v. Atlantic Ref. Co.* 231 Pa. 13, 79 Atl. 814, holding that in action for injury to growing crops alleged to have been caused by noxious products from oil refinery, plaintiff need not prove negligence; *Farver v. American Car & Foundry Co.* 24 Pa. Super. Ct. 583, holding investment of large amount of money does not secure right to injure one having comparatively small estate nor does erection of extensive works justify violation of another's right; *Rieker v. Harrisburg Consumer's Brewing Co.* 10 Pa. Dist. R. 409, enjoining brewery company from allowing water used in washing kegs to escape upon adjoining lots and assessing damages for injury caused thereby; *Welliver v. Irondale Electric Light, Heat & P. Co.* 38 Pa. Super. Ct. 33, holding damages recoverable for injury to land, caused by seepage and percolation of water through embankment of mill-race not maintained to develop natural resources of defendant's land; *McNary v. Southwest Pennsylvania Pipe Line*, 38 Pittsb. L. J. N. S. 234, 17 Pa. Dist. R. 849, 34 Pa. Co. Ct. 445, holding question of negligence does not necessarily arise in nuisance cases.

Cited in footnotes to *Fogarty v. Junction City Pressed Brick Co.* 18 L. R. A. 756, which holds generation of gas destroying growing crops on adjacent land a nuisance; *Rowland v. Miller*, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants;" *Frost v. Berkeley Phosphate Co.* 26 L. R. A. 693, which holds owner of factory liable for damage by fumes; *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Distinguished in *Czarnecki v. Bolen-Darnell Coal Co.* 91 Ark. 62, 120 S. W. 376, holding distinction between mine and manufacturing plant as to disposition of waste inapplicable to case of burning dump-pile of mine, where burning of waste not customary or necessary and fire extinguishable.

Measure of damages for nuisance.

Approved in *Eshleman v. Martie Twp.* 152 Pa. 75, 31 W. N. C. 184, 25 Atl. 178, holding cost of repair measure of damages for injury from water overflowing from highway.

Cited in *Hoffman v. Mill Creek Coal Co.* 16 Pa. Super. Ct. 638, holding cost of removal measure of damages for deposit of coal dirt upon land of another; *McCartney v. Philadelphia*, 22 Pa. Super. Ct. 260, holding difference in value before and after injury not measure of damages for injury to property by overflow of water from defective highway; *Welliver v. Pennsylvania Canal Co.* 23 Pa. Super. Ct. 84, holding evidence of value of land admissible in action for damages for failure to repair canal banks; *Helbling v. Allegheny Cemetery Co.* 201 Pa. 174, 50 Atl. 970, holding cost of repair measure of damages for injuries to house by clogging of sewer; *Drake v. Lady Ensley Coal, Iron & R. Co.* 102 Ala. 507, 24 L. R. A. 66, 48 Am. St. Rep. 77, 14 So. 749, holding difference in value before and after injury measure of damages for pollution of stream; *Fischer v. Sanford*, 12 Pa. Super. Ct. 440, holding extent of injury measure of damages for negligent maintenance of livery stable; *McGettigan v. Potts*, 149 Pa. 158, 24 Atl. 198, holding actual amount of injury measure of damages for removal of lateral support to land; *Ehrgood v. Moscow Water Co.* 4 Lack. Legal News, 152, holding net loss sustained by interference with water power of mill proper measure of damages; *Wood v. Roxborough, C. H. & N. Pass. R. Co.* 12 Montg. Co. L. Rep. 157, holding it duty of court to modify damages awarded under erroneous theory; *McGill v. Pintsch Compressing Co.* 140 Iowa, 435, 20 L.R.A. (N.S.) 472, 118 N. W. 786, holding only nominal damages recoverable in case of nuisance caused by smoke, soot, fumes and noises from compressed gas plant, where no evidence adduced showing diminution in rental value of plaintiff's premises due to conduct of defendant's business; *McClelland v. Schwerd*, 32 Pa. Super. Ct. 321, on depreciation in market value as measure of damages for injury to realty.

Abatement of nuisance.

Cited in *Strobel v. Kerr Salt Co.* 164 N. Y. 319, 51 L. R. A. 694, 79 Am. St. Rep. 643, 58 N. E. 142, holding equity will enjoin pollution of stream by discharge of water from salt mines; *Rarick v. Smith*, 17 Pa. Co. Ct. 631, 5 Pa. Dist. R. 532, sustaining injunction against pollution of stream by percolation of ingredients from dynamite factory; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 219, 28 Atl. 702, holding equity will enjoin operation of bone-boiling establishment which renders vicinity unhealthful; *Scott v. Houpt*, 8 Kulp, 50, denying injunction restraining operation of planing mill; *Lyons v. Harrisburg Consumers' Brewing Co.* 25 Pa. Co. Ct. 206, 4 Dauphin Co. Rep. 103, holding engagement in lawful business no excuse for liability for injury from water flowing upon neighbor's lot; *Keiser v. Mahoney City Gas Co.* 143 Pa. 290, 22 Atl. 759, holding injuries to hotel business, due to gas company's allowing waste to flow into stream, must be substantial; *Rainey v. Herbert*, 5 C. C. A. 189, 3 U. S. App. 592, 55 Fed. 445, raising, without deciding, question as to enjoining annoyances affecting comforts of life; *Morey v. Black*, 21 Montg. Co. L. Rep. 107, enjoining operation, during night, of bowling alley in residential district; *Tull v. Lanning*, 24 Montg. Co. L. Rep. 109, holding that injunction will not be issued when it will inflict greater injury than it will prevent; *Good v. Queens Run Fire Brick Co.* 224 Pa. 503, 73 Atl. 906, on denial of injunction and leaving injured party to his remedy at law where injury inflicted will be greater than that prevented.

Distinguished in *Sullivan v. Jones & L. Steel Co.* 298 Pa. 553, 57 Atl. 1065, Reversing 33 Pittsb. L. J. N. S. 231, holding one living at top of bluff entitled to

enjoin operation of furnaces, located at foot; *Sullivan v. Jones & L. Steel Co.* 208 Pa. 553, 66 L.R.A. 716, 57 Atl. 1065, enjoining operation of furnaces so as to cause emission therefrom of clouds of ore dust causing injury to nearby property.

New trial for excessive damages.

Cited in *Stauffer v. Reading*, 208 Pa. 437, 57 Atl. 829, denying new trial in absence of abuse of discretion for excessive allowance for taking property; *Carpenter v. Lancaster*, 22 Lanc. L. Rev. 33, holding that court will not reduce verdict because excessive where there is testimony that justifies verdict; *Levan v. Dalton*, 26 Lanc. L. Rev. 263, to the point that when trial judge believes that verdict has been arrived at by adoption of erroneous measure of damages, he should set it aside; *Reddig v. Eberly*, 27 Lanc. L. Rev. 123, holding that new trial for insufficiency of verdict will not be granted where there is nothing to show that jury were improperly influenced or wrong in their compilations or measure of damages.

Measure of damages for injury to realty.

Cited in *Hoenning v. School Dist.* 23 Lanc. L. Rev. 202, holding that in action for damages for causing water to run into another's cellar items of damage must be specified; *Funk v. Kerbaugh*, 24 Lanc. L. Rev. 292, holding that measure of damages from heavy blasting is cost of restoring property together with compensation for loss of use, unless such cost would exceed value of property; *Byrne v. Cambria & C. R. Co.* 219 Pa. 220, 68 Atl. 672, holding testimony as to amount of damage done to mill property by filling up of dam with mud, sand, sediment and alluvial deposits and necessity for cleaning race and injury to mill inadmissible because of questions being in bulk without specifying items of cost or damage.

Distinguished in *Hunter v. Pennsylvania R. Co.* 45 Pa. Super. Ct. 473, holding that measure of damages where wood lot is burned over by railroad fire is difference between value of land immediately before and value after fire.

Explained in *Rabe v. Shoenberger Coal Co.* 213 Pa. 258, 3 L.R.A.(N.S.) 784, 62 Atl. 854, 5 A. & E. Ann. Cas. 216, holding where there is permanent injury to real estate, extent of damage caused thereby is measured by resulting depreciation in value of the property.

14 L. R. A. 333, *FISHER v. FAIR*, 34 S. C. 203, 13 S. E. 470.

Easements appurtenant to, or in gross.

Cited in footnotes to *Smith v. Furbish*, 47 L. R. A. 226, which holds easements appurtenant to, and not in gross, created by reservation in deed; *Mitchell v. D'Olier*, 59 L. R. A. 949, which holds rights and privileges in waters of lake passed under deed as appurtenant to upland, and not in gross; *Houston v. Zahn*, 65 L.R.A. 799, which holds that easement of way cannot be imposed on land by one who has not at the time acquired title thereto, although he undertakes to do so as part of the consideration of another tract conveyed to him.

Cited in notes (20 L.R.A. 635) on exception and reservation of easements; (2 L.R.A.(N.S.) 984) on way appurtenant to close separated by intervening lands; (10 Eng. Rul. Cas. 14) on right to claim easement, only as accessory to, and for benefit of, a tenant.

14 L. R. A. 336, *HALE v. BONNER*, 82 Tex. 33, 27 Am. St. Rep. 850, 17 S. W. 605.

Damages for mental suffering.

Cited in *Western U. Teleg. Co. v. Carter*, 2 Tex. Civ. App. 626, 21 S. W. 688, upholding right to damages for mental pain due to delay in transmission of

telegram ordering coffin; *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 366, 27 S. W. 830, upholding right to damages against express company for mental pain caused by delay in delivery of medicine; *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 337, 28 S. W. 96, denying damages for mental anguish resulting from fright of child; *Louisville & N. R. Co. v. Hull*, 113 Ky. 569, 57 L. R. A. 773, footnote p. 771, 68 S. W. 433, authorizing consideration of mental anguish in assessing damages for breach of contract to transport corpse; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 658, 142 S. W. 775, to the point that recovery of damages for mental suffering caused by handling of corpse, may be had; *Western U. Teleg. Co. v. Rowell*, 153 Ala. 320, 45 So. 73, holding damages recoverable for mental suffering due to failure to deliver message; *Kyles v. Southern R. Co.* 147 N. C. 399, 16 L.R.A.(N.S.) 407, 61 S. E. 278, holding damages recoverable by wife for mental anguish due to mutilation of husband's body which lay upon railroad track for considerable time after life extinct and was repeatedly run over.

Cited in note (19 L.R.A.(N.S.) 566) on mental anguish as element of damages in action for breach of contract relative to corpse.

Disapproved in *Beaulin v. Great Northern R. Co.* 103 Minn. 53, 19 L.R.A.(N.S.) 569, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, holding damages for mental anguish not recoverable in action for breach of contract to transport and deliver dead body; *Long v. Chicago, R. I. & P. R. Co.* 15 Okla. 516, 6 L.R.A.(N.S.) 885, 86 Pac. 289, 6 A. & E. Ann. Cas. 1005, holding parents cannot recover damages for mental anguish due to mutilation of body of deceased child.

Rights as to dead body.

Cited in *Louisville & N. R. Co. v. Wilson*, 123 Ga. 68, 51 S. E. 24, 3 A. & E. Ann. Cas. 128, holding cause of action set out by declaration in action by wife for damages against carrier for negligence in care of body of husband which it accepted for transportation.

14 L. R. A. 337, *BURDETT v. ALLEN*, 35 W. Va. 347, 13 S. E. 1012.

Validity of acts within police power.

Cited in *Paris v. Hale*, 13 Tex. Civ. App. 389, 35 S. W. 333, sustaining ordinance as to sale of stock running at large, upon notice to owner; *Haigh v. Bell*, 41 W. Va. 24, 31 L. R. A. 132, 23 S. E. 666, upholding act prohibiting hogs from running at large; *Newman v. People*, 23 Colo. 307, 47 Pac. 278, raising without deciding question as to constitutionality of act authorizing destruction of gambling devices; *Greer v. Downey (Ariz.)* 61 L. R. A. 410, footnote p. 408, 71 Pac. 900, holding statute authorizing, without judicial proceedings, sale at auction of trespassing animals after specified notice, void; *Clapp v. Houg*, 12 N. D. 608, 65 L.R.A. 761, 102 Am. St. Rep. 589, 98 N. W. 710, 1 A. & E. Ann. Cas. 110, holding statute providing for appointment of special administrator of property of person believed to be dead, invalid.

Cited in footnote to *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice for highway repairs, valid.

Cited in note (90 Am. St. Rep. 217) on summary proceedings to impound and sell animals.

14 L. R. A. 342, *BENNETT v. VAN RIPER*, 47 N. J. Eq. 563, 24 Am. St. Rep. 416, 22 Atl. 1055.

Who are relatives.

Cited in *Tepper v. Supreme Council*, R. A. 61 N. J. Eq. 640, 88 Am. St. Rep. 449, 47 Atl. 460, Reversing 59 N. J. Eq. 334, 45 Atl. 111, holding stepchildren

relatives entitled to take under certificate of benefit society; *Faxon v. Grand Lodge B. L. F.* 87 Ill. App. 268, holding stepmother may be named as beneficiary in certificate; *Mattison v. Sovereign Camp W. W.* 25 Tex. Civ. App. 216, 60 S. W. 897, holding wife "relative" within meaning of benefit certificate; *Wolfstern v. Pennsylvania R. Voluntary Relief Dept.* 76 N. J. Eq. 81, 74 Atl. 533, to the point that words "related to" in benefit society by-laws, refer to relation by affinity as well as by blood; *Tolson v. National Provident Union*, 60 Misc. 463, 115 N. Y. Supp. 534, holding word "relatives," as used in by-laws of mutual benefit association, broad enough to cover persons connected by affinity.

Cited in footnotes to *Simcoke v. Grand Lodge, A. O. U. W.* 15 L. R. A. 114, which holds stepfather may be beneficiary; *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as having no insurable interest; *Marshall v. Macon Sash, Door & Lumber Co.* 41 L. R. A. 211, which denies child's right of action for homicide of its stepfather; *Smith v. Supreme Tent K. of M.* 69 L.R.A. 174, which holds niece of former wife not relative of child by subsequent wife within meaning of statute relating to benefit certificates.

Cited in note (52 Am. St. Rep. 561, 569) on relation of beneficiary of mutual or membership life or accident insurance.

14 L. R. A. 344, *SOMERS v. METROPOLITAN ELEV. R. CO.* 129 N. Y. 576, 29 N. E. 802.

Damages for injuries to property — Abutter's easement in street.

Cited in *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 492, 42 C. C. A. 184, 102 Fed. 91, holding interference with church services by smoke and noise constitutes taking of property; *Re Grade Crossing*, 154 N. Y. 557, 49 N. E. 127, holding change of street grade, cutting off light and air, subject of award under grade crossing act; *Torge v. Salamanca*, 176 N. Y. 331, 68 N. E. 626, sustaining right of abutter, whose property is injured by change of railroad grade crossing, to proceed against village for damages under village law; *Hadden v. Metropolitan Elev. R. Co.* 75 Hun, 66, 26 N. Y. Supp. 995; *Bookman v. New York Elev. R. Co.* 137 N. Y. 305, 33 N. E. 333; *Lazarus v. Metropolitan Elev. R. Co.* 69 Hun, 194, 23 N. Y. Supp. 515,—holding refusal to find easements appurtenant to land taken for railroad, apart from damages to land, have only nominal value, error; *McGrane v. New York Elev. R. Co.* 67 App. Div. 39, 73 N. Y. Supp. 498, denying injunction restraining operation of elevated road in absence of substantial damages; *Smith v. New York Elev. R. Co.* 44 N. Y. S. R. 877, 18 N. Y. Supp. 132, holding injuries from running of trains properly considered in ascertaining compensation; *Less v. Butte*, 28 Mont. 32, 61 L. R. A. 602, 98 Am. St. Rep. 545, 72 Pac. 140, holding city liable for injury to property by improvement of street; *Bramlett v. Greenville*, 88 S. C. 116, 70 S. E. 450, holding that under charter abutter is not entitled to damages because sidewalk was lowered where benefits accruing therefrom overcome injury; *Donahue v. Keystone Gas Co.* 181 N. Y. 319, 70 L.R.A. 764, 106 Am. St. Rep. 549, 73 N. E. 1108, holding abutting owner has such property in trees in street, but not on his land that he can maintain action for killing of them by gas escaping from pipes; *Rourke v. Holmes Street R. Co.* 221 Mo. 61, 133 Am. St. Rep. 468, 119 S. W. 1094, holding owner of property abutting on street whose easement of light, air and access to and from his property is interfered with or taken by elevated street railway is entitled to damages; *Re Board of Rapid Transit R. Comrs.* 197 N. Y. 103, 36 L.R.A. (N. S.) 657, 90 N. E. 456, 18 Ann. Cas. 366, modifying 128 App. Div. 114, 112 N. Y. Supp. 619, holding real ground upon which abutter is entitled to damages for

physical impairment of his property by subway is that he owns land abutting on street, not that he owns fee of street.

Cited in footnotes to *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; (64 L. R. A. 959) holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street.

Cited in notes (14 L.R.A. 383) on injury to abutter's easements by railroad in street; (36 L.R.A.(N.S.) 677) on abutter's right to compensation for railroads in streets; (31 Am. St. Rep. 733) on occupation of city streets by railroads; (106 Am. St. Rep. 247) on what are additional servitudes in highways.

Distinguished in *Matlaga v. New York Elev. R. Co.* 14 Misc. 294, 35 N. Y. Supp. 704, holding incumbent upon railroad to show owner of fee in street not damaged by erection of road, to defeat injunction; *Betjeman v. New York Elev. R. Co.* 1 Misc. 141, 84 N. Y. S. R. 723, 20 N. Y. Supp. 628, and *Gerber v. Metropolitan Elev. R. Co.* 3 Misc. 430, 23 N. Y. Supp. 166, holding refusal to find easements of light and air taken by railroad have only nominal value aside from land, no error; *Adler v. Metropolitan Elev. R. Co.* 138 N. Y. 178, 33 N. E. 935, holding refusal of court to find evidentiary facts as to damages for operation of elevated road, no error; *Rasch v. Nassau Electric R. Co.* 198 N. Y. 388, 36 L.R.A. (N.S.) 646, 91 N. E. 785, holding abutting owner, also owner of fee in street, entitled to damages on account of noise and vibration resulting from operation of trolley cars on his property in the street.

— Damages for land not taken.

Cited in *Rome, W. & O. R. Co. v. Gleason*, 42 App. Div. 533, 59 N. Y. Supp. 647, and *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 305, 68 N. E. 366, Affirming 86 App. Div. 61, 83 N. Y. Supp. 613, holding consequential damages to land not taken should be awarded, as for land condemned for railroad; *Re Grade Crossing*, 6 App. Div. 335, 40 N. Y. Supp. 520, and *Re Grade Crossing*, 59 App. Div. 502, 69 N. Y. Supp. 152, holding commissioners may award damages for injury to parcel remaining; *Cunard v. Manhattan R. Co.* 1 Misc. 153, 48 N. Y. S. R. 756, 20 N. Y. Supp. 724, holding refusal to limit award to mere value of easement taken, excluding remaining property, no error; *Re New York Elev. R. Co.* 76 Hun, 387, 28 N. Y. Supp. 110, holding no past benefit allowable in assessing damages for property condemned; *Re Tuthill*, 36 App. Div. 507, 55 N. Y. Supp. 657, holding state may exercise power of taxation to reclaim land on ground of public utility; *Re Board of Public Improvement*, 99 App. Div. 580, 91 N. Y. Supp. 161, holding term "consequential damages" does not necessarily and only refer to use of property taken in its effect upon the residue; *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 397, 1 L.R.A.(N.S.) 85, 85 S. W. 881, holding legislative authority to take private property for station houses, round-houses, coal chutes and other necessary conveniences, does not carry with it authority to injure property not so taken in locating such works; *Re New York*, 193 N. Y. 124, 85 N. E. 1064, holding railroad company surrendering to lessor its leases of bulkhead and wharf and adjacent property, reserving claim for injury to its property or fixtures other than bulkhead, entitled to damages for injury to such property or fixtures, when city took bulkhead for water front improvements.

— Benefits as affecting right to damages.

Followed in *Bookman v. New York Elev. R. Co.* 147 N. Y. 301, 49 Am. St. Rep. 664, 41 N. E. 705, holding increase in value of property caused by construction of

elevated road in unimproved district bars damages for erection; *Nette v. New York Elev. R. Co.* 1 Misc. 342, 48 N. Y. S. R. 724, 20 N. Y. Supp. 627; *Odell v. New York Elev. R. Co.* 130 N. Y. 691, 29 N. E. 998; *Malcolm v. New York Elev. R. Co.* 147 N. Y. 312, 41 N. E. 790,—holding refusal of court to find increase of value since building of elevated road according to undisputed evidence, error.

Cited in *Cookman v. New York Elev. R. Co.* 69 N. Y. S. R. 660; *Mattlage v. New York Elev. R. Co.* 1 Misc. 341, 48 N. Y. S. R. 684, 20 N. Y. Supp. 624; *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 598, 33 N. E. 319; *Sutro v. Manhattan R. Co.* 137 N. Y. 593, 33 N. E. 334,—holding award of damages to abutter, when erection of elevated line increases values, error; *Brush v. Manhattan R. Co.* 44 N. Y. S. R. 114, 17 N. Y. Supp. 540; *Rich v. Manhattan R. Co.* 46 N. Y. S. R. 674, 19 N. Y. Supp. 543; *Hoffman v. Manhattan Elev. R. Co.* 1 Misc. 156, 48 N. Y. S. R. 713, 20 N. Y. Supp. 625,—denying injunctive relief in absence of finding that greater increase in rental value was prevented by road; *Marsh v. Kings County Elev. R. Co.* 29 C. C. A. 657, 57 U. S. App. 724, 86 Fed. 191, holding owner failing to show operation of road caused decrease in rental value, bars injunction; *Stewart v. Ohio River R. Co.* 38 W. Va. 451, 18 S. E. 604, and *Sillcocks v. Manhattan R. Co.* 10 Misc. 261, 31 N. Y. Supp. 428, holding abutter must show diminution in rental value, for damages against elevated road; *Bauman v. Ross*, 167 U. S. 578, 42 L. ed. 284, 17 Sup. Ct. Rep. 966, holding benefits created by establishment of highway should be considered in making estimate of damages; *Huggins v. Manhattan R. Co.* 1 Misc. 111, 48 N. Y. S. R. 680, 20 N. Y. Supp. 648, holding instruction that abutters entitled to damages for road's interference with easement, regardless of benefit, error; *Fahnestock v. Peoria*, 171 Ill. 457, 49 N. E. 496, defining "special benefit," used in city and village act, as increase in value occasioned by improvement; *Otten v. Manhattan R. Co.* 2 App. Div. 402, 37 N. Y. Supp. 982 (dissenting opinion), majority holding present value of premises affected by elevated road to be considered, irrespective of prior conditions; *Skelly v. New York Elev. R. Co.* 7 Misc. 92, 27 N. Y. Supp. 304, holding refusal to find special benefit resulting from road should be set off against damages, no error, benefit lacking; *Struthers v. New York Elev. R. Co.* 5 Misc. 244, 25 N. Y. Supp. 81, sustaining finding of diminution in benefits after construction of elevated road; *Re Brooklyn Elev. R. Co.* 87 Hun, 105, 33 N. Y. Supp. 974, denying right to set off against lots increased in value, depreciation of one, caused by construction of road; *Maclean v. Westchester Electric R. Co.* 25 Misc. 384, 55 N. Y. Supp. 556, granting injunction against erection of electric line without proof of probable benefits offsetting injury; *Elias v. Manhattan R. Co.* 85 Hun, 384, 32 N. Y. Supp. 1053, holding greater increase in value of neighboring property insufficient to sustain allowance of damages for construction of elevated road; *Re New York, W. & B. R. Co.* 73 Misc. 223, 130 N. Y. Supp. 1005, holding that in condemnation of land by railroad benefits to land may be off-set against consequential damages to that part of land not taken; *Manhattan R. Co. v. Stuyvesant*, 126 App. Div. 850, 111 N. Y. Supp. 222, holding where easements of light, air and access are condemned for purpose of stairway to elevated railway station benefits to the realty may be considered in making award; *Re New York*, 64 Misc. 269, 118 N. Y. Supp. 580, on allowance for full value of land actually taken without deduction for benefits; *Lehigh Valley R. Co. v. State*, 66 Misc. 434, 123 N. Y. Supp. 378, on offsetting benefits against damages to balance of property.

Cited in note (9 L.R.A.(N.S.) 812, 843) on right to set off benefits against damages on condemnation.

Distinguished in *Becker v. Metropolitan Elev. R. Co.* 131 N. Y. 510, 30 N. E.

499, upholding abutter's right to damages for construction of elevated road in locality built up independent of road; *Storck v. Metropolitan Elev. R. Co.* 131 N. Y. 520, 30 N. E. 497, affirming right to damages for construction of road, decreasing rental values and causing influx of undesirable tenants; *Roberts v. New York Elev. R. Co.* 155 N. Y. 37, 49 N. E. 262, holding construction of switches, tank, and coal platform, diminishing rental values and drawing inferior class of tenants, gives abutter right to damages; *Lewiston & Y. F. R. Co. v. Ayer*, 27 App. Div. 575, 50 N. Y. Supp. 502, denying right to ride or transport property on railroad, benefit to be set off against injury for land condemned; *Mantorville R. & Transfer Co. v. Slingerland*, 101 Minn. 498, 11 L.R.A.(N.S.) 783, 118 Am. St. Rep. 647, 112 N. W. 1033, holding mere increase of transportation facilities and prospective feasibility of connecting industrial works upon tract with railroad are not ordinarily sufficient to constitute special benefits at least where land owner cannot by law compel railroad company to furnish him with particular facilities; *Re New York*, 190 N. Y. 356, 16 L.R.A.(N.S.) 338, 83 N. E. 299, 13 A. & E. Ann. Cas. 598, modifying 120 App. Div. 854, 105 N. Y. Supp. 750, holding provisions of city charter authorizing benefits to be set off against award for land taken for improvement of water front unconstitutional.

— Measure of damages.

Followed in *Buek v. Metropolitan R. Co.* 73 Hun, 252, 25 N. Y. Supp. 1048, holding refusal to charge difference between advantage and disadvantage as measure of damage for construction of road, error.

Cited in *Peeksport Connecting R. Co. v. West*, 79 N. Y. S. R. 648, 45 N. Y. Supp. 644, holding market value of land taken and depreciation of remainder, measure of damages for land condemned; *Lewis v. New York & H. R. Co.* 162 N. Y. 228, 56 N. E. 540, holding abutter may recover difference between effect of old viaduct and new steel bridge, deducting benefits for increased space; *Bischoff v. New York Elev. R. Co.* 138 N. Y. 263, 33 N. E. 1073, holding balance of injury over benefit measure of damages for cutting off light and air by erection of elevated road; *Metropolitan West Side Elev. R. Co. v. White*, 166 Ill. 381, 46 N. E. 978, and *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 382, 26 L. R. A. 778, 37 N. E. 1098, holding difference in value of land before construction of railroad and afterwards, measure of damages for land not taken; *Moore v. New York Elev. R. Co.* 4 Misc. 135, 23 N. Y. Supp. 863, holding abutter entitled to nominal damages, evidence failing to show excess of injury over benefit; *Struthers v. New York Elev. R. Co.* 5 Misc. 240, 25 N. Y. Supp. 81, and *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 87, 35 N. Y. Supp. 557, holding value of abutter's easement in street, measure of damage for conducting railroad through open excavation; *Cook v. New York Elev. R. Co.* 144 N. Y. 118, 39 N. E. 2, and *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 551, 34 N. E. 400, denying that adoption of correct rule for measure of damages requires reversal for refusal to find value of easement nominal, aside from land; *Blair v. Charleston*, 43 W. Va. 73, 35 L. R. A. 858, 64 Am. St. Rep. 837, 26 S. E. 341, holding evidence admissible as to value before and after change in grade; *Peeksport Connecting R. Co. v. West*, 79 N. Y. S. R. 647, 45 N. Y. Supp. 644, holding risk of injury to cattle should be considered in estimating damages for construction of railroad; *Root v. Butte, A. & P. R. Co.* 20 Mont. 358, 51 Pac. 155, holding owner entitled to special damages for injury to property by smoke, in excess of injury to community; *Syracuse v. Stacey*, 45 App. Div. 254, 61 N. Y. Supp. 165, holding riparian owners not entitled to damages for appropriation of lake to supply city; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 10, 55 N. Y. Supp. 192, holding diminution in rental value measure of damages for nuisance injuring property in possession of tenant; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 524 90

Pac. 889, holding whether fee of street is in public or in abutting owner measure of damages for taking street for public purpose is injury to abutting owner as evidenced by depreciation in reasonable salable value of his property; *People ex rel. New York v. Lyon*, 114 App. Div. 586, 100 N. Y. Supp. 62, holding measure of damages in proceeding to condemn land for bridge purposes is value of land actually taken, and consequential damages to balance arising from use to which land taken is to be put; *Eutaw v. Botnick*, 150 Ala. 434, 43 So. 739, holding question as to market value of abutting property immediately after grading for which damages claimed admissible.

14 L. R. A. 352, *JAFFEE v. JACOBSON*, 1 C. C. A. 11, 4 U. S. App. 4, 48 Fed. 21.

Specific performance of contract.

Cited in *McKinnon v. McKinnon*, 5 C. C. A. 533, 56 Fed. 412, holding enforcement of partnership agreement of uncle to leave property to nephew at death, does not violate statute of wills; *Svanburg v. Fosseen*, 75 Minn. 361, 43 L. R. A. 431, 74 Am. St. Rep. 490, 78 N. W. 4, holding performance of services entitles vendee to specific performance of oral contract to convey.

— To pay after death.

Cited in *Kofka v. Rosicky*, 41 Neb. 350, 25 L. R. A. 214, 43 Am. St. Rep. 685, 59 N. W. 788, holding equity will enforce agreement of uncle to leave property to niece leaving home and taking his name; *Burns v. Smith*, 21 Mont. 267, 69 Am. St. Rep. 653, 53 Pac. 742, enforcing against estate, promise of decedent to leave portion of property in payment for services; *Healey v. Simpson*, 113 Mo. 346, 20 S. W. 881, holding equity will enforce as contract of adoption, instrument inoperative as deed; *Owens v. McNally*, 113 Cal. 449, 33 L. R. A. 372, 45 Pac. 710, holding that equity will not enforce vague contract of uncle to leave property to niece; *McCabe v. Healy*, 138 Cal. 86, 70 Pac. 1008, impressing intestate's property with trust in favor of nephew to whom former had agreed to give property at death; *Wilson v. Heath*, 23 Misc. 718, 53 N. Y. Supp. 166, denying specific performance for failure to establish proof of agreement to provide in will; *Hood v. McGehee*, 189 Fed. 208, holding that ineffective adoption may amount to contract in behalf of child, where definite promise to leave property to child is shown and full performance on part of child is made; *Flood v. Templeton*, 148 Cal. 379, 83 Pac. 148, holding specific performance of contract to devise realty not decreed where right to relief based upon forbearance in matter of money demand; *Starnes v. Hatcher*, 121 Tenn. 340, 117 S. W. 219, holding where person agrees to adopt children and leave them his property and takes them into his custody and rears them, but does not adopt them, agreement to leave them his property is specifically enforced after his death.

Cited in footnotes to *Bryson v. McShane*, 49 L. R. A. 527, which holds specifically enforceable executed oral contract to give entire property for support during life, and burial after death; *Clancy v. Flusky*, 52 L. R. A. 277, which authorizes specific performance of executed oral contract to convey land to son for taking care of father for life, though father left son before death.

Cited in note (9 L.R.A.(N.S.) 158) on specific performance of contract to compensate services to continue during promisor's lifetime, as affected by brevity of period elapsing before his death.

14 L. R. A. 356, *WAIT v. NASHUA ARMORY ASSO.* 66 N. H. 581, 49 Am. St. Rep. 630, 23 Atl. 77.

Powers of corporate officers.

Cited in *Holland v. Laconia Bldg. & L. Asso.* 68 N. H. 481, 41 Atl. 178, holding

action not maintainable upon unauthorized promise of corporate officers to pay mortgage deficiency; *Dallas Ice Factory & Cold Storage Co. v. Crawford*, 18 Tex. Civ. App. 180, 44 S. W. 875, holding general manager of corporation has power to employ counsel; *Mathias v. White Sulphur Springs Asso.* 19 Mont. 363, 48 Pac. 624, holding president of corporation organized to acquire land and erect buildings no implied power to contract with architect; *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 37, 31 L. R. A. 536, footnote p. 535, 54 Am. St. Rep. 282, 34 S. W. 89, denying inherent power of corporate president and secretary to execute negotiable paper; *Ferguson v. Venice Transp. Co.* 79 Mo. App. 359, holding corporate president without authority *in virtute officii* to assign asset in payment of debt; *Murphy v. W. H. & F. W. Cane*, 80 N. J. L. 165, 76 Atl. 323, holding that president of building company has no implied power to award subcontracts on construction work for which his company has main contract; *Harding v. Oregon-Idaho Co.* 57 Or. 41, 110 Pac. 412, holding that office of president of corporation does not confer authority to bind corporation or control its property; *Kline Bros. & Co. v. Royal Ins. Co.* 192 Fed. 386, holding that president of corporation has no authority as such to make contract for insurance in its behalf, in absence of some incidental powers express or implied; *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 460, 84 N. E. 812, holding authority of president of private corporation to execute promissory note in its name when specifically denied cannot be inferred from his official station and doing of the act; *Model Clothing House v. Hirsch*, 42 Ind. App. 273, 85 N. E. 719, holding president having power to hire employees to conduct corporation's business has power to increase their salaries to retain them in its employ; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 481, 3 L.R.A. (N.S.) 558, 111 Am. St. Rep. 637, 62 Atl. 971, holding there is no presumption of law that official relation to bank of its vice-president and director furnishes or proves his authority to bind bank by an admission; *Kidd v. New Hampshire Traction Co.* 74 N. H. 168, 66 Atl. 127, holding by-laws of corporation regarding exercise of power to make contracts by directors in accordance with law as to powers of directors; *Campbell v. Pittsburg Bridge Co.* 23 Pa. Super. Ct. 141, holding president of corporation has power to employ counsel to defend suit against it.

Cited in footnotes to *Citizens' Nat. Bank v. Berry*, 24 L. R. A. 719, which upholds bank president's power to employ counsel; *Cheever v. Pittsburg, C. & L. E. R. Co.* 34 L. R. A. 69, which holds one taking note for his own debt from corporate president executing same a bona fide holder; *Grow v. Cockrill*, 36 L. R. A. 89, which holds bank receiver not liable for president's loan of depositor's money; *Wells, F. & Co. v. Enright*, 49 L. R. A. 647, which holds bank bound by agreement executed by president and general manager with vice president's approval; *Franklin Sav. Bank v. Cochrane*, 61 L. R. A. 760, which holds corporation bound by treasurer's agreement to pay mortgage on property transferred to corporation.

Admission of harmless evidence.

Cited in *State v. Saidell*, 70 N. H. 176, 85 Am. St. Rep. 504, 46 Atl. 1083, refusing to disturb verdict for erroneous admission of newspaper item unconnected with dispute; *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 256, 51 Atl. 898, denying incompetent evidence, admitted without prejudicial effect, sufficient to set aside verdict; *Mechanicks Nat. Bank v. Comins*, 72 N. H. 22, 101 Am. St. Rep. 650, 55 Atl. 191, holding admission of indorsements proving facts shown by records, no error.

Harmless error.

Cited in *Beckman v. Hampton*, 74 N. H. 49, 65 Atl. 254, holding remarks of counsel in closing argument, where not prejudicial, are not ground for setting aside verdict.

14 L. R. A. 361, *ALLEN v. WEBER*, 80 Wis. 531, 27 Am. St. Rep. 51, 50 N. W. 514.

Water as boundary line.

Cited in *Brophy v. Richeson*, 137 Ind. 121, 36 N. E. 424, holding grant "to stake at low-water mark" excludes bed of lake.

Cited in footnote to *Boardman v. Scott*, 51 L. R. A. 180, which denies grant bounding land by artificial pond, extends to thread of stream forming same.

Cited in notes (42 L.R.A. 506) on effect of bounding grant on river or tide water; (127 Am. St. Rep. 41) on relative rights of state and riparian owner in navigable waters; (21 Eng. Rul. Cas. 605) on presumption of ownership to middle of stream; (23 Eng. Rul. Cas. 189) on ownership of riparian owner to thread of stream.

Declaring stream navigable by statute.

Cited in *Miller v. State*, — Tenn. —, 35 L.R.A.(N.S.) 410, 137 S. W. 760, holding that legislature cannot declare stream navigable which is not so in fact without making compensation to riparian owner.

14 L. R. A. 364, *COLLINS v. VOORHEES*, 47 N. J. Eq. 555, 22 Atl. 1054.

What constitutes valid marriage.

Cited in *Re Wallace*, 49 L. J. Eq. 535, 25 Atl. 260, holding occasional cohabitation does not establish marriage; *Barker v. Valentine*, 125 Mich. 336, 51 L. R. A. 787, footnote p. 787, 84 Am. St. Rep. 578, 84 N. W. 297; holding cohabitation after removal of impediment to marriage constitutes lawful marriage; *Stevens v. Stevens*, 56 N. J. Eq. 497, 38 Atl. 460, holding marriage presumed from long cohabitation and acknowledgment of matrimonial relation; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 400, 45 L. R. A. 674, 72 Am. St. Rep. 652, 42 Atl. 333, upholding marriage contracted *per verba de presenti*, without ceremony or witnesses; *Clark v. Barney*, 24 Okla. 458, 103 Pac. 598, to the point that presumption arises that valid marriage was intended where parties continue to cohabit in good faith after time when marriage ceremony might have been performed; *O'Neil v. Davis*, 88 Ark. 200, 113 S. W. 1027, holding marriage not proved by continuance of cohabitation, illicit in the beginning, after legal impediment to marriage was removed, also citing annotation on this point; *Stevens v. Stevens*, 56 N. J. Eq. 497, 38 Atl. 460, on disposition of court to hold in favor of marriage where there is issue which may be bastardized by contrary ruling; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 739, 3 L.R.A.(N.S.) 247, 111 Am. St. Rep. 658, 62 Atl. 680, 6 A. & E. Ann. Cas. 483, affirming 68 N. J. Eq. 421, 59 Atl. 813, holding marriage established where, after entrance into matrimonial relations, woman procured divorce from lawful husband, and, after such divorce, man assured woman, in presence of witnesses, she was his legal wife; *McCombs v. State*, 50 Tex. Crim. Rep. 494, 9 L.R.A.(N.S.) 1039, 123 Am. St. Rep. 855, 99 S. W. 1017, 14 A. & E. Ann. Cas. 72, holding where man who has wife living marries woman and after death of first wife, while second woman is alive, marries third woman marriage to second woman is nullity and marriage to third not bigamous; *Travers v. Reinhardt*, 205 U. S. 444, 51 L. ed. 874, 27 Sup. Ct. Rep. 563 (dissenting opinion), as to what constitutes evidence of valid marriage in New Jersey.

Cited in footnotes to *Re McLaughlin*, 16 L. R. A. 699, which holds common-law marriage invalid under statute; *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence; *Schuchart v. Schuchart*, 50 L. R. A. 180, which holds common-law marriage formed by persons living together as husband and wife after removal of disability under belief that no new marriage necessary; *University of Michigan v. McGuckin*, 57 L. R. A. 917, which holds lawful marriage shown between persons whose cohabitation originally meretricious, by continued cohabitation after disability removed and birth of children baptized as legitimate; *Eaton v. Eaton*, 60 L. R. A. 605, which holds marriage consummated by cohabitation with intent to sustain relation of husband and wife after removal of impediment existing when marriage first contracted.

Cited in notes (3 L.R.A.(N.S.) 246) on effect of removal of impediment to marriage after cohabitation begun; (17 Eng. Rul. Cas. 171) on what constitutes a valid marriage.

Distinguished in *Keavey v. Barrett*, 62 N. J. Eq. 466, 49 Atl. 1073, holding marriage of child's father and mother previous to child's birth is, after death of both parties, presumed in favor of legitimacy of child.

14 L. R. A. 370, *SELDEN v. JACKSONVILLE*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 So. 457.

Injury to abutter's easement in street.

Cited in *Brand v. Multnomah County*, 38 Or. 96, 50 L. R. A. 396, footnote p. 389, 84 Am. St. Rep. 772, 62 Pac. 209, holding bridge approach, elevating street to established grade, not additional servitude; *Willis v. Winona City*, 59 Minn. 34, 26 L. R. A. 144, footnote p. 142, 60 N. W. 814, holding elevated approach to bridge in street not additional servitude; *Pueblo v. Strait*, 20 Colo. 21, 24 L. R. A. 395, footnote p. 392, 46 Am. St. Rep. 273, 36 Pac. 789, holding abutter entitled to damages for building viaduct over railroad partially closing street; *Blair v. Charleston*, 43 W. Va. 67, 35 L. R. A. 856, 64 Am. St. Rep. 837, 26 S. E. 341, denying purchase after establishment of grade line, and before actual change, defeats abutter's right to damages; *Sauer v. New York*, 40 Misc. 588, 83 N. Y. Supp. 27, denying abutter's right to damages for city's erection of viaduct by statutory authority over street of which latter owned fee; *Long v. Wilson*, 119 Iowa, 272, 60 L. R. A. 722, footnote p. 720, 97 Am. St. Rep. 315, 93 N. W. 282, holding judgment establishing boundary of highway in suit against owner on one side not conclusive on opposite owner; *Bowden v. Jacksonville*, 52 Fla. 224, 42 So. 394, holding damages not recoverable by abutting owner from city for alleged injury to his property from change of grade in reconstruction of viaduct in street, and from other causes in connection with such viaduct; *Borghart v. Cedar Rapids*, 126 Iowa, 315, 68 L.R.A. 307, 101 N. W. 1120, holding city vacating portion of public square abutting on lot without other means of access liable in damages to lot owner; *Butt v. Iffert*, 171 Ind. 556, 86 N. E. 961, on vacation of highway, annotation also cited on this point; *De Lucca v. North Little Rock*, 142 Fed. 603, denying abutting owner an injunction to restrain city from constructing viaduct in street for public travel, such viaduct not being additional servitude; *Sauer v. New York*, 206 U. S. 544, 51 L. ed. 1180, 27 Sup. Ct. Rep. 686, on nonrecovery of damages for impairment of access to abutting land and interference with light and air by erection of elevated viaduct over street for public travel.

Cited in footnotes to *Levee Dist. No. 9 v. Farmer*, 23 L. R. A. 388, which holds discontinuance of road, not taking or damaging of abutter's property; *Cram v. Laconia*, 57 L. R. A. 282, which denies right to recover for injury by discontinuing part of street on which property abuts; *Re Melon Street*, 38 L. R. A. 275, which holds abutting owners entitled to recover for vacating other portion of street leav-

ing remaining portion a *cul de sac*; *Stanwood v. Malden*, 16 L. R. A. 591, which holds that discontinuance of street does not entitle landowner, whose access is substantially unimpaired, to damages; *Anderton v. Milwaukee*, 15 L. R. A. 830, which holds discrimination between lot owners as to compensation for change of street grade void; *Brown v. Seattle*, 18 L. R. A. 161, which holds abutting owner entitled to compensation for change of street grade; *First Nat. Bank v. Tyson*, 59 L. R. A. 399, which sustains right of injunction against pillars in street in front of adjoining lot, obstructing light and air from street; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, sustaining abutter's right to damages for erection of track on pillars 15 to 25 feet above street; *Townsend v. Epstein*, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street; *Van Witsen v. Gutman*, 24 L. R. A. 403, which denies right to take away for private use abutter's easement in public alley; *Clemens v. Connecticut Mut. L. Ins. Co.* 67 L.R.A. 362, which denies right to injunction to stay improvement of public street according to adopted grade until payment of damages; *Borghart v. Cedar Rapids*, 68 L.R.A. 306, which sustains property owner's right of action for vacation of public square cutting off only means of access to his property; *Sauer v. New York*, 70 L.R.A. 717, which denies right of abutting owner at point where street is depressed below grade of other property to enjoin use of viaduct by city to facilitate travel though it is fifty feet above street level in front of his place and impairs free circulation of light and air and decreases the value of his property.

Cited in notes (18 L. R. A. 544) on protection of private rights from interference by public; (23 L. R. A. 658) on damage to abutting owner by first grading and improvement of street; (26 L. R. A. 659) on effect of abandonment of highway; (26 L. R. A. 821) on discontinuance or vacation of highway by acts of public authorities; (67 L.R.A. 257) on municipal liability for defective plan of street construction; (36^o L.R.A.(N.S.) 1115) on right of abutter to compensation for vacation of highway; (36 L.R.A.(N.S.) 1195) on liability of municipality for injury to abutting property from changing street grade under constitutional provision against "damaging" private property for public use without compensation; (30 Am. St. Rep. 836) on municipal liability for change of street grade; (106 Am. St. Rep. 238, 266) on what are additional servitudes in highways.

Distinguished in *Blincoe v. Choctaw O. & W. R. Co.* 16 Okla. 293, 4 L.R.A. (N.S.) 893, 83 Pac. 903, 8 A. & E. Ann. Cas. 689, holding "damages" as used in constitutional provision for assessment of damages in condemnation proceedings includes injury to real or personal property by the taking.

— By railroad.

Cited in *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 283, 24 L. R. A. 398, footnote p. 396, 29 Atl. 830, holding erection in street of abutment 9 feet high for elevated road not taking of abutter's property.

Cited in footnotes to *Nichols v. Ann Arbor & Y. Street R. Co.* 16 L. R. A. 371, which requires compensation to owner of fee before construction of railway along highway; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758, which holds exclusion of light and air from abutting property by erecting bridge to carry railroad tracks diagonally across street, proper element of damage; *Memphis & C. R. Co. v. Birmingham*, S. & T. River R. Co. 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Rauenstein v. New York, L. & W. R. Co.* 18 L. R. A. 768, which denies liability to abutter for embankment to change grade necessitated by railroad embankment in intersecting street; *Buhl v. Ft. Street Union Depot Co.* 23 L. R. A. 392, which denies recovery for inconvenience to abutter by discontinuing other portions of street; *Freiday v. Sioux*

City Rapid Transit Co. 26 L. R. A. 246, which holds elevated railroad a "railway;" Willamette Iron Works v. Oregon R. & Nav. Co. 29 L. R. A. 88, which denies right to make approach to bridge without compensation to abutting owner; Aldrich v. Metropolitan West Side Elev. R. Co. 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away.

Cited in notes (19 L. R. A. 510) on change of street grade as affecting railroad tracks, gas and water pipes, etc.; (26 L. R. A. 95) on liability for cost of changing grade of street to prevent crossing of railroad at grade.

14 L. R. A. 381, *EGERER v. NEW YORK C. & H. R. R. CO.* 130 N. Y. 108, 20 N. E. 95.

Injury to abutter's easement.

Cited in *Re Rochester*, 24 App. Div. 389, 48 N. Y. Supp. 764, upholding right to damages for injury to land, abutting condemned property in cutting off drainage and access to highway; *Lazzell v. Garlow*, 44 W. Va. 482, 30 S. E. 171, holding right to remove obstruction fencing in highway not discontinued by authorities; *Brown v. San Francisco*, 124 Cal. 281, 57 Pac. 82, denying that constitutional provision forbidding damage to property without compensation applies to diminution in value by closing end of street; *De Geofroy v. Merchants Bridge Terminal R. Co.* 179 Mo. 706, 64 L. R. A. 963, 101 Am. St. Rep. 524, 79 S. W. 386, holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street; *Re Rutland*, 70 Misc. 86, 128 N. Y. Supp. 94, to the point that legislature has power to discontinue highway and also to delegate power to others; *Reis v. New York*, 188 N. Y. 68, 80 N. E. 573, affirming 113 App. Div. 465, 99 N. Y. Supp. 291, holding abutting owner suffers no actionable wrong by closing of street where another means of access by public ways is left open; *Kline v. State*, 61 Misc. 22, 114 N. Y. Supp. 318, holding same but that state which neglects to repair bridge and keeps it closed for purpose of making repairs without making them, becomes liable for damages to adjacent owner; *Johnston v. Lonstorf*, 128 Wis. 27, 107 N. W. 459, holding city council cannot vacate alley without compensation to protesting owners of lands abutting thereon.

Cited in footnotes to *Pueblo v. Strait*, 24 L. R. A. 392, which holds abutter entitled to damages on building of viaduct over railroad in practically closing street; *Townsend v. Epstein*, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street; *First Nat. Bank v. Tyson*, 59 L. R. A. 399, which sustains right of injunction against pillars in street in front of adjoining lot, obstructing light and air from street.

Cited in notes (18 L.R.A. 544) on protection of private rights from interference by public; (15 L.R.A.(N.S.) 55) on cutting off access to highway as a taking.

— By railroad.

Cited in *Egerer v. New York C. & H. R. R. Co.* 70 App. Div. 422, 75 N. Y. Supp. 476, denying right of railroad company to deprive abutter of light and air by erection of embankment under legislative authority; *Re Grade Crossing*, 166 N. Y. 75, 59 N. E. 706, denying compensation for closing street, when another and safer passage provided; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 600, 30 L.R.A.(N.S.) 240, 100 Pac. 1110, holding where abutting property owners' means of ingress and egress to and from lot is destroyed or materially interfered with by construction of steam railroad tracks in street, he is entitled to damages; *South Bound R. Co. v. Burton*, 67 S. C. 524, 46 S. E. 340, holding jarring of building, noise, smoke, vapors, loss of light and air, increased risk of fire, material interference with egress and ingress, may enter

into estimate of damages to abutting property by construction of steam railroad in street, so far as they depreciate value of such property, also citing annotation on this point.

Cited in footnotes to *Nichols v. Ann Arbor & Y. Street R. Co.* 16 L. R. A. 371, which requires compensation to owner of fee before construction of railway along highway; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758, which holds exclusion of light and air from abutting property by erecting bridge to carry railroad tracks diagonally across street proper element of damage; *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Rauenstein v. New York, L. & W. R. Co.* 18 L. R. A. 768, which denies liability to abutter for embankment to change grade necessitated by railroad embankment in intersecting street; *Spencer v. Metropolitan Street R. Co.* 22 L. R. A. 668, which denies right to construct viaduct in street without compensating abutters; *Garrett v. Lake Roland Elev. R. Co.* 24 L. R. A. 396, which holds erection for elevated railroad of abutment 9 feet high in street not taking of abutter's property; *Lockwood v. Wabash R. Co.* 24 L. R. A. 516, which denies city's power to authorize steam railroad in narrow highway devoted to wholesale business; *Block v. Salt Lake Rapid Transit Co.* 24 L. R. A. 610, which authorizes injunction against laying additional street-car track unnecessarily interfering with travel; *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 246, which holds elevated railroad a "railway;" *Home Bldg. & Conveyance Co. v. Roanoke*, 27 L. R. A. 551, which holds elevated approach to bridge over railroad tracks not additional burden; *O'Reilly v. New York Elev. R. Co.* 31 L. R. A. 407, which denies right of abutter to enjoin maintenance of elevated railroad in street; *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders from railroad; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *McKeon v. New York, N. H. & H. R. Co.* 61 L. R. A. 730, which holds abutter entitled to compensation for interference with access to property by temporary occupation of street with rails while elevating roadbed; *Suffolk & C. R. Co. v. West End L. & I. Co.* 68 L.R.A. 333, which holds value of land taken together with damage to abutting lots measure of compensation on condemnation by railroad company of street for right of way.

Cited in notes (15 L. R. A. 377) on right to construct elevated railroad in street; (17 L. R. A. 481) on what use of street or highway constitutes an additional burden; (36 L.R.A.(N.S.) 691, 764) on abutter's right to compensation for railroads in streets.

Distinguished in *Fries v. New York & H. R. Co.* 169 N. Y. 284, 62 N. E. 358, denying liability of railroad company to abutter for erection of viaduct under statutory order; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 488, 51 N. E. 402, denying liability for construction of railroad in place never opened or used as street; *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 86, 35 N. Y. Supp. 557, denying abutter's right to enjoin railroad company's excavation in street under direction of police power.

14 L. R. A. 386, *TURNER v. HEBRON*, 61 Conn. 175, 22 Atl. 951.

Right to fish.

Cited in *Lee v. Mallard*, 116 Ga. 18, 42 S. E. 372, holding conveyance of land on bank of unnavigable stream across which is mill dam not pass right to fish below high-water mark.

Annotation in *Hampton v. Columbia Canning Co.* 3 Alaska, 102, holding right to fish in tidal waters is not dependent upon ownership of abutting land; such right, being public, is incapable of acquisition by prescription, and cannot be exclusive in any individual.

Cited in footnotes to *Sollers v. Sollers*, 20 L. R. A. 94, which denies power to hold adverse possession of land covered by water within ebb and flow of tide; *Albright v. Cortright*, 48 L. R. A. 616, which denies right to fish in private pond by prescription or long usage by public.

Cited in notes (14 L. R. A. 334) on right to assign or transmit easement in gross; (41 L. R. A. 269) on public right of access to water; (60 L. R. A. 497, 498, 523) on right to fish; (131 Am. St. Rep. 755, 761) on law of fishing; (8 Eng. Rul. Cas. 348) on acquisition by prescription of right of fishery in private waters.

Distinguished in *Percy Summer Club v. Astle*, 90 C. C. A. 527, 163 Fed. 13, holding that right to fish in considerable lakes and ponds in New Hampshire is free in the public.

14 L. R. A. 389, *SNEEDEN v. HARRISS*, 109 N. C. 349, 13 S. E. 920.

Abuse of legal process.

Cited in *Lockhart v. Bear*, 117 N. C. 304, 23 S. E. 484, holding creditor liable for arrest of debtor to force payment out of exempt property; *Dishaw v. Wadleigh*, 15 App. Div. 209, 44 N. Y. Supp. 207, holding abuse of legal process to use subpoena to compel payment rather than travel long distance; *Marlatte v. Weickgenant*, 147 Mich. 271, 110 N. W. 1061 (dissenting opinion), on abuse of process; *Pittsburgh, J. E. & E. R. Co. v. Wakefield Hardware Co.* 138 N. C. 177, 50 S. E. 571, 3 A. & E. Ann. Cas. 720, holding complaint for alleged unlawful seizure of cars need not allege termination of proceedings.

Cited in footnotes to *LeClear v. Perkins*, 26 L. R. A. 627, which holds advice of counsel admissible as defense to malicious prosecution of civil suit; *McCormick Harvesting Mach. Co. v. Willan*, 56 L. R. A. 338, which authorizes suit for malicious prosecution of civil action without restraint of person or seizure of property; *Abbott v. Thorne*, 65 L.R.A. 826, which denies right of action for malicious prosecution of civil action in which there was no arrest or attachment of property and no special injuries inflicted.

Cited in note (86 Am. St. Rep. 399, 407, 408, 409) on abuse of lawful process and liability therefor.

Accrual of action for malicious prosecution.

Cited in *Dishaw v. Wadleigh*, 15 App. Div. 211, 44 N. Y. Supp. 207, and *Lockhart v. Bear*, 117 N. C. 304, 23 S. E. 484, upholding right to maintain action for malicious prosecution without proof of termination of malicious suit; *Harr v. Ward*, 73 Ark. 440, 84 S. W. 496, holding signing bond for attachment as surety not sufficient to subject person to penalties of malicious prosecution.

Cited in footnote to *Luby v. Bennett*, 56 L. R. A. 261, which holds suit for malicious prosecution maintainable of material issues of prosecution decided in defendant's favor before suit commenced.

14 L. R. A. 393, *DEWEY v. SUGG*, 109 N. C. 328, 13 S. E. 923.

Index to records.

Cited in *Valentine v. Britton*, 127 N. C. 59, 37 S. E. 74, holding one cross-index insufficient for two judgments; *Darden v. Blount*, 126 N. C. 249, 35 S. E. 479, denying that failure to index supplementary judgment impairs lien of original judgment, rendering clerk liable; *Western Sav. Co. v. Currey*, 39 Or. 412,

87 Am. St. Rep. 660, 65 Pac. 360, holding insufficient entry of judgment in book "Judgment Lien Docket, B County;" *Redmond v. Staton*, 116 N. C. 141, 21 S. E. 186, denying that assignment of judgment includes action against clerk for failure to index judgment; *Hahn v. Mosely*, 119 N. C. 75, 25 S. E. 713, holding judgments indexed as to one of several plaintiffs sufficient notice; *Blum v. Keyser*, 8 Tex. Civ. App. 677, 28 S. W. 561, holding judgment indexed under name of one of two defendants creates lien against such one; *Wilkes v. Miller*, 156 N. C. 431, 72 S. E. 482, holding that judgments docketed but not cross-indexed do not constitute lien on land as against mortgage subsequently registered.

Cited in footnotes to *Davis v. Steeps*, 23 L. R. A. 818, which holds docket entry of judgment against Edward Davis not constructive notice of encumbrance against Edward A. Davis; *Armstrong v. Austin*, 29 L. R. A. 772, which holds failure to index mortgage on records not fatal to validity; *State v. Higgins*, 27 L. R. A. 74, which holds second initial material part of name where only initial of first name given; *Johnson v. Schlosser*, 36 L. R. A. 59, which upholds lien of judgment against bona fide purchaser, although clerk failed to enter same in docket; *Hilpipe v. Claude*, 46 L. R. A. 171, which holds sufficient, indexing adopting instrument under child's original, and also under adopted, name; *Stuyvesant v. Weil*, 53 L. R. A. 562, which holds mistake in Christian name of defendant duly served and notified that he is person intended, not prevent jurisdiction.

Cited in notes (17 L. R. A. 825) on presumption of identity of person from identity of name; (26 L. R. A. 633) on what entry or record is necessary to complete a judgment or order; (38 L. R. A. 247) on priority of judgment over conveyance made after beginning of term.

Distinguished in *Davis v. Whitaker*, 114 N. C. 281, 41 Am. St. Rep. 793, 19 S. E. 699, denying that failure of register of deeds to index deed impairs efficacy of conveyance.

14 L. R. A. 398, *BABBAGE v. POWERS*, 130 N. Y. 281, 29 N. E. 132.

Liability for holes and obstructions in street.

Cited in *Canandaigua v. Foster*, 156 N. Y. 359, 41 L. R. A. 556, footnote p. 554, 66 Am. St. Rep. 575, 50 N. E. 971, Affirming 81 Hun, 150, 30 N. Y. Supp. 686, holding lessor required to keep sidewalk in repair, though tenant has exclusive use of same; *Curran v. Flammer*, 49 App. Div. 295, 62 N. Y. Supp. 1061, denying landlord's liability for injury to subtenant's customer falling through grate of store rented by month; *Jacobs v. O'Gorman*, 13 Misc. 173, 34 N. Y. Supp. 108, denying owner, authorized to repair walk, liable as trespasser to one falling over obstruction; *Maltbie v. Bolting*, 6 Misc. 345, 26 N. Y. Supp. 903, denying liability of owner to one injured by heating barrel placed as guard over open coal hole by contractor; *Brown v. Metropolitan Street R. Co.* 60 App. Div. 187, 70 N. Y. Supp. 40, holding cable slot 2 inches wide, into which bicycle fell, nuisance rendering company liable; *Tinker v. New York, O. & W. R. Co.* 71 Hun, 435, 24 N. Y. Supp. 977, same case on later appeal in 157 N. Y. 319, 51 N. E. 1031, holding railroad company liable for fright of horse caused by deposit of timbers in highway on land owned by company; *Sautter v. Utica City Nat. Bank*, 119 App. Div. 905, 104 N. Y. Supp. 1139, affirming 45 Misc. 21, 90 N. Y. Supp. 838 (dissenting opinion) on authority of municipalities to permit encroachments upon public streets; *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 844, 109 N. Y. Supp. 249, holding construction and maintenance of portico or stoop or steps within stoop line, as approach to building, and of areaway are uses of public street which may be properly made under legislative authority; *Sanford v. White*, 80 C. C. A. 390, 150 Fed. 728, Affirming, on rehearing, a decision overruling 132 Fed. 534, holding trespass will not lie for injury caused by running

into a guy rope, placed across street by contractor authorized thereto by city; *Mixer v. Herrick*, 78 Vt. 351, 62 Atl. 1019, holding where obstruction or excavation is made with consent of municipal authorities liability rests on principles of negligence; *McKim v. Philadelphia*, 217 Pa. 249, 19 L.R.A.(N.S.) 515, 66 Atl. 340, holding city granting electric company permission to erect trolley poles in street is under duty of seeing permission is not so used as to render street unsafe; *Devine v. National Wall Paper Co.* 95 App. Div. 197, 88 N. Y. Supp. 704, holding one maintaining areaway in street by permission of municipal officers bound to use reasonable care to make highway safe for those lawfully using same; *Oppen v. Hellinger*, 116 App. Div. 266, 101 N. Y. Supp. 616, holding cellarway permitted by municipal authorities and provided with doors completely covering and protecting it does not constitute nuisance; owner liable only for negligence in connection therewith; *Friedman v. New York*, 63 Misc. 311, 116 N. Y. Supp. 750, holding boards placed on sidewalk under permit from city to place building materials in street is obstruction governed by law of negligence and not law of nuisance; *O'Hara v. Laclede Gaslight Co.* 131 Mo. App. 452, 110 S. W. 642, on non-delegation to independent contractor of responsibility for condition of street by one occupying street for private use under license; *New York Steam Co. v. Foundation Co.* 123 App. Div. 263, 108 N. Y. Supp. 84, holding permit for construction of vault in public highway, for use of abutting owner, is in nature of private revocable easement; *Mullins v. Siegel-Cooper Co.* 95 App. Div. 238, 88 N. Y. Supp. 737, holding one who while making unauthorized use of sidewalk renders it unsafe by causing stone therein to project above level of sidewalk is liable for injury resulting from such unsafe condition; *New York v. Knickerbocker Trust Co.* 104 App. Div. 228, 93 N. Y. Supp. 937, holding steps, coping and areaway in street without authority constitute nuisance; *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 61, 89 S. W. 330, holding in cause of action based on nuisance negligence is not essential element.

Cited in footnotes to *Terry v. Richmond*, 38 L. R. A. 834, which denies city's liability for injury to adjacent buildings through caving in of excavation under street made by railroad company under authority from state; *West Chicago Masonic Asso. v. Cohn*, 55 L. R. A. 235, which denies landlord's liability for injury by defective condition of coal hole in sidewalk; *Perry v. Castner*, 66 L.R.A. 160, which denies right of abutting owner even with city's consent to construct area to reach basement on sidewalk so that approach to and from it is in front of neighbor's property; *O'Hanlin v. Carter Oil Co.* 66 L.R.A. 893, which holds person maintaining steam pipe beneath highway liable for injury to child precipitated into opening on giving away of earth over such pipe and burned by steam escaping from break in pipe, although the city permitted its placing in highway.

Cited in notes (39 L.R.A. 654) on municipal power over nuisances affecting highways and waters; (16 L.R.A.(N.S.) 1038) on right of abutter to change conditions in surface of street or highway; (92 Am. St. Rep. 543) on liability of lessor for injury from vault in sidewalk constructed under license from municipality.

Distinguished in *Lane v. Syracuse*, 12 App. Div. 121, 42 N. Y. Supp. 219, holding liability of company in leaving trench open in street, question for jury; *McMillan v. Klaw & E. Constr. Co.* 107 App. Div. 411, 95 N. Y. Supp. 365, enjoining at suit of abutting owners, erection, as part of building, of structure forty-five feet high and extending into street four feet beyond building line, though authorized by ordinance.

Permission presumed by acquiescence.

Followed in *Sandmann v. Baylies*, 26 Misc. 694, 56 N. Y. Supp. 1070, holding use for many years of iron doors in walk, without complaint presumes sanction of authorities.

Cited in *Canandaigua v. Foster*, 156 N. Y. 358, 41 L. R. A. 556, footnote p. 554, 66 Am. St. Rep. 575, 50 N. E. 971, Affirming 81 Hun, 149, 30 N. Y. Supp. 686, holding acquiescence in maintenance of grate for seventeen years raises presumption of consent; *Korte v. St. Paul Trust Co.* 54 Minn. 534, 56 N. W. 246, and *Kuechenmeister v. Brown*, 13 Misc. 141, 34 N. Y. Supp. 180, holding continued use of trap door in walk to cover coal hole infers permission; *Jorgensen v. Squires*, 144 N. Y. 285, 39 N. E. 373, holding long user, without objection, presumptive evidence of authorities' consent to maintain cellar doors, without regard to ordinance; *Campion v. Rollwagen*, 43 App. Div. 121, 59 N. Y. Supp. 308, holding refusal to charge that opening in walk used for four years as coal hole charged owner with injury for maintaining nuisance, no error; *Schubkegel v. Butler*, 76 App. Div. 13, 78 N. Y. Supp. 644, holding consent to construction of ash pit under walk presumed from three years' user without objection; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 232, 35 L. R. A. 285, 45 N. E. 430, holding acquiescence for twenty years estops city to deny right of railroad company to cross highways within city limits; *Tubering v. Buffalo*, 51 App. Div. 17, 64 N. Y. Supp. 399, holding (*obiter*) use for six years of trap door to vault under walk raises presumption of municipal permission; *Mahoney v. New York*, 145 App. Div. 886, 130 N. Y. Supp. 602, holding that presumption that owner had permit for vault in street because of its existence there for fourteen years is overcome, if records do not show grant of permit; *Opper v. Hellinger*, 116 App. Div. 266, 101 N. Y. Supp. 616, on inference of permission of municipal authorities to maintain areaway opening from street where it has existed for long time.

Distinguished in *Deshong v. New York*, 176 N. Y. 482, 68 N. E. 880, Affirming 74 App. Div. 237, 77 N. Y. Supp. 563, denying recovery of money paid for permit to remodel vault constructed under walk before enactment of law necessitating permit.

Licensing nuisance.

Cited in *Indiana R. Co. v. Calvert*, 168 Ind. 328, 10 L.R.A.(N.S.) 783, 80 N. E. 961, 11 A. & E. Ann. Cas. 635, holding rule that council cannot license nuisance so as to prevent recovery by person specially damaged thereby inapplicable where council possesses legislative authority to determine rights of parties.

14 L. R. A. 403, *SMITH v. PROCTOR*, 130 N. Y. 319, 29 N. E. 312.

What constitutes majority.

Cited in *Scott v. Twombly*, 20 Misc. 654, 46 N. Y. Supp. 1084, requiring majority of taxable inhabitants to adopt proposition to issue park bonds; *Re Denny*, 156 Ind. 122, 51 L. R. A. 729, footnote p. 722, 59 N. E. 359, requiring majority of all votes cast at election for any purpose to adopt constitutional amendment; *May v. Bermel*, 20 App. Div. 58, 46 N. Y. Supp. 622, Affirming 20 Misc. 517, 45 N. Y. Supp. 913, holding majority of votes cast on town bonding proposition sufficient; *Tinkel v. Griffin*, 26 Mont. 432, 68 Pac. 859, holding favorable majority on proposition as to loan, sufficient, though less than majority voting at election; *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 638, 42 L. R. A. 742, 47 S. W. 773, holding two-thirds majority voting on proposition to aid turnpikes, sufficient; *Citizens & Taxpayers v. Williams*, 49 La. Ann. 439, 37 L. R. A. 769,

21 So. 647, defining "by vote of majority" on question tax rate, as "majority of those actually voting;" *Miller v. School Dist. No. 3*, 5 Wyo. 223, 39 Pac. 879, holding voters absent from election on bond proposition, presumed to assent to action of majority voting; *Spitzer v. Fulton*, 33 Misc. 266, 68 N. Y. Supp. 660, holding legislature may limit right of suffrage by property qualification on proposition to create debt; *State v. Fabrick*, 18 N. D. 406, 121 N. W. 65, holding that words "majority vote" mean majority of all votes cast on proposition, and not majority of all votes cast at election; *Rice v. Palmer*, 78 Ark. 453, 96 S. W. 396, as to what constitutes majority; *State ex rel. Granvold v. Porter*, 11 N. D. 319, 91 N. W. 944, holding majority of those present at political party convention competent to transact business; *Murdock v. Strange*, 99 Md. 110, 57 Atl. 628, 3 A. & E. Ann. Cas. 66, holding where city council consisting of eight members gave four votes in favor of one person for market master and three votes for another person, and there was one blank ballot, person receiving four votes was elected; *Myers v. Union League*, 17 Pa. Dist. R. 306, holding majority means majority of those voting upon question before meeting, quorum being present.

Cited in footnotes to *State ex rel. Childs v. Kiichli*, 19 L. R. A. 779, which holds president of city council removable at pleasure; *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant.

14 L. R. A. 405, *GRIFFITH v. SHIPLEY*, 74 Md. 591, 22 Atl. 1107.

Burden of proof as to bona fides.

Cited in *McCosker v. Banks*, 84 Md. 297, 35 Atl. 935, holding it incumbent upon holder to show preceding indorser took note in good faith, upon proof of fraudulent inception; *Banks v. McCosker*, 82 Md. 524, 51 Am. St. Rep. 478, 34 Atl. 539, and *Cover v. Myers*, 75 Md. 418, 32 Am. St. Rep. 394, 23 Atl. 850, holding note, fraudulent in inception, requires holder to show bona fide title; *Hazard v. Spencer*, 17 R. I. 564, 23 Atl. 729, denying recovery, holder failing to show bona fides after proof of note obtained by fraud; *Arnd v. Heckert*, 108 Md. 306, 70 Atl. 416, holding evidence that holder took note with knowledge of fraud in its obtaining and of failure of consideration sufficient to take defense of fraud to jury.

Cited in note (3 Eng. Rul. Cas. 679) on notice to banker of equitable rights.

Distinguished in *Hutchins v. Langley*, 27 App. D. C. 240, where evidence fell short of showing note obtained by fraud, or fraudulently negotiated.

Evidence of fraud as to notes.

Cited in *Stouffer v. Alford*, 114 Md. 116, 78 Atl. 387, holding that evidence of fraud in procuring acceptance of draft on which action is founded is admissible under general issue.

Cited in notes (37 Am. St. Rep. 458) on fraud in procuring delivery of negotiable instruments; (4 Eng. Rul. Cas. 435) on notice of fraud in issuance of accommodation paper by insolvent persons.

14 L. R. A. 407, *Re BUSKETT*, 106 Mo. 602, 27 Am. St. Rep. 378, 17 S. W. 753.

Exemption from self-incrimination.

Cited in *People ex rel. Lewisohn v. O'Brien*, 81 App. Div. 60, 80 N. Y. Supp. 816, holding witness not compelled to answer question whether he has been in gambling house, in criminal investigation against keeper; *Re Briggs*, 135 N. C. 121, 47 S. E. 403, sustaining statute requiring witness to testify as to unlawful gaming by himself or another.

Cited in footnotes to *State ex rel. Wood v. Hardware*, 15 L. R. A. 676, which holds individual protected from being compelled to furnish link in chain securing his conviction; *Re Carter*, 57 L. R. A. 654, which holds mere exemption from liability to have testimony used against witness in case of subsequent prosecution insufficient to prevent claim of privilege.

Cited in notes (26 L. R. A. 418) on statutory exemption from prosecution as substitute for constitutional exemption from self-incriminating evidence; (1 L.R.A.(N.S.) 167) on constitutional guaranty against self-incrimination equivalent exemption to witness; (75 Am. St. Rep. 345) on privilege of witness as to incriminating testimony; (48 L. ed. U. S. 861) on sufficiency of statutory immunity to satisfy constitutional guaranty against self-incrimination.

14 L. R. A. 410, *LOUGHEED v. DYKEMAN'S BAPTIST CHURCH & SOC.* 129 N. Y. 211, 29 N. E. 249.

Validity of gift.

Cited in *Connor v. Sheridan*, 116 Wis. 672, 93 N. W. 835, sustaining devise to son and if he is not heard from in ten years then to nephews.

— To unincorporated society.

Cited in *Wait v. Society for Political Study*, 68 Misc. 249, 123 N. Y. Supp. 637, holding that association unincorporated at time of death of testator cannot take under will although it afterward becomes incorporated.

Cited in footnotes to *Crerar v. Williams*, 21 L. R. A. 454, which holds that gift for free library not made conditional by provision for organizing corporation to administer charity; *Re Winchester*, 54 L. R. A. 281, which authorizes reception of bequest to unincorporated educational society by corporation subsequently formed by its members.

Cited in notes (32 L.R.A. 630) on validity of gift to unincorporated charity; (63 Am. St. Rep. 264) on what are charitable uses or trusts.

14 L. R. A. 414, *PARKER v. PROVIDENCE & S. S. CO.* 17 R. I. 376, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102.

Sufficiency of general allegation.

Cited in *Goldrick v. Union R. Co.* 20 R. I. 129, 37 Atl. 635, holding declaration alleging improper management of cars to injury of plaintiff, sufficient; *Ellis v. Waldron*, 19 R. I. 370, 33 Atl. 869, holding allegation that lessor owed lessee duty to maintain safe elevator, of which he had entire control, sufficient; *Miller v. Coffin*, 19 R. I. 166, 36 Atl. 6, holding declaration failing to connect company with negligent storage of acids, defective; *Wilson v. New York, N. H. & H. R. Co.* 18 R. I. 492, 29 Atl. 258, holding complaint charging negligence without setting out particular act or omission, demurrable; *Goldrick v. Union R. Co.* 20 R. I. 129, 37 Atl. 635, holding occurrence, of accident, without fault of one injured, creates presumption of company's negligence; *Bucci v. Waterman*, 25 R. I. 126, 54 Atl. 1059, holding negligence in ejecting child from a low gear vehicle not set out with sufficient definiteness; *Dalton v. Rhode Island Co.* 25 R. I. 577, 57 Atl. 383, holding in action by servant against master for negligence plaintiff should negative assumption of known risk or give excuse for continuing to work if it was known.

Cited in notes (59 L. R. A. 218, 274) on sufficiency of general allegations of negligence.

Administrator's power to compromise claim.

Cited in *Foot v. Great Northern R. Co.* 81 Minn. 495, 52 L. R. 355, footnote p. 354, 83 Am. St. Rep. 395, 84 N. W. 342, sustaining administrator's power to

compromise cause of action for death; *Pittsburgh, C. C. & St. L. R. Co. v. Gipe*, 160 Ind. 365, 65 N. E. 1034, sustaining power of administrator to compromise claim against railroad company for death of decedent; *Shambach v. Middlecreek Electric Co.* 45 Pa. Super. Ct. 303, holding that widow with minor children, who has brought action for benefit of self and children, has right to compromise and settle case; *Olston v. Oregon Water Power & R. Co.* 52 Or. 348, 20 L.R.A.(N.S.) 921, 96 Pac. 1095, holding administrator may liquidate and accept settlement of claim for unliquidated damages.

Cited in notes (70 Am. St. Rep. 685) on power of personal representative to compromise right of action for death of decedent; (78 Am. St. Rep. 187, 188) on common-law power of executor or administrator to compromise claims.

Res ipsa loquitur.

Distinguished in *Wilbur v. Rhode Island Co.* 27 R. I. 206, 61 Atl. 601, holding no presumption of negligence raised by fact that person catches shoe on running board of car, heel is torn off and person thrown.

14 L. R. A. 418, *DAKOTA SYNOD v. STATE*, 2 S. D. 366, 50 N. W. 632.

Appropriation of public funds.

Cited in footnotes to *Cutting v. Taylor*, 15 L. R. A. 691, which holds appropriation to reward fire companies complying with specified conditions not a donation; *Wasson v. Wayne County*, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; *Institution for Education of Mute & Blind v. Henderson*, 18 L. R. A. 398, which holds invalid, act for paying bounties by county treasurer; *Conlin v. San Francisco*, 21 L. R. A. 474, which holds void act for relief of street contractor; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes.

Cited in notes (14 L. R. A. 474) on public purposes for which money may be appropriated or raised by taxation; (42 L. R. A. 38, 55) on what claims constitute valid demands against a state.

— For sectarian purposes.

Cited in *Hysong v. School District*, 164 Pa. 644, 26 L. R. A. 207, footnote p. 203, 44 Am. St. Rep. 632, 30 Atl. 482, upholding employment, as public school teachers, of Roman Catholic sisters wearing distinctive garb; *Roberts v. Bradfield*, 12 App. D. C. 474, denying that erection of building by commissioner on sectarian property, for poor patients, violates Constitution.

Cited in footnotes to *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay claim for which no obligation exists; *Farmer v. St. Paul*, 33 L. R. A. 199, which denies right to select as workhouse institution under control of religious society; *Pfeiffer v. Board of Education*, 42 L. R. A. 536, which sustains use as supplemental reading book of extracts from Bible consisting mostly of moral precepts.

Cited in notes (15 L. R. A.) 826) on power to use public school moneys in support of other educational institutions; 105 Am. St. Rep. 152, 156; 16 L.R.A. (N. S.) 863) on religious exercises or instruction in public schools; (19 L.R.A. (N. S.) 172) on right to recover back public money appropriated to sectarian institution.

Self-executing constitutional provisions.

Cited in *Ex parte Show*, 4 Okla. Crim. Rep. 429, 113 Pac. 1062, to the point that constitutional provisions prohibitive in character, are self-executing; *Ex parte McNaught*, 23 Okla. 292, 1 Okla. Crim. Rep. 267, 100 Pac. 27, holding constitutional provisions prohibiting criminal prosecution of person otherwise

than by presentment or indictment or by information and requiring preliminary examination in case of prosecution for felony by information self executing.

Effect of adoption of constitution on existing laws.

Cited in *Mannie v. Hatfield*, 22 S. D. 477, 118 N. W. 817, holding that laws in force at time of adoption of constitution, not inconsistent therewith remain in force until changed by legislature.

14 L. R. A. 424, *HANGEN v. ALBINA LIGHT & WATER CO.* 21 Or. 411, 28 Pac. 244.

Compulsory service to public.

Approved in *Gordon v. Doran*, 100 Minn. 351, 8 L.R.A.(N.S.) 1053, 111 N. W. 272, enjoining water commissioners from shutting off consumer's water connection to enforce unreasonable rule.

Cited in *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 529, 41 L. R. A. 519, 67 Am. St. Rep. 739, 53 Pac. 719, holding one improving property, relying upon operation of street car line, may compel company to resume operation; *Potwin Place v. Topeka R. Co.* 51 Kan. 613, 37 Am. St. Rep. 312, 33 Pac. 309, sustaining city's right to compel street railway company to operate line in accordance with ordinance; *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 538, 66 L. R. A. 586, 58 Atl. 46, holding electric light company using streets for wires bound to supply electricity without discrimination; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 214, 11 L.R.A.(N.S.) 111, 112 N. W. 395, holding company incorporated to generate and supply electricity to public is public service corporation.

Cited in (7 Eng. Rul. Cas. 463) on right to compel public service corporation to perform its obligations and to refrain from exceeding its powers.

— By water company.

Cited in *Watauga Water Co. v. Wolfe*, 99 Tenn. 431, 63 Am. St. Rep. 841, 41 S. W. 1060; *Wiemer v. Louisville Water Co.* 130 Fed. 252, holding water company bound to supply city and inhabitants without discrimination; *Rogers Park Water Co. v. Fergus*, 178 Ill. 577, 49 L. R. A. 654, 53 N. E. 363, upholding right of consumer to compel company to furnish water at rate reduced by council; *State ex rel. Milsted v. Butte City Water Co.* 18 Mont. 206, 32 L. R. A. 699, 56 Am. St. Rep. 574, 44 Pac. 966, holding rule of water company not to supply rented premises except upon responsibility of owner, unreasonable; *Weatherly v. Capital City Water Co.* 115 Ala. 175, 22 So. 140, holding water company may be compelled to furnish water, pending settlement of its affairs; *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 334, 46 L. R. A. 516, 70 Am. St. Rep. 598, 32 S. E. 720, holding breach of contract to supply water sufficient for protection against fire, gives one damaged right to sue; *Seaton Mountain Electric Light, H. & P. Co. v. Idaho Springs Invest Co.* 49 Colo. 127, 33 L.R.A.(N.S.) 1081, 111 Pac. 834; *Leavitt v. Lassen Irrig. Co.* 157 Cal. 90, 29 L.R.A.(N.S.) 216, 106 Pac. 404,—to the point that when company undertakes to supply demand which is affected by public interest, it must supply all alike who are like situated; *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 590, 27 L.R.A.(N. S.) 676, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951, holding business of furnishing water to public affected with public use; *Woodbury v. Tampa Water Works Co.* 57 Fla. 260, 21 L.R.A.(N.S.) 1041, 49 So. 559, holding duties of company undertaking service of furnishing water for fire protection are expressed or implied by law and not merely defined by contract; *Hatch v. Consumers Co.* 17 Idaho, 214, 104 Pac. 670, holding it is duty of water company to lay pipes in street up to line of abutting property; *Independent School Dist.*

v. Le Mars City Water & Light Co. 131 Iowa, 19, 10 L.R.A.(N.S.) 863, 107 N. W. 944, holding statute granting city power to authorize private persons or corporations to construct waterworks and giving city power to fix rates by contract, impliedly makes every consumer of water thereunder privy to contract to such extent as to enable him to enforce his rights under such contract.

Cited in notes (15 L. R. A. 322) on compulsory service by party whose business it is to serve public; (61 L. R. A. 90, 108) on establishment and regulation of municipal water supply; (81 Am. St. Rep. 479, 480) on liability of water companies.

— **By gas company.**

Cited in State *ex rel.* Wood v. Consumers Gas Trust Co. 157 Ind. 352, 55 L. R. A. 248, 61 N. E. 674, holding gas company, licensed to use street, cannot refuse to furnish applicant because of insufficiency of supply; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 519, 57 L. R. A. 762, footnote p. 761, 63 N. E. 220, denying right of gas company to discriminate against single consumer by enforcing meter rate instead of flat rate; Richmond Natural Gas Co. v. Clawson, 155 Ind. 669, 51 L. R. A. 747, 58 N. E. 1049, holding rule charging users of gas for fuel and light to pay higher rate than for light alone, unreasonable; Phelan v. Boone Gas Co. 147 Iowa, 628, 31 L.R.A.(N.S.) 320, 125 N. W. 208, holding that gas company cannot require security before serving consumer merely because accounts were in good faith disputed; State *ex rel.* Deeney v. Butte Electric & Power Co. 43 Mont. 123, 115 Pac. 44, holding that corporation authorized to furnish electricity to inhabitants of city may be compelled to furnish it to all persons along its lines; Vanderberg v. Kansas City Missouri Gas Co. 126 Mo. App. 606, 105 S. W. 17, holding while gas company may refuse to supply gas for premises without contract executed by tenant in possession, it cannot refuse to furnish gas for wife because she declines to pay her husband's gas bill.

Remedy to compel service to public.

Followed in Mackin v. Portland Gas Co. 38 Or. 120, 49 L. R. A. 598, 61 Pac. 134, holding mandamus remedy to compel gas company to supply persons along line.

Cited in Crumley v. Watauga Water Co. 99 Tenn. 425, 41 S. W. 1058, holding mandamus appropriate remedy to compel water company to supply applicant; Atty. Gen. *ex rel.* Moore v. American Exp. Co. 118 Mich. 688, 77 N. W. 317, holding mandamus will lie to compel express company to transport packages; State *ex rel.* Marion v. Marion Light & Heating Co. 174 Ind. 626, 92 N. E. 731, holding that public service corporation may be compelled by mandamus to perform franchise duties; State *ex rel.* Ferguson v. Birmingham Waterworks Co. 164 Ala. 590, 27 L.R.A. (N.S.) 676, 51 So. 354, on remedy for discrimination between customers of water company; Camilla v. Norris, 134 Ga. 351, 67 S. E. 940, holding petition for mandamus to compel municipality to furnish water to petitioner, a resident, is not subject to dismissal on ground plaintiff had specific legal remedy.

Cited in notes (37 Am. St. Rep. 319) on mandamus to compel private corporation to perform duty; (125 Am. St. Rep. 513) on duties, performance of which may be compelled by mandamus.

14 L. R. A. 429, DU BOIS v. DECKER, 130 N. Y. 325, 27 Am. St. Rep. 529, 29 N. E. 313.

Liability for malpractice.

Cited in Elebach v. Weed, 29 Misc. 757, 60 N. Y. Supp. 1136, holding surgeon

responsible for negligent treatment of broken elbow; *Gerken v. Plimpton*, 62 App. Div. 38, 70 N. Y. Supp. 793, holding surgeon liable for neglect to attend patient with broken arm, resulting in union causing deformity; *Staloch v. Holm*, 100 Minn. 282, 9 L.R.A.(N.S.) 715, 111 N. W. 264, holding if surgeon waits too long before undertaking necessary amputation he may be held liable for resulting damage; *Johnson v. Winston*, 68 Neb. 431, 94 N. W. 607, holding belief as to whether operation is proper which will excuse from consequences of operation must be well founded belief acquired in exercise of due professional care and skill; *Sauers v. Smits*, 49 Wash. 561, 17 L.R.A.(N.S.) 1247, 95 Pac. 1097, holding patient not prevented from recovering for malpractice because subsequent or independent act of negligence on patient's part increases or augments injury caused by negligence or incompetency of physician.

Cited in footnotes to *Myers v. Holburn*, 30 L. R. A. 345, which denies liability of physician for negligence or unskilfulness of other physician sent in former's place; *Maguire v. Sheehan*, 59 L. R. A. 496, which sustains liability for entire injury through negligence, though shock brought on delirium tremens retarding recovery; *Texas & P. R. Co. v. White*, 62 L.R.A. 90, which denies liability for aggravation of personal injuries due to failure to obtain needed medical or surgical assistance.

Cited in notes (23 L. R. A. 201) on liability of charitable institution for negligence; (37 L. R. A. 832) on degree of care and skill which physicians or surgeons must exercise; (49 L. R. A. 829) on obeying or disobeying physician as affecting remedy of injured person against one who injured him; (17 L.R.A.(N.S.) 1245) on patient's negligence or failure to follow instructions as affecting liability for malpractice; (93 Am. St. Rep. 659, 663) on liability of physicians and surgeons for negligence and malpractice.

Tort in connection with contract.

Distinguished in *German Alliance Ins. Co. v. Home Water Supply Co.* 99 C. C. A. 258, 174 Fed. 769, holding water company not liable in contract or tort to property owner whose property is burned by reason of company's failure to supply sufficient water at pressure great enough to extinguish fire.

14 L. R. A. 431, *BLACKWELL v. MIAMI VALLEY INS. CO.* 48 Ohio St. 533, 29 Am. St. Rep. 574, 29 N. E. 278.

Sale of part interest as affecting policy.

Cited in *Queen Ins. Co. v. Leonard*, 9 Ohio C. C. 53, holding violation of warranty in policy of transfer of interest, renders policy voidable; *Mitchell v. Aetna Ins. Co.* 4 Ohio N. P. 389, holding right of mortgagees to recover on policy, issued to mortgagor by mistake, who conveyed after delivery of policy; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 563, 30 L. R. A. 720, 53 Am. St. Rep. 658, 42 N. E. 546, holding warranties in policy issued to husband and wife on farm implements of former and house of latter, construed in popular, not technical, sense; *Sun Fire Office v. Fraser*, 5 Kan. App. 66, 47 Pac. 327, holding policy not avoided by delivery on transferring note and mortgage; *Phenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 848, 25 L. R. A. 686, 60 N. W. 133, holding trust company, assigning mortgage securing debt which it guaranteed, retains insurable interest; *Ohio Farmers' Ins. Co. v. Black*, 6 Ohio C. C. N. S. 133, 27 Ohio C. C. 87, holding trust deed to pay off incumbrances, residue to be returned to insured, a conveyance in violation of policy.

Cited in footnote to *Clinton v. Norfolk Mutual F. Ins. Co.* 50 L. R. A. 833, which holds insurance on house not forfeited by conveyance of all interest of insured except life estate in house.

Cited in notes (18 L. R. A. 483) on how far undivided interest in property is a complete or full ownership for purposes of insurance; (21 L.R.A.(N.S.) 445) on formation of partnership or change in personnel of firm as affecting change of title or ownership within provision of policy.

Acts or omissions generally working forfeiture of insurance policy.

Cited in *Swander v. Northern Cent. L. Ins. Co.* 1 Ohio C. C. N. S. 238, 25 Ohio C. C. 7, holding where there is no clause of forfeiture in policy failure to pay premiums will only work suspension until such length of time has passed as shows absence of intention of party to pay practical withdrawal.

14 L. R. A. 433, *BALLOU v. EARLE*, 17 R. I. 441, 33 Am. St. Rep. 81, 22 Atl. 1113.

Limitation of carrier's liability.

Cited in *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 191, 34 S. W. 41, Affirming 68 Mo. App. 272, holding stipulation limiting carrier's liability to sum stated, not construed as exempting from damages for negligence; *Calderon v. Atlas S. S. Co.* 170 U. S. 279, 42 L. ed. 1035, 18 Sup. Ct. Rep. 588, holding receipt freeing carrier from liability above stated sum for loss of goods, prohibited by Harter Act; *Graves v. Adams Exp. Co.* 176 Mass. 282, 57 N. E. 462, denying company's liability for full value of paintings, receipt accepted limiting liability, stamped "value asked and not given;" *Smith v. American Exp. Co.* 108 Mich. 577, 66 N. W. 479, holding receipt limiting express company's liability for article of undisclosed value, fixes limit of recovery; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 158, 56 L. R. A. 249, footnote, p. 246, 88 Am. St. Rep. 949, 88 N. W. 41, sustaining carrier's right to secure entire exemption from liability as insurer for loss, not due to negligence; *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding company liable for failure to transmit message correctly, regardless of agreement on back; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 610, 94 Am. St. Rep. 279, 63 N. E. 245, holding acceptance of unsigned receipt from express company limiting liability, binding; *George N. Pierce Co. v. Wells Fargo & Co.* 110 C. C. A. 645, 189 Fed. 564, holding that carrier may stipulate for limitation of amount he will be liable for in case of loss, in consideration of reduced rates; *M. M. Stone & Co. v. Postal Teleg. Co.* 31 R. I. 182, 29 L.R.A.(N.S.) 798, 76 Atl. 762, holding that telegraph company may contract for limitation of liability for delay in transmission of message.

Cited in footnotes to *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, which holds statement as to value inserted in bill of lading conclusive; *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, which holds carrier entitled to limit liability to value of horse as fixed; *Alair v. Northern P. R. Co.* 19 L. R. A. 764, which upholds carrier's right to fix value of live stock lost by negligence; *Willock v. Pennsylvania R. Co.* 27 L. R. A. 228, which holds carrier not protected against own negligence by requirement that shipper shall insure for carrier's benefit; *Shackt v. Illinois C. R. Co.* 28 L. R. A. 176, which holds carrier relieved from liability by fraud in shipping valuable goods as "household goods;" *J. J. Douglass Co. v. Minnesota Transfer R. Co.* 30 L. R. A. 860, which sustains stipulation as condition of making lower freight rate for adjusting loss at specified valuation; *United States Exp. Co. v. Koerner*, 33 L. R. A. 600, which denies right of express company to additional compensation because value of package carried exceeded amount represented; *Ohio & M. R. Co. v. Taber*, 34 L. R. A. 685, which holds invalid, stipulation limiting value of animals carried, and as to time of notice of injury; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for wet; *Rosenthal*

v. Weir, 57 L. R. A. 527, which holds failure to comply with agreement for stoppage *in transitu* not within contract limiting liability to specified amount; Parker v. Atlantic Coast Line R. Co. 63 L.R.A. 827, which denies right of carrier to contract for exemption from liability for injury by delay due to its own negligence; Bosley v. Baltimore & O. R. Co. 66 L.R.A. 871, which denies right of carrier of live stock to exempt itself from liability for loss by delay in transportation occasioned by its negligence or misfeasance by contract providing that shipper shall accept as full compensation in case of unusual detention amount actually expended in purchase of food and water while so detained.

Cited in notes (18 L. R. A. 528) on right of common carrier to limit common-law liability by contract in absence of negligence; (1 L.R.A.(N.S.) 986) on limiting valuation of property as affecting amount of recovery for loss by carrier's negligence; (88 Am. St. Rep. 82, 86, 97, 107, 110) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 347) on special limitations of liability of carrier.

Failure to read contract as defense.

Cited in Rozen v. Dry Dock, E. B. & B. R. Co. 7 Misc. 132, 27 N. Y. Supp. 337, holding failure of conductor to read contract of employment, no defense against provisions.

14 L. R. A. 438, WESTERN & A. R. CO. v. STATE (Ga.)

Liability of state for interest.

Cited in Flint & P. M. R. Co. v. State Auditors, 102 Mich. 502, 60 N. W. 773, holding state not liable for interest on bill of costs.

Cited in note (42 L. R. A. 38, 40, 62) on what constitutes valid claims against state.

14 L. R. A. 459, STEVENSON v. COLGAN, 91 Cal. 649, 25 Am. St. Rep. 230, 27 Pac. 1089.

Extrinsic evidence as to validity of act.

Cited in Yolo County v. Colgan, 132 Cal. 270, 84 Am. St. Rep. 41, 64 Pac. 403, denying right to impeach validity of statute by resort to legislative journal; Fragley v. Phelan, 126 Cal. 403, 58 Pac. 923, holding adoption by legislature of city charter as law, conclusive as to existence of requisite facts; Conlin v. San Francisco, 99 Cal. 20, 21 L. R. A. 476, 37 Am. St. Rep. 17, 33 Pac. 753, sustaining demurrer to answer setting forth matters as basis for legislative action; State *ex rel.* Cheyenne v. Swan, 7 Wyo. 177, 40 L. R. A. 198, 75 Am. St. Rep. 889, 51 Pac. 209, holding court has authority to examine legislative journals to determine validity of passage of disputed act; Lee v. Tucker, 130 Ga. 48, 60 S. E. 164; Smith v. Mathews, 155 Cal. 756, 103 Pac. 199,—on presumption that governor and legislature have ascertained existence of fact before passing statute right to pass which depends on existence of fact; People *ex rel.* Chapman v. Sacramento Drainage Dist. 155 Cal. 386, 103 Pac. 207, holding where legislature itself creates reclamation district and its decision is dependent on question of fact it is conclusively presumed legislature took evidence in the determination.

Cited in footnotes to Waterloo Woolen Mfg. Co. v. Shanahan, 14 L. R. A. 481, which holds legislative statement as to purpose of appropriation bill conclusive on court; Stockton v. Powell, 15 L. R. A. 42, which holds courts without power to inquire as to notice of application to legislature for local legislation; State v. Womble, 19 L. R. A. 827, which holds exemption of railroad employees from road duty not special privilege; People v. Dettenthaler, 44 L. R. A. 164, which

holds bill in which enacting clause added without authority by clerk of one branch of legislature, void.

Cited in notes (23 L. R. A. 347) on conclusiveness of enrolled bill; (47 L. R. A. 519) on unconstitutionality of statute as defense against mandamus to compel its enforcement.

Legislative control of public property.

Cited in *Crockett v. Mathews*, 157 Cal. 157, 106 Pac. 575, holding that courts have no right to review determination of legislature to change from fee to salary system of compensation for officers, where it is not disclosed whether increase in compensation is produced; *Patty v. Colgan*, 97 Cal. 252, 18 L.R.A. 745, 31 Pac. 1133, holding appropriation for benefit of flood sufferers violates constitutional provision against making gift of public property to individual.

Distinguished in *Conlin v. San Francisco*, 114 Cal. 407, 33 L.R.A. 753, 46 Pac. 279, where question was as to power of legislature to deal with moneys in treasury of municipal corporation.

14 L. R. A. 462, *HIGHLAND AVE. & BELT R. CO. v. MATTHEWS*, 99 Ala. 24, 10 So. 267.

Action at law for injury to property.

Cited in *Dennis v. Mobile & M. R. Co.* 137 Ala. 657, 97 Am. St. Rep. 69, 35 So. 30, holding that action at law affords adequate remedy for injury to property for hotel purposes from construction of depot.

Continuing injury.

Cited in *Williams v. Southern P. R. Co.* 150 Cal. 627, 89 Pac. 599, holding injury due to construction and operation of steam railroad is continuing and action must be commenced within statutory period after original infliction of injury; *Virginia Hot Springs Co. v. McCray*, 106 Va. 472, 10 L.R.A.(N.S.) 470, 56 S. E. 216, 10 A. & E. Ann. Cas. 179, on remedies for continuing injuries.

Cited in note (128 Am. St. Rep. 960, 962, as to when nuisance will support only one recovery and when it may support several.

Injunction against injury to easement.

Cited in *Western R. Co. v. Alabama G. T. R. Co.* 96 Ala. 282, 17 L. R. A. 482, 11 So. 483, holding equity will not enjoin construction of railroad in highway in favor of another; *Mobile & M. R. Co. v. Alabama Midland R. Co.* 116 Ala. 61, 23 So. 57, denying injunction restraining construction of railroad working no injury to abutter; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 135, 24 So. 368, denying right of railway company to cross another's right of way without compensation; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 140, 43 L.R.A. 234, 24 So. 502, denying injunctive relief against trespass by railway company, without authority to extend line; *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.* 119 Ala. 152, 24 So. 731, sustaining injunction against injury to telephone system by erection of trolley wires so as to touch; *Southern R. Co. v. Hood*, 126 Ala. 316, 85 Am. St. Rep. 32, 28 So. 662, denying railroad company's right to enjoin ejection without making compensation for land taken; *Montgomery Light & Water P. Co. v. Citizen's Light, Heat & P. Co.* 147 Ala. 364, 40 So. 981, dissolving preliminary injunction to restrain light company from stringing wires on pole of another company where compensation due latter was fixed by city electrician under ordinance and refused by company.

Cited in footnote to *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders from railroad.

Demurrer for remoteness of damages.

Cited in *Treadwell v. Tillis*, 108 Ala. 263, 18 So. 886, denying objection to remoteness of damages raised by demurrer, when complaint states cause of action.

Action in trespass passing with grant.

Cited in *Huntsville v. Ewing*, 116 Ala. 582, 22 So. 984, denying that action against city for digging ditch passes to subsequent grantee.

Damages recoverable for injury to or taking of realty.

Cited in *Meighan v. Birmingham Terminal Co.* 165 Ala. 603, 51 So. 775, holding that measure of damages for closing street is difference between market value of property before and after obstruction; *Sloss-Sheffield Steel & I. Co. v. Mitchell*, 161 Ala. 287, 49 So. 851, holding damages for depreciation in market value of premises not recoverable where nuisance complained of is abatable and remediable.

Cited in footnote to *Suffolk & C. R. Co. v. West End L. & I. Co.* 68 L.R.A. 333, which holds value of land taken together with damage to abutting lots measure of compensation on condemnation by railroad company of street for right of way.

Cited in notes (28 L.R.A.(N.S.) 969) on right of one whose property taken for public use without consent or condemnation, to maintain action for compensation or permanent damages; (36 L.R.A.(N.S.) 764, 785) on abutter's right to compensation for railroads in streets.

Distinguished in *Enterprise Lumber Co. v. Porter*, 155 Ala. 429, 46 So. 773, holding abutting owner entitled to damages for injury to his property by changing grade, whether he owns fee in street or not; also that in assessing damages to property not taken, measure is difference between actual market value before and after work is done.

14 L. R. A. 466, *McQUIGAN v. DELAWARE, L. & W. R. CO.* 129 N. Y. 50, 41 N. Y. S. R. 382, 21 N. Y. Civ. Proc. Rep. 396, 26 Am. St. Rep. 507, 29 N. E. 235.

Compelling submission to inspection.

Cited in *Syracuse v. Glenside Woolen Mills*, 73 Hun, 424, 26 N. Y. Supp. 429, denying courts power to grant right to inspect buildings not condemned to acquire evidence on assessment of damages; *Auerbach v. Delaware, L. & W. R. Co.* 66 App. Div. 202, 73 N. Y. Supp. 118, denying power of court to compel production of parts of boiler alleged as causing injury.

Cited in note (41 Am. St. Rep. 388, 389, 394) on power to compel party to produce boxes and papers as evidence on examination of adversary.

— Physical examination.

Followed in *Cole v. Fall Brook Coal Co.* 159 N. Y. 69, 53 N. E. 670, Affirming 87 Hun, 590, 34 N. Y. Supp. 572, holding prior to amendment to Civ. Code, § 873, courts could not compel submission to physical examination.

Cited in *Lyon v. Manhattan R. Co.* 142 N. Y. 302, 25 L. R. A. 404, footnote p. 402, 37 N. E. 113, denying power to authorize official examination of plaintiff as independent proceeding; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 232, 33 N. E. 951, and *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 157, 52 L. R. A. 329, footnote p. 328, 83 Am. St. Rep. 269, 58 N. E. 686, denying power of court to compel plaintiff to submit to physical examination; *Neill v. Brooklyn Elev. R. Co.* 13 Misc. 404, 34 N. Y. Supp. 1144, holding plaintiff in action for personal injuries cannot be compelled to exhibit injuries to jury; *People ex rel. Mosher v. Roosa*, 43 App. Div. 612, 60 N. Y. Supp. 244, denying policeman required to submit to physical examination in mandamus proceedings to determine right to

position; *Sewell v. Butler*, 16 App. Div. 79, 44 N. Y. Supp. 1074, compelling plaintiff under Civ. Code, § 873, to submit to physical examination in action for personal injuries; *Anonymous*, 34 Misc. 110, 69 N. Y. Supp. 547, holding court may compel husband to submit to physical examination in suit to annul marriage to enable wife to establish existence of disease; *Cahn v. Cahn*, 21 Misc. 507, 48 N. Y. Supp. 173, holding court may compel husband to submit to examination as to physical ability; *Ottawa v. Gilliland*, 63 Kan. 167, 88 Am. St. Rep. 232, 65 Pac. 252; *McGovern v. Hope*, 63 N. J. L. 79, 42 Atl. 830; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 135, 46 L. R. A. 159, footnote p. 153, 75 Am. St. Rep. 821, 57 Pac. 367,—sustaining power of court to order physical examination of woman, in action for personal injuries; *Green v. Middlesex R. Co.* 10 Misc. 475, 32 N. Y. Supp. 177, holding affidavit stating nature of action, ignorance of nature and extent if injury, sufficient to obtain order for examination; *Austin & N. W. R. Co. v. Cluck*, 97 Tex. 177, 64 L.R.A. 497, footnote p. 494, 77 S. W. 403, denying court's power, in absence of statute, to compel physical examination of plaintiff in negligence case; *Chicago, R. I. & T. R. Co. v. Langston*, 19 Tex. Civ. App. 579, 47 S. W. 1027 (dissenting opinion), majority upholding right of company to examine plaintiff, who exhibited wounded limbs to jury; *Hall v. Manson*, 99 Iowa, 715, 34 L. R. A. 214, 68 N. W. 922 (dissenting opinion), majority holding refusal of court to take disputed measurement in presence of jury, plaintiff not objecting, error; *Joliet Street R. Co. v. Call*, 143 Ill. 182, 32 N. E. 389, holding court without power to require plaintiff to submit to physical examination; *Mutual L. Ins. Co. v. Griesa*, 156 Fed. 403, on power of court to order physical examination of person; *Cedartown v. Brooks*, 2 Ga. App. 591, 59 S. E. 836 (dissenting opinion), on compelling plaintiff in action for personal injuries to submit to physical examination; *May v. Northern P. R. Co.* 32 Mont. 528, 70 L.R.A. 114, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, holding court cannot, in absence of legislation, compel plaintiff in action for personal injuries to submit to physical examination; *Goldenberg v. Zirinsky*, 114 App. Div. 828, 100 N. Y. Supp. 251, holding power of court to direct physical examination is derived wholly from statute; *People ex rel. Gow v. Bingham*, 57 Misc. 69, 107 N. Y. Supp. 1011, holding it unlawful for police to compel person charged with crime by grand jury to submit to having his photograph taken and measurements and imprints made under Bertillon system; *Moore v. Reinhardt*, 136 App. Div. 619, 121 N. Y. Supp. 205, reversing order directing appointment of physician to examine defendant and report upon his physical ability to be present at examination before trial.

Cited in footnotes to *Bagwell v. Atlanta Consol. Street R. Co.* 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal after attaining majority to submit to physical examination; *Wittenberg v. Onsgard*, 47 L. R. A. 141, which denied application to compel plaintiff to submit his neck to be photographed by X-Ray; *O'Brien v. La Crosse*, 40 L. R. A. 831, which denies power of court to order examination as to condition of plaintiff's bladder under evidence that it might be dangerous; *Graves v. Battle Creek*, 19 L. R. A. 641, which holds court may compel exhibition of injured arm to physician during trial; *Wanek v. Winona*, 46 L. R. A. 448, which sustains court's power to order physical examination of plaintiff under penalty of dismissal of action; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 36 L. R. A. 681, which holds production of plaintiff's urine for examination should be required where claim of disease of urine made; *State v. Height*, 59 L. R. A. 437, which holds unlawful, disclosure by physicians of knowledge as to venereal disease obtained by examination against his will of one accused of rape; *Achison, T. & S. F. R. Co. v. Palmer*, 64 L. R. A. 90, which holds that physical examination of eye involving use of

drugs should be granted in action for physical injury; *Austin & N. W. R. Co. v. Cluck*, 64 L.R.A. 494, which denies power of court in absence of statute to require the plaintiff in an action for personal injuries to submit to an examination of his person; *May v. Northern P. R. Co.* 70 L.R.A. 111, which denies judicial power at common law to compel plaintiff to submit to physical examination.

Cited in notes (2 L.R.A.(N.S.) 387) on waiver of right to object to physical examination or exhibition of person; (23 L.R.A.(N.S.) 463, 465) on power to compel physical examination; (68 Am. St. Rep. 242, 246) on physical examination of parties by order of court.

— Voluntary exhibition.

Cited in *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 37, 58 S. W. 278, holding plaintiff may exhibit injured limb to jury in action for injuries.

Distinguished in *Winner v. Lathrop*, 67 Hun, 514, 22 N. Y. Supp. 516, holding one submitting injured wrist to examination of jury must allow defendant's inspection of same.

Right of action to vacate assessment.

Cited in *J. & A. McKechnie Brewing Co. v. Canandaigua*, 15 App. Div. 153, 78 N. Y. S. R. 326, 44 N. Y. Supp. 317 (dissenting opinion), majority holding property owner may sue to vacate assessment for sewer construction.

Judicial discretion.

Cited in *Re Ingalls Bros.* 70 C. C. A. 101, 137 Fed. 520, on judicial discretion.

14 L. R. A. 470, *CARTIER v. TROY LUMBER CO.* 138 Ill. 533, 28 N. E. 932.

Presumption from failure to produce evidence.

Cited in *Princeville v. Hitchcock*, 101 Ill. App. 591, holding refusal of defendant to testify in own behalf raises no inference of unfavorable evidence; *Rossiter v. Boley*, 13 S. D. 375, 83 N. W. 428, holding instruction that jury may infer damaging evidence from failure to produce receipts in action for debt, error, when notice to produce not served; *Western & A. R. Co. v. Morrison*, 102 Ga. 331, 40 L. R. A. 88, 66 Am. St. Rep. 173, 29 S. E. 104 (dissenting opinion), majority holding inference of prejudicial testimony drawn from failure of company to examine as witness, employee who saw disputed occurrence; *Lowe v. Donnelly*, 36 Colo. 296, 85 Pac. 318, holding instruction in action of replevin for mare that if jury believed mare was removed from jurisdiction of court so as to make her identification impossible they might infer that her production would be unfavorable to defendants erroneous where there was no evidence to show such purpose in her removal; *St. Louis v. R.* 25 Can. S. C. 682, holding litigant who had destroyed books and papers not to be deemed spoliator under circumstances of case.

Cited in note (34 L. R. A. 582) on presumption against destroyer of evidence.

Charge indicating court's views.

Cited in *Preston v. Moline Wagon Co.* 44 Ill. App. 343, holding instruction indicating views of court constitutes reversible error; *Miller v. People*, 229 Ill. 383, 82 N. E. 391, disapproving an instruction on possession of recently stolen goods which assumed the fact of such possession and the inadequacy of explanation.

14 L. R. A. 474, *DAGGETT v. COLGAN*, 92 Cal. 58, 27 Am. St. Rep. 95, 28 Pac. 51.

Appropriation of public funds.

Cited in footnotes to *Conlin v. San Francisco*, 33 L. R. A. 752, which denies legislative right to direct use of city money to pay claim based on merely moral obligation; *Edgerton v. Goldsboro Water Co.* 48 L. R. A. 444, which holds cost of pro-

viding water for city authorized by charter not a "necessary expense;" *Cutting v. Taylor*, 15 L. R. A. 691, which holds appropriation to reward fire companies complying with specified conditions not a donation; *Knowlton v. Williams*, 47 L. R. A. 314, which holds statutory restriction of height of buildings adjacent to public square for promotion of its beauty and attractiveness to be for a public purpose; *Carter v. Thorson*, 24 L. R. A. 734, which upholds legislative power to incur indebtedness for public printing without prior appropriation; *People ex rel. Einsfeld v. Murray*, 32 L. R. A. 344, which holds valid excise law graduating according to population of cities excise taxes which are divided between cities and state; *Baltimore & E. S. R. Co. v. Spring*, 27 L. R. A. 72, which denies right to issue county bonds in aid of railroad in receivers' hands, with provision for first paying claims due residents of county; *Re Stanford*, 45 L. R. A. 788, which holds statute exempting certain persons from liability for inheritance tax invalid; *Wasson v. Wayne County*, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; *State ex rel. Crow v. St. Louis*, 61 L. R. A. 593, which sustains city's right to reimburse policeman amount of judgment collected from him for shooting bystander while attempting to shoot mad steer on street; *Chapman v. New York*, 56 L. R. A. 846, which denies city's power to issue necessary expenses previously incurred by city officer in defending charge of official misconduct; *State ex rel. Custer County Agri. Soc. v. Robinson*, 17 L. R. A. 383, which holds legislature empowered to determine purposes authorizing taxation; *Owensboro v. Com.* 44 L. R. A. 202, which holds public parks and fire department buildings and appliances exempt from taxation; *Manning v. Devil's Lake*, 65 L.R.A. 187, which holds that city cannot impose taxes to raise funds to pay for a bridge outside the city boundaries; *Moorhead v. Murphy*, 68 L.R.A. 400, which sustains power of municipality to reimburse police officer for expenses and attorneys' fees in defending action for false imprisonment.

Cited in notes (18 L. R. A. 544) on protection of private rights from interference by public; (42 L. R. A. 36, 72) on what claims constitute valid demands against a state.

— **For educational and charitable purposes.**

Cited in *Shelby County v. Tennessee Centennial Exposition Co.* 96 Tenn. 662, 33 L. R. A. 719, footnote p. 717, 36 S. W. 694, holding exhibition of county resources at state exposition, county purpose; *State ex rel. Douglas County v. Cornell*, 53 Neb. 563, 39 L. R. A. 516, footnote p. 513, 68 Am. St. Rep. 629, 74 N. W. 59, sustaining as for public purpose, county exhibit at interstate fair; *Melvin v. State*, 121 Cal. 22, 53 Pac. 416, holding authority implied to charge admission fee to state fair, under statute providing for annual fair; *Minneapolis v. Janney*, 86 Minn. 119, 90 N. W. 312, holding taxation, resulting from donation of land for exposition purposes, not used for private enterprise; *Leatherwood v. Hill*, 10 Ariz. 247, 89 Pac. 521, sustaining appropriation for historical society; *Board of Directors v. Nye*, 8 Cal. App. 544, 97 Pac. 208, sustaining appropriation for Woman's Relief Corps Home Association; *Hager v. Kentucky Children's Home Soc.* 119 Ky. 245, 67 L.R.A. 818, 83 S. W. 605, sustaining appropriation for society to seek out destitute children and provide homes for them; *Kentucky Live Stock Breeders' Asso. v. Hager*, 120 Ky. 133, 85 S. W. 738, 9 A. & E. Ann. Cas. 50, holding state fair is public purpose for which legislature may appropriate money of state.

Cited in footnotes to *Bourn v. Hart*, 15 L. R. A. 431, which holds payment of claim for injuries to person in employ of state for which it is not liable a "gift;" *Norman v. Kentucky Bd. of Managers*, 18 L. R. A. 556, which holds for public purpose appropriation for exhibit at Columbian Exposition; *Patty v. Colgan*, 18 L. R. A. 744, which holds appropriation for sufferers from flood illegal; *Conlin*

v. San Francisco, 21 L. R. A. 474, which holds void act for relief of street contractor; Marion Twp. v. State, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay claim for which no obligation exists; Baltimore v. Keeley Institute, 27 L. R. A. 646, which holds valid act authorizing treatment of habitual drunkard at expense of county or city of residence; *Re House*, 33 L. R. A. 832, which sustains right to use county funds to pay for cure of indigent inebriates in private establishment; Lund v. Chippewa County, 34 L. R. A. 131, which sustains donation by county to secure site for state institution for feeble minded; Wisconsin Keeley Institute Co. v. Milwaukee County, 36 L. R. A. 55, which holds invalid, statute for treatment of habitual drunkards at private institution at county expense; Bush v. Orange County, 45 L. R. A. 556, which holds void, statute authorizing counties to raise by taxation money to pay drafted men or their heirs; Allen v. State Auditors, 47 L. R. A. 117, which denies right to appropriate public money to pay pardoned convict for alleged wrongful imprisonment; Opinion of Justices, 49 L. R. A. 564, which holds legislative right to appropriate money for widow, heirs, etc., of deceased officer dependent on whether public good will be served; State *ex rel.* New Richmond v. Davidson, 58 L. R. A. 739, which sustains appropriation by legislature to pay city debt for burying dead, removing debris, and caring for injured and homeless; Hager v. Kentucky Childrens' Home Soc. 67 L.R.A. 815, which upholds appropriation of public money for care of destitute children.

Cited in note (7 L.R.A.(N.S.) 1198) on validity of statute providing for assistance of individual members of certain classes of unfortunate or afflicted persons.

— **To conduct or promote business.**

Cited in Denning v. State, 123 Cal. 322, 55 Pac. 1000, denying that collection of tolls by government harbor commissioners converts same into business enterprise.

Cited in footnotes to Waterloo Woolen Mfg. Co. v. Shanahan, 14 L. R. A. 481, which authorizes appropriation to enlarge private mill race for extension of navigation; Stockton v. Powell, 15 L. R. A. 42, which holds improvement of navigation within county a county purpose; Opinion of Justices, 15 L. R. A. 809, which holds purchase of fuel by municipality and resold to inhabitants not a public purpose; *Re Clark*, 19 L. R. A. 138, which holds suit maintainable to compel investment of taxes from railroads in sinking fund to pay railroad aid bonds; Rippe v. Becker, 22 L. R. A. 857, which denies power of state to own and operate grain elevator; Lancey v. King County, 34 L. R. A. 817, which authorizes county indebtedness for public canal through county to connect large public waterways with ocean; Sun Print. & Pub. Asso. v. New York, 37 L. R. A. 788, which holds rapid-transit railway in city streets a highway for which indebtedness may be incurred; Pritchard v. Magoun, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes toll bridge owned by private corporation; Oren *ex rel.* Barbour v. Pingree, 46 L. R. A. 407, which holds void, statute empowering city to purchase and operate street railways; Dodge v. Mission Twp. 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation.

Cited in note (31 L.R.A.(N.S.) 117) on right of municipality to engage in enterprises of private character.

— **For bounties.**

Cited in footnotes to Deal v. Mississippi County, 14 L. R. A. 622, which holds tree-planting bounties valid; Institution for Education of Mute & Blind v. Henderson, 18 L. R. A. 398, which holds invalid, act for paying bounties by coun-

ty treasurer; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *Michigan Sugar Co. v. Dix*, 56 L. R. A. 329, which holds beet sugar bounty unconstitutional.

What is public purpose or use.

Cited in *Sisson v. Buena Vista County*, 128 Iowa, 454, 70 L.R.A. 445, 104 N. W. 454, holding drainage of surface waters from agricultural lands is public use; *McGlone v. Womack*, 129 Ky. 288, 17 L.R.A.(N.S.) 860, 111 S. W. 688, suggesting that act imposing tax on dogs to provide fund to pay for sheep killed by dogs may be sustained as levying tax for public purpose.

14 L. R. A. 481, *WATERLOO WOOLEN MFG. CO. v. SHANAHAN*, 128 N. Y. 345, 40 N. Y. S. R. 95, 28 N. E. 358.

Extrinsic evidence as to constitutionality of statute or ordinance.

Cited in *Kittinger v. Buffalo Traction Co.* 160 N. Y. 389, 54 N. E. 1081, refusing to inquire into motives inducing common council to grant rights to traction company; *State ex rel. Rose v. Superior Court*, 105 Wis. 677, 48 L. R. A. 829, 81 N. W. 1046, refusing to supervise passage of ordinance creating contract between city and street railway company; *Stevenson v. Colgan*, 91 Cal. 653, 14 L. R. A. 462, 25 Am. St. Rep. 230, 27 Pac. 1089, holding courts must confine attention to facts appearing on face of act when assailing same; *Lehigh Valley R. Co. v. Canal Board*, 69 Misc. 264, 125 N. Y. Supp. 227, to the point that court cannot determine upon testimony of witnesses that purpose of legislature was to appropriate money for individual, when it has expressed its purpose in bill to be for improvement of canal; *Metz v. Maddox*, 121 App. Div. 158, 105 N. Y. Supp. 702, on limiting investigation to statute itself, circumstances leading to its passage and its purpose in determining whether it is local; *Rochester v. Gray*, 60 Misc. 594, 112 N. Y. Supp. 774, on not going behind language of act to seek out purpose not disclosed on its face; *Henderson v. Lexington*, 132 Ky. 407, 22 L.R.A.(N.S.) 36, 111 S. W. 318, refusing to inquire into motives of city council in closing alley.

Statutes assailed as local.

Cited in *People ex rel. Mitchell v. Sturges*, 156 N. Y. 584, 51 N. E. 295, Affirming 27 App. Div. 390, 50 N. Y. Supp. 5, upholding abridgment of term of president of village as incident of abolition of office by amendment of charter; *People ex rel. Burby v. Howland*, 155 N. Y. 290, 41 L. R. A. 845, 49 N. E. 775 (dissenting opinion), majority declaring unconstitutional, act excluding justices of the peace of single town from criminal jurisdiction; *Re Henneberger*, 155 N. Y. 435, 42 L. R. A. 137, 50 N. E. 61 (dissenting opinion), majority holding laws providing for widening highways outside of certain incorporated villages, violate constitution; *Swikehard v. Michels*, 81 Hun. 329, 8 Misc. 571, 29 N. Y. Supp. 777, holding legislature may provide for drainage of thickly settled land partly outside of city; *Smithsonian Institution v. St. John*, 214 U. S. 31, 53 L. ed. 899, 29 Sup. Ct. Rep. 601. (Dismissing writ of error to 191 N. Y. 270, 83 N. E. 981, 14 Ann. Cas. 708, 192 N. Y. 382, 583, 85 N. E. 143, 1115, on what constitutes special legislation.

Who may question validity of statute.

Cited in *Board of Education v. Board of Education*, 76 App. Div. 358, 78 N. Y. Supp. 522, denying right of board of education to maintain action to have statute dividing district declared void.

Purposes for which public funds may be raised.

Cited in footnotes to *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay

claim for which no obligation exists; *Institution for Education of Mute & Blind v. Henderson*, 18 L. R. A. 398, which holds invalid, act for paying bounties by county treasurer; *Conlin v. San Francisco*, 21 L. R. A. 474, which holds void, act for relief of street contractor; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation; *Wasson v. Wayne County*, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; *Cutting v. Taylor*, 15 L. R. A. 691, which holds appropriation to reward fire companies complying with specified conditions not a donation; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes toll bridge owned by private corporation; *People ex rel. Einsfeld v. Murray*, 32 L. R. A. 344, which holds valid, excise law graduating according to population of cities excise taxes which are divided between cities and state.

Adverse possession against state.

Followed in *Fulton Light, Heat & P. Co. v. New York*, 200 N. Y. 422, 37 L.R.A. (N.S.) 322, 94 N. E. 199, holding that, as against state, no title to river can be obtained through private use, whether adverse or by permission, however long continued, or by prescriptive right.

Right to improve navigability of stream.

Cited in note (67 L.R.A. 823) on right to improve navigability of stream.

Injunction against acts of public officers.

Cited in note (8 L.R.A.(N.S.) 127) on injunction to restrain actions of public boards under void statutes.

Taking private property for public use.

Cited in *Ontario Knitting Co. v. State*, 69 Misc. 160, 125 N. Y. Supp. 57, to the point that question as to whether use to which property is to be put is public use or otherwise, is reviewable by courts; *George Sweet Mfg. Co. v. Van Der Hoof*, 137 App. Div. 495, 121 N. Y. Supp. 842, holding that private corporation cannot condemn land for switch under section 20 of Railroad Law; *Litchfield v. Bond*, 186 N. Y. 87, 78 N. E. 719, reversing 105 App. Div. 234, 93 N. Y. Supp. 1016 (dissenting opinion), on insufficiency of consequential damages to private property as ground for arresting work upon which legislature has determined in interest of state government; *People v. Fisher*, 116 App. Div. 684, 101 N. Y. Supp. 1047, holding owner's fee of lands taken by state for canal purposes may be divested without making, filing and serving map.

Judicial power over eminent domain.

Cited in note (22 L.R.A.(N.S.) 17, 26, 51, 53) on judicial power over eminent domain.

Practice in condemnation proceedings.

Cited in *Moroney v. State*, 67 Misc. 66, 124 N. Y. Supp. 824, to the point that damages for appropriation of lands for canal, are, when there are liens or incumbrances, deposited by comptroller to account of such award, to be paid to person entitled on supreme court orders.

14 L. R. A. 487, *TURNER v. NYE*, 154 Mass. 579, 28 N. E. 1048.

Condemnation for pipe-line purposes.

Cited in *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 569, 66 N. E. 765, holding proof that company furnishes gas for public use necessary before exercise of right to condemn property.

Purposes for which public funds may be used.

Cited in *Sweet v. Rechal*, 159 U. S. 400, 40 L. ed. 196, 16 Sup. Ct. Rep. 40, upholding act authorizing city to abate nuisance by taking lands and completing system of drainage.

Cited in footnotes to *Bradley v. Pharr*, 19 L. R. A. 647, which denies power to construct private railroad on public road; *Bell v. Lamborn*, 20 L. R. A. 241, which authorizes taking by eminent domain of right of way to carry water to electric light plant; *Wisconsin Water Co. v. Winans*, 20 L. R. A. 662, which denies water-supply company's right to condemn land for pipe line; *Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 29 L. R. A. 853, which holds condemnation of land for irrigating ditches to be "for public purpose;" *Leitzsey v. Columbia Water Power Co.* 34 L. R. A. 215, which holds damages by flooding lands by dam recoverable under eminent-domain law, not by suit for nuisance.

Cited in note (14 L. R. A. 480) on public purposes for which money may be appropriated or raised by taxation.

Mill dam acts.

Cited in *Blackstone Mfg. Co. v. Blackstone*, 200 Mass. 88, 18 L.R.A.(N.S.) 757, 85 N. E. 880, on legislation relative to mills; *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 448, 5 L.R.A.(N.S.) 647, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182, on resting validity of mill acts upon general welfare clause of constitution; *Nye v. Swift*, 190 Mass. 147, 76 N. E. 652, holding general statutory provisions with reference to mills and mill dams applicable, as far as may be, to dams erected for cranberry culture; *Otis Co. v. Ludlow Mfg. Co.* 186 Mass. 95, 104 Am. St. Rep. 563, 70 N. E. 1009, holding interference with use of neighboring property by appropriation of mill site is not taking under right of eminent domain.

Cited in footnote to *Gaylord v. Chicago Sanitary Dist.* 63 L.R.A. 582, which denies power of legislature to authorize condemnation of private property for erection of public mills and machinery without anything to give the public an interest in the mill after its erection.

Cited in notes (59 L.R.A. 824) on validity of mill acts; (102 Am. St. Rep. 838) on creation of dams as public use for which power of eminent domain can be exercised.

Distinguished in *Brown v. Gerald*, 100 Me. 365, 70 L.R.A. 479, 109 Am. St. Rep. 526, 61 Atl. 785, holding manufacturing, generating, selling, distributing and supplying electricity for manufacturing or mechanical purposes is not public use, also referring to annotation on this point.

14 L. R. A. 492, *MURCHIE v. CORNELL*, 155 Mass. 60, 31 Am. St. Rep. 526, 29 N. E. 207.

Implied warranty of quality.

Approved in *Alden v. Hart*, 161 Mass. 580, 37 N. E. 742, holding warranty of merchantable quality implied in contract for sale of coal.

Cited in *Carleton v. Lombard, A. & Co.* 149 N. Y. 150, 43 N. E. 422, holding warranty of freedom from latent defects implied in sale of refined petroleum by manufacturer; *Hardy v. American Exp. Co.* 182 Mass. 328, 59 L. R. A. 732, 65 N. E. 375, holding carrier must repay price of books sent C. O. D. collected knowing goods to be damaged; *Union Selling Co. v. Jones*, 63 C. C. A. 229, 128 Fed. 677, holding warranty of fitness implied in contract for sale of binder twine to retail dealer "quality guaranteed;" *St. Louis Union Packing Co. v. Mertens*, 160 Mo. App. 585, 131 S. W. 354, holding that upon sale of all surplus

ice to be manufactured by party, there was implied warranty that it would be merchantable; *Leavitt v. Fiberloid Co.* 196 Mass. 451, 15 L.R.A.(N.S.) 875, 82 N. E. 682, holding in case of goods commonly known in trade as ordered by description, without inspection, there is an implied warranty of merchantable quality; *Atkins Bros. Co. v. Southern Grain Co.* 119 Mo. App. 123, 95 S. W. 949, holding in an executory contract of sale of corn there exists an implied warranty that the corn will be sound and merchantable at place of delivery where sale is to be completed; *Oil-Well Supply Co. v. Watson*, 168 Ind. 611, 15 L.R.A.(N.S.) 867, 80 N. E. 157, holding a commercial contract for the delivery of "one cargo of ice" implies the condition that ice shall be of merchantable quality; *Bunch v. Weil*, 72 Ark. 347, 65 L.R.A. 82, 80 S. W. 582, holding same of an order of a quantity of flour of a certain grade; *Farrell v. Manhattan Market Co.* 198 Mass. 281, 15 L.R.A.(N.S.) 891, 126 Am. St. Rep. 436, 84 N. E. 481, 15 A. & E. Ann. Cas. 1076, holding cases of implied warranty and implied condition that thing sold was merchantable, rest on the same principal.

Cited in footnotes to *Columbian Ironworks & D. D. Co. v. Douglas*, 33 L. R. A. 103, which holds sale of scrap from steel plates of cruisers not satisfied by delivery of something other than cruiser steel; *Talbot Paving Co. v. Gorman*, 27 L. R. A. 96, which holds no warranty implied in contract for paving stones according to certain specifications; *Hodges v. Wilkinson*, 17 L. R. A. 545, which holds action for breach of implied warranty of title of personalty sold, after its taking by third person, not premature; *Bunch v. Weil*, 65 L.R.A. 80, which holds that purchaser of flour by the barrel for resale may, on discovering that quality is not as represented, tender back amount undisposed of and recover proportionate part of purchase price.

Cited in notes (15 L. R. A. 795) on effect of representing things sold to be "good;" (18 L. R. A. 386) on measure of damages for breach of implied warranty; (22 L. R. A. 187) on implied warranty of fitness of property bought for special purpose; (35 L.R.A.(N.S.) 286) on effect of sale with particular description of kind or quality; (102 Am. St. Rep. 612) on implied warranty of quality; (23 Eng. Rul. Cas. 492) on implied warranty of fitness for purpose for which goods are sold.

Distinguished in *Gage v. Carpenter*, 47 C. C. A. 43, 107 Fed. 890, holding warranty of merchantable quality not implied in sale of ice to subvendee, not stored or seen by vendor.

Sale of ice.

Cited in footnotes to *Mansfield v. Place*, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired; *Marsh v. McNider*, 20 L. R. A. 334, which authorizes sale by tenant of right to cut ice on running stream.

Written statement as evidence.

Approved in *Loomis v. New York, N. H. & H. R. Co.* 159 Mass. 43, 34 N. E. 82, holding affidavits of facts shown in former trial, incompetent upon motion for new trial.

Cited in *Gray v. Boston & M. R. Co.* 168 Mass. 20, 46 N. E. 397, holding license for dog issued prior to suit, inadmissible to corroborate statement that dog owned differed from one inflicting injury.

14 L. R. A. 495, *JOHNSON v. CHICAGO, ST. P. M. & O. R. CO.* 80 Wis. 641, 27 Am. St. Rep. 76, 50 N. W. 771.

Rights as to flow of surface water.

Cited in *Connell v. Stark*, 108 Wis. 98, 83 N. W. 1092, upholding right to

conduct surface water through ditches to adjoining land; *Champion v. Crandon*, 84 Wis. 409, 19 L. R. A. 837, 54 N. W. 775, denying damages to one injured by diversion of surface water by change of grade; *Harp v. Baraboo*, 101 Wis. 370, 77 N. W. 744, denying liability of city for damages due to stoppage of surface water by grading street; *Franklin v. Durgee*, 71 N. H. 188, 58 L. R. A. 113, 51 Atl. 911, holding complaint sufficient alleging injury to highway by abutters filling depression causing surface water to flow back; *Manteufel v. Wetzel*, 133 Wis. 622, 19 L.R.A.(N.S.) 170, 114 N. W. 91, holding no liability results from collecting surface water in a ditch following course of usual flow of surface water; *Shaw v. Ward*, 131 Wis. 655, 111 N. W. 671, 11 A. & E. Ann. Cas. 1139, holding mere change of the surface of one's premises where reasonably necessary to cause surface water to flow therefrom by the natural course of drainage is not such accumulation of water as creates a liability; *Peck v. Baraboo*, 141 Wis. 54, 122 N. W. 740, on liability for damming against surface water.

Cited in notes (21 L. R. A. 595, 600) on rights as to flow of surface water; (20 L.R.A.(N.S.) 157) on obstruction of surface water in city; (41 L. ed. U. S. 840) on drainage of surface waters.

— Of railroad company.

Cited in *Clauson v. Chicago & N. W. R. Co.* 106 Wis. 311, 82 N. W. 146, denying damages for injury from surface water diverted from natural course by change of railroad grade; *Borchsenius v. Chicago*, St. P. M. & O. R. Co. 96 Wis. 451, 71 N. W. 884, holding complaint insufficient, alleging injury by overflow of surface water, collected by construction of embankment; *Morrissey v. Chicago*, B. & Q. R. Co. 38 Neb. 430, 56 N. W. 946; *Egener v. New York & R. B. R. Co.* 3 App. Div. 161, 38 N. Y. Supp. 319; *Edwards v. Charlotte, C. & A. R. Co.* 39 S. C. 475, 22 L. R. A. 248, 39 Am. St. Rep. 746, 18 S. E. 58; *Chicago, K. & N. R. Co. v. Steck*, 51 Kan. 741, 33 Pac. 601; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 625, 69 Am. St. Rep. 385, 52 N. E. 1008 — denying railroad company's duty to provide outlet for surface water collected behind embankment; *Missouri P. R. Co. v. Renfro*, 52 Kan. 243, 39 Am. St. Rep. 344, 34 Pac. 802, holding railroad company not liable for damage from surface water due to leaving ditch on either side of roadbed.

Cited in note (12 L.R.A.(N.S.) 683) on liability of railroad conducting surface water through embankments onto adjoining property.

14 L. R. A. 498, *GRAND RAPIDS v. POWERS*, 89 Mich. 94, 28 Am. St. Rep. 276, 50 N. W. 661.

Grant bounded by stream.

Cited in *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 94, 40 L. ed. 87, 15 Sup. Ct. Rep. 991, holding grant of land in Michigan includes bed to center of navigable or unnavigable stream; *Hobart v. Hall*, 174 Fed. 474, holding the grantee of land in Minnesota bounded by a navigable stream takes an absolute title in fee to high-water mark, and has a qualified title of the bed of the stream to the middle thread thereof.

Rights of riparian owner.

Cited in *Prieve v. Wisconsin State Land & Improv. Co.* 93 Wis. 548, 33 L. R. A. 652, 67 N. W. 918, denying power of legislature to authorize destruction of lake to injury of riparian owner without compensation; *Hall v. Alford*, 114 Mich. 168, 38 L. R. A. 207, 72 N. W. 137, holding one hunting from boat anchored outside navigable part of stream guilty of trespass; *Toledo Liberal Shooting Club v. Erie Shooting Club*, 33 C. C. A. 236, 62 U. S. App. 644, 90 Fed. 682, and *Baldwin v. Erie Shooting Club*, 127 Mich. 662, 87 N. W. 59, denying right of

passage over shallow bay conveyed to private parties by state; *United States v. Chandler-Dunbar Water Power Co.* 81 C. C. A. 221, 152 Fed. 39, holding the land under a boundary river is in the adjacent riparian owner; *People ex rel. Bird v. Grand Rapids-Muskegon Power Co.* 164 Mich. 125, 129 N. W. 211, holding that riparian owner may do what he pleases with land under water so long as he does not interfere with public easement; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 465, — L.R.A.(N.S.) —, 133 N. W. 169, Ann. Cas. 1912 D, 1029, to the point that stream navigable for pleasure is navigable in law.

Cited in note (42 L. R. A. 320) on what waters are navigable.

Rights of travelers in public streams.

Cited in *Smart v. Aroostook Lumber Co.* 103 Me. 49, 14 L.R.A.(N.S.) 1086, 68 Atl. 527, holding the travel of summer residents and transportation of their merchandise is as fully entitled to protection in use of a public water way as travelers for business.

Cited in note (70 L.R.A. 277) on use of navigable stream.

Validity of statute as to building lines and wharves.

Cited in *St. Louis v. Hill*, 116 Mo. 536, 21 L. R. A. 228, 22 S. W. 861, declaring unconstitutional act empowering cities to establish building line without notice to owner.

Cited in note (40 L. R. A. 644, 645) on right to erect wharves.

Power of legislature as to nuisances.

Cited in notes (47 Am. St. Rep. 545; 107 Am. St. Rep. 202) on power of legislature to declare certain acts to be public nuisances.

Purprestures.

Cited in notes (60 Am. St. Rep. 272, 275) on what are purprestures; (69 Am. St. Rep. 276) on authority to erect purprestures.

14 L. R. A. 508, *ROCK v. MATHEWS*, 35 W. Va. 531, 14 S. E. 137.

Enforcement of contracts tainted with illegality.

Cited in *Burton v. McMillan*, 52 Fla. 244, 11 L.R.A.(N.S.) 165, 42 So. 879, holding where parties to a contract are "in pari delicto" good policy requires that the court leave them as it finds them.

Cited in footnotes to *Jones v. Dannenberg Co.* 52 L. R. A. 271, which holds void, in hands of bona fide purchaser, note given to stop criminal prosecution; *William Deering & Co. v. Cunningham*, 54 L. R. A. 410, which holds void, contract to withdraw opposition to granting of pardon.

Cited in note (48 L. R. A. 849) on allowing injunction in favor of party *in pari delicto* against enforcing or otherwise proceeding with illegal contract.

Distinguished in *Burton v. McMillan*, 52 Fla. 476, 8 L.R.A.(N.S.) 993, 120 Am. St. Rep. 220, 42 So. 849, 11 A. & E. Ann. Cas. 380, holding maxim "in pari delicto melior est conditio defendentis," has no application to a suit by married woman to set aside deed of her separate property, given by her to save her husband from threatened prosecution.

14 L. R. A. 512, *HUNT v. CONRAD*, 47 Minn. 557, 50 N. W. 614.

Assignability of cause of action.

Cited in *Billingsley v. Clelland*, 41 W. Va. 259, 23 S. E. 812 (dissenting opinion), majority holding note given to compromise bastardy proceedings assignable, carrying remedies of assignor; *Williams v. West Chicago Street R. Co.* 199 Ill. 61, 64 N. E. 1024, upholding assignment of judgment for personal injuries executed before final judgment; *Hammons v. Great Northern R. Co.* 53 Minn. 252, 54 N. W. 1108, holding that attorney's lien cannot be created upon right of action for as-

sault; *Boogren v. St. Paul City R. Co.* 97 Minn. 54, 3 L.R.A.(N.S.) 381, 114 Am. St. Rep. 691, 106 N. W. 104, holding cause of action for personal tort is not assignable and does not pass to party's representatives.

Cited in footnotes to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded; *John V. Farwell Co. v. Josephson*, 37 L. R. A. 138, which holds claim for damages from conspiracy to defraud not assignable; *Lehmann v. Deuster*, 37 L. R. A. 333, which holds cause of action which will survive, assignable.

Cited in note (44 L. R. A. 178, 179, 183) on assignability of cause of action for personal injury.

Distinguished in *Kent v. Chapel*, 67 Minn. 422, 70 N. W. 2, holding verdict in action for personal injury assignable under statute.

Counterclaims to actions.

Cited in *Laybourn v. Seymour*, 53 Minn. 109, 39 Am. St. Rep. 579, 54 N. W. 941, upholding counterclaim for nondelivery of goods against claim of assignee of insolvent corporations; *Nichols & S. Co. v. Soderquist*, 77 Minn. 510, 80 N. W. 630, holding breach of warranty may be interposed as defense to note given for grain elevator; *Lindholm v. Itasca Lumber Co.* 64 Minn. 48, 65 N. W. 931, refusing to set off unliquidated claim against judgment; *Martin County Nat. Bank v. Bird*, 92 Minn. 112, 99 N. W. 780, holding court has power to order that one judgment be set off against another, when adverse judgments are between same parties.

Cited in note (109 Am. St. Rep. 146) on setting off one judgment against another.

14 L. R. A. 515, *KANSAS CITY, M. & B. R. CO. v. HIGDON*, 94 Ala. 286, 33 Am. St. Rep. 119, 10 So. 282.

Demurrer for misjoinder of causes.

Cited in *Richmond & D. R. Co. v. Weems*, 97 Ala. 273, 12 So. 186, holding refusal to sustain demurrer for misjoinder of causes in one court, error.

Liability for act of agent.

Cited in *Postal Teleg. Cable Co. v. Brantley*, 107 Ala. 688, 18 So. 321, holding telegraph company liable for trees cut by servants in constructing line.

Cited in note (41 L. R. A. 651) on criminal and penal liability for act of copartner, servant, or agent.

Distinguished in *Williams v. Hendricks*, 115 Ala. 283, 41 L. R. A. 651, 67 Am. St. Rep. 32, 22 So. 439, denying penal liability for trees wilfully cut by copartner without consent.

Carrier's liability for baggage.

Cited in footnotes to *Bullock v. Delaware, L. & W. R. Co.* 37 L. R. A. 417, which denies right to carry packages of groceries on trains as "personal baggage;" *Kansas City, P. & G. R. Co. v. State*, 41 L. R. A. 333, which holds samples of merchandise carried by traveling salesman not baggage; *Trimble v. New York C. & H. R. R. Co.* 48 L. R. A. 115, which sustains recovery for loss of sample trunk checked as baggage on payment of charge for excess baggage; *Illinois C. R. Co. v. Matthews*, 60 L. R. A. 846, which holds carrier liable for loss of, or damage to, samples in possession of traveling salesman checked as baggage.

Cited in notes (40 L.R.A. 508) on liability of carriers for injuries to dogs; (67 Am. St. Rep. 296) on same point; (99 Am. St. Rep. 352) on liability for loss of baggage.

Disapproved in *Fleischman v. Southern R. Co.* 76 S. C. 240, 9 L.R.A.(N.S.) 520, 56 S. E. 974, holding a carrier receiving sample trunks is liable as for personal baggage.

14 L. R. A. 518, *LAMB v. CAIN*, 129 Ind. 486, 29 N. E. 13.

Revision of creed as affecting rights to church property.

Cited in *Franke v. Mann*, 106 Wis. 132, 48 L. R. A. 861, 81 N. W. 1014, denying right of majority of church members to defeat trust by employing pastor teaching different doctrine; *Cape v. Plymouth Cong. Church*, 117 Wis. 155, 93 N. W. 449, holding minority adhering to original church entitled to use of church property, as against seceding majority; *Brundage v. Deardorf*, 92 Fed. 230, holding that minority members, dissenting from adoption of amended creed, have no claim to church property; *Horsman v. Allen*, 129 Cal. 135, 61 Pac. 796, denying rights to church property of minority seceding from general conference after adoption of new constitution and revised confession of faith; *Bear v. Heasley*, 98 Mich. 294, 24 L. R. A. 627, footnote p. 615, 57 N. W. 270, holding unauthorized change in church constitution by general conference, illegal.

Cited in footnote to *Philomath College v. Wyatt*, 26 L. R. A. 68, which holds incorporation into confession of faith of doctrines previously contained in discipline not vital change destroying identity of church.

Cited in note (5 Eng. Rul. Cas. 702) on property rights on division in religious society.

Distinguished in *Smith v. Pedigo*, 145 Ind. 406, 32 L. R. A. 843, 44 N. E. 363, Affirming on rehearing 145 Ind. 377, 19 L. R. A. 437, 33 N. E. 777, denying that expulsion of minority members of church who still adhere to original faith, affects rights to church property.

Relation of civil courts to churches.

Approved in *Landrith v. Hudgins*, 121 Tenn. 660, 120 S. W. 783, holding the power of two churches to form a union must be exercised in accordance with their constitutions.

Cited in *Kuns v. Robertson*, 154 Ill. 413, 40 N. E. 343, holding decision of church judicial body that new constitution superseded former, conclusive upon civil courts; *Bear v. Heasley*, 98 Mich. 289, 24 L. R. A. 627, 57 N. W. 270, and *Russie v. Brazzell*, 128 Mo. 116, 49 Am. St. Rep. 542, 30 S. W. 526, holding judgment of general conference that enlarged confession works no change in creed binds courts; *State ex rel. Hatfield v. Cummins*, 171 Ind. 116, 36 L.R.A.(N.S.) 950, 85 N. E. 359, holding the civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions; *Ramsey v. Hicks*, 174 Ind. 443, 30 L.R.A.(N.S.) 672, 91 N. E. 344, holding that court has no jurisdiction to examine into regularity and validity of church tribunal concerning only spiritual or ecclesiastical rights; *Yanthis v. Kemp*, 43 Ind. App. 206, 86 N. E. 451, holding doctrine, discipline and creed, are not matters with which courts concern themselves, except as they come incidentally in question in the adjudication of property rights; *Wallace v. Hughes*, 131 Ky. 480, 115 S. W. 684, holding where the supreme ecclesiastical power is exercised to reunite a divided church such union must be held binding so far as the civil courts are concerned; *First Presby. Church v. First Cumberland Presby. Church*, 245 Ill. 93, 91 N. E. 761, holding in the adjudication of civil and property rights civil courts are bound by adjudications of the ecclesiastical court as to which of the contending factions in the church is the true representative of the church; *Mack v. Kline*, 129 Ga. 19, 24 L.R.A.(N.S.) 686, 58 S. E. 184, holding where a right of property turns upon decision of ecclesiastical court as to creed, doctrine or teaching civil courts will allow property to go in that direction in which decision of church tribunal carries it; *Fussell v. Hail*, 134 Ill. App. 630, holding question whether confession of faith of the two churches are identical, or in substance the same, is a question solely for the ecclesiastical courts to determine; *Paynter*

v. Phelps, 129 Ky. 393, 24 L.R.A.(N.S.) 735, 111 S. W. 699, holding property of a denominational church, like the Presbyterian or Methodist, in case of controversy or division must be given by the civil courts to those recognized by the highest ecclesiastical court of the denomination; *Boyles v. Roberts*, 222 Mo. 729, 121 S. W. 805 (dissenting opinion), on decision of ecclesiastical tribunal as being binding upon the courts in matters purely within their jurisdiction.

Cited in footnote to *Philomath College v. Wyatt*, 26 L. R. A. 68, which holds construction of legislative acts of ecclesiastical body should be adopted by courts.

Cited in notes (49 L.R.A. 386, 398) on conclusiveness of decisions of tribunals of associations or corporations; (3 L.R.A.(N.S.) 870, 873) on enjoining control, use of, or interference with, church property; (24 L.R.A.(N.S.) 694, 701, 722) on litigation growing out of schism in religious society; (68 Am. St. Rep. 865) on jurisdiction of equity over voluntary unincorporated associations.

Vote sufficient to carry motion.

Cited in *Re Denny*, 156 Ind. 151, 51 L. R. A. 739, 59 N. E. 359 (dissenting opinion), majority holding vote by majority means majority of those actually voting; *Russie v. Brazzell*, 128 Mo. 111, 49 Am. St. Rep. 542, 30 S. W. 526, holding two thirds of society requesting amendment to constitution means two thirds voting; *Fabro v. Gallup*, 15 N. M. 114, 103 Pac. 271, holding that two-thirds of those actually voting and not two-thirds of all voters of municipality are required to authorize issue of municipal bonds, under statute; *Ramsey v. Hicks*, 44 Ind. App. 505, 87 N. E. 1091, to the point that it may be provided that direct vote of members of each congregation shall be taken upon questions of general concern.

Trust for religious purposes.

Cited in *Kelly v. Nichols*, 18 R. I. 83, 19 L. R. A. 432, 25 Atl. 840 (dissenting opinion), majority holding trust providing entertainment for traveling ministers and circulation of religious books, invalid.

Collateral attack upon order of commissioner's courts.

Cited in *Ryder v. Horsting*, 130 Ind. 106, 16 L. R. A. 187, 29 N. E. 567, sustaining demurrer to complaint collaterally assailing order of highway commissioner's court.

Implied agreement of member to obey rules of church.

Cited in *Committee of Missions v. Pacific Synod*, 157 Cal. 122, 106 Pac. 395, holding that agreement to abide by rules of church is always implied from membership.

14 L. R. A. 529, *STATE v. RAY*, 109 N. C. 736, 14 S. E. 83.

Sale of tickets or passes.

Cited in *Allardt v. People*, 197 Ill. 508, 64 N. E. 533, sustaining act of 1897, against selling passes; *Re O'Neill*, 41 Wash. 181, 3 L.R.A.(N.S.) 562, 83 Pac. 104, 6 A. & E. Ann. Cas. 869, holding the sale of railway transportation is a proper subject for police regulation.

Cited in notes (24 L.R.A. 152) on statutes against ticket "scalping;" (61 Am. St. Rep. 79) on sale of ticket as creating relation of passenger; (96 Am. St. Rep. 834) on power of state to control sale and use of passenger tickets.

What constitutes "carrying on business."

Cited in *Kimmel v. Americus*, 105 Ga. 697, 31 S. E. 623, denying that sale of one sample renders agent liable to pay for peddler's license; *Theus v. State*, 114 Ga. 53, 39 S. E. 913, holding one employing laborers to work outside of state not "emigrant agent" requiring license; *Rotschild v. Schneider*, 167 Mich. 506, 133

N. W. 530, on what constitutes sale of liquor in violation of statute requiring license; *State use of Gemundt v. Shipley*, 98 Md. 662, 57 Atl. 12, holding occasional performance of isolated acts in collecting rents on party's own property does not constitute "carrying on business."

Cited in footnotes to *Re Houston*, 14 L. R. A. 719, which holds offer to sell sample to one person and sale and delivery to another not dealing in goods; *Thibaut v. Kearney*, 18 L. R. A. 596, which requires license from planter keeping store on plantation and selling goods to employees; *State v. Morehead*, 26 L. R. A. 585, which holds sale and delivery of sample sewing-machine not sale by peddler; *Delaware & H. Canal Co. v. Mahlenbrock*, 45 L. R. A. 538, which holds single transaction involving purchase of coal on credit, not transaction of business.

Cited in note (24 L. R. A. 297) on what constitutes "doing business" prohibited by statute.

14 L. R. A. 533, *JACKSONVILLE, T. & K. W. R. CO. v. ADAMS*, 28 Fla. 631, 10 So. 465.

Appeal in condemnation proceedings.

Cited in *Jacksonville, T. & K. W. R. Co. v. Adams*, 29 Fla. 276, 11 So. 169, upholding appeal from circuit court dismissing condemnation proceedings.

Compensation for improvement made before condemnation.

Cited in *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 18, 70 Am. St. Rep. 17, 30 S. E. 972, holding improvements by company after end of life estate should not be considered in assessing damages for remainderman's interest; *Seattle & M. R. Co. v. Corbett*, 22 Wash. 191, 60 Pac. 127; *Illinois C. R. Co. v. Le Blanc*, 74 Miss. 674, 21 So. 748; *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 414, 48 L.R.A. 250, 59 Pac. 1040,—denying recovery of value of improvements placed on land by railroad company before condemnation; *Aldridge v. Board of Education*, 15 Okla. 357, 82 Pac. 827, holding the owner cannot recover for the improvements placed upon the land during the unauthorized occupancy; *McClarren v. Jefferson School Twp.* 169 Ind. 144, 13 L.R.A.(N.S.) 419, 82 N. E. 73, 13 A. & E. Ann. Cas. 978, holding upon condemnation owner, though originally a trespass was committed, is not entitled to the value of improvements made.

Cited in note (66 L.R.A. 48) on structures on lands of another before condemnation.

Right to condemn property after unlawful possession has been taken.

Cited in *Blackwell, E. & S. W. R. Co. v. Bebout*, 19 Okla. 72, 91 Pac. 877, 14 A. & E. Ann. Cas. 1145, holding entry upon and appropriation of land prior to initiation of condemnation proceedings, will not defeat right of either owner or railway company to institute proceedings to condemn; *Ingleside Mfg. Co. v. Charleston Light & Water Co.* 76 S. C. 100, 56 S. E. 664, holding right of owner to damages for the illegal trespass, is subject to right of corporation to institute condemnation proceedings to obtain easement and have future damages ascertained; *Spratt v. Helena Power Transmission Co.* 37 Mont. 93, 94 Pac. 631, holding right to condemn is not lost by reason of trespass committed or wrongful possession taken.

Consent as defense to ejectment.

Cited in *Griffin v. Jacksonville, T. & K. W. R. Co.* 33 Fla. 607, 15 So. 338, refusing to disturb judgment for defendant where proof shows company's occupation of street with abutter's consent.

Conclusiveness of judgment.

Cited in footnote in *Moore v. Snowball*, 66 L.R.A. 745, which holds judgment for defendants in trespass to try title to land sold under judgment foreclosing tax

lien and to set aside the judgment not bar to subsequent suit to set aside sheriff's sale for irregularities on equitable terms in which title is admitted to be in purchaser.

14 L. R. A. 540, *MEGGINSON v. MEGGINSON*, 21 Or. 387, 28 Pac. 388.

Presumption as to validity of marriage.

Cited in *Lanctot v. State*, 98 Wis. 138, 67 Am. St. Rep. 800, 73 N. W. 575, holding proof of formal marriage by one authorized to perform ceremony, followed by cohabitation, raises presumption of valid marriage; *Jackson v. Phalen*, 237 Mo. 150, 140 S. W. 879, holding that presumption that first marriage was dissolved arises where second marriage ceremony is shown; *Huff v. Huff*, 20 Idaho, 459, 118 Pac. 1080, holding that reasonable presumption is indulged in favor of legitimacy of child where parents cohabited; *Lyon v. Lash*, 79 Kan. 344, 99 Pac. 598, holding undisputed testimony of a subsequent marriage would create a presumption of a preceding valid divorce; *Re Sloan*, 50 Wash. 89, 17 L.R.A.(N.S.) 963, 96 Pac. 684, holding uncontradicted testimony of both parties that they were married at a certain date and lived together as husband and wife is ample to establish validity of a marriage.

Cited in footnotes to *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence; *Hunter v. Hunter*, 31 L. R. A. 411, which holds presumption of illegality of marriage regularly solemnized prevails over presumption of continuance of former husband's life; *Norman v. Norman*, 42 L. R. A. 343, which holds burden of proving law on high seas upholding marriage, on person married on high seas.

Cited in notes (17 Eng. Rul. Cas. 176; 16 L.R.A.(N.S.) 98) on presumptions flowing from marriage ceremony.

Burden of proof of invalidity of marriage.

Cited in *Ollschlager v. Widmer*, 55 Or. 149, 105 Pac. 717, holding, that burden of proof is upon party objecting to validity of marriage however celebrated; *Murchison v. Green*, 128 Ga. 342, 11 L.R.A.(N.S.) 704, 57 S. E. 709, holding burden is upon one attacking validity of a marriage to show invalidity, by clear, distinct, positive and satisfactory proof.

Cited in note (89 Am. St. Rep. 198) on burden of proving and sufficiency of evidence of termination of former marriage.

14 L. R. A. 545, *WARREN v. WARREN*, 89 Mich. 123, 50 N. W. 842.

Wife's right to sue for alienation of husband's affections.

Cited in *Beach v. Brown*, 20 Wash. 268, 43 L. R. A. 116, 72 Am. St. Rep. 98, 55 Pac. 46, holding wife's right under statute to damages for enticing husband away; *Wolf v. Frank*, 92 Md. 143, 52 L. R. A. 105, footnote, p. 102, 48 Atl. 132, and *Humphrey v. Pope*, 122 Cal. 258, 54 Pac. 847, upholding wife's right to maintain action in own name for alienation of husband's affections; *Sims v. Sims*, 79 N. J. L. 580, 29 L.R.A.(N.S.) 845, 76 Atl. 1063, holding that under statutes married woman may maintain action in her own name for alienation of husband's affections; *Nolin v. Pearson*, 191 Mass. 290, 4 L.R.A.(N.S.) 647, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding a cause of action for criminal conversation with the husband lies in favor of wife; *King v. Hanson*, 13 N. D. 97, 99 N. W. 1085, holding a married woman can maintain action for alienation of husband's affection by reason of statutory removal of disabilities at the common law; *Quick v. Church*, 23 Ont. Rep. 272, holding wife may maintain action in her own name against a woman who procures abandonment by husband with loss of means of support, where such woman lives

by such procurement in adultery with the husband; *Dodge v. Rush*, 28 App. D. C. 152, 8 A. & E. Ann. Cas. 671, holding the conjugal rights of a wife are the same in principle as the husband's, and violation of those rights results from acts of same nature; *Lonstorf v. Lonstorf*, 118 Wis. 167, 95 N. W. 961 (dissenting opinion), on right of action in wife for loss of consortium of husband.

Cited in footnotes to *Haynes v. Nowlin*, 14 L. R. A. 787, *Dietzman v. Mullin*, 50 L. R. A. 808; *Betser v. Betser*, 52 L. R. A. 630; *Clow v. Chapman*, 26 L. R. A. 412,—which uphold wife's right of action for alienating husband's affections; *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery known to husband to deny same; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections unaccompanied by adultery.

Cited in notes (28 Am. St. Rep. 218; 46 Am. St. Rep. 473) on wife's action for alienation of husband's affections.

Distinguished in *Kroessin v. Keller*, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, denying wife's right of action against another woman in nature of criminal conversation.

— By parent.

Cited in *Williams v. Williams*, 20 Colo. 56, 37 Pac. 614, sustaining recovery for alienation of husband's affections by father's threat to disinherit; *Hodgkinson v. Hodgkinson*, 43 Neb. 271, 27 L. R. A. 121, footnote, p. 120, 47 Am. St. Rep. 759, 61 N. W. 577, holding one effecting husband's desertion liable to suit by wife; *Gerner v. Gerner*, 185 Pa. 236, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884; *Railsback v. Railsback*, 12 Ind. App. 662, 40 N. E. 276; *Price v. Price*, 91 Iowa, 698, 29 L. R. A. 152, footnote p. 150, 51 Am. St. Rep. 360, 60 N. W. 202; *Lockwood v. Lockwood*, 67 Minn. 481, 70 N. W. 784,—upholding wife's action against father and mother for alienation of husband's affections; *Lonstorf v. Lonstorf*, 118 Wis. 167, 95 N. W. 961 (dissenting opinion), majority denying wife's right to maintain suit against mother-in-law for alienation of husband's affections.

Cited in footnote to *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife.

14 L. R. A. 548, *LOUISVILLE & N. R. CO. v. WALLACE*, 91 Tenn. 35, 17 S. W. 882.

Interest on damages.

Cited in *Jacobson v. United States Gypsum Co.* 150 Iowa, 339, 130 N. W. 122, holding that interest should not be allowed in action for personal injury, on verdict for damages which had not fully accrued at time of trial; *Louisville & N. R. Co. v. Fort*, 112 Tenn. 456, 80 S. W. 429, holding where owner is deprived of value, possession and use of property through wrongful act of another, damages with interest until paid should be assessed.

Cited in notes (18 L.R.A. 449) on interest on sum allowed as damages; (28 L.R.A.(N.S.) 73) on interest on unliquidated damages.

Distinguished in *Western U. Teleg. Co. v. Carver*, 15 Tex. Civ. App. 550, 39 S. W. 1021, holding interest recoverable from time of institution of suit for neglect to deliver message.

Reduction of verdict.

Cited in *Young v. Cowden*, 98 Tenn. 589, 40 S. W. 1088, holding court may, as condition of denying motion for new trial, require remittitur of part of verdict; *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 492, 67 L.R.A. 497, 82 S. W. 314,

3 A. & E. Ann. Cas. 937, holding in case of an apparent error of calculation in an action of debt, this court will not reverse and remand, but will remit the erroneous part.

14 L. R. A. 550, *ILLINOIS C. R. CO. v. PETERSEN*, 68 Miss. 454, 10 So. 43.

Carrier's duty toward livestock.

Cited in footnotes to *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, which holds it carrier's duty to obey request to set on side track car containing frightened horse; *Betts v. Chicago, R. I. & P. R. Co.* 26 L. R. A. 248, which holds carrier liable for injuries to live stock by breaking of slats; *Chesapeake & O. R. Co. v. American Exch. Bank*, 44 L. R. A. 452, denying carrier's right to release itself by contract from providing safe facilities for caring for stock; *Atchison, T. & S. F. R. Co. v. Campbell*, 48 L. R. A. 251, which holds void, statute for free transportation of shippers of stock.

Cited in notes (44 L. R. A. 452) on statutory duties of carriers of live stock with reference to care of stock during transportation; (39 L.R.A.(N.S.) 641) on duty of carrier to take precaution to prevent loss threatened without its antecedent fault; (63 Am. St. Rep. 558, 562) on respective duties of carriers and shippers of livestock.

14 L. R. A. 552, *WARDEN v. LOUISVILLE & N. R. CO.* 94 Ala. 277, 10 So. 276.

Contributory negligence of employee.

Cited in *Louisville & N. R. Co. v. Stutts*, 105 Ala. 378, 53 Am. St. Rep. 127, 17 So. 29, holding careless management of engine bars recovery for death of engineer; *Southern R. Co. v. Arnold*, 114 Ala. 190, 21 So. 954, denying recovery to one unnecessarily coupling cars at night; *Chattanooga Southern R. Co. v. Myers*, 112 Ga. 240, 37 S. E. 439, denying company's liability for one killed while riding on engine in violation of duty; *Kansas City, M. & B. R. Co. v. Williford*, 115 Tenn. 115, 88 S. W. 178, holding where one injured was occupying the most exposed position on most dangerous part of train at time of collision without invitation and without necessity of being there he is guilty of gross contributory negligence; *Williams v. Monongahela Connecting R. Co.* 223 Pa. 485, 72 Atl. 811, 16 A. & E. Ann. Cas. 271, holding one guilty of contributory negligence in standing on pilot of moving engine without necessity for so doing.

Distinguished in *Biles v. Seaboard Air Line R. Co.* 143 N. C. 83, 55 S. E. 512, holding to render act negligent per se in taking a position on the pilot of an engine, such position must have been taken voluntarily; *Milbourne v. Arnold Electric Power Station Co.* 140 Mich. 323, 70 L.R.A. 605, 103 N. W. 821, holding an employee electing to ride on outside of a horse car while returning from work, in order to watch tools and with acquiescence of assistant superintendent of road, is not guilty of contributory negligence as matter of law.

Effect of custom.

Cited in *Pennsylvania R. Co. v. Naive*, 112 Tenn. 255, 64 L.R.A. 447, 79 S. W. 124, holding custom of suspending business on Fourth of July not unreasonable; *Missouri, K. & T. R. Co. v. Kennedy*, 51 Tex. Civ. App. 472, 112 S. W. 339, holding that evidence of custom of conductors to alight from moving train as it passed station to register train was admissible on question of contributory negligence of injured conductor.

— As excuse for negligence.

Cited in *Andrews v. Birmingham Mineral R. Co.* 99 Ala. 440, 12 So. 432, holding evidence of custom of riding on engine pilot and leaning to open switch when train in motion, incompetent; *Richmond & D. R. Co. v. Hissong*, 97 Ala. 192, 13 So.

209, holding evidence of custom of going between cars to drop coupling, inadmissible to vary rules; *Louisville & N. R. Co. v. Mothershed*, 110 Ala. 159, 20 So. 67, holding evidence of custom to disregard rule to slacken trains near depots, no excuse for contributory negligence; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 439, 10 So. 530, holding complaint alleging "injury received in discharge of customary duty as switchman," demurrable; *Hill v. Birmingham Union R. Co.* 100 Ala. 451, 14 So. 211, denying practice of passengers to go from car to car by means of running board and steps, excuse for contributory negligence; *George v. Mobile & O. R. Co.* 109 Ala. 256, 19 So. 784; and *Alabama G. S. R. Co. v. Richie*, 111 Ala. 301, 20 So. 49, holding republication alleging custom, acquiesced in by company, of going between cars to draw coupling, defective; *Martin v. Kansas City, M. & B. R. Co.* 77 Miss. 727, 27 So. 646, holding trainmen's habit of riding on engine no ground for recovery for company's negligence; *Douglas v. Chicago, M. & St. P. R. Co.* 100 Wis. 408, 69 Am. St. Rep. 930, 76 N. W. 356, denying practice of crossing tracks without looking for trains excuses contributory negligence; *Alabama G. S. R. Co. v. Roach*, 110 Ala. 272, 20 So. 132, holding evidence of company's consent to practice of disregarding rules to display signal must be convincing; *El Dorado & B. R. Co. v. Whatley*, 88 Ark. 27, 129 Am. St. Rep. 93, 114 S. W. 234, holding custom cannot impart qualities of due care and prudence to an act which involves obvious peril; *Kansas City S. R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 23, holding no amount of usage justifies an employee, without superior orders and in the absence of extraordinary emergency, in taking a dangerous way to perform a duty when a safe one is at hand.

Negligence as matter of law.

Cited in *Louisville & N. R. Co. v. Richards*, 100 Ala. 366, 13 So. 944, holding that undisputed facts showing plaintiff's negligence raise question of law for court; *Barley v. Southern Indiana R. Co.* 30 Ind. App. 410, 66 N. E. 72, holding it not negligence as matter of law for one employed in construction gang to ride home on flat car.

Cited in footnotes to *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L. R. A. 146, holding question as to servant's negligence in using defective ladder to adjust belt, for jury; *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L.R.A. 146, which holds employee's contributory negligence in using defective ladder to adjust belt upon moving machinery after complaining of the risk, one for the jury; *Milbourne v. Arnold Electric P. Station Co.* 70 L.R.A. 600, which holds railroad employee not negligent *per se* in taking exposed position on flat car unless risk of injury is so great that no person of ordinary prudence would assume it.

Variance between pleading and proof.

Cited in *Alabama G. S. R. Co. v. Hall*, 105 Ala. 607, 17 So. 176, holding complaint alleging injury when engaged as brakeman defective, proof showing performance of fireman's duties.

14 L. R. A. 556, *FLYNN v. TAYLOR*, 127 N. Y. 596, 28 N. E. 418.

Use of highway.

Cited in *Kelly v. Otterstedt*, 80 App. Div. 399, 80 N. Y. Supp. 1008, denying damages, to pedestrian slipping on green vegetables in front of street stand; *Spier v. Brooklyn*, 45 N. Y. S. R. 262, 18 N. Y. Supp. 170, holding city liable for injury to house by exhibition of fireworks, licensed by mayor; *Donovan v. Pennsylvania Co.* 61 L. R. A. 144, 57 C. C. A. 366, 120 Fed. 219, enjoining hackmen and hotel runners from congregating on sidewalk in front of depot; *Willard Hotel Co. v. District of Columbia*, 23 App. D. C. 282, holding owner of land

abutting upon a street has a right to encroach to a reasonable extent upon the public right, whenever reasonably necessary for transaction of his business; *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 376, 66 L.R.A. 405, 105 Am. St. Rep. 304, 58 Atl. 21, holding right of abutter on street to occupy it for other than public purposes is a permissive, and subordinate one to public purposes of travel and transportation; *John A. Tolman & Co. v. Chicago*, 240 Ill. 276, 24 L.R.A.(N.S.) 102, 88 N. E. 488, holding interference with the public's free enjoyment of the use of the sidewalk depends upon the necessity of the case so far as the individual is concerned, and the reasonableness of the use against the public; *Sanford v. White*, 132 Fed. 534, holding in repairing a street, or in constructing a line of street railway along it, the street may be temporarily obstructed, provided it does not unreasonably interfere with rights of the public; *Sweet v. Perkins*, 115 App. Div. 789, 101 N. Y. Supp. 163 (dissenting opinion) on right of adjacent owner to appropriation of highway.

Cited in footnotes to *Smith v. Milwaukee Builders' & Traders' Exchange*, 30 L. R. A. 504, which upholds requirement on constructing building abutting on sidewalk to build roofed passageway over sidewalk; *Pittsburgh, Ft. W. & C. R. Co. v. Cheevers*, 24 L. R. A. 156, which denies right of company to enjoin congregating of hotel runners, etc., in front of station; *Kessler v. Berger*, 61 L. R. A. 611, which holds boy injured by fall of lumber pile not loungee by stopping in street to cool after playing game in vacant lot; *Garibaldi v. O'Connor*, 66 L.R.A. 73, which holds merchants using portion of sidewalk adjoining place of business for receiving and shipping goods so that travelers are limited to narrow passageway during most of day liable for injury caused by permitting straw and loose bananas in such passageway; *Friedman v. Snare & Triest Co.* 70 L. R. A. 147, which sustains abutting owner's right to deposit in street building materials required for improvement of his property subject to regulation in public interest such right to be reasonably exercised in view of rights of public.

Cited in notes (39 L. R. A. 667) on municipal power over nuisances affecting highways and waters; (13 L.R.A.(N.S.) 254) on loss of customers as element of damages from obstruction of highway; (19 L.R.A.(N.S.) 509) on liability of municipality for permitting obstruction in street; (24 L.R.A.(N.S.) 97, 99) on temporary obstructions in street for purpose of loading or unloading.

— By railroads.

Cited in *Buchholz v. New York, L. E. & W. R. Co.* 148 N. Y. 644, 43 N. E. 76, upholding abutter's right to damages for erection of bridge diverting travel from hotel; *Old Forge Co. v. Webb*, 31 Misc. 321, 65 N. Y. Supp. 503, denying injunction to hotel keeper against construction of railroad over Forest Preserve likely to divert travel from his hotel; *Tinker v. New York, O. & W. R. Co.* 157 N. Y. 321, 51 N. E. 1031, holding deposit of timbers near highway, frightening horses, unreasonable interference with public travel; *Central Crosstown R. Co. v. Metropolitan Street R. Co.* 17 Misc. 716, 40 N. Y. Supp. 1090, sustaining injunction restraining construction of parallel trolley line; *Rauenstein v. New York, L. & W. R. Co.* 47 N. Y. S. R. 142, 19 N. Y. Supp. 833, holding railroad company liable for unauthorized obstruction of street by erection of embankment; *Dunn v. Wilmington & W. R. Co.* 124 N. C. 260, 32 S. E. 711, Subsequent Appeal in 131 N. C. 452, 42 S. E. 862 (dissenting opinion), holding unnecessarily keeping engine with steam escaping close to highway, negligence; *Nette v. New York Elev. R. Co.* 2 Misc. 62, 20 N. Y. Supp. 844, holding refusal to consider benefits accruing to abutter, in assessing damages for construction of elevated road, error.

Cited in footnotes to *Lund v. St. Paul, M. & M. R. Co.* 61 L. R. A. 506, which denies contractor's liability for damage from obstruction of street because of

delay in constructing bridge due to strikes; *Brunswick & W. R. Co. v. Hardy*, 52 L. R. A. 396, which authorizes recovery by merchant specially damaged by wilful obstruction of street.

— **Question of fact.**

Cited in *Tinker v. New York, O. & W. R. Co.* 71 Hun, 435, 24 N. Y. Supp. 977, holding question of fact whether weather-beaten timbers lying partly hidden in ditch by highway calculated to frighten horses; *Lewis v. Ballston Terminal R. Co.* 45 App. Div. 131, 60 N. Y. Supp. 1035, holding question for jury whether use of steam roller in highway unreasonable; *Gassenheimer v. District of Columbia*, 25 App. D. C. 181, holding whether a particular use of a street is a reasonable use or otherwise is a question of fact depending on all the facts of the case.

Private action for special injury.

Cited in *Hatfield v. Straus*, 189 N. Y. 213, 82 N. E. 172, holding damages incident to the construction and operation of a private railway by a department store in front of a residence, are special and peculiar within the rule which allows private actions.

Cited in footnotes to *Jacksonville, T. & K. W. R. Co. v. Thompson*, 26 L. R. A. 410, which denies right to maintain private action for inconvenience from obstruction of highway in common with others; *O'Brien v. Central Iron & Steel Co.* 57 L. R. A. 508, which authorizes private action for permanent obstruction of street within 200 feet of abutter; *Brauer v. Baltimore R. & H. Co.* 66 L.R.A. 403, which sustains right of owner of building devoted to retail trade to enjoin adjoining owner from erecting platform along front of ice-plant in process of erection on portion of sidewalk space, and from removing curbs so that wagons can load from platform where pedestrian travel will be rendered inconvenient and entirely interrupted part of the time.

Question for jury.

Cited in *Overhouser v. American Cereal Co.* 118 Iowa, 421, 92 N. W. 74, holding for jury to decide whether it is negligence to scatter stones and dirt along street in conveying same from excavation.

14 L. R. A. 562, *RENIER v. HURLBUT*, 81 Wis. 24, 29 Am. St. Rep. 850, 50 N. W. 783.

Service of process.

Cited in *Cox v. North Wisconsin Lumber Co.* 82 Wis. 145, 51 N. W. 1130, denying that service of summons upon nonresident by publication gives jurisdiction to render judgment; *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 514, 36 Pac. 616, holding service of process upon agent of garnishee ineffectual to confer jurisdiction; *St. Sure v. Landsfelt*, 82 Wis. 349, 19 L. R. A. 517, 33 Am. St. Rep. 50, 52 N. W. 308, holding courts of Sweden no jurisdiction to dissolve marriage between residents of this state.

Cited in notes (16 L. R. A. 231) on validity of personal judgments rendered on constructive service of process; (53 Am. St. Rep. 181) on jurisdiction over absent citizens with respect to judgments in personam.

Situs of debt for purpose of suit or garnishment.

Cited in *Morawetz v. Sun Ins. Office*, 96 Wis. 179, 65 Am. St. Rep. 43, 71 N. W. 109, denying garnishment of foreign insurance company doing business in forum for debt due nonresident for loss in other state; *National Bank v. Furtick*, 2 Marv. (Del.) 60, 44 L. R. A. 118, 69 Am. St. Rep. 99, 42 Atl. 479, holding demand against insurance company has no situs in state of agency, when debt due nonresident for property insured in foreign state; *Reimers v. Seatco*

Mfg. Co. 30 L. R. A. 367, 17 C. C. A. 232, 37 U. S. App. 426, 70 Fed. 577, denying court's power to give judgment in favor of nonresident against foreign corporation, of debt due from another foreign corporation, payable elsewhere; Swedish-American Nat. Bank v. Bleecker, 72 Minn. 390, 42 L. R. A. 287, 71 Am. St. Rep. 492, 75 N. W. 740, holding situs of debt not in state, parties not residing or transaction taking place in state; Strause Bros. v. Ætna F. Ins. Co. 126 N. C. 229, 43 L. R. A. 454, 35 S. E. 471, holding debt due from insurance company for loss in one state, no situs in third to sustain garnishment by insured's creditor; Louisville & N. R. Co. v. Nash, 118 Ala. 487, 41 L. R. A. 333, 72 Am. St. Rep. 181, 23 So. 825, holding courts of Alabama no jurisdiction in garnishment proceedings over debt due nonresident, payable elsewhere; Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 246, 27 L. R. A. 653, 48 Am. St. Rep. 626, 29 S. W. 1010, Affirming 54 Mo. App. 153, upholding right to garnish debt wherever creditor may sue on claim; Bragg v. Gaynor, 85 Wis. 488, 21 L. R. A. 168, 55 N. W. 919, holding debts due nonresidents, represented by notes and mortgages, have situs in state in favor of resident creditors of holders; Eingartner v. Illinois Steel Co. 94 Wis. 85, 34 L. R. A. 508, 59 Am. St. Rep. 859, 68 N. W. 664, holding citizen of foreign state may sue fellow citizen found in state, on cause arising in former state; Lancashire Ins. Co. v. Corbetts, 165 Ill. 596, 36 L. R. A. 642, 56 Am. St. Rep. 275, 46 N. E. 631, holding foreign corporation having property and agents in Illinois may be garnished for debt due nonresident; Atchison. T. & S. F. R. Co. v. Maggard, 6 Colo. App. 96, 39 Pac. 985, holding state where employee resides and services rendered, situs of debt; McBee v. Purcell Nat. Bank, 1 Ind. Terr. 293, 37 S. W. 55, holding place of deposit situs of debt for purpose of garnishment; Fond Du Lac Cheese & Butter Co. v. Henningser Produce Co. 141 Wis. 72, 123 N. W. 640, holding the courts cannot, by reason of statutes declaring such power, acquire jurisdiction over persons not present in the state, except for purpose of adjudicating with reference to property or status within state; Jordan v. Chicago & N. W. R. Co. 125 Wis. 592, 1 L.R.A.(N.S.) 891, 110 Am. St. Rep. 865, 104 N. W. 803, 4 A. & E. Ann. Cas. 1113 (dissenting opinion) on existence of jurisdictional facts necessary to decision.

Cited in notes (19 L. R. A. 578) on protection of nonresident creditor against garnishment; (3 L.R.A.(N.S.) 611) on place of payment as affecting jurisdiction to garnish debt; (69 Am. St. Rep. 117) on situs of debts for purposes of garnishment and of property in transit in hands of carriers.

14 L. R. A. 566, *STATE ex rel. TERRE HAUTE v. KOLSEM*, 130 Ind. 434, 29 N. E. 595.

Legislative interference with local government.

Cited in *State ex rel. White v. Barker*, 116 Iowa, 104, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, denying right of legislature to name appointees to control municipal water system; *State ex rel. Geake v. Fox*, 158 Ind. 129, 56 L. R. A. 895, 63 N. E. 19, and *State ex rel. Smyth v. Moores*, 55 Neb. 530, 41 L. R. A. 640, 76 N. W. 175 (dissenting opinion), majority declaring unconstitutional, act conferring authority upon governor to appoint fire and police commissioners; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 184, 37 L. R. A. 194, 46 N. E. 77, holding act giving circuit judges power to appoint city commissioners, unconstitutional; *State ex rel. Harrison v. Menaugh*, 151 Ind. 268, 43 L. R. A. 412, 51 N. E. 117, holding law changing time of election of town trustees valid exercise of legislative power; *Mannie v. Hatfield*, 22 S. D. 478, 118 N. W. 817, holding that municipal corporations have only such powers as legislature grants them, which power is subject to legislative control; *Smith*

v. Indianapolis Street R. Co. 158 Ind. 437, 63 N. E. 849, upholding act regulating the granting of franchises to railroads in cities of 100,000 inhabitants; State ex rel. Dreibelbiss v. Berghoff, 158 Ind. 358, 63 N. E. 717, holding the motives of the legislative body in enacting that office of municipal judge shall come into existence a certain date and that elections shall take place upon certain dates are not proper subjects of judicial examination; Ex parte Lewis, 45 Tex. Crim. Rep. 40, 108 Am. St. Rep. 929, 73 S. W. 811 (dissenting opinion), on the extent of local self-government by a city; Ex parte Corliss, 16 N. D. 534, 114 N. W. 962 (dissenting opinion), on extent there exists a local right to act independently of the state.

Cited in footnotes to State ex rel. McCausland v. Freeman, 47 L.R.A. 67, which sustains statute arbitrarily establishing high school and requiring its maintenance by people of county; Rathbone v. Wirth, 34 L. R. A. 408, which holds void, statute for bipartisan police board of four members to be selected by all members of common council voting for two members of board only; Davoek v. Moore, 28 L. R. A. 783, which sustains legislative power to provide for city board of health with power to incur expenses without city's consent.

Cited in notes (48 L.R.A. 481) on power of legislature to impose burdens upon municipalities and to control their local administration and property; (1 L.R.A.(N.S.) 513) on right of local self-government; legislative regulation of municipal officers.

Local or general laws.

Cited in Pennsylvania Co. v. State, 142 Ind. 440, 41 N. E. 937, holding determination as to application of general laws, not specially enumerated, legislative question; Young v. Tipton County, 137 Ind. 325, 36 N. E. 1118, declaring constitutional, act authorizing counties to issue bonds to complete construction of courthouses; Bell v. Maish, 137 Ind. 231, 36 N. E. 1118, holding act authorizing aid to construction of railroads, constitutional; Harmon v. Madison County, 153 Ind. 77, 54 N. E. 105, holding law prohibiting payment of compensation to any officer exceeding sum paid in, valid; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 8, 71 Am. St. Rep. 301, 49 N. E. 582, holding act "regulating railroad and other corporations" within § 9, art. 4, constitutional; Indianapolis v. Navin, 151 Ind. 155, 41 L. R. A. 343, 47 N. E. 525, holding constitutional, law regulating fares charged by existing street railway company; Indianapolis Street R. Co. v. Robinson, 157 Ind. 234, 61 N. E. 197, holding act requiring plaintiff to prove freedom from contributory negligence constitutional; Woods v. McCay, 144 Ind. 323, 33 L. R. A. 99, 43 N. E. 269, holding creation of local courts of concurrent jurisdiction with circuit courts not prohibited by Constitution; State v. Lewis, 134 Ind. 254, 20 L. R. A. 54, 33 N. E. 1024, holding act making possession of gill net misdemeanor, constitutional; Jackson County v. State, 147 Ind. 487, 46 N. E. 908, upholding statute providing remedy to force public officer to perform duty; Forsyth v. Hammond, 18 C. C. A. 179, 34 U. S. App. 552, 71 Fed. 446, declaring unconstitutional, statute allowing appeal from decision of county commissioners as to annexation of territory to city; Mode v. Beasley, 143 Ind. 315, 42 N. E. 727, holding relocation of county seat not within constitutional prohibition against local legislation regulating county business; State v. Hammond, 66 S. C. 224, 44 S. E. 797, holding it to be judicial question whether act making it crime to fail to remove dam after notice, is special legislation; Buist v. Charleston, 77 S. C. 270, 57 S. E. 862, holding the question whether an act conflicts with provision of state constitution which prohibits passage of special laws where general laws can apply, is one for the legislature to pass upon.

Cited in footnotes to *Com. ex rel. Jones v. Blackley*, 52 L. R. A. 367, which sustains classification of townships by density of population; *State, Alexander, Prosecutor, v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating between municipalities already having and those not having race course; *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *Edmunds v. Herbrandson*, 14 L. R. A. 725, which holds necessity of special law a legislative question; *Re Henneberger*, 42 L.R.A. 132, which holds local, statute general in terms, but enumerating restrictions constituting identification rather than classification; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; *Stockton v. Powell*, 15 L. R. A. 42, which holds courts without power to inquire as to notice of application to legislature for local legislation; *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void; *Longview v. Crawfordsville*, 68 L.R.A. 623, which holds void classification of cities for purpose of legislation so as to make particular law conferring power to annex territory applicable to those having population between six and seven thousand.

Cited in note (93 Am. St. Rep. 108) on constitutional inhibition against special legislation where general law can be made applicable.

Sufficiency of title to statute.

Cited in *Maule Coal Co. v. Partenheimer*, 155 Ind. 107, 55 N. E. 751, holding act regulating operation of mines and right to recover for death of employee not invalid for failure to express subject in title; *Clarke v. Darr*, 156 Ind. 697, 60 N. E. 688, holding solvent domestic corporation and insolvent foreign corporation related within meaning of Constitution; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 8, 71 Am. St. Rep. 301, 49 N. E. 582, holding statute prohibiting contracts releasing corporations from liability to employees need not be expressed in title to employers liability act.

Legislative discretion.

Cited in *Arnett v. State*, 168 Ind. 184, 8 L.R.A.(N.S.) 1194, 80 N. E. 153, holding the legislature cannot delegate to others the power to make laws, but it may give discretion to others in the enforcement of laws made.

14 L. R. A. 577, *Re OBERG*, 21 Or. 406, 28 Pac. 130.

Validity of class legislation.

Followed in *State ex rel. Bell v. Frazier*, 36 Or. 188, 59 Pac. 5, upholding law for assessment of tax to pay certain fees to certain officers.

Cited in *State v. Loomis*, 115 Mo. 324, 21 L. R. A. 807, 22 S. W. 350, declaring unconstitutional, law prohibiting persons engaged in manufacturing or mining from issuing to employees non-negotiable instrument or unredeemable order; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 440, 23 L. R. A. 276, 41 Am. St. Rep. 109, 25 S. W. 75, upholding law requiring payment of wages "without abatement or discount;" *State v. Baker*, 50 Or. 385, 13 L.R.A.(N.S.) 1042, 92 Pac. 1076, holding so long as the law operates alike upon all persons similarly situated, it is not objectionable as class or special legislation; *State v. Thompson*, 47 Or. 498, 4 L.R.A.(N.S.) 484, 84 Pac. 476, 8 A. & E. Ann. Cas. 646, holding a law restricting sale of railroad tickets to railroad agents holding certificates of authority to sell, is not objectionable as special legislation; *State v. Fraternal K. & L.* 35 Wash. 345, 77 Pac. 500, holding equal protection of the laws does not mean equality of operation on persons merely as such, but on persons according to their relations; *State v. Muller*, 48 Or. 258, 120 Am. St. Rep. 805, 85

Pac. 855, 11 A. & E. Ann. Cas. 88, holding same where all persons subject to such legislation are treated alike under like circumstances and conditions.

Cited in note (60 L. R. A. 341, 345) on constitutional equality in the United States in relation to corporate taxation.

14 L. R. A. 579, LOUISVILLE SAFETY VAULT & T. CO. v. LOUISVILLE & N. R. CO. 92 Ky. 233, 17 S. W. 567.

Regulation of rights, privileges, and contracts.

Cited in *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 21, 55 L. R. A. 201, 42 Atl. 1063, upholding stipulation in policy that "no action shall be brought except against attorneys in facts," and referring particularly to annotation in 14 L. R. A. 579.

Cited in footnotes to *Sprague v. Fletcher*, 37 L. R. A. 840, which holds statute allowing deduction of debts to resident taxpayers only, void; *State v. Travelers' Ins. Co.* 57 L. R. A. 481, which sustains statute imposing tax on market value of nonresident shareholders' stock without deduction of capital invested in land, as in case of resident shareholders; *Van Harlingen v. Doyle*, 54 L. R. A. 771, which holds void, statute prohibiting letting of public printing to papers established less than year; *Consumers Gas Trust Co. v. Harless*, 15 L. R. A. 505, which holds constitutional act limiting to corporations within state grant of right of eminent domain; *Williams v. Crabb*, 59 L. R. A. 425, which sustains Federal jurisdiction, in case of diverse citizenship, of suit to set aside probate of will in state extending equity jurisdiction to such suits; *Eingartner v. Illinois Steel Co.* 34 L. R. A. 503, which sustains action between nonresidents for injuries received in other state; *State v. Hogan*, 52 L. R. A. 864, which sustains statute making it a crime for male tramp not blind, outside county of residence, to threaten injury to another; *People ex rel. Cisco v. School Board*, 48 L. R. A. 113, which denies right of colored children to attend same schools as white children when separate schools with equal accommodations provided; *People ex rel. Bibb v. Alton*, 56 L. R. A. 95, which denies right of city to send colored children out of district to separate school established for them; *Brown v. Russell*, 32 L. R. A. 253, which holds act requiring appointment of veterans on sworn statement of qualifications void; *Anderton v. Milwaukee*, 15 L. R. A. 830, which holds discrimination between lot owners as to compensation for change of street grade void; *Roby v. Smith*, 15 L. R. A. 792, which holds act prohibiting appointment of nonresident as trustee unconstitutional; *Sweeney v. Hunter*, 14 L. R. A. 594, which holds prohibition against assigning claim against resident to nonresident valid; *Williams v. Donough*, 56 L. R. A. 766, which holds void, statute exempting proceeds of fraternal benefit certificate from liability for debts; *Leep v. St. Louis, I. M. & S. R. Co.* 23 L. R. A. 264, which upholds statute requiring payment of wages earned without discount on discharge of employees by corporations; *Re Oberg*, 14 L. R. A. 577, which holds valid act prohibiting arrest of officer or seaman of sea-going vessel; *Middleton v. Middleton*, 36 L. R. A. 221, which holds act permitting limited divorce with special consequences to person holding conscientious scruples against absolute divorce unconstitutional; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 17 L. R. A. 856, which holds corporation not a person within protection of 14th Amendment; *Hammond Beef & Provision Co. v. Best*, 42 L. R. A. 528, which holds foreign corporation a "person" protected against discharge of debtor by state insolvency proceedings; *Mathews v. People*, 63 L.R.A. 73, which holds void provision in statute establishing free employment agencies at public expense for bidding furnishing of help to persons whose employees are on strike or locked out; *Nathan v. Spokane County*, 65 L.R.A. 337, which holds property liable to taxation under

general laws of state not exempt because returned for taxation for same years in another state.

Cited in notes (60 L. R. A. 321, 331) on constitutional equality in the United States in relation to corporate taxation; (24 L. R. A. 292) on recognition or exclusion of foreign corporations; (19 L. R. A. 225) on who or what is included in term "persons;" (18 L. R. A. 641) on rights of colored passengers; (16 L. R. A. 277) on treaty guaranties to aliens; (14 L. R. A. 846) on implied sanction of evil by statutory regulations; (21 L. R. A. 790) on constitutionality of statutes restricting contracts and business; (34 L.R.A.(N.S.) 264) on constitutionality of statute imposing liability for injury to servant, irrespective of negligence; (62 Am. St. Rep. 169) on protection of corporations from special and hostile legislation; (45 L. ed. U. S. 245) on separate coach acts.

— **Practice of dentistry and medicine.**

Cited in *People v. Reetz*, 127 Mich. 87, 86 N. W. 396, upholding right of legislature to regulate examinations for physicians; *Com. v. Gibson*, 21 Pa. Co. Ct. 239, 7 Pa. Dist. R. 389, holding legislature may regulate practice of dentistry; *State v. Knowles*, 90 Md. 658, 49 L. R. A. 698, footnote p. 695, 45 Atl. 877, sustaining discrimination between regular dental colleges and others authorized to grant diplomas to dentists; *Gothard v. People*, 32 Colo. 15, 74 Pac. 890, upholding act restricting practice of dentistry to persons holding a diploma from a dental school.

Cited in footnotes to *Overshiner v. State*, 51 L. R. A. 748, which upholds act authorizing appointment by state dental association of some of members of board of dental examiners; *Mathews v. Murphy*, 54 L. R. A. 415, which holds void, statute authorizing state health board to revoke physician's license for unprofessional conduct without fixing standard; *State v. Randolph*, 17 L. R. A. 470, which holds valid act exempting present practitioners of medicine from requirements as to diploma or certificate; *State ex rel. Kellogg v. Currans*, 56 L. R. A. 253, which sustains requirement of examination of graduate of foreign medical college not required of graduates of college in state; *State v. Wilson*, 52 L. R. A. 679, which holds one prosecuted for unlawful practice of medicine required to prove compliance with statute; *State ex rel. Burroughs v. Webster*, 41 L. R. A. 212, which holds valid act requiring all physicians to obtain new certificate and license; *State v. Bair*, 51 L. R. A. 776, which sustains statute requiring examination before state board of examiners, practice for five years, or certificate from medical school, before practising medicine; *Scholle v. State*, 50 L. R. A. 411, which sustains statute requiring license for physicians excepting certain classes of persons; *Parks v. State*, 59 L. R. A. 190, which sustains requirement that magnetic healer procure license; *State v. Biggs*, 64 L. R. A. 140, which holds statute conferring upon licensed doctors exclusive right to treat all diseases void; *State v. Buswell*, 24 L. R. A. 68, which holds certificate necessary to practise as Christian scientist; *State v. Liffing*, 46 L. R. A. 334, which denies necessity of certificate from medical board for practice of osteopathy; *Ex parte Gerino*, 66 L.R.A. 249, which sustains validity of statute fixing standard of preparation required of applicants for license to practice medicine, though under provisions of law such standard may vary from time to time and may be fixed by requirements which schools teaching particular system of medicine require of their pupils; *Territory v. Newman*, 68 L.R.A. 783, which upholds statute defining practice of medicine so as to include every method of treating disease for gain and requiring practitioners to obtain a license; *State v. Brown*, 68 L.R.A. 889, which denies right to require license to own, run, or manage a dental office from one having no intention of engaging in actual practice of dentistry.

— Taking oysters or fish.

Cited in footnotes to *State v. Dow*, 53 L. R. A. 314, which sustains statute against fishing for trout with intent to sell or trade; *Tyler v. State*, 52 L. R. A. 100, which holds oysters taken from waters outside of state not within statutory prohibition of possession of; *Com. v. Hilton*, 45 L. R. A. 475, which sustains town regulation limiting to residents, right to dig clams for sale; *Gustafson v. State*, 43 L. R. A. 615, which holds void, act limiting to taxpayers right to take oysters in public waters.

— Other trades and occupations.

Cited in *Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 526, 20 L. R. A. 61, footnote p. 58, 36 Am. St. Rep. 245, 12 So. 579, holding valid, act prohibiting banker discounting paper at more than specified rate; *Noble State Bank v. Haskell*, 22 Okla. 79, 97 Pac. 590, holding that regulation of Banking is within police power of legislature; *Louisville & N. R. Co. v. Melton*, 218 U. S. 48, 54 L. ed. 926, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676, holding that act regulating railroads violates no constitutional provision because it is made to apply only to railroads; *Louisville & N. R. Co. v. Melton*, 127 Ky. 286, 105 S. W. 366, holding an act regulating railroads violates no constitutional provision because it is made to apply to railroads only; *Com. v. Remington Type-writer Co.* 127 Ky. 191, 105 S. W. 399, holding a requirement that all corporations shall place beneath name on all printed matter the word "incorporated" is a proper police regulation.

Cited in footnotes to *Bessette v. People*, 56 L. R. A. 558, which sustains classification of municipalities for licensing of horseshoers; *People v. Bellet*, 22 L. R. A. 696, which upholds prohibition of business of barber on Sunday under greater penalties than those imposed on other business; *People ex rel. Nechameus v. Warden of City Prison*, 27 L. R. A. 718, which upholds act requiring examination and certificate from employing or master plumbers; *State v. Gardner*, 41 L. R. A. 689, which holds void, statute allowing all members of plumbing firm to pursue business when one has license, or all members of corporation to do so when manager has license; *Bailey v. People*, 54 L. R. A. 839, which holds void, restriction on number lodging-house keepers may permit to occupy one room; *State v. Walsh*, 35 L. R. A. 231, which holds void, statute against book making, etc., containing proviso exempting persons within limits of regular race course; *Juniata Limestone Co. v. Fagley*, 42 L. R. A. 442, which holds void, *per diem* tax on employers for each unnaturalized employee; *State v. Cadigan*, 57 L. R. A. 666, which holds void, imposition of penalty on agents for foreign partnerships not complying with conditions not required of local firms; *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement of peddling license; *People v. Bray*, 27 L. R. A. 158, which holds valid, prohibition against selling or giving liquor to Indians; *Broadfoot v. Fayetteville*, 39 L. R. A. 245, which sustains statute discriminating in favor of nonresidents of city as to allowing stock to run at large; *Brim v. Jones*, 29 L. R. A. 97, which upholds act making driver of live stock over highway on hillside liable for injury to banks, or by rolling rocks into highway; *McCandless v. Richmond & D. R. Co.* 18 L. R. A. 440, which holds equal protection not denied by act making railroad companies liable for fires; *Luman v. Hitchins Bros. Co.* 46 L. R. A. 393, which holds void, statute prohibiting officer of railroad and mining corporation only being interested in mercantile business; *State v. Loomis (Mo.)* 21 L. R. A. 795, footnote p. 790, 20 S. W. 332, Reversed in 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, sustaining statute prohibiting mining or manufacturing concerns issuing to employees orders, unless negotiable and redeemable in cash or supplies.

Cited in notes (25 L. R. A. 238) on restrictions on insurance by unincorporated associations or individuals; Lloyds' associations; (24 L. R. A. 152) on statutes against brokerage or "scalping;" (15 L. R. A. 478) on constitutionality of statutes prohibiting private banking.

— **Allowance of attorney's fees.**

Cited in *Pyramid Land & Stock Co. v. Pierce*, 30 Nev. 252, 95 Pac. 210, holding enactment providing for attorney's fees in favor of one recovering damages for unlawful use of land is a proper police regulation.

Cited in footnotes to *Vogel v. Pekoe*, 30 L. R. A. 491, which sustains act allowing attorneys' fees to employees in actions for wages; *Cameron v. Chicago, M. & St. P. R. Co.* 31 L. R. A. 553, which holds valid, act allowing attorneys' fees in actions against railroad companies for taking land without making compensation; *Turner v. Boger*, 49 L. R. A. 590, which holds provision for attorneys' fees in trust deed, void; *Dell v. Marvin*, 45 L. R. A. 201, which sustains statute allowing attorney's fees to successful plaintiff, but not to defendant, in mechanic's lien case; *Gulf, C. & S. F. R. Co. v. Ellis*, 17 L. R. A. 286, which holds valid, act authorizing attorneys' fees against railroad corporations in suits on claims; *Union Cent. L. Ins. Co. v. Chowning*, 24 L. R. A. 504, which holds equal protection not denied by requiring damages and attorneys' fees from insurance company not paying loss within time fixed; *Hocking Valley Coal Co. v. Rosser*, 29 L. R. A. 386, which holds void, act allowing attorney's fees in action for wages not paid within three days after written demand; *Gano v. Minneapolis & St. L. R. Co.* 55 L. R. A. 263, which sustains requirement for payment of attorney's fee on successful appeal by landowner from award in eminent domain; *Atkinson v. Woodmansee*, 64 L.R.A. 325, which holds void, provision for taxation as costs of attorney's fee in successful action by labor or artisan to enforce mechanic's lien; *Hartford Fire Ins. Co. v. Redding*, 67 L.R.A. 518, which upholds provision for recovery of attorney's fees in certain cases against insurance companies; *L'Engle v. Scottish Union & N. Ins. Co.* 67 L.R.A. 581, which upholds provision for recovery of attorneys' fees in certain cases against fire and life insurance companies.

Joinder of claims of ordinary and gross negligence.

Cited in note (31 L.R.A.(N.S.) 160) on right to join claims of ordinary and gross negligence arising out of the state of facts.

Who may object to void discrimination in statute.

Cited in note (32 L.R.A.(N.S.) 955, 958) as to who may object to statute as containing unconstitutional discrimination.

14 L. R. A. 588, *BANK OF COMMERCE v. FUQUA*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291.

Effect on issues of reversal of entire judgment.

Cited in *Mattock v. Goughnour*, 13 Mont. 301, 34 Pac. 36, holding reversal on appeal from entire judgment and order, requires new trial of all issues; *Mattingly v. Lewisohn*, 13 Mont. 517, 35 Pac. 111, refusing to strike out amended complaint filed after reversal of entire judgment for refusal to sustain demurrer.

Review of instructions.

Cited in *Missoula Electric Light Co. v. Morgan*, 13 Mont. 397, 34 Pac. 488, and *Kleinschmidt v. McDermott*, 12 Mont. 313, 30 Pac. 393, refusing to review instructions on appeal unless incorporated in bill of exceptions.

Nature of demurrer.

Cited in *Plymouth Gold Min. Co. v. United States Fidelity & G. Co.* 35 Mont. 27, 88 Pac. 565, 10 A. & E. Ann. Cas. 951, holding the aim of a demurrer is to uproot and cast out the whole pleading.

Pleading of foreign statute.

Cited in *Lowry v. Moore*, 16 Wash. 479, 58 Am. St. Rep. 49, 48 Pac. 238, holding foreign statute must be pleaded; *McKnight v. Oregon Short Line R. Co.* 33 Mont. 42, 82 Pac. 661, holding where one relies upon a statute of a sister state such statute must be pleaded and proved as a fact; *Baird v. Vines*, 18 S. D. 54, 99 N. W. 89, on necessity of pleading and proving law of a sister state.

Effect of provision for attorneys' fees.

Cited in *Morrison v. Ornbaun*, 30 Mont. 113, 75 Pac. 953, holding where note is made payable with reasonable attorney's fees such fees are collectible where payment is not made at maturity though collection is made by attorneys without suit; *Green v. Spires*, 71 S. C. 112, 50 S. E. 554, 4 A. & E. Ann. Cas. 261 (dissenting opinion), on effect on negotiability of the words, "costs" and "expenses."

Cited in note (55 Am. St. Rep. 438, 443) on validity of stipulations for attorneys' fees.

Distinguished in *Lang v. Cadwell*, 13 Mont. 462, 34 Pac. 957, denying contribution from cotenant for attorneys' fees stipulated in mortgage, paid by one to avoid foreclosure.

— On negotiability of note.

Cited in *Benn v. Kutzschan*, 24 Or. 30, 32 Pac. 763; *Salisbury v. Stewart*, 15 Utah, 313, 62 Am. St. Rep. 934, 49 Pac. 777; *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 598, 3 C. C. A. 20, 6 U. S. App. 312, 52 Fed. 195; *Stapleton v. Louisville Bkg. Co.* 95 Ga. 804, 23 S. E. 81; *Shenandoah Nat Bank v. Marsh*, 89 Iowa, 276, 48 Am. St. Rep. 381, 56 N. W. 458,—denying that provision for attorney's fees for nonpayment renders note non-negotiable; *Bullard v. Smith*, 28 Mont. 395, 72 Pac. 761, holding note with provision for attorney's fee, negotiable before passage of § 3992 of Code.

Cited in footnote to *Pattillo v. Alexander*, 29 L. R. A. 616, which sustains payee's guaranty of attorney's fees if note has to be collected by law.

Cited in note (125 Am. St. Rep. 209) on agreements and conditions destroying negotiability.

Distinguished in *Cornish v. Woolverton*, 32 Mont. 467, 108 Am. St. Rep. 598, 81 Pac. 4, holding where rule of negotiability is fixed by legislative enactment, stipulation for attorney's fees destroys negotiability.

Disapproved in effect in *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 311, 37 L. R. A. 88, 26 S. E. 609, holding provision in note requiring makers to pay attorneys' fees if collected by suit, renders note non-negotiable.

What transactions are usurious.

Cited in note (46 Am. St. Rep. 193) on what transactions are usurious. **Sham pleadings.**

Cited in note (113 Am. St. Rep. 640) on sham pleadings.

14 L. R. A. 594, **SWEENEY v. HUNTER**, 145 Pa. 363, 22 Atl. 653.

Restriction of contract between debtor and creditor.

Cited in *Dennis v. Moses*, 18 Wash. 597, 40 L. R. A. 315, 52 Pac. 333, declaring unconstitutional, statute prohibiting deficiency judgments; *Re Flukes*, 157 Mo. 129, 51 L. R. A. 177, 80 Am. St. Rep. 619, 57 S. W. 545, declaring void, statute forbidding assignment of claim for wages to nonresident; *State v. Loomis*, 115 Mo. 334, 21 L. R. A. 810, 22 S. W. 350 (dissenting opinion) majority declaring void, statute prohibiting mining and manufacturing concerns issuing to employees, order unredeemable in cash or supplies; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 419, 23 L. R. A. 269, 41 Am. St. Rep. 109, 25 S. W. 75, upholding act prohibiting

retention of part of employee's wages by corporation; *Workingman v. Merchant*, 26 Pa. Co. Ct. 472 (opinion by attorney general), holding creditors liable to penalty at suit of debtor for assignment of claims to foreign collection agency; *Little v. Balliette*, 9 Pa. Super. Ct. 413, holding wages of laborer not liable to foreign attachment; *Re Larocco*, 32 Pittsb. L. J. N. S. 40, denying exemption of nonresident widow of foreigner, who died in Pennsylvania; *Galbraith v. Rutter*, 20 Pa. Super. Ct. 556, denying right of creditor to maintain suit in foreign court under Act of May 23, 1887, for collection of claim against wage-earner; *Com. v. Stambaugh*, 22 Pa. Super. Ct. 339, Affirming 27 Pa. Co. Ct. 179, refusing to quash indictment for conspiracy to violate statute forbidding assignment of claims against wage-earner; *Com. v. Miller*, 12 Pa. Dist. R. 75, holding an indictment will lie against assignor and assignee of a claim exempt from debt, under a state law forbidding such assignment; *Assignment of Claims of Creditors*, 11 Pa. Dist. R. 310, upholding act imposing a penalty for the assignment of exempt claims against residents of the state to nonresidents.

Cited in footnotes to *Illinois C. R. Co. v. Smith*, 19 L. R. A. 580, denying that garnishment in another state defeats exemption of wages earned elsewhere; *Stewart v. Thompson*, 36 L. R. A. 583, holding nonresident creditor liable to debtor by attaching property found in another state.

Cited in notes (19 L. R. A. 580) on protection of nonresident creditor against garnishment; (36 L. R. A. 583) on debtor's right of action against his creditor for collecting debt in another jurisdiction in evasion of exemption laws of their domicile.

Distinguished in *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 374, 33 L.R.A. (N.S.) 722, 108 N. W. 902, holding it within police power of state to declare invalid any private contract limiting the liability of a railway company for negligence of a fellow servant.

Effect of voluntary act of debtor on his right to exemption.

Cited in *Telike v. Matievith*, 13 Luzerne L. Reg. Rep. 212, holding that wages of coal miner are exempt by statute and exemption cannot be waived; *Morris Box Board Co. v. Rossiter*, 30 Pa. Super. Ct. 25, holding the right to exempt wages or salary is not lost by a general appearance in a foreign attachment; *Malloy v. McCollum*, 36 Pa. Co. Ct. 229, 18 Pa. Dist. R. 674, holding fact that judgment is substituted for a wage claim by voluntary act of the plaintiff in the judgment, is of no avail against claim that wages were exempt from debt; *O'Neill v. Beasley*, 17 Pa. Dist. R. 154, holding the exemption is regarded as founded on public policy, looking to protection as against voluntary acts.

Distinguished in *Larocco's Estate*, 10 Pa. Dist. R. 568, holding the widow's exemption given by statute has no application to a nonresident widow.

14 L. R. A. 596, *BAGG v. WILMINGTON, C. & A. R. CO.* 109 N. C. 279, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79.

Statutes affecting interstate commerce.

Cited in *State v. Womble*, 112 N. C. 867, 19 L. R. A. 829, 17 S. E. 491, holding act exempting officers and employees of certain railroad from working on public roads, valid; *State v. Southern R. Co.* 119 N. C. 820, 56 Am. St. Rep. 689, 25 S. E. 862, holding valid, a statute prohibiting running freight trains on Sunday; *Currie v. Raleigh & A. A. L. R. Co.* 135 N. C. 537, 47 S. E. 654, holding carrier liable for penalty for refusal to receive car of lumber, properly loaded, for interstate shipment; *Hutton v. Webb*, 124 N. C. 753, 59 L. R. A. 39, 33 S. E. 169 (dissenting opinion), majority denying legislature's right to impose duties upon commerce of navigable stream to build forts and bridges; *McCann v. Eddy*, 133 Mo. 70, 35 L. R. A. 113, 33 S. W. 71, sustaining statute imposing liability for

negligence of connecting carrier; Yazoo & M. R. Co. v. Greenwood Grocery Co. 96 Miss. 417, 51 So. 450, holding that state railroad commission may fix reciprocal demurrage rules, making carrier liable for delays in delivery of interstate shipments after arrival at point of consignment; Reid v. Southern R. Co. 153 N. C. 492, 69 S. E. 618, holding that section 2631 of Revisal, imposing penalty on carrier refusing freight for shipment, is constitutional in its application to interstate shipments; St. Louis, I. M. & S. R. Co. v. Edwards, 94 Ark. 398, 127 S. W. 713, holding that demurrage is not invalid, so far as it applies to interstate commerce; Garrison v. Southern R. Co. 150 N. C. 592, 64 S. E. 578; Reid v. Southern R. Co. 150 N. C. 758, 64 S. E. 874, 17 A. & E. Ann. Cas. 247,—holding statutes imposing a penalty for refusal to receive freight are upheld as a just and reasonable exercise of police power, both as to inter and intrastate commerce; Reid v. Southern R. Co. 149 N. C. 425, 63 S. E. 112; Burlington Lumber Co. v. Southern R. Co. 152 N. C. 72, 67 S. E. 167,—holding act of refusing to receive for shipment is not a part of the act of transportation and state penalty statutes apply; Morris-Scarboro-Moffitt Co. v. Southern Exp. Co. 146 N. C. 172, 15 L.R.A.(N.S.) 986, 59 S. E. 667, upholding statute imposing a penalty on common carriers for failure to adjust and pay claims for damages to goods within three months after demand; Walker v. Southern R. Co. 137 N. C. 168, 49 S. E. 84, holding statutes imposing a penalty for failure to ship goods within four days of time they are received does not contravene commerce clause; State v. Seaboard Air Line R. Co. 56 Fla. 662, 32 L.R.A.(N.S.) 668, 47 So. 969, holding state regulation of interstate transportation, if it only indirectly and incidentally affects interstate commerce, is not in conflict with commerce clause; Harrill Bros. v. Southern R. Co. 144 N. C. 538, 57 S. E. 383, holding statute imposing a penalty for refusal to deliver freight upon lawful tender of charges by consignee is not unconstitutional as a burden upon interstate commerce.

Cited in footnotes to Lafarier v. Grand Trunk R. Co. 17 L.R.A. 111, which holds state statute giving ticket holder stopover rights not applicable outside of state; Central Stockyards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, which holds that state cannot require delivery of interstate freight by one carrier to another within its borders in order that it may reach a particular depot.

Cited in notes (24 L. R. A. 152) on statutes against ticket brokerage or "scalping;" (20 L.R.A.(N.S.) 126) on constitutionality of legislation affecting amount of liability or penalty for delay in delivery, or for destruction, of freight; (27 Am. St. Rep. 548, 559) on state regulation of interstate commerce.

Distinguished in Southern R. Co. v. Greensboro Ice & Coal Co. 134 Fed. 92, holding a state commission may be enjoined from enforcing an order compelling carriers to deliver carloads of coal to consignee shipped into the state on certain tracks for unloading; Murphy Hardware Co. v. Southern R. Co. 150 N. C. 706, 22 L.R.A.(N.S.) 1202, 64 S. E. 873, 17 A. & E. Ann. Cas. 481, holding carrier may show, as defense to action for refusal to receive stock, that a strike and conditions over which it had no control make shipment impossible if stock were accepted.

14 L. R. A. 600, STATE v. WORKMAN, 35 W. Va. 367, 14 S. E. 9.

Statutes regulating rights and privileges.

Approved in State v. Peel Splint Coal Co. 36 W. Va. 815, 17 L. R. A. 389, 15 S. E. 1000, sustaining act regulating manner of paying employees of certain corporations.

Cited in State v. Hunter, 37 W. Va. 745, 17 S. E. 307, sustaining conviction of one carrying revolver, not for self-protection; State v. Bingham, 42 W. Va. 238, 24 S. E. 883, sustaining provision that jury may find conspiracy from pres-

ence of others aiding commission of act; *Strickland v. State*, 137 Ga. 5, 36 L.R.A. (N.S.) 117, 72 S. E. 260, holding valid, act prohibiting carrying of revolver without license.

Cited in footnotes to *Com. v. Murphy*, 32 L. R. A. 606, which upholds statute prohibiting drills and parades by unauthorized parties of men; *State v. Hogan*, 52 L. R. A. 864, which sustains statute making it a crime for male tramp not blind, outside county of residence, to threaten injury to another.

Cited in notes (3 L.R.A.(N.S.) 169; 115 Am. St. Rep. 200, 201, 203) on constitutional right to keep and bear arms; (78 Am. St. Rep. 263) on acts which legislature may declare criminal.

Construction of statutes.

Cited in *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 536, 55 S. E. 664, holding where certain construction is in effect violative of a constitutional right it is an admonition to the court that such construction is wrong, if statute is susceptible of a construction that will make it valid; *Coal & Coke R. Co. v. Conley*, 67 W. Va. 166, 67 S. E. 613, holding that every reasonable construction must be resorted to, in order to save statute from unconstitutionality.

14 L. R. A. 605, *STATE v. LINGERFELT*, 109 N. C. 775, 14 S. E. 75.

Rights and liabilities of sureties on bail bond.

Cited in *State v. Schenck*, 138 N. C. 564, 49 S. E. 917, 3 A. & E. Ann. Cas. 928, holding the conviction does not have the effect of putting the defendant into the custody of the court or relieve sureties for his appearance from liability.

14 L. R. A. 609, *STATE v. STOWE*, 3 Wash. 206, 28 Pac. 337.

Cumulative evidence as ground for new trial.

Cited in *State v. Townsend*, 7 Wash. 467, 35 Pac. 367, granting new trial for newly discovered white witness, although evidence is cumulative; *Kreielsheimer v. Nelson*, 31 Wash. 406, 72 Pac. 72, refusing to disturb order for new trial when discretion not abused.

Jurisdiction where offense is committed before admission of state in Union.

Cited in *Higgins v. Brown*, 20 Okla. 386, 1 Okla. Crim. Rep. 62, 94 Pac. 703; *Ex parte Bailey*, 20 Okla. 500, 1 Okla. Crim. Rep. 118, 94 Pac. 553,—holding where crime is committed prior to admission of state into the union and no prosecution is had before statehood offense is triable in district court of state in county where crime was committed.

14 L. R. A. 613, *KLEIBER v. PEOPLE'S R. CO.* 107 Mo. 240, 17 S. W. 946.

Fear affecting contributory negligence.

Cited in *Ephland v. Missouri P. R. Co.* 57 Mo. App. 159, holding instruction disregarding question as to negligence of trainman in giving false alarm, error; *Edwards v. Chicago & A. R. Co.* 94 Mo. App. 40, 67 S. W. 950, holding flagman failing to warn traveler in time renders company liable; *Bischoff v. People's R. Co.* 121 Mo. 225, 25 S. W. 908, sustaining recovery of one jumping from street car at warning cry of flagman; *De Bolt v. Kansas City, Ft. S. & M. R. Co.* 123 Mo. 521, 27 S. W. 575 (dissenting opinion), majority denying recovery for death of superintendent jumping, with knowledge of surroundings, to avoid collision; *McPeak v. Missouri P. R. Co.* 128 Mo. 651, 30 S. W. 170, holding company liable for injuries to passengers, jumping at warning of brakeman; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 89, 41 C. C. A. 40, 100 Fed. 756, holding passenger escaping from wrecked car need not close eyes and ears to everything trans-

piring, to recover for nervous shock; *Blyston-Spencer v. United R. Co.* 152 Mo. App. 139, 132 S. W. 1175, to the point that person who adopts dangerous alternative in emergency is not necessarily guilty of contributory negligence; *Twelkemeyer v. St. Louis Transit Co.* 102 Mo. App. 196, 76 S. W. 682, holding question whether, in view of grave perils confronting him, the injured one adopted course of a man of ordinary prudence, was properly for the jury; *Palmer v. Chicago & A. R. Co.* 142 Mo. App. 646, 121 S. W. 1087, holding court had no right to tell jury it was contributory negligence as emergency of the peril may have been so imminent, and terrifying as to excuse failure to adopt very best expedient possible under the circumstances; *Feddeck v. St. Louis Car Co.* 125 Mo. App. 36, 102 S. W. 675, holding one placed in a position of imminent danger by negligence of another, is not negligent in running toward instead of away from falling timbers when he heard crash and warning to "look out;" *McManus v. Metropolitan Street R. Co.* 116 Mo. App. 113, 92 S. W. 176, holding a case for the jury is shown where injuries result from a panic on car, when gripman took no heed to warning cries but ran car nearer to a wreck than necessary under circumstances; *Cooper v. Century Realty Co.* 224 Mo. 729, 123 S. W. 848, holding an attempt to escape from elevator in motion, where appearance of imminent danger gave no time for deliberation is not contributory negligence where there was reasonable cause to apprehend danger.

Cited in footnotes to *St. Louis & S. F. R. Co. v. Murray*, 16 L. R. A. 787, which requires passenger's prudence in attempting to escape to be judged by apparent circumstances; *Gannon v. New York, N. H. & H. R. Co.* 43 L. R. A. 833, which holds carrier liable for injury to passenger while impulsively trying to escape from car in which oil lamp caught fire.

Cited in note (37 L.R.A.(N.S.) 45, 47) on care required in sudden emergency.

Question for jury.

Cited in *Anna v. Missouri P. R. Co.* 96 Mo. App. 549, 70 S. W. 398, holding for jury to determine whether child used due care in crawling from ditch under cars, before train passed; *Twelkemeyer v. St. Louis Transit Co.* 102 Mo. App. 196, 76 S. W. 682, holding it to be question for jury as to negligence in whipping horses to cross tracks when trains approaching from both directions.

Admissibility of evidence.

Cited in *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 129, 46 L. R. A. 615, 76 Am. St. Rep. 639, 52 S. W. 872, holding alarm of children at time of father's expulsion from car admissible as part of *res gestæ*; *Cromeenes v. San Pedro, L. A. & S. L. R. Co.* 37 Utah, 491, 109 Pac. 10, Ann. Cas. 1912 C, 307, holding that instinctiveness is requisite to make declarations part *res gestæ*; *Louisville R. Co. v. Johnson*, 131 Ky. 286, 20 L.R.A.(N.S.) 144, 115 S. W. 207, holding in actions for damages where injuries result from jumping off cars in anticipation of a collision, outcries of others are properly admitted to show danger confronting the passengers; *Tretter v. St. Louis & Suburban R. Co.* 122 Mo. App. 416, 99 S. W. 508, holding an unusual explosion cannot be inferred from fact of a panic of the passengers, but must receive direct proof.

Cited in notes (20 L.R.A.(N.S.) 142) on nonparticipation in accident or affray as rendering one's statements or exclamations inadmissible as *res gestæ*; (11 Eng. Rul. Cas. 291) on admissibility of declarations as part of the *res gestæ*.

Reversal of judgment.

Cited in *Davis v. Cohn*, 85 Mo. App. 534, reversing judgment for failure to show judgment valid as to all defendants; *State ex rel. Ozark County v. Tate*, 109 Mo. 269, 32 Am. St. Rep. 664, 18 S. W. 1088, denying right of surviving sureties to set aside as to them, judgment against all; *Bates-Smith Invest. Co. v.*

Scott, 56 Neb. 479, 76 N. W. 1063, affirming judgment as to party of whom court had jurisdiction; *Stotler v. Chicago & A. R. Co.* 200 Mo. 150, 98 S. W. 509, holding where interests of parties to an appeal may be rightfully served, judgment as to one tortfeasor may be reversed and affirmed as to the other; *Shreeder v. Davis*, 43 Wash. 136, 86 Pac. 198, 10 A. & E. Ann. Cas. 77, holding where judgment is against two defendants, one of whom was not served with process, the court will reverse the judgment as to one not served and affirm as to the other; *Blackmer & P. Pipe Co. v. Mobile & O. R. Co.* 137 Mo. App. 512, 119 S. W. 1, holding a judgment is not reversed as to one party and affirmed as to another, except when the judgment on appeal settles the litigation as to all parties.

Duty as to operation of safety gates at crossings.

Cited in note (33 L.R.A.(N.S.) 994) on railroads: duty as to operation of safety gates at crossings.

14 L. R. A. 622, *DEAL v. MISSISSIPPI COUNTY*, 107 Mo. 464, 18 S. W. 24

Presumption as to statute's validity.

Cited in State *ex rel. McCaffery v. Aloe*, 152 Mo. 477, 47 L. R. A. 397, 54 S. W. 494, holding presumption of validity attaches to act until contrary appears; *McCully v. Chicago, B. & Q. R. Co.* 212 Mo. 52, 110 S. W. 711, holding every statute must be presumed to be constitutional and valid until the contrary plainly appears.

Purposes for which public funds may be used.

Cited in State *ex rel. Garth v. Switzler*, 143 Mo. 319, 40 L. R. A. 286, 65 Am. St. Rep. 653, 45 S. W. 245, declaring unconstitutional, collateral-inheritance tax law for defraying expenses of poor students at state college; *Institute for Education of Mute & Blind v. Henderson*, 18 Colo. 106, 18 L. R. A. 401, 31 Pac. 714, declaring void, statute providing bounties for destruction of wild animals and poisonous weeds; *United States ex rel. Miles Planting & Mfg. Co. v. Carlisle*, 5 App. D. C. 151, holding no vested rights to bounty acquired, entitling licensed sugar producer to compel payment of bounty after repeal of act; *Dodge v. Mission Twp.* 54 L. R. A. 247, 46 C. C. A. 667, 107 Fed. 833, declaring void, issue of town bonds to promote sugar industry; *Opinion of the Justices*, 204 Mass. 612, 27 L.R.A.(N.S.) 485, 91 N. E. 405, holding legislature cannot authorize the exercise of right of eminent domain by a city for promotion of private interests.

Cited in footnote to *Michigan Sugar Co. v. Dix*, 56 L. R. A. 329, which holds beet sugar bounty unconstitutional.

Limitations upon legislative power.

Cited in *First Nat. Bank v. Shallenberger*, 172 Fed. 1003, as an example of legislative excess of authority.

14 L. R. A. 624, *PEOPLE ex rel. NICHOLS v. ONONDAGA COUNTY*, 129 N. Y. 395, 29 N. E. 327.

Marking official ballots.

Cited in *Re McDade*, 29 Misc. 217, 60 N. Y. Supp. 105, holding use of paster ballots violates election law by tending to identify ballot; *Pennington v. Hare*, 60 Minn. 156, 62 N. W. 116 (dissenting opinion), majority holding any mark intended for cross must be given effect; *People ex rel. Sherman v. Person*, 64 Hun, 331, 19 N. Y. Supp. 297, holding count of ballot for supervisor not authorized by indorsement of ballot for excise commissioner by affixing paster for former; *People ex rel. Bradley v. Shaw*, 64 Hun, 361, 19 N. Y. Supp. 302, hold-

ing canvassers must count paster ballots, leaving courts to decide upon defects. *Montgomery v. O'Dell*, 67 Hun, 178, 22 N. Y. Supp. 412, holding valid, paster on only ballot cast for excise commissioner; *People ex rel. Bradshaw v. Bidelman*, 69 Hun, 598, 23 N. Y. Supp. 954, holding ballots not vitiated by use of some not consecutively numbered; *People ex rel. Wells v. Collin*, 19 App. Div. 465, 46 N. Y. Supp. 701, holding "X" placed before name outside of voting space renders ballot void; *People ex rel. White v. Buffalo*, 31 App. Div. 447, 52 N. Y. Supp. 643, raising without deciding question as to proof of voter's intention to mark ballot; *New York & R. Cement Co. v. Keator*, 62 App. Div. 583, 71 N. Y. Supp. 185, holding rejection of evidence as to how witness voted on water-bond question, no error; *Tebbe v. Smith*, 108 Cal. 108, 29 L. R. A. 676, 49 Am. St. Rep. 68, 41 Pac. 454, holding ballot not invalidated by placing cross after name instead of in square; *Cook v. Fisher*, 100 Iowa, 32, 69 N. W. 264, denying rejection of ballots containing name of candidate slightly misspelled; *Dial v. Hollandsworth*, 39 W. Va. 11, 19 S. E. 557 (dissenting opinion), majority denying poll invalidated because ballot-clerks all of same party; *Miller v. Schallern*, 8 N. D. 403, 79 N. W. 865, and *Slaymaker v. Phillips*, 5 Wyo. 494, 47 L. R. A. 857, 42 Pac. 1049 (dissenting opinion) majority holding absence of official stamp on exterior of ballot renders ballot void; *Morris v. Board of Canvassers*, 49 W. Va. 255, 38 S. E. 500, holding voter using two ballots on election sheet invalidates both; *Re Hearst*, 48 Misc. 455, 96 N. Y. Supp. 119, holding if there be a substantial compliance, without a manifest intent to evade or violate the law, the ballot is valid.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which holds county clerk's refusal to certify returns not justified by county canvassers' illegal counting and rejection of votes; *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *Sego v. Stoddard*, 22 L. R. A. 468, as to what constitutes a distinguishing mark on ballot.

Cited in notes (25 L. R. A. 481) on how far right to vote is absolute; (47 L.R.A. 811, 812) on marking official ballot; (49 Am. St. Rep. 243, 248) on distinguishing marks invalidating ballot.

Distinguished in *Bowers v. Smith*, 111 Mo. 59, 16 L. R. A. 760, footnote p. 755, 33 Am. St. Rep. 491, 20 S. W. 101, holding election not defeated by clerk's error in printing additional candidates on official ballots; *Boyd v. Mills*, 53 Kan. 606, 25 L. R. A. 490, 42 Am. St. Rep. 306, 37 Pac. 16, sustaining count of colored ballots voted by mistake; *Esquibel v. Chaves*, 12 N. M. 505, 78 Pac. 505, holding ballot is not void as a matter of law where emblem adopted by a political party is at head of ticket but all the names of candidates adopting it are not given; *People ex rel. Deister v. Wintermute*, 194 N. Y. 109, 86 N. E. 818, holding attempts to vote on a voting machine clearly showing choice of elector should be counted as votes though machine failed to record votes cast.

— Directory or mandatory provisions.

Cited in *State ex rel. Waggoner v. Russell*, 34 Neb. 123, 15 L. R. A. 742, footnote p. 740, 33 Am. St. Rep. 625, 51 N. W. 465, holding provision for marking ballots with ink directory only; *Horning v. Board of Canvassers*, 119 Mich. 53, 77 N. W. 446, holding provision as to place on ballot, of inspector's initials, directory only; *Van Winkle v. Crabtree*, 34 Or. 471, 55 Pac. 831, construing as mandatory act relating to space for voting marks; *Ellis ex rel. Reynolds v.*

May, 99 Mich. 545, 25 L. R. A. 328, 58 N. W. 483, holding mandatory statute requiring voters to be sworn as to ability to read English; *State ex rel. Bennett v. Barber*, 4 Wyo. 84, 32 Pac. 14, and *Stackpole v. Hallahan*, 16 Mont. 61, 28 L. R. A. 509, 40 Pac. 80, holding election, otherwise legal, not invalidated by defective nomination certificate; *Rampendahl v. Crump*, 24 Okla. 888, 105 Pac. 201, holding that statute which provides that "on leaving booth voter shall deliver ballots to inspector etc.," is mandatory; *Westville v. Stillwell*, 24 Okla. 897, 105 Pac. 664, holding that statute providing that every person desiring to vote at special election shall subscribe and swear to affidavit is mandatory; *Newhouse v. Alexander*, 27 Okla. 64, 30 L.R.A.(N.S.) 615, 110 Pac. 1121, Ann. Cas. 1912 B, 674; *Board v. Dill*, 26 Okla. 113, 29 L.R.A.(N.S.) 1175, 110 Pac. 1107, Ann. Cas. 1912 B, 101,—holding that statutes designed to secure secrecy in voting are mandatory; *Re Houligan*, 55 Misc. 9, 106 N. Y. Supp. 205, holding question of voter's intent is not involved where statute provides clear and explicit rules regulating where and how the ballots shall be marked; *Re Jerome Ballots*, 48 Misc. 448, 96 N. Y. Supp. 122, holding failure of voter to comply with advisory directions of statute as to marking of ballot does not invalidate it.

Mandamus to correct returns.

Cited in *People ex rel. Ranton v. Syracuse*, 88 Hun, 205, 34 N. Y. Supp. 661, holding mandamus will lie to compel inspectors to correct returns; *Re Stewart*, 24 App. Div. 205, 48 N. Y. Supp. 957, holding inspectors may be required to amend returns by inserting results shown by tally sheet; *People ex rel. Brink v. Way*, 92 App. Div. 88, 86 N. Y. Supp. 892, holding that mandamus will lie to compel election officers to canvass vote correctly; *People ex rel. Munro v. Board of Canvassers*, 129 N. Y. 473, 29 N. E. 361, holding candidate whose name misspelled in return may compel inspectors to send it back for correction; *People ex rel. March v. Beam*, 117 App. Div. 377, 103 N. Y. Supp. 818, holding court has power to make order directing the inspectors to reconvene and make correct statement of the result of the canvass.

Cited in footnote to *Rosenthal v. State Canvassers*, 19 L. R. A. 157, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Review of order as to recount of ballots.

Cited in *People ex rel. Feeny v. Board of Canvassers*, 156 N. Y. 47, 50 N. E. 425, holding court of appeals may review appellate-division order determining recount of marked ballots.

Intention controlling construction of act.

Cited in *Bowers v. Smith*, 111 Mo. 65, 16 L. R. A. 761, 33 Am. St. Rep. 491, 20 S. W. 101, and *Opinion of the Justices*, 66 N. H. 659, 33 Atl. 1076, holding intention of legislature must control construction of act; *Hicks v. Krigbaum*, 13 Ariz. 240, 108 Pac. 482, holding that courts should construe statutes so as to effectuate legislative intent.

Cited in note (45 L. ed. U. S. 216) on validity of registration laws.

14 L. R. A. 643, *PEOPLE ex rel. DALEY v. RICE*, 129 N. Y. 449, 41 N. Y. S. R. 938, 29 N. E. 345.

Contempt of court by canvassing board.

Cited in *People ex rel. Platt v. Rice*, 144 N. Y. 261, 39 N. E. 88, Affirming 80 Hun, 443, 30 N. Y. Supp. 457, and *People ex rel. Platt v. State Canvassers*, 74 Hun, 181, 26 N. Y. Supp. 345, holding board of canvassers guilty of contempt of court by canvassing returns in violation of injunction.

Power of board of canvassers to select secretary.

Cited in *Re Noble*, 34 App. Div. 60, 54 N. Y. Supp. 42, holding board of canvassers may select secretary, when county clerk's office is vacant.

Mandamus as to election matters.

Cited in *People ex rel. Pond v. Monroe County*, 65 Hun, 265, 19 N. Y. Supp. 978, denying mandamus to compel board of supervisors to divide county into assembly districts; *Stearns v. State*, 23 Okla. 471, 100 Pac. 909, holding that court may by mandamus require board of canvassers after it has made partial canvass to reassemble and make canvass of all returns if it appears upon first canvass board improperly rejected returns from one precinct.

Cited in footnote to *Rosenthal v. State Board*, 19 L. R. A. 158, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Distinguished in *People ex rel. Ward v. Roosevelt*, 9 App. Div. 626, 41 N. Y. Supp. 572, holding duty of secretary of state to place both nominees upon official ballot; *Stearns v. State*, 23 Okla. 471, 100 Pac. 909, holding where the undisputed facts disclose frauds committed which have changed the result of the election a petitioner has a legal right to the writ of mandamus to compel canvassers to reassemble and make a canvass.

Certifying as to ballots.

Cited in footnote to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, which holds mere certification that ballots were double, insufficient on rejection of ballots for different candidates for same office for being double.

Ministerial duties of officers.

Cited in *Re Hilton Bridge Constr. Co.* 13 App. Div. 33, 43 N. Y. Supp. 99, by Herrick, J., dissenting, who holds process of determining highest bidder for public contract, ministerial only.

14 L. R. A. 646, *PEOPLE ex rel. SHERWOOD v. STATE CANVASSERS*, 129 N. Y. 360, 41 N. Y. S. R. 912, 29 N. E. 345.

Who are public officers.

Cited in *People ex rel. White v. York*, 35 App. Div. 395, 55 N. Y. Supp. 10, holding captain in village before annexation to Brooklyn, afterwards patrolman, not entitled to be made captain upon consolidation of Greater New York; *Opinion of the Justices*, 95 Me. 386, 51 Atl. 224, holding fish and game commissioner and trustees of state institutions, state officers; *People ex rel. Borgia v. Doe*, 109 App. Div. 673, 96 N. Y. Supp. 389, holding inspectors of elections act only ministerially; *Metz v. Maddox*, 121 App. Div. 170, 105 N. Y. Supp. 702 (dissenting opinion), on character of acts of election officers.

Cited in footnotes to *Com. ex rel. Hensel v. Fitler*, 15 L. R. A. 205, which holds medical staff of city hospital not subject as officers, clerks or employees, to competitive examination; *State ex rel. Walker v. Bus*, 33 L. R. A. 616, which holds deputy sheriff not state officer within prohibition against holding county or municipal office; *Bishop v. State*, 39 L. R. A. 278, which holds postmaster of local postoffice a "deputy postmaster" within provision as to right to hold other office; *Baltimore v. Lyman*, 52 L. R. A. 406, which holds superintendent of public instruction not a municipal officer.

Distinguished in *People ex rel. Court House v. Oneida County*, 36 Misc. 605, 73 N. Y. Supp. 1098, holding commissioners appointed to build courthouse not county officers.

Jurisdiction over qualification of candidates.

Cited in *Montgomery v. O'Dell*, 67 Hun, 174, 22 N. Y. Supp. 412, holding inop-

erative, ballot containing more names than number limited to office of excise commissioner; *State v. South Kingstown*, 18 R. I. 267, 22 L. R. A. 68, 27 Atl. 599 (dissenting opinion), majority holding legislature's rights relating to qualifications of members not defeated by courts' power to order another election; *Covington v. Buffett*, 90 Md. 578, 47 L. R. A. 623, 45 Atl. 204, denying court's jurisdiction to determine qualifications of legislator; *Sherrill v. O'Brien*, 188 N. Y. 214, 117 Am. St. Rep. 841, 81 N. E. 124, holding courts have no jurisdiction to determine the title of any member of the legislature; *Re Independent Nomination*, 186 N. Y. 279, 79 N. E. 708, holding the question whether a nominee if elected to the legislature would be disqualified is for the assembly to determine; *State ex rel. Sullivan v. Schnitger*, 16 Wyo. 514, 95 Pac. 698, holding the court cannot question qualification or right to any one to his seat in the legislature though legislature was elected under an inequitable apportionment act; *State ex rel. Hathorn v. United States Exp. Co.* 95 Minn. 445, 104 N. W. 556, holding even that sound judicial discretion should not be exercised unless some sufficient legal purpose is to be subserved.

Cited in footnote to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Distinguished in *People v. Purdy*, 21 App. Div. 68, 47 N. Y. Supp. 601, holding "eligible" as used in town law relates to time of election.

Mandamus.

Cited in *People ex rel. Jones v. New York Homeopathic Medical College*, 47 N. Y. S. R. 395, 20 N. Y. Supp. 379, denying mandamus to compel medical college to issue diploma to one failing in examinations; *State ex rel. Matheny v. County Court*, 47 W. Va. 679, 35 S. E. 959, denying mandamus to compel county court to build new courthouse pending removal of county seat; *People ex rel. Lehmaier v. Interurban Street R. Co.* 85 App. Div. 412, 83 N. Y. Supp. 622, denying writ of mandamus to compel street railway company to carry passenger over connecting lines for one fare, when company has not refused; *People ex rel. Wood v. Board of Assessors*, 137 N. Y. 204, 33 N. E. 145, denying mandamus to cancel tax apportioned by mistake and paid with knowledge of error; *Re Wheeler*, 62 Misc. 51, 115 N. Y. Supp. 605, holding applicant for writ of mandamus must not only show a clear legal right to it but must convince the court that considerations of justice require it to act; *People ex rel. Dillon v. Moir*, 62 Misc. 36, 115 N. Y. Supp. 1029, holding writ of mandamus to compel president of village to sign certain bonds should not be granted if bonds when signed would be void because of defect in their issuance; *Re Long Acre Electric Light & P. Co.* 117 App. Div. 92, 102 N. Y. Supp. 242 (dissenting opinion), on what must appear to entitle one to writ of mandamus.

— Relating to political matters.

Cited in *People ex rel. Pond v. Monroe County*, 65 Hun. 266, 19 N. Y. Supp. 978, denying mandamus to compel revision of assembly districts under unconstitutional provision; *People ex rel. Thomson v. Hinsdale*, 43 Misc. 185, 88 N. Y. Supp. 206, denying writ of mandamus to compel clerk to file applicant's oath as mayor when latter's title to office not clear; *Rice v. Coffey County*, 50 Kan. 154, 32 Pac. 134, denying mandamus for recanvass of votes, when writ fruitless if granted; *State ex rel. Bennett v. Barber*, 4 Wyo. 94, 32 Pac. 14 (dissenting opinion), majority holding that mandamus will lie to compel board of canvassers to canvass certain returns; *State ex rel. Bancroft v. Frear*, 144 Wis. 89, 140 Am. St. Rep. 992, 128 N. W. 1068, holding that vote cast for deceased person by voters who know of his decease cannot be considered as votes for or against any person; *State ex rel. Kustermann v. State Canvassers*, 145 Wis. 323, 130 N. W. 489, holding that

canvassing board can be compelled by judicial proceedings to exercise its jurisdiction properly; *People v. Acitelli*, 57 Misc. 593, 110 N. Y. Supp. 430, on mandamus to compel election officers to register disqualified voter.

Cited in footnote to *Rosenthal v. State Board*, 19 L. R. A. 158, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Cited in note (36 L.R.A.(N.S.) 971) on duty of election officer to accept sworn vote.

Distinguished in *State ex rel. Butler v. Callahan*, 4 N. D. 492, 61 N. W. 1025, sustaining mandamus compelling superintendent of schools to deliver official property; *Stearns v. State*, 23 Okla. 470, 100 Pac. 909, holding mandamus lies to compel canvass of election returns and it is not competent for court to inquire into and investigate alleged fraud of election officers.

Interference with local government.

Cited in *Rathbone v. Wirth*, 150 N. Y. 521, 34 L. R. A. 429, 45 N. E. 15 (dissenting opinion) majority holding provision that each member of council shall elect but two of four police commissioners, unconstitutional.

Right of public officer to question validity of statute.

Cited in *Com. ex rel. Atty. Gen. v. Mathues*, 210 Pa. 385, 59 Atl. 961, holding state treasurer may question constitutionality of act relative to salaries by refusing to pay warrants drawn on him; *Com. ex rel. Atty. Gen. v. State Treasurer*, 29 Pa. Co. Ct. 556, 13 Pa. Dist. R. 237, holding a state treasurer may refuse to pay warrants under provisions of state law on the ground of unconstitutionality of the statute.

Municipal corporation's liability for negligence of fire department.

Cited in *Workman v. New York*, 63 Fed. 304, holding municipal corporation liable for collision of fire boat with barkentine.

14 L. R. A. 657, *STATE EX REL. MORRIS v. BULKELEY*, 61 Conn. 287, 23 Atl. 186.

Acts of de facto officers.

Cited in *Re Moore*, 4 Wyo. 114, 31 Pac. 980, holding acts of governor performed prior to canvass of vote, void.

Cited in footnote to *State, Clifford, Prosecutor, v. Heller*, 57 L. R. A. 312, which denies right of president of senate to act, after resignation, as governor in place of governor resigning office.

Jurisdiction of superior court.

Cited in *Cocking v. Greenslit*, 71 Conn. 651, 42 Atl. 1000, sustaining action in superior court, record not showing lack of jurisdiction; *Ansonia v. Studley*, 67 Conn. 177, 34 Atl. 1030, holding superior court has power to issue mandamus to court of common pleas.

Sufficiency of certificate.

Cited in *State ex rel. Phelan v. Walsh*, 62 Conn. 305, 17 L. R. A. 373, 25 Atl. 1 (dissenting opinion), majority holding mere certifying that ballots are double, insufficient; *Rowe v. Hardy*, 97 Va. 677, 78 Am. St. Rep. 811, 34 S. E. 625, holding sufficient any proceeding indorsed on mandate by sheriff.

Quo warranto remedy to oust officer.

Cited in *State ex rel. Oakey v. Fowler*, 66 Conn. 300, 32 Atl. 162, holding quo warranto proper means to oust collector of taxes.

Advice upon reserved question.

Approved in *Hart v. Roberts*, 80 Conn. 79, 66 Atl. 1026 (dissenting opinion), as an instance of the court giving advice upon a reserved question.

14 L. R. A. 666, *EWING v. PITTSBURGH, C. C. & ST. L. R. CO.* 147 Pa. 40, 30 Am. St. Rep. 709, 23 Atl. 340.

Mental suffering or fright as element of damages.

Followed in *Morris v. Lacka. & W. Valley R. Co.* 14 Luzerne Leg. Reg. Rep. 435, holding there can be no recovery of damages for bodily or mental suffering unconnected with physical injuries.

Cited in *Linn v. Duquesne*, 204 Pa. 554, 93 Am. St. Rep. 800, 54 Atl. 341, holding mental suffering not element of damages for injury to hands; *Haas v. Metz*, 78 Ill. App. 51, denying recovery for mental disturbance caused by harsh words; *Watson v. Dilts*, 116 Iowa, 251, 57 L. R. A. 561, footnote p. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, affirming liability for frightening woman, causing nervous prostration, by stealthily entering home at night; *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 335, denying recovery for miscarriage due to fright at man wearing woman's clothes; *Braun v. Craven*, 175 Ill. 412, 42 L. R. A. 203, 51 N. E. 657, denying liability for negligent acts causing fright unaccompanied by physical injury; *Lee v. Burlington*, 113 Iowa, 357, 86 Am. St. Rep. 379, 85 N. W. 618, denying right to recover for death of horse by rupture of blood vessel due to fright caused by negligent operation of steam roller; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 543, 60 L. R. A. 620, footnote p. 617, 42 S. E. 983, sustaining right of action for physical injury or disease from fright or nervous shock from negligent acts; *Haile v. Texas & P. R. Co.* 23 L. R. A. 777, footnote p. 774, 9 C. C. A. 137, 23 U. S. App. 80, 60 Fed. 559, denying liability for insanity resulting from shock and excitement without bodily injury; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 414, 40 Am. St. Rep. 866, 25 S. W. 419, and *Spade v. Lynn & B. R. Co.* 168 Mass. 290, 38 L. R. A. 514, footnote p. 512, 60 Am. St. Rep. 393, 47 N. E. 88, denying recovery for fright alone; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 381, 56 N. E. 917, denying damages for impairment to health resulting from fright at peril of another; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 206, 63 Am. St. Rep. 343, 47 N. E. 694, denying recovery for mental anguish resulting from fright of horse at negligent closing of railroad gate; *Ward v. West Jersey & S. R. Co.* 65 N. J. L. 384, 47 Atl. 561, denying damages for shock received from negligent operation of railroad gates; *Mitchell v. Rochester R. Co.* 151 N. Y. 109, 34 L. R. A. 783, footnote p. 781, 56 Am. St. Rep. 604, 45 N. E. 354, Reversing 4 Misc. 577, 25 N. Y. Supp. 744, denying recovery for miscarriage resulting from fright caused by negligence; *Mack v. South Bound R. Co.* 52 S. C. 334, 40 L. R. A. 684, footnote p. 679, 68 Am. St. Rep. 913, 29 S. E. 905, sustaining liability for personal injuries from fright without physical injury; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 243, 37 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 944, holding physical injuries resulting from mental emotion entitles one to recover; *Lehigh & H. River R. Co. v. Marchant*, 28 C. C. A. 546, 55 U. S. App. 427, 84 Fed. 873, affirming recovery for injuries resulting from ejection from berth causing nervous complications; *North German Lloyd S. S. Co. v. Wood*, 18 Pa. Super. Ct. 493, holding mental suffering properly considered in action for physical injury; *Tiller v. St. Louis & S. F. R. Co.* 189 Fed. 1001, holding that damages are not recoverable for mere fright unconnected with physical injury; *Reardon v. Philadelphia Rapid Transit Co.* 43 Pa. Super. Ct. 350, holding that recovery of damages for fright unconnected with physical injury cannot be had in action by passenger against street railway; *Morris v. Lackawanna & M. V. R. Co.* 228 Pa. 200, 77 Atl. 445, holding that passenger cannot recover damages resulting from fright unconnected

with physical injury; *Hack v. Dady*, 142 App. Div. 514, 127 N. Y. Supp. 22, holding that there may be recovery where bodily injury and fright concur in producing shock giving rise to damage; *Simone v. Rhode Island Co.* 28 R. I. 195, 9 L.R.A.(N.S.) 743, 66 Atl. 202, holding there can be no recovery for physical injuries resulting from fright, terror, anxiety, or distress of mind where there is no injury to the person from without; *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 316, 18 L.R.A.(N.S.) 951, 125 Am. St. Rep. 699, 85 N. E. 499; *Hess v. American Pipe Mfg. Co.* 221 Pa. 68, 70 Atl. 294,—holding mere fright unaccompanied by physical injury is not sufficient to sustain an action for negligence; *Huston v. Freemansburg*, 212 Pa. 550, 3 L.R.A.(N.S.) 51, 61 Atl. 1022, 9 North Co. Rep. 360, holding in such case there can be no recovery for the suffering produced unconnected with physical injury; *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 47, 13 L.R.A.(N.S.) 163, 104 S. W. 551, holding reason for the denial of a recovery in such cases is that it is deemed to be too remote, uncertain and difficult of ascertainment; *Shellabarger v. Morris*, 115 Mo. App. 571, 91 S. W. 1005, on mental suffering unaccompanied by bodily injury as element in estimating damage.

Cited in footnotes to *Kline v. Kline*, 58 L.R.A. 397, which sustains right to damages for mental suffering for assault by pointing gun with threat to shoot unless house abandoned; *Purcell v. St. Paul City R. Co.* 16 L.R.A. 203, which holds carrier's negligence in placing passenger in position of apparent danger proximate cause of convulsions and illness from fright; *Sloane v. Southern California R. Co.* 32 L. R. A. 193, which sustains right to recover for paroxysms of the nervous system from wrongful ejection from train; *Homans v. Boston Elev. R. Co.* 57 L. R. A. 291, which holds carrier liable for nervous shock to passenger from jar to nervous system accompanying blow; *Sanderson v. Northern P. R. Co.* 60 L. R. A. 403, which denies right to recover for fright resulting in physical injury, but without contemporaneous injury, unless fright proximate result of legal wrong; *Reed v. Maley*, 62 L.R.A. 900, which holds no right of action given by merely soliciting a woman to sexual intercourse.

Cited in notes (53 L.R.A. 634, 635) on extent of trespasser's liability for consequential injuries to person from fright and its consequences; (3 L.R.A.(N.S.) 58; 22 L.R.A.(N.S.) 1073) on right to recover for physical injury resulting from fright; (68 Am. St. Rep. 826) on damages for mental suffering; (77 Am. St. Rep. 860, 862, 864, 870) on fright as element of recoverable damages.

Distinguished in *Sandy v. Swift & Co.* 159 Fed. 273, holding defendant's negligence in turning team suddenly in front of lady and not her fright in trying to escape being trampled upon was direct cause of injury; *Gillam v. Hogue*, 39 Pa. Super. Ct. 549, holding the rule that no recovery can be had for the results of fright unaccompanied by physical injury has no application to case of a horse rendered unfit for use by reason of fright.

— **For nondelivery or negligent transmission of telegram.**

Cited in *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 77, 54 L. R. A. 850, 60 N. E. 674, Affirming 26 Ind. App. 219, 54 L. R. A. 850, 59 N. E. 416; *Chapman v. Western U. Teleg.* 88 Ga. 771, 17 L. R. A. 433, 30 Am. St. Rep. 183, 15 S. E. 901; *Butner v. Western U. Teleg. Co.* 2 Okla. 239, 4 Inters. Com. Rep. 772, 37 Pac. 1087; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 442,—denying damage for mental suffering due to nondelivery of telegram; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 64 L. R. A. 549, 101 Am. St. Rep. 268, 98 N. W. 281, sustaining right to damages for mental suffering due to negligent transmission of death message; *Thomas v. Western U. Teleg. Co.* 12 Pa. Dist. R. 683, holding there can be no recovery for "mental pain" due to negligence of telegraph company in failing

to deliver telegram; *Kagy v. Western U. Teleg. Co.* 37 Ind. App. 83, 117 Am. St. Rep. 278, 76 N. E. 792, holding there can be no recovery for a physical injury resulting from mental suffering caused by delay in delivery of a telegram.

Cited in footnote to *Smith v. Postal Teleg. Cable Co.* 47 L. R. A. 323, which denies recovery for sickness due to fright caused by grossly negligent act of one knowing result would follow.

— **Proximate cause.**

Cited in *Chittick v. Philadelphia Rapid Transit Co.* 224 Pa. 16, 22 L.R.A. (N.S.) 1076, 73 Atl. 4, holding the injury must be such a natural and probable consequence of the alleged negligent act as might and ought to have been foreseen by the wrongdoer; *Pankopf v. Hinkley*, 141 Wis. 149, 24 L.R.A. (N.S.) 1161, 123 N. W. 625, holding when physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured party, such fright or shock is as efficient link in chain of causation as physical impact.

Cited in notes (31 L.R.A. (N.S.) 981) on liability for injuries from negligent operation of trains to persons on adjoining property or highway; (8 Eng. Rul. Cas. 414, 417) on remoteness of damages.

14 L. R. A. 669, *TACOMA HOTEL CO. v. TACOMA LIGHT & WATER CO.* 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516.

Right to compel water or other public service.

Cited in *Mackin v. Portland Gas Co.* 38 Or. 125, 49 L. R. A. 598, footnote p. 596, 61 Pac. 134, sustaining right to discontinue gas supply on one set of premises till payment of bill on another; *American Waterworks Co. v. State*, 46 Neb. 200, 30 L. R. A. 449, 50 Am. St. Rep. 610, 64 N. W. 711, declaring void, rule of water company charging \$1 for turning water off or on; *Jones v. Nashville*, 109 Tenn. 561, 72 S. W. 985, sustaining ordinance prohibiting supply of water until payment of past-due rates; *Hieronymous Bros. v. Bienville Water Supply Co.* 131 Ala. 454, 31 So. 31, holding that water company may require payment in advance; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa, 440, 138 Am. St. Rep. 299, 120 N. W. 966, holding that gas company may adopt rules and regulations for transaction of its business, such as requiring security or payment in advance; *State ex rel. Deeney v. Butte Electric & P. Co.* 43 Mont. 123, 115 Pac. 44, holding that rule of electric light company, that one who fails to pay price of electricity furnished when due may be refused further service, is reasonable; *State ex rel. McMahon v. Independent Teleph. Co.* 59 Wash. 160, 31 L.R.A. (N.S.) 331, 109 Pac. 366, holding that establishment of maximum monthly rental for telephone service in charter does not prevent its requiring fees in advance and making additional charge if not so paid; *State ex rel. Latshaw v. Board of Water & Light Comrs.* 105 Minn. 476, 127 Am. St. Rep. 581, 117 N. W. 827, upholding regulation of gas company fixing a net price for gas as furnished with an additional charge when payment was made afterward, with right to refuse further service until payment; *Poole v. Paris Mountain Water Co.* 81 S. C. 443, 128 Am. St. Rep. 923, 62 S. E. 874, holding as to a customer under contract to pay rent, it is reasonable to allow company to protect itself by cutting off supply of water until water rent due by him is paid.

Cited in footnote to *Gardner v. Providence Teleph. Co.* 55 L. R. A. 113, which sustains right to deprive customer of telephone service on refusal to discontinue use of extension instrument not furnished by it.

Cited in notes (61 L.R.A. 106) on establishment and regulation of municipal

water supply; (31 L.R.A.(N.S.) 330) on right of public service corporation to exact charge in addition to maximum rental for delay in payment.

Distinguished in *Hatch v. Consumers Co.* 17 Idaho, 216, 104 Pac. 670, holding company cannot deprive one of a right to water by reason of an alleged claim for water consumed during a period of two years by carrying water from residences of other consumers; *Linne v. Bredes*, 43 Wash. 543, 6 L.R.A.(N.S.) 708, 117 Am. St. Rep. 1068, 86 Pac. 858, 11 A. & E. Ann. Cas. 238, holding city cannot refuse water to an occupant of property because a delinquent water charge incurred by a prior occupant, stands against the property.

City's power to contract.

Cited in *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 525, 22 C. C. A. 182, 40 U. S. App. 257, 76 Fed. 282, holding city has power to contract with private party for construction and operation of waterworks; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 343, 105 Fed. 11, holding city has authority to contract to increase water supply and furnish electricity to inhabitants; *Tahlequah v. Guinn*, 5 Ind. Terr. 516, 82 S. W. 886; *Odgen City v. Bear Lake & River Waterworks & Irrig. Co.* 28 Utah, 42, 76 Pac. 1069,—holding the exercise of powers conferred upon a city for the private advantage of the inhabitants, is to be governed by the same rules that governs private individuals or corporations.

Sufficiency of answer.

Cited in *Bennett v. Tacoma Light & Water Co.* 3 Wash. 337, 28 Pac. 520, holding answer raising material issues, not demurrable.

14 L. R. A. 673, *KERNOCHAN v. NEW YORK ELEV. R. CO.* 130 N. Y. 651, 3 Silv. Ct. App. 581, 29 N. E. 245.

Opinion as to valuation.

Cited in *Suydam v. New York Elev. R. Co.* 46 N. Y. S. R. 361, 19 N. Y. Supp. 49, and *Jefferson v. New York Elev. R. Co.* 132 N. Y. 486, 30 N. E. 981, holding opinions as to value of premises had elevated road not been constructed, incompetent; *Jefferson v. New York Elev. R. Co.* 132 N. Y. 486, 30 N. E. 981, holding opinions of witnesses as to what premises in question would have been worth if they were not affected by road and its operation, were incompetent.

14 L. R. A. 675, *CHADDOCK v. PLUMMER*, 88 Mich. 225, 26 Am. St. Rep. 283, 50 N. W. 135.

Use of dangerous agencies.

Cited in footnotes to *Stephenson v. Southern P. Co.* 15 L. R. A. 476, which holds railroad company not liable for engineer's moving engine to frighten street car passenger at crossing; *Schubert v. J. R. Clark Co.* 15 L. R. A. 818, which holds manufacturer of stepladder from decayed lumber liable for injury to anyone using; *Knotnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency making owner of pleasure resort liable for owner's negligence; *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas companies insuring reasonable promptness in detecting leaks; *State use of Hartlove v. M. Fox & Son*, 24 L. R. A. 679, which holds seller of horse with contagious disease liable for death of one contracting disease while in charge of horse.

Cited in note (10 L.R.A.(N.S.) 373) on liability for injury by servant to third person in use of dangerous agency.

— Firearms.

Cited in *Chaddock v. Tabor*, 115 Mich. 29, 72 N. W. 1093, affirming recovery for injuries inflicted by boy firing gun loaned by friend; *Harris v. Cameron*, 81 Wis.

246, 29 Am. St. Rep. 891, 51 N. W. 437, holding not culpable negligence to give toy air-gun to child eleven years old; *Meers v. McDowell*, 110 Ky. 929, 53 L. R. A. 790, footnote p. 789, 96 Am. St. Rep. 475, 62 S. W. 1013, holding parent liable for injuries inflicted with deadly weapon entrusted by him to incompetent child.

Cited in footnotes to *Bahel v. Manning*, 36 L. R. A. 523, which holds pointing gun believed to be unloaded at another and pulling trigger negligence; *Chesterfield v. Ratliff*, 41 L. R. A. 503, which holds reasonableness of excuse for shooting firearms within city limits question for jury.

Liability of parent.

Cited in *Palm v. Iverson*, 117 Ill. App. 537, holding mere fact of being father of infant does not render him liable for tort of infant; *Dick v. Swenson*, 137 Ill. App. 75, holding a father is not liable for injuries inflicted upon another by his infant son resulting from use of an air gun without knowledge or consent of father.

Cited in notes (10 L.R.A.(N.S.) 944) on parent's liability for torts of minor; (74 Am. St. Rep. 807) on liability of parent for acts of children.

14 L. R. A. 677, *STANDARD OIL CO. v. TIERNEY*, 92 Ky. 367, 36 Am. St. Rep. 595, 17 S. W. 1025.

Notice as to dangerous article.

Cited in *Gibson v. Torbert*, 115 Iowa, 167, 56 L. R. A. 100, 91 Am. St. Rep. 147, 88 N. W. 443, denying druggist's liability for failure to warn one delivering phosphorus, properly packed and labeled; *Standard Oil Co. v. Wakefield*, 102 Va. 829, 66 L.R.A. 795, 47 S. E. 830, holding it a matter of common knowledge that naphtha is a dangerous substance; *O'Hara v. Nelson*, 71 N. J. Eq. 170, 63 Atl. 836, enjoining storing of automobiles in garage with tanks filled with gasoline.

Cited in footnotes to *Koelsch v. Philadelphia Co.* 18 L.R.A. 759, sustaining recovery for injuries caused by negligent explosion of gas; *Standard Oil Co. v. Wakefield's Admr.* 66 L.R.A. 792, which holds one delivering gas naphtha to consignee in tank car provided by himself liable for death of servant of consignee while unloading car by explosion due to fact that car could not be unloaded with safety in ordinary way because of defective condition.

Cited in notes (36 L. R. A. 649) on limitation of carrier's duty and liability in case of dangerous articles; (46 L. R. A. 49) on knowledge as element of defendant's liability to servants of another person; (100 Am. St. Rep. 194) on right to recover for negligence in absence of privity in case of inherently dangerous articles.

Distinguished in *Berger v. Standard Oil Co.* 126 Ky. 161, 11 L.R.A.(N.S.) 240, 103 S. W. 245, holding lubricating oil is not of the class of articles that duty rests upon one furnishing it to take care to protect the public from its dangers.

Shipper's liability for negligence.

Cited in footnotes to *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, which holds burning mill by oil escaping from tank car not proximate result of shipper's negligence in not having valve in tank outlet; *Fowles v. Briggs*, 40 L. R. A. 528, which denies shipper's liability for injury to brakeman by shunting of lumber negligently loaded.

Distinguished in *Hanna v. Pitt*, 121 App. Div. 423, 106 N. Y. Supp. 145, holding shipper is not bound to state true weight of article shipped where carrier may readily ascertain true weight for himself.

Evidence as to family of person injured.

Cited in *Louisville & N. R. Co. v. Eakin*, 103 Ky. 478, 45 S. W. 529, holding evidence of number and condition of decedent's family incompetent in action for per-

sonal injuries; *Louisville & N. R. Co. v. Schumaker*, 112 Ky. 436, 53 S. W. 12, holding instruction that jury should compensate "wife and child" for loss of brakeman's life, error.

Evidence of precautions after injury.

Cited in *Baran v. Reading Iron Co.* 202 Pa. 286, 51 Atl. 979, holding evidence of different support and operation of boiler after explosion, incompetent; *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 166, 59 L. R. A. 120, 42 S. E. 405, holding incompetent, evidence of additional precautions after injury; *Louisville & N. R. Co. v. Morton*, 121 Ky. 401, 89 S. W. 243; *Pribbeno v. Chicago, B. & Q. R. Co.* 81 Neb. 659, 116 N. W. 494,—holding evidence of repairs made subsequent to injury inadmissible to show negligence; *Plunkett v. Clearwater Bleachery & Mfg. Co.* 80 S. C. 318, 61 S. E. 431 (dissenting opinion), on evidence of repairs to show negligence at time of injury.

Cited in footnote to *Georgia Southern & F. R. Co. v. Cartledge*, 59 L. R. A. 118, denying admissibility of proof of removal of semaphore post after injury due to its striking mail grab.

Cited in note (32 L.R.A.(N.S.) 1130) on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.

Excessive damages.

Cited in *Standard Oil Co. v. Tierney*, 96 Ky. 92, 27 S. W. 983, setting aside verdict of \$20,000 for personal injuries, as excessive; *Ribich v. Lake Superior Smelting Co.* 123 Mich. 410, 48 L. R. A. 652, 81 Am. St. Rep. 215, 82 N. W. 279 (dissenting opinion) majority holding verdict of \$15,000 for injuries from explosion, excessive; *Louisville & N. R. Co. v. Brown*, 127 Ky. 749, 13 L.R.A.(N.S.) 1140, 106 S. W. 795, holding in case verdict appears to have been given under influence of passion or prejudice, a new trial will be granted; *Seaboard Air-Line R. Co. v. Miller*, 5 Ga. App. 406, 63 S. E. 299, holding courts in testing verdicts for excessiveness have compared them with verdicts rendered by juries in similar cases.

Cited in footnote to *Johnson v. St. Paul City R. Co.* 36 L. R. A. 586, which holds verdict of \$4,000 for injury to aged woman's ankle preventing walking again without crutch excessive.

Cited in notes (26 L.R.A. 393) on power of appellate court to interfere with verdict for excessive damages; (8 Eng. Rul. Cas. 461) on excessive damages as ground for new trial.

Measure of damages for personal injury.

Cited in *Louisville & N. R. Co. v. Logsdon*, 114 Ky. 752, 71 S. W. 905; *Louisville Gas Co. v. Fuller*, 122 Ky. 620, 92 S. W. 566,—holding measure of damages for personal injuries should include expense of cure, value of time lost, reasonable compensation for physical and mental suffering and permanent reduction of earning capacity.

14 L. R. A. 684, *STONE v. MUTUAL F. INS. CO.* 74 Md. 579, 22 Atl. 1051.

Garnishment of amount due on policy.

Cited in *Reid v. Mercurio*, 91 Mo. App. 684, holding insurance company may show failure to file proofs of loss to defeat garnishment proceedings.

Cited in footnote to *Boisseau v. Penn.* 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life which ceases on failure to pay premiums.

14 L. R. A. 685, FRITTS v. FRITTS, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. 1058.

Grounds for divorce.

Approved in Schoessow v. Schoessow, 83 Wis. 554, 53 N. W. 856, holding refusal of husband to have sexual intercourse with wife not desertion.

Cited in Severns v. Severns, 107 Ill. App. 145, holding refusal of wife to cohabit with husband not ground for divorce; Fizette v. Fizette, 146 Ill. 335, 34 N. E. 799, holding mere abusive words not cruelty within meaning of statute; Duberstein v. Duberstein, 171 Ill. 139, 49 N. E. 316, and Aurand v. Aurand, 157 Ill. 323, 41 N. E. 859, holding husband seeking divorce must show inability to protect himself by exercise of marital powers; Elzas v. Elzas, 171 Ill. 639, 49 N. E. 717, holding abandonment of wife without intention to return, though continuing to support, constitutes desertion; Berger v. Berger, 23 Pa. Co. Ct. 234, holding voluntary castration after marriage insufficient ground for divorce at suit of wife; Reynolds v. Reynolds, 68 W. Va. 22, 69 S. E. 381, Ann. Cas. 1912 A, 889, holding that refusal of sexual intercourse will not constitute good grounds for desertion; Prall v. Prall, 58 Fla. 509, 26 L.R.A.(N.S.) 584, 50 So. 867, holding mere refusal of wife to accord to the husband the marital privileges is not desertion such as gives cause for divorce; Williams v. Williams, 121 Mo. App. 356, 99 S. W. 42, holding mere withdrawal from the marital bed is not sufficient offense to give cause for a divorce; Pfannebecker v. Pfannebecker, 133 Iowa, 427, 119 Am. St. Rep. 608, 110 N. W. 618, 12 A. & E. Ann. Cas. 543, holding there must be a complete separation of the parties by the one absenting himself or herself from the other to constitute desertion; Walton v. Walton, 114 Ill. App. 118, holding the ill-conduct which excuses a wife from living with her husband must be such as would justify a decree of divorce; Kupka v. Kupka, 132 Iowa, 193, 109 N. W. 610, holding there must be not only a separation, but an intent to cease to live together as husband and wife.

Cited in footnotes to Hardie v. Hardie, 25 L. R. A. 697, which holds divorce for desertion not authorized by wife on receiving blow from husband leaving house without intent to remain away permanently; Danforth v. Danforth, 31 L. R. A. 608, which authorizes divorce for wife's desertion though husband visited her for a few days during statutory period; Tirrell v. Tirrell, 47 L. R. A. 750, which holds mere payment of allowance to abandoned wife under order of court not prevent divorce for desertion; Bucknam v. Bucknam, 49 L. R. A. 735, which maintains wife's right to sue for separate maintenance for husband's failure to furnish support, though living in same house; Maddox v. Maddox, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling house, clothing, and food; Ring v. Ring, 62 L. R. A. 878, holding habitual intoxication from excessive use of morphine not "cruel treatment."

Cited in notes (65 Am. St. Rep. 74) on cruelty as ground for divorce; (119 Am. St. Rep. 632) on desertion as ground for divorce.

14 L. R. A. 690, LAFLIN & R. POWDER CO. v. STEYTLER, 146 Pa. 434, 23 Atl. 215.

Acquisition and use of name.

Cited in Butts v. Cruttenden, 14 Pa. Super. Ct. 455, holding subsequent encumbrancer not misled, having notice of docketed judgment omitting middle letter; Com. v. Scouton, 20 Pa. Super. Ct. 516, holding description of jurors by initials instead of full names not grounds for quashing array; Brayton v. Beall, 73 S. C. 311, 53 S. E. 641, holding that statute providing mode of changing

name, is an affirmance of common law that person may change name or by general use acquire another; *Re Burstein*, 69 Misc. 50, 124 N. Y. Supp. 989, to the point that man's name is designation by which he is distinctly known in community; *Loser v. Plainfield Sav. Bank*, 149 Iowa, 677, 31 L.R.A.(N.S.) 1115, 128 N. W. 1101, holding that name by which one is known and called in community where he lives is for all legal purposes his name; *Smith v. United States Casualty Co.* 197 N. Y. 429, 26 L.R.A.(N.S.) 1170, 90 N. E. 947, holding mode provided by legislature of changing the name is but an act in affirmance of common law by giving additional method of affecting change; *State v. Smith*, 129 Iowa, 717, 4 L.R.A.(N.S.) 543, 106 N. W. 187, 6 A. & E. Ann. Cas. 1023 (dissenting opinion), on meaning attaching to a name.

Cited in footnotes to *Illinois Watch Case Co. v. Pearson*, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, which holds transfer of trademark including surname prevents subsequent use by transferrer; *Brass & Iron Works Co. v. Payne*, 19 L. R. A. 82, which holds good will of partnership transferred on dissolution by one partner's transfer of interest to other partners; *Enewold v. Olsen*, 22 L. R. A. 573, which holds name of person consists of one given name and one surname; *Davis v. Steeps*, 23 L. R. A. 818, which holds docket entry of judgment against Edward Davis not constructive notice of encumbrance against Edward A. Davis; *Mosely v. Reily*, 26 L. R. A. 721, which holds initials of given name of delinquent taxpayers sufficient description; *State v. Higgins*, 27 L. R. A. 74, which holds second initial material part of name where only initial of first name given; *Beattie v. National Bank*, 43 L. R. A. 654, which holds forgery not committed by fraudulently indorsing own name on paper belonging to other person with same name; *Kansas Nat. Bank v. Bay*, 54 L. R. A. 408, which denies liability of one refusing to sign own name, on note signed by him in third person's name without authority, to knowledge of indorsee and payee.

Cited in notes (17 L. R. A. 825) on presumption of identity of person from identity of name; (24 L. R. A. 543) on form of Christian name required by recording acts; (37 L.R.A. 184) on delivery to impostor by carrier; (26 L.R.A. (N.S.) 1167) on effect upon common-law right of statutory provision for change of name by judicial proceedings.

Sufficiency of schedule of assets of limited partnership.

Cited in *Haslet v. Kent*, 160 Pa. 88, 34 W. N. C. 58, 28 Atl. 501, holding insufficient, item of "bills receivable \$2,206.17," in schedule of limited partnership; *Robbins Electric Co. v. Weber*, 172 Pa. 645, 37 W. N. C. 466, 34 Atl. 116, holding schedule disclosing names, amount contributed, itemized unsigned statement of property, sufficient; *Blumenthal Bros. v. Whitaker*, 170 Pa. 314, 33 Atl. 103, holding certificate setting forth general statement as to capital stock, insufficient; *Blumenthal v. Whitaker*, 70 Pa. 314, 37 W. N. C. 83, 33 Atl. 103, holding certificate reciting merchandise constitutes contribution of special partner, insufficient.

Limited partnership's rights in court.

Cited in *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 294, 58 U. S. App. 444, 86 Fed. 586, and *Youngstown Coke Co. v. Andrews Bros. Co.* 79 Fed. 670, holding limited partnerships may sue and be sued as corporations.

14 L. R. A. 696, *LYNCH v. WEBSTER*, 17 R. I. 513, 23 Atl. 27.

Individual liability of executor for costs of suit.

Cited in *McCarthy v. Speed*, 16 S. D. 591, 94 N. W. 411, holding executor

liable for costs of action but he may charge same in his accounts against the estate; *Meyer v. O'Rourke*, 150 Cal. 180, 88 Pac. 706, holding in absence of statute costs should be assessed against the executor individually, leaving him to seek an allowance from the estate in a proper case.

Effect of qualifying words.

Cited in note (15 L. R. A. 852) on effect of qualifying words "as executor" and "as administrator."

14 L. R. A. 700, *LAWYER v. FRITCHER*, 130 N. Y. 239, 27 Am. St. Rep. 521, 29 N. E. 267.

Right of action for seduction.

Cited in *Larocque v. Conheim*, 42 Misc. 615, 87 N. Y. Supp. 625; *Disler v. McCauley*, 66 App. Div. 44, 73 N. Y. Supp. 270, denying female's right to sue for seduction.

Cited in note (17 Eng. Rul. Cas. 363) on right to maintain action for seduction.

Parents' damages from injury to child.

Cited in *Westbrook v. Miller*, 98 App. Div. 593, 90 N. Y. Supp. 558, holding loss of services to which a parent is entitled from a child is the basis of a cause of action at the common law.

Cited in note (17 Eng. Rul. Cas. 356) on liability for inducing breach of contract or service.

Master's liability for servant's negligence.

Cited in *Higgins v. Western U. Teleg. Co.* 8 Misc. 436, 28 N. Y. Supp. 676, holding master loaning servant to operate elevator, liable to employee of contractor injured by former's negligence.

Cited in note (21 L.R.A.(N.S.) 1049) on liability of principal on negotiable paper executed by agent.

Right to punitive damages.

Cited in note (8 Eng. Rul. Cas. 375) on right to punitive damages.

14 L. R. A. 708, *PEOPLE ex rel. BRUSH ELECTRIC ILLUMINATING CO. v. WEMPLE*, 129 N. Y. 543, 29 N. E. 808.

What constitutes manufacturing.

Cited in *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 516, 47 N. Y. Supp. 122, holding foreign corporation producing in state kiln-dried wood from slabs shipped from another state, engaged in manufacturing; *People ex rel. F. W. Devoe & C. T. Reynolds Co. v. Roberts*, 51 App. Div. 79, 64 N. Y. Supp. 494, holding corporation making mixed paints, engaged in manufacturing business; *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 App. Div. 376, 70 N. Y. Supp. 516, holding production of paving compound, manufacturing business; *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 587, 34 N. E. 386, Affirming 63 Hun, 455, 18 N. Y. Supp. 504, holding corporation not exempt from taxation by completing articles manufactured in foreign state; *Cuyler v. City Power Co.* 74 Minn. 27, 76 N. W. 948, holding production of motive power for transmission and use manufacturing business.

Cited in footnotes to *Com. v. Pottsville Iron & Steel Co.* 22 L. R. A. 228, which holds exemption of manufacturing company not lost by possessing power of mining its own raw material; *Com. v. Juniata Coke Co.* 22 L. R. A. 232, which holds exemption of manufacturing company not lost by possessing power to mine own coal; *Cowling v. Zenith Iron Co.* 33 L. R. A. 508, which holds stockholders

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of iron-ore mining corporation exempt from double liability; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 41 L. R. A. 228, which denies exemption as manufacturing company to corporation buying, slaughtering, and selling sheep and lambs; *Columbia Ironworks v. National Lead Co.* 64 L. R. A. 645, holding building, sale and repairing of vessels within statute permitting involuntary bankruptcy proceedings against manufacturing corporations.

Cited in notes (57 L. R. A. 43) on taxation of corporate franchise in the United States; (58 L. R. A. 548, 604) on taxation of capital stock of corporations in the United States; (64 L. R. A. 36, 40, 43, 59, 67) on taxation of manufacturing corporations in the United States.

— Production of electricity.

Cited in *People ex rel. Edison Electric Light Co. v. Wemple*, 63 Hun, 452, 18 N. Y. Supp. 511, holding investment of capital in patents and stock of foreign corporation not "employing" capital within state; *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 129 N. Y. 665, 29 N. E. 812; *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 301, 38 Am. St. Rep. 94, 11 So. 381; *People ex rel. Edison Electric Light Co. v. Campbell*, 88 Hun, 529, 34 N. Y. Supp. 711,—holding production of electricity "manufacturing" within statute; *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 141 N. Y. 474, 36 N. E. 506, holding taxes collected from electric light company, prior to passage of chap. 353, Laws 1889, illegal; *Re Charles Town Light & Power Co.* 183 Fed. 163, holding that electricity generated for purpose of furnishing light, heat and power is product of "manufacture;" *Perkins v. Coffin*, 84 Conn. 309, 79 Atl. 1070, Ann. Cas. 1912 C, 1188 (dissenting opinion), on corporation engaged in generation of electricity as "manufacturing" corporation; *Bates Mach. Co. v. Trenton & N. B. R. Co.* 70 N. J. L. 687, 103 Am. St. Rep. 811, 58 Atl. 935, holding mechanical generation of electric current to propel cars was manufacturing, *Re Rutland Realty Co.* 157 Fed. 297, holding the production and distribution of electricity, although the generation of electric current, is but the guiding into a new channel of a natural element or force.

Disapproved in effect in *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 604, 36 L. R. A. 132, footnote p. 130, 36 Atl. 362; *Williams v. Park* (*Williams v. Warren*), 72 N. H. 314, 64 L. R. A. 48, 56 Atl. 463, holding electric light company not "manufacturing" industry; *Re Hudson River Electric Power Co.* 173 Fed. 942, holding the generating of electricity by a company does not make it a "manufacturing company" within meaning of the bankruptcy act.

Court's power to review comptroller's account.

Cited in *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 562, 29 N. E. 812, holding § 20, chap. 463, Laws 1889, confers upon supreme court power to review comptroller's settlement of accounts.

Exemption from tax of building used for benevolent purposes.

Cited in *People ex rel. Young Men's Asso. v. Sayles*, 32 App. Div. 201, 53 N. Y. Supp. 67, holding corporation organized for benevolent purposes taxable as to part of building used for public hall; *Re Moses*, 138 App. Div. 526, 123 N. Y. Supp. 443, holding that Young Women's Christian Association is exempt from taxation under Transfer Tax Law as educational corporation; *Shreveport Creosoting Co. v. Shreveport*, 119 La. 642, 44 So. 325, holding even in cases where an express grant of exemption is claimed, every presumption must be in favor of a continuance of the taxing power and against any surrender thereof.

14 L. R. A. 712, *ROMAINE v. CHAUNCEY*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826.

Alimony and proceeds under policy as exempt property.

Followed in *Andrews v. Whitney*, 82 Hun, 123, 31 N. Y. Supp. 164, holding alimony not subject to payment of debts contracted before decree entered.

Cited in *Locke v. Locke*, 71 Hun, 366, 24 N. Y. Supp. 1129, denying husband's right to offset judgment upon note against wife's claim for alimony; *Amberg v. Manhattan L. Ins. Co.* 56 App. Div. 348, 67 N. Y. Supp. 872, holding wife's interest under matured policy on husband's life exempt from her creditors; *Livingston v. Livingston*, 173 N. Y. 393, 61 L. R. A. 806, 66 N. E. 123 (dissenting opinion), Affirming 74 App. Div. 264, 77 N. Y. Supp. 476, majority holding that alimony awarded by judgment of divorce constitutes property which cannot be impaired by subsequent statute; *Wetmore v. Wetmore*, 149 N. Y. 527, 33 L. R. A. 710, 52 Am. St. Rep. 752, 44 N. E. 169, Modifying 79 Hun, 271, 29 N. Y. Supp. 440, holding judgment awarding alimony in divorce action makes wife husband's creditor within statute of uses and trusts; *Kingman v. Carter*, 8 Kan. App. 49, 54 Pac. 13, holding alimony exempt from debts created prior to divorce; *Fickel v. Granger*, 83 Ohio St. 107, 32 L.R.A.(N.S.) 274, 93 N. E. 527, 21 Ann. Cas. 1347, holding that alimony cannot be subjected to payment of debts of wife which existed prior to allowance thereof; *Re Smith*, 30 N. Y. Civ. Proc. Rep. 104, holding alimony a natural duty judicially reduced to dollars and cents.

Cited in note (32 L.R.A.(N.S.) 271, 273) on liability of alimony for debts.

Subjection of choses in action to judgment.

Cited in note (63 L. R. A. 705) on equitable remedy to subject choses in action to judgment after return of no property found.

What interests assignable.

Cited in *Re Tompkins*, 28 Misc. 355, 59 N. Y. Supp. 902, declaring invalid, assignment of trust income to wife in payment of alimony; *McCord v. McCord*, 40 App. Div. 279, 57 N. Y. Supp. 1049, denying wife's right to assign interest in gratuity fund established by produce exchange; *Spencer v. Myers*, 150 N. Y. 272, 34 L. R. A. 176, 55 Am. St. Rep. 675, 44 N. E. 942, upholding wife's right to assign policy on husband's life issued to her by foreign company.

Cited in footnote to *Kempster v. Evans*, 15 L. R. A. 391, which holds future instalment of alimony not assignable.

Continuation of Alimony.

Cited in *Wilson v. Hinman*, 182 N. Y. 411, 2 L.R.A.(N.S.) 236, 108 Am. St. Rep. 820, 75 N. E. 236, holding the obligation to pay alimony to an innocent wife does not survive the death of the husband.

Change in decree as to alimony.

Cited in *Tonjes v. Tonjes*, 14 App. Div. 544, 43 N. Y. Supp. 941, sustaining court's power to change alimony awarded in separation actions.

Distinguished in *Walker v. Walker*, 155 N. Y. 80, 49 N. E. 663, Reversing 21 App. Div. 223, 47 N. Y. Supp. 513, holding prior judgment not affected by amendments to Code authorizing change in alimony.

Divorce as affecting liability for support.

Cited in *Re Thrall*, 12 App. Div. 238, 42 N. Y. Supp. 439 (dissenting opinion), majority denying liability of husband's assignee for alimony *pendente lite* in unsuccessful separation suit; *Allen v. Farmers' Loan & T. Co.* 18 App. Div. 35, 79 N. Y. S. R. 398, 45 N. Y. Supp. 398, holding rights in trust fund for support of husband and wife not destroyed by decree of divorce against husband; *People ex rel. Public Charities & Correction v. Cullen*, 153 N. Y. 636, 44 L. R.

A. 423, 47 N. E. 894, denying wife's right to enforce support by husband after entry of judgment of separation; *Shepard v. Shepard*, 99 App. Div. 311, 90 N. Y. Supp. 982, holding alimony awarded is founded upon the marital obligation to support and maintain, and is awarded by the court in enforcement of this obligation and duty.

Effect on alimony of discharge in bankruptcy.

Cited in *Maisner v. Maisner*, 62 App. Div. 288, 70 N. Y. Supp. 1107, holding arrears of alimony not provable in bankruptcy; *Audubon v. Shufeldt*, 181 U. S. 579, 45 L. ed. 1011, 21 Sup. Ct. Rep. 735, holding alimony not provable in bankruptcy or barred by discharge; *Wetmore v. Markoe*, 196 U. S. 74, 49 L. ed. 393, 25 Sup. Ct. Rep. 172, 2 A. & E. Ann. Cas. 265, holding prior instalments of alimony evidenced by a judgment are not a provable debt barred by discharge in bankruptcy; *Tisdale v. Rider*, 119 App. Div. 598, 104 N. Y. Supp. 77, holding this does not mean that it is not a property asset capable of constituting a valuable consideration.

Cited in footnote to *Noyes v. Hubbard*, 15 L. R. A. 394, which holds decree for alimony not affected by discharge in insolvency.

14 L. R. A. 716, *CLARK v. HELM*, 130 Ind. 117, 29 N. E. 568.

Estate's liability for interest.

Cited in *Brown v. Bernhamer*, 159 Ind. 540, 65 N. E. 580, holding widow entitled to interest on her allowance from time of administrator's refusal to pay; *Lupton v. Coffel*, 47 Ind. App. 453, 94 N. E. 799, holding that judgment in action for legacy should include interest thereon after one year from death of testator.

Cited in footnotes to *Rhea v. Bagley*, 36 L. R. A. 86, which holds father accountable for rents collected on property paid for by him, but conveyed to minor children; *Wysong v. Rambo*, 49 L. R. A. 766, which holds interest on advancements to some heirs to equalize share of other heir should only be allowed during reasonable time for settling estate.

14 L. R. A. 719, *Re HOUSTON*, 47 Fed. 539.

Necessity of taking out license.

Cited in *Theus v. State*, 114 Ga. 53, 39 S. E. 913, holding nonresident soliciting laborers to work in another state not "emigrant agent" subject to license tax.

— For peddling.

Cited in *Kimmel v. Americus*, 105 Ga. 697, 31 S. E. 623, holding agent not liable for license fee by single sale of sample; *State v. Hoffman*, 50 Mo. App. 588, denying that shipments, for delivery, to agent who took orders by sample makes agent "peddler;" *Re Tinsman*, 95 Fed. 651, declaring void, ordinance requiring solicitors for nonresident picture manufacturer to procure license.

Cited in footnotes to *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent, delivering from wagon, goods previously ordered, and taking other orders, not a peddler; *State v. Morehead*, 26 L. R. A. 585, which holds sale and delivery of sample sewing machine not sale by peddler.

Cited in note (19 L.R.A.(N.S.) 305) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

14 L. R. A. 721, PRITCHARD v. SAVANNAH STREET & RURAL RESORT R. CO. 87 Ga. 294, 13 S. E. 493.

Retroactive laws.

Followed in *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967, holding repealing act as to amendment of executions applies to those pending and subsequent.

Cited in *Bacon v. Savannah*, 105 Ga. 64, 31 S. E. 127, sustaining city's right to amend ordinance as to apportionment of paving tax after completion of work; *Moore v. Ripley*, 106 Ga. 561, 32 S. E. 647, sustaining receiver's power to enforce stockholder's individual liability under act subsequent to incorporation; *Mills v. Geer*, 111 Ga. 280, 52 L. R. A. 943, 36 S. E. 673, upholding act authorizing purchaser in good faith to set off improvements erected before its passage, against rents and profits; *Lears v. Seaboard Air-Line R. Co.* 3 Ga. App. 623, 60 S. E. 343, holding a statute which merely affects or alters the remedy for the collection of a debt is not objectionable as retroactive.

Cited in footnotes to *Tufts v. Tufts*, 16 L. R. A. 482, which holds cause of action for divorce not taken away by repeal of statute; *Cleveland, C. C. & St. L. R. Co. v. Wells*, 58 L. R. A. 651, which sustains statute repealing act allowing penalties, made applicable to pending actions.

Abatement of action for personal injuries.

Followed in *Marshall v. McAllister*, 22 Tex. Civ. App. 214, 54 S. W. 1068, holding action for personal injuries does not abate at death.

14 L. R. A. 725, EDMUNDS v. HERBRANDSON, 2 N. D. 270, 50 N. W. 970.

Local and special statutes.

Cited in *Plummer v. Borsheim*, 8 N. D. 568, 80 N. W. 690, declaring unconstitutional, law applying only to school townships which include cities of specified population; *Minneapolis & N. Elevator Co. v. Traill County*, 9 N. D. 223, 50 L. R. A. 272, 82 N. W. 727, sustaining law relating to taxation of grain in elevators; *Murnane v. St. Louis*, 123 Mo. 495, 27 S. W. 711, holding act requiring cost of street improvements to be collected as provided in charters, void as applying to existing charters only; *Weaver v. Davidson County*, 104 Tenn. 329, 59 S. W. 1105, holding void, statute not limiting number of deputies given to certain county officials in counties of particular class; *Henderson v. Koenig*, 168 Mo. 372, 57 L. R. A. 662, 68 S. W. 72, declaring void, statute providing salaries for judges in certain cities, fees in other places; *Groves v. County Court*, 42 W. Va. 594, 26 S. E. 460, declaring unconstitutional, act providing for relocation of county seats in specified instances; *Codlin v. Kohlhausen*, 9 N. M. 578, 58 Pac. 499, denying invalidity of act providing for relocation of courthouse and jail in certain counties; *Standard Cattle Co. v. Baird*, 8 Wyo. 157, 56 Pac. 598, denying invalidity of statute relating to taxation of live stock on open range; *Ladd v. Holmes*, 40 Or. 172, 91 Am. St. Rep. 457, 66 Pac. 714, sustaining act providing method of holding elections in certain cities, applicable to but one at time of enactment; *Groves v. County Court*, 42 W. Va. 594, 26 S. E. 460, holding effect of statute determines special character; *Sasser v. Martin*, 101 Ga. 455, 29 S. E. 278, holding legislative classification of counties as to sale of liquor must be natural, not arbitrary; *De Hay v. Berkeley County*, 66 S. C. 242, 44 S. E. 790, holding act providing salary for school commissioners of certain county, void; *Re Connolly*, 17 N. D. 550, 117 N. W. 946, holding the classification of objects or places for the purpose of legislation must be natural, not artificial; *McGarvey v. Swan*, 17 Wyo. 139, 96 Pac. 697, holding a reasonable classification of objects of legislation or localities may be resorted to without rendering an act objectionable as a local or special law; *Beleal v. Northern P.*

R. Co. 15 N. D. 325, 108 N. W. 33, holding property classification is permitted, but arbitrary and unreasonable discrimination is forbidden; *Angell v. Cass County*, 11 N. D. 270, 91 N. W. 72, holding an arbitrary classification for purposes of taxation which includes some counties and excludes others from certain privileges is unconstitutional; *Powers Elevator Co. v. Pottner*, 16 N. D. 363, 113 N. W. 703, holding to grant liens on buildings erected on government lands only is not an unconstitutional classification; *State ex rel. Mitchell v. Mayo*, 15 N. D. 332, 108 N. W. 36, holding unconstitutional a law requiring the county treasurer to pay the interest and penalties on city and city school taxes of cities organized under a general law to such cities; *Kraus v. Lehman*, 170 Ind. 419, 83 N. E. 714, 15 A. & E. Ann. Cas. 849, holding the question whether the classification comes within rule as to objectionable class legislation would be one reviewable by the courts; *Oklahoma City v. Shields*, 22 Okla. 305, 100 Pac. 559, holding the determination under a state constitution, of what can be accomplished by general or special legislation, is a question solely for the legislature.

Cited in footnotes to *State, Alexander, Prosecutor, v. Elizabeth*, 23 L. R. A. 525, which holds invalid, special statute discriminating between municipalities already having and those not having race course; *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census, without respect to actual population, void; *Com. ex rel. Jones v. Blackley*, 52 L. R. A. 367, which sustains classification of townships by density of population; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; *Riccio v. Hoboken*, 63 L.R.A. 485, which upholds classification of school districts within due limits of generality; *McDonald v. Doust*, 69 L.R.A. 220, which holds void, statute abolishing existing county and creating two new counties from same territory with new county seat for each.

Cited in note (93 Am. St. Rep. 108) on constitutional inhibition against special legislation where general law can be made applicable.

Mandamus to determine legality of removal of county seat.

Cited in *State ex rel. Little v. Lanaglie*, 5 N. D. 605, 32 L. R. A. 729, 67 N. W. 958, denying mandamus to determine legal location of county seat.

14 L. R. A. 731, *MOORE v. NEW YORK ELEV. R. CO.* 130 N. Y. 523, 29 N. E. 997.

Damages for operation of elevated road.

Cited in *Golden v. Metropolitan Elev. R. Co.* 1 Misc. 144, 48 N. Y. S. R. 725, 20 N. Y. Supp. 630, holding noise not element of fee damage.

Cited in footnotes to *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street.

Cited in notes (31 L.R.A. 283) on law of privacy; (36 L.R.A.(N.S.) 762) on abutter's right to compensation for railroads in streets; (85 Am. St. Rep. 311) on elements of damages allowable in eminent domain proceedings.

Damage necessary for injunction.

Cited in *Kornder v. Kings County Elev. R. Co.* 61 App. Div. 440, 70 N. Y. Supp. 708, denying injunction in absence of proof of money damage.

Interest on unliquidated damages.

Cited in *Kerr v. New York Elev. R. Co.* 49 Misc. 333, 96 N. Y. Supp. 1021, holding interest may be computed upon an award of damages for injuries in-

flicted upon property by an elevated railway, from date of trial to time judgment is entered.

Effect of misdirection of court.

Cited in *Huggins v. Manhattan R. Co.* 1 Misc. 111, 48 N. Y. S. R. 679, 20 N. Y. Supp. 648, holding instruction that abutter entitled to damages regardless of benefits from construction of road, error; *Jacobs v. Sire*, 4 Misc. 400, 23 N. Y. Supp. 1063, reversing for misdirection of court to possible prejudice of party.

14 L. R. A. 733, *LOUISVILLE, N. A. & C. R. CO. v. CREEK*, 130 Ind. 139, 29 N. E. 481.

Conflict between general and special verdict.

Cited in *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 53, 44 N. E. 669, refusing to interfere with general verdict when evidence fails to disclose answers to interrogatories; *Louisville & N. R. Co. v. Cronbach*, 12 Ind. App. 675, 41 N. E. 15, and *Rogers v. Bloomington*, 22 Ind. App. 604, 52 N. E. 242, holding dismissal, when answers to interrogatories conflict with verdict for plaintiff in negligence suit, no error; *Lake Erie & W. R. Co. v. Graver*, 23 Ind. App. 684, 55 N. E. 968, holding that answers showing knowledge of dangerous crossing, that train was due, and failure to look and listen, irreconcilably in conflict with general verdict for plaintiff; *Rhodus v. Johnson*, 24 Ind. App. 406, 56 N. E. 942, holding answers to interrogatories failing to show negligence in passing through dimly lighted hallway not irreconcilable with recovery; *Warner v. Mier Carriage Co.* 26 Ind. App. 358, 58 N. E. 554, holding answers showing elevator shaft unguarded, decedent's ignorance of its existence, and failure of manager to give warning not inconsistent with recovery; *Cleveland C. C. & St. L. R. Co. v. Griffin*, 26 Ind. App. 372, 58 N. E. 503, holding answers showing failure to look and listen before crossing tracks defeat recovery; *South Bend v. Turner*, 156 Ind. 423, 54 L. R. A. 399, 83 Am. St. Rep. 200, 60 N. E. 271, holding contributory negligence not proved by answers showing that six-year-old child, while playing in sand pile, fell into manhole left open for two weeks; *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 658, 95 Am. St. Rep. 330, 64 N. E. 906, holding that answer to interrogatories which would prevent recovery if standing alone does not affect general verdict with which it is inconsistent, if it is also inconsistent with answer to other interrogatory; *Anderson v. Citizens Nat. Bank*, 38 Ind. App. 193, 76 N. E. 811, holding special answers cannot control and overthrow the general verdict unless they are in irreconcilable conflict with it; *McCoy v. Kokomo R. & Light Co.* 158 Ind. 664, 64 N. E. 92, holding motion for judgment non obstanti should be refused, where antagonism between verdict and answers to questions is not such, on face of record, as to be beyond possibility of being removed by any legitimate evidence under the issues.

Presumption in aid of verdict.

Cited in *Lindley v. Kemp*, 38 Ind. App. 368, 76 N. E. 798, holding the pleadings upon review are to be considered as presenting the issues tried by the jury, and jury's conclusion is presumed to be supported by evidence legitimately admissible under such issues.

Imputing negligence.

Cited in *Vincennes v. Thuis*, 28 Ind. App. 529, 63 N. E. 315, holding reckless driving bars recovery for death of guest when both intoxicated; *Boone County v. Mutchler*, 137 Ind. 149, 36 N. E. 534, holding county not relieved of liability for defective bridge by fact that plaintiff's daughter drove horse at time of injury; *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 647, 45 N. E. 812, holding one riding as another's guest, failing to look and listen on approaching crossing, see-

ing train at station, guilty of contributory negligence; *Wilson v. Puget Sound Electric R. Co.* 52 Wash. 531, 132 Am. St. Rep. 1044, 101 Pac. 50, holding a passenger in an automobile is not guilty of contributory negligence in not attempting to control acts of paid driver in case of apparent danger; *Burleigh v. St. Louis Transit Co.* 124 Mo. App. 732, 102 S. W. 621, holding one is not precluded from recovering damages if he exercises ordinary care for his safety, because driver's imprudence contributed to the collision; *Shultz v. Old Colony Street R. Co.* 193 Mass. 317, 8 L.R.A.(N.S.) 607, 118 Am. St. Rep. 502, 79 N. E. 873, 9 A. & E. Ann. Cas. 402, holding one riding as guest with another may recover from negligent third person for injuries received though one he is riding with is negligent; *Contos v. Jamison*, 81 S. C. 490, 19 L.R.A.(N.S.) 499, 62 S. E. 867, holding there is no such privity between lessor and lessee as can excuse negligence of another resulting in injury to the lessee, whether combined with lessor or not.

Cited in notes (37 L.R.A. 74) as to which of two or more persons is master of another, who is conceded to be the servant of one of them; (8 L.R.A.(N.S.) 646, 659, 660) on imputed negligence of driver to passenger; (110 Am. St. Rep. 296) on imputed negligence.

— **To husband or wife.**

Cited in *Chicago, B. & Q. R. Co. v. Honey*, 26 L. R. A. 44, footnote p. 42, 12 C. A. 193, 27 U. S. App. 196, 63 Fed. 42, holding wife's contributory negligence prevents recovery by husband for her injury; *Munger v. Sedalia*, 66 Mo. App. 633; *Reading Twp. v. Telfer*, 57 Kan. 801, 57 Am. St. Rep. 355, 48 Pac. 134; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 272, 38 N. E. 476; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 403, 33 N. E. 280,—holding negligence of husband in driving team not imputable to wife defeating recovery; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 387, 26 L. R. A. 559, 44 Am. St. Rep. 145, 20 S. E. 550, holding negligence of husband in intrusting child to incompetent person, not chargeable to wife by virtue of conjugal relation; *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 361, 37 N. E. 150, holding wife need not allege her freedom from fault to recover for carrier's negligence in causing husband's death; *Moon v. St. Louis Transit Co.* 237 Mo. 435, 141 S. W. 870, holding that negligence of master's servant is not imputable to master's wife; *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 183, 76 N. E. 804, holding existence of marriage relation only, cannot have the effect of imputing negligence of one spouse to the other; *Southern R. Co. v. King*, 128 Ga. 386, 11 L.R.A.(N.S.) 830, 57 S. E. 687, 119 Am. St. Rep. 390; *Louisville R. Co. v. McCarthy*, 129 Ky. 820, 19 L.R.A.(N.S.) 232, 130 Am. St. Rep. 494, 112 S. W. 925, holding mere fact of the marital relation does not render wife chargeable with husband's negligence so as to preclude her recovery from negligent third party for injuries sustained; *Macdonald v. O'Reilly*, 45 Or. 596, 78 Pac. 753, holding mere fact of expressing a desire for medicine by reason of which husband obtains it, does not make him wife's agent in such sense that his contributory negligence could be imputed to her.

Cited in note (22 L. R. A. 460) on husband's negligence as bar to recovery for wife's personal injuries.

14 L. R. A. 737, *DAVIS v. HOUGHTELIN*, 33 Neb. 582, 50 N. W. 765.

Master's responsibility for acts of servant.

Cited in *McPeak v. Missouri P. R. Co.* 128 Mo. 637, 30 S. W. 170 (dissenting

opinion), majority holding carrier liable for injuries to passengers caused by jumping at warning cry of brakeman; *Bowler v. O'Connell*, 162 Mass. 321, 27 L. R. A. 177, 44 Am. St. Rep. 359, 38 N. E. 498, denying master's liability to boy injured by being thrown from colt servant leading to water.

Cited in footnotes to *Stephenson v. Southern P. Co.* 15 L. R. A. 476, which holds railroad company not liable for engineer's moving engine to frighten street-car passengers at crossing; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw at boys playing on cotton bales; *Kolner v. Capital Traction Co.* 62 L.R.A. 875, which holds carrier not liable as matter of law for injury to passenger by conductor who claims that the accident occurred while attempting to save himself from falling.

Cited in notes (27 L. R. A. 163, 187, 196, 197) on master's civil responsibility for wrongful or negligent act of his servant or agent towards one who has no claim on master by reason of contract incipient or perfected; (59 L. R. A. 213) on sufficiency of general allegations of negligence; (10 L.R.A.(N.S.) 397) on liability for injury by servant to third person in use of dangerous agency; (34 L.R.A.(N.S.) 110) on liability of master for injuries inflicted by coemployee; (54 Am. St. Rep. 72, 73, 87) on acts of servant for which master is not responsible.

— **For assault.**

Cited in *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 55, 54 S. W. 971, upholding recovery by passenger wilfully expelled from train by brakeman whether act within scope of authority or not; *Cincinnati, N. O. & T. P. R. Co. v. Rue*, 142 Ky. 700, 34 L.R.A.(N.S.) 204, 134 S. W. 1144, holding railroad not liable for assault by freight train crew upon one who had been trespasser but had left train; *Savannah Electric Co. v. Hodges*, 6 Ga. App. 477, 65 S. E. 322; *Sullivan v. Louisville & N. R. Co.* 115 Ky. 450, 103 Am. St. Rep. 330, 74 S. W. 171,—holding where servant steps aside from his employment and acts solely on his own account, his act does not bind the master; *Peter Anderson & Co v. Diaz*, 77 Ark. 608, 4 L.R.A.(N.S.) 651, 113 Am. St. Rep. 180, 92 S. W. 861, holding employer is not liable for an unauthorized assault by his bartender upon a patron where the act is without scope of his employment; *Klugman v. Sanitary Laundry Co.* 141 Ill. App. 426, holding declaration insufficient to hold master liable which alleges an assault by the servant but fails to allege it was committed by the servant while acting within scope of his employment in prosecution of master's business.

Cited in footnotes to *Gabrielson v. Waydell*, 17 L. R. A. 228, which holds wilful attack by captain on seamen not within scope of authority; *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not within scope of employment; *Smith v. Louisville & N. R. Co.* 22 L. R. A. 72, which holds brakeman within scope of employment in kicking boy off moving train for failure to pay fare; *Dickson v. Waldron*, 24 L. R. A. 483, which holds proprietor of theater liable for wrongful assault by janitor and ticket taker; *Baltimore & O. R. Co. v. Barger*, 26 L. R. A. 220, which holds passenger's profane and abusive language not excuse carrier's liability for assault by conductor; *Goodloe v. Memphis & C. R. Co.* 29 L. R. A. 729, which denies carrier's liability for injuries to passenger by accidental blow from employee playfully attempting to strike other employee; *Atchison, T. & S. F. R. Co. v. Henry*, 29 L. R. A. 465, which holds carrier liable for illegal arrest of passenger, without warrant, caused by conductor; *Krantz v. Rio Grande Western R. Co.* 30 L. R. A. 297, which denies carrier's liability for unprovoked assault on passenger after alighting at station without effort by ticket agent to prevent same; *Richberger v. American*

Exp. Co. 31 L. R. A. 390, which holds express company not liable for assault by agent on person to whom he had just refunded overcharge; *Lucy v. Chicago G. W. R. Co.* 31 L. R. A. 551, which holds carrier liable for abuse and insult to passenger by drunken fellow passenger without conductor's interference; *Ball v. Chesapeake & O. R. Co.* 32 L. R. A. 792, which denies liability of carrier for murder of passenger while asleep; *West Memphis Packet Co. v. White*, 38 L. R. A. 427, which holds carrier liable for injury to passenger on excursion boat by careless discharge of gun by other passenger; *St. Louis S. W. R. Co. v. Jones*, 39 L. R. A. 784, which holds carrier liable for conductor's unreasonably beating passenger, slapping his face; *Savannah, F. & W. R. Co. v. Quo*, 40 L. R. A. 483, which holds carrier liable for baggage master's assault with intent to rape passenger; *Haver v. Central R. Co.* 43 L. R. A. 84, which holds carrier liable for malicious assault by employee on passenger; *McDermott v. American Brewing Co.* 52 L. R. A. 684, which denies master's liability for assault by servant to protect his own interest; *Lamb v. Littman*, 53 L. R. A. 852, which holds employer liable for assault by cruel overseer on minor employee; *Birmingham R. & Electric Co. v. Baird*, 54 L. R. A. 752, which holds carrier liable for conductor's assault on passenger; *Lipscomb v. Houston & T. C. R. Co.* 55 L. R. A. 869, which sustains liability for act of railroad company's employee in shooting, through want of proper care, co-employee mistaken for burglar; *Holler v. Ross*, 59 L. R. A. 943, which denies liability for shooting trespasser on land refusing to leave, by one employed to watch personalty; *Southern R. Co. v. James*, 63 L.R.A. 257, which holds master liable for act of nightwatchman in shooting trespasser while running away after having escaped from him while taking to town calaboose; *McNamara v. St. Louis Transit Co.* 66 L.R.A. 486, which holds exemplary damages against street car company justified by conductor's intentional and unjustified kicking of boy attempting to board car.

Cited in notes (55 L.R.A. 719) on carrier's liability for assault on passenger by strikers, mob, or third persons; (32 L.R.A.(N.S.) 1201) on liability for assault by servant on passenger while on train.

Distinguished in *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 18, 104 N. W. 49, holding railroad company liable for act of conductor of train in throwing a trespasser from one of defendant's moving freight trains.

14 L. R. A. 741, *LONG v. PENNSYLVANIA R. CO.* 147 Pa. 343, 30 Am. St. Rep. 732, 23 Atl. 459.

Inevitable accident as affecting liability.

Cited in *Dixon v. Breon*, 22 Pa. Super. Ct. 346, holding performance of contract to cut and manufacture certain kind of timber excused by destruction by forest fires; *Uhl v. Ohio River R. Co.* 56 W. Va. 508, 68 L.R.A. 145, 107 Am. St. Rep. 968, 49 S. E. 378, 3 A. & E. Ann. Cas. 201, holding where evidence shows variability and irregularity in the raises to which river is subject, one of which was much higher than one complained of, it cannot be said to be an extraordinary flood.

— Of carrier.

Cited in *Norfolk & W. R. Co. v. Marshall*, 90 Va. 837, 20 S. E. 823, denying carrier's liability for death of passenger caused by running into washout; *Wald v. Pittsburg, C. C. & St. L. R. Co.* 162 Ill. 551, 35 L. R. A. 358, footnote p. 356, 53 Am. St. Rep. 332, 44 N. E. 888, holding carrier liable for baggage lost by unprecedented flood when due to negligent delay.

Cited in footnotes to *Libby v. Maine C. R. Co.* 20 L. R. A. 812, which holds unprecedented flood causing washout of railroad culvert an act of God; *Long v.*

Pennsylvania R. Co. 20 L. R. A. 360, which holds theft or destruction of whisky after train wrecked by flood not due to inevitable accident; *Faucher v. Wilson*, 39 L. R. A. 431, which denies carrier's liability for bursting of hogshead of molasses from fermentation; *Smith v. North American Transp. & Trading Co.* 44 L. R. A. 557, which holds steamer company abandoning trip to Dawson because of low water, required to bring passenger back without charge; *Terre Haute & I. R. Co. v. Fowler*, 48 L. R. A. 531, which holds railroad company liable for injury to employee by breaking of railroad trestle by flood and drift.

Cited in notes (29 L.R.A.(N.S.) 664) on burden of proof where defense in action for loss or injury to goods during carriage in act of God or vis major; (1 Eng. Rul. Cas. 233, 234) on losses to goods for which common carrier is liable.

Distinguished in *Grier v. St. Louis Merchants Bridge Terminal R. Co.* 108 Mo. App. 570, 84 S. W. 158, holding where negligence of carrier in leaving property exposed was proximate cause of destruction by a flood the carrier is liable.

Presumption of negligence.

Cited in *St. Louis & S. F. R. Co. v. Brosius*, 47 Tex. Civ. App. 656, 105 S. W. 1131, holding mere fact that an animal apparently sound when delivered for shipment arrives at its destination sick with a disorder such as pneumonia should not raise presumption of negligence on part of carrier; *Colsch v. Chicago, M. & St. P. R. Co.* 149 Iowa, 182, 34 L.R.A.(N.S.) 1017, 127 N. W. 198, Ann. Cas. 1912 C, 915, holding that fact that animal apparently sound when delivered for shipment arrives at destination sick with pneumonia should not raise presumption of carrier's negligence.

Sufficiency of reserved question of law.

Cited in *Suter v. Findlay*, 19 Pa. Co. Ct. 11, 6 Pa. Dist. R. 254, 27 Pittsb. L. J. N. S. 351, 13 Montg. Co. L. Rep. 74, holding proper, reserved question as to sufficiency of evidence to entitle plaintiff to recover.

14 L. R. A. 743, *VALLO v. UNITED STATES EXP. CO.* 147 Pa. 404, 30 Am. St. Rep. 741, 23 Atl. 594.

Proximate cause of injury.

Cited in *Butterman v. McClintic-Marshall Constr. Co.* 206 Pa. 85, 55 Atl. 839, holding steel company's negligence in letting car get beyond control proximate cause of injury to servant of construction gang; *Louisville & N. R. Co. v. Morgan*, 165 Ala. 421, 51 So. 827, holding that railroad was liable to licensee for failure to provide railing upon platform, where its absence was proximate cause of injury; *Wadesz v. Peoples Bros.* 30 Pa. Co. Ct. 21, 13 Pa. Dist. R. 335, holding if accident be caused by an intervening and independent cause, for which the defendant was not responsible, there can be no recovery; *Stahle v. Poth*, 220 Pa. 342, 69 Atl. 864, holding it a question for the jury whether brewery exercised its right of receiving and sending commodities from their building with due regard to the safety of pedestrians on sidewalk; *Cohn v. May*, 210 Pa. 619, 69 L.R.A. 802, 105 Am. St. Rep. 840, 60 Atl. 301, holding a cause is not too remote merely because it produces the damages by means of an intermediate agency.

Cited in note (36 Am. St. Rep. 847) on proximate and remote cause.

Injuries from attempt to avoid sudden danger.

Cited in *Hookey v. Oakdale*, 5 Pa. Super. Ct. 409, 44 W. N. C. 374, holding traveler upon unfinished highway not negligent by making instinctive effort to avoid fire-plug, thereby falling into peril; *Shuart v. Consolidated Traction Co.* 15 Pa. Super. Ct. 28, affirming liability for starting car before passenger had fully

boarded; *Sprowls v. Morris Twp.* 179 Pa. 225, 39 W. N. C. 555, 36 Atl. 242, holding driver of horse and buggy suddenly placed in danger by approach of train not responsible for error in judgment; *Crampton v. Ivie Bros.* 124 N. C. 597, 32 S. E. 968, holding sudden precipitation into peril under reasonable apprehension of collision, proximate cause of driver's negligence.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Tuttle v. Atlantic City R. Co.* 54 L. R. A. 582, which authorizes recovery for fall while trying to escape from derailed car; *Palmer v. Warren Street R. Co.* 63 L.R.A. 507, which holds passenger not negligent in jumping from moving car to avoid impending collision.

Cited in note (37 L.R.A.(N.S.) 53) on care required in sudden emergency.

Interference with verdict for excessive damages.

Cited in *Smith v. Times Pub. Co.* 178 Pa. 524, 35 L. R. A. 827, 39 W. N. C. 347, 36 Atl. 296 (dissenting opinion), majority holding right to jury trial not violated by reversal of judgment for excessive damages; *Bogges v. Metropolitan Street R. Co.* 118 Mo. 341, 24 S. W. 210 (dissenting opinion), majority expressing opinion that findings of fact as to amount of damages in actions for personal injuries may be reviewed on appeal; *Burdiet v. Missouri P. R. Co.* 123 Mo. 252, 26 L. R. A. 401, 45 Am. St. Rep. 528, 27 S. W. 453 (dissenting opinion), majority holding appellate court should designate excess of damages and affirm judgment for remainder.

Use of street by abutter.

Cited in *Linderman v. Hershberger*, 47 Pa. Super. Ct. 311, holding that occupants of places of business on street when using sidewalk for receiving and sending merchandise, must exercise rights with due regard to safety of pedestrians; *Rech v. South Bethlehem*, 10 North Co. Rep. 233, to the point that as to what constitutes reasonable care in use of street if evidence is disputed and sufficient, must be submitted to jury.

Cited in note (125 Am. St. Rep. 349) on grant by city of right to use streets and sidewalks for private purpose.

14 L. R. A. 745, *BROWN v. BIGNE*, 21 Or. 260, 28 Am. St. Rep. 752, 28 Pac. 11.

Champertous or otherwise illegal agreements.

Cited in *Johnson v. Van Wyck*, 4 App. D. C. 319, 41 L. R. A. 526, holding attorney's agreement to prosecute ejectment suit for half of recovery, champertous; *Casserleigh v. Wood*, 56 C. C. A. 218, 119 Fed. 314, denying specific performance of contract to furnish evidence establishing interest in mine and to pay costs in consideration of specified part of recovery; *Casserleigh v. Wood*, 14 Colo. App. 271, 59 Pac. 1024, holding to the contrary; *Young v. Thomson*, 14 Colo. App. 315, 59 Pac. 1030, denying validity of contract to suppress evidence material to codefendant's defense; *Jahn v. Champagne Lumber Co.* 157 Fed. 418, holding in absence of agreement to share in recovery, it is not violative of law or public policy to aid a poor suitor in maintaining a meritorious cause of action; *Roller v. Murray*, 107 Va. 546, 59 S. E. 421, holding void a contract between a litigant and attorney whereby the attorney carries on the litigation at his own expense for a share of amount to be recovered.

Cited in note (6 Eng. Rul. Cas. 390) on invalidity of champertous agreement or one for compounding a felony.

Distinguished in *Holland v. Sheehan*, 108 Minn. 367, 23 L.R.A.(N.S.) 512, 122 N. W. 1, 17 A. & E. Ann. Cas. 687, holding champertous a contract between a

layman and a lawyer whereby the former agrees to drum up business for a share in the returns from the litigation.

14 L. R. A. 749, *CLARK v. WILMINGTON & W. R. CO.* 109 N. C. 430, 14 S. E. 43.

Duty towards one guilty of contributory negligence.

Cited in *Emry v. Roanoke Nav. & Water Power Co.* 111 N. C. 102, 17 L. R. A. 702, 16 S. E. 18, denying landlord's liability to tenant for accidental destruction of tenant's buildings which latter refused to remove.

Cited in note (69 L.R.A. 517, 526, 538, 549, 550, 552, 553, 554, 555, 556) on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained.

— Of railroad company.

Approved in *Little v. Carolina C. R. Co.* 118 N. C. 1075, 24 S. E. 514, denying liability for injury to one on trestle where engineer believed he had reached safe place on cap sill before allowing train to proceed; *Strickland v. Atlantic Coast Line R. Co.* 150 N. C. 8, 63 S. E. 161, holding where whistle was sounded before train went upon bridge engineer was not bound to stop train as he had right to suppose one walking on tracks would not go upon bridge before an approaching train.

Cited in *Norwood v. Raleigh & G. R. Co.* 111 N. C. 240, 16 S. E. 4, holding neglect of trespasser to avoid train, when possible, bars recovery; *Little v. Caroline C. R. Co.* 119 N. C. 776, 26 S. E. 106, upholding dismissal of action for damages to one injured by crossing trestle knowing train due; *Smith v. Norfolk & S. R. Co.* 114 N. C. 754, 25 L. R. A. 298, 19 S. E. 863, holding failure of engineer to use ordinary care to discover drunken person, not gross negligence barring defense of contributory negligence; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 631, 30 L. R. A. 258, 53 Am. St. Rep. 611, 23 S. E. 264, holding failure of engineer to keep vigilant outlook makes company liable for death of one lying on track; *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1012, 54 Am. St. Rep. 764, 24 S. E. 805, sustaining liability for running over person on trestle, resulting from neglect to provide headlight; *Baker v. Wilmington & W. R. Co.* 118 N. C. 1020, 24 S. E. 415, and *Lea v. Durham & N. R. Co.* 129 N. C. 463, 40 S. E. 212, denying liability when company and decedent were both negligent; *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 631, 77 Am. St. Rep. 557, 80 N. W. 682, holding failure to stop train when possible, saving collision with trespasser on bridge, renders company liable; *Chesapeake & O. R. Co. v. Hawkins*, 109 C. C. A. 258, 187 Fed. 573, holding that person who made honest effort to escape in reasonably prudent way, performed legal duty imposed upon him; *Duncan v. St. Louis & S. F. R. Co.* 152 Ala. 125, 44 So. 418, holding railroad company was not bound to keep a lookout for trespassers, and were not negligent in failing to discover one on the track; *Snipes v. Camp Mfg. Co.* 152 N. C. 46, 67 S. E. 27, holding an engineer knowing that injuries to workmen on track is not improbable unless warning is given should under the circumstances resolve doubts in favor of the safer course.

Cited in footnotes to *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape; *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track by train running at excessive speed without ringing bell; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Raines v. Chesapeake & O. R. Co.* 24 L. R. A. 226, which holds railroad employees have right to presume, on giving signals, that person on track will step aside.

Cited in notes (25 L. R. A. 289) on duty to maintain lookout on-railroad train;

(40 L. R. A. 142) on intoxication as affecting negligence; (55 L. R. A. 457) on doctrine of last-clear chance; (31 L.R.A.(N.S.) 1035) on intoxication of persons on track as affecting applicability of doctrine of last clear chance; (36 L. ed. U. S. 1065; 30 Am. St. Rep. 55) on duty to trespassers on railroad track.

Distinguished in *High v. Carolina C. R. Co.* 112 N. C. 388, 17 S. E. 79, holding engineer may assume one apparently in full possession of his faculties will step from track to avoid injury; *Palmer v. Oregon Short Line R. Co.* 34 Utah, 482, 98 Pac. 689, 16 A. & E. Ann. Cas. 229, holding in absence of a statutory duty or an implied license from use of railroad tracks, the company is not required to keep a lookout as a matter of law.

— **Duty to passenger or employee.**

Cited in *Mason v. Richmond & D. R. Co.* 111 N. C. 493, 18 L. R. A. 848, 32 Am. St. Rep. 814, 16 S. E. 698, holding nonsuit error, in action for damages for injuries received in coupling defective cars under order of conductor, contrary to company's rule; *Cawfield v. Asheville Street R. Co.* 111 N. C. 600, 16 S. E. 703, sustaining recovery for injuries to passenger alighting in view of conductor as car started; *Styles v. Richmond & D. R. Co.* 118 N. C. 1088, 24 S. E. 740, holding railroad company not liable for injury to sectionman negligently in cut because loose dirt on which he jumped to avoid approaching train gave way unless engineer could have avoided injury; *Kelley v. Chicago, B. & Q. R. Co.* 118 Iowa, 392, 92 N. W. 45, holding company liable for injury due to late train striking one repairing track.

Proximate cause of injury.

Cited in *Cole v. German Sav. & L. Soc.* 63 L. R. A. 422, 59 C. C. A. 600, 124 Fed. 120, holding strange boy's opening door to elevator well proximate cause of injury to one who fell in; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 302, 32 L.R.A.(N.S.) 1212, 69 S. E. 238, holding that wrongful act of independent third person, not intended by defendant are not regarded as natural consequences of defendant's wrong; *American Bridge Co. v. Seeds*, 11 L.R.A.(N.S.) 1045, 75 C. C. A. 407, 144 Fed. 610, holding where an independent intervening cause, without which an alleged act of negligence would not have caused injury, comes between and produces the result, it is the proximate cause of injury; *Smith v. Norfolk & S. R. Co.* 145 N. C. 103, 122 Am. St. Rep. 423, 58 S. E. 799, holding where injury is the result of a sequence of negligent acts, the law fixes the liability upon the one whose negligence was the proximate cause.

Cited in footnote to *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds failure to build fence not proximate cause of injury to one pushed on track by cow.

Statement by judge of contentions of fact to jury.

Cited in *State v. Cox*, 153 N. C. 644, 69 S. E. 419, holding that it is not error for trial judge to fairly state to jury various contentions of fact by parties.

14 L. R. A. 755, *Re MADERA IRRIG. DIST. BONDS*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675.

Municipal corporations.

Cited in *Merchants Nat. Bank v. Escondido Irrig. Dist.* 144 Cal. 334, 77 Pac. 937, holding the definition of a public or municipal corporation must be taken as any corporation exercising governmental functions.

Irrigation districts as municipal corporations.

Cited in *Perry v. Otay Irrig. District*, 127 Cal. 568, 60 Pac. 40, denying collector's right to off-set claim for salary against irrigation assessments; *Lincoln & Dawson County Irrig. Dist. v. McNeal*, 60 Neb. 619, 83 N. W. 847, holding trustees

of irrigation district not authorized to incur debts for construction of canal without "construction fund;" *Herring v. Modes to Irrig. District*, 95 Fed. 717; *People ex rel Brady v. Brown's Valley Irrig. District*, 119 Fed. 538, affirming legislature's power to create irrigation district for irrigation of arid lands; *Herring v. Modes to Irrig. District*, 95 Fed. 716, holding that exclusion of lands from irrigation district after organization does not affect validity of bonds; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 13, 46 L. ed. 779, 22 Sup. Ct. Rep. 531, denying to irrigation district, defense of nonexistence of corporation in action to collect municipal bonds; *People ex rel. Sels v. Reclamation Dist. No. 551*, 117 Cal. 123, 48 Pac. 1016, holding reclamation district not municipal corporation rendering void, property qualification of voters; *Belknap Sav. Bank v. Lamar Land & Canal Co.* 28 Colo. 339, 64 Pac. 212, holding irrigation canal company, not quasi-public corporation making receiver's certificates lien co-ordinate with mortgage; *Prescott Irrig. Co. v. Flathers*, 20 Wash. 459, 55 Pac. 635, upholding right to create corporation for irrigation of crops in sage-brush soil; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 159, 41 L. ed. 389, 17 Sup. Ct. Rep. 56; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 13, 46 L. ed. 779, 22 Sup. Ct. Rep. 531,—holding irrigation districts public municipal corporations; *People v. Selma Irrig. Dist.* 98 Cal. 208, 32 Pac. 1047; *Boehmer v. Big Rock Irrig. Dist.* 117 Cal. 28, 48 Pac. 908,—holding an irrigation district organized under a general law of the state a public corporation; *Augusta v. Augusta Water Dist.* 101 Me. 152, 63 Atl. 663, holding a water district to be regarded as a public municipal corporation; *Herring v. Modesto Irrig. Dist.* 95 Fed. 717, holding a district organized under legislative act providing for the organization and government of irrigation districts, is at least a de facto municipal corporation; *Whipple v. Tuxworth*, 81 Ark. 402, 99 S. W. 86, holding improvement districts of the state endowed by law with perpetual succession until their object is accomplished are corporations; *Hertle v. Ball*, 9 Idaho, 199, 72 Pac. 963, holding directors of an irrigation district are public officers within meaning of statutes governing elections; *Healey v. Anglo-California Bank*, 5 Cal. App. 282, 90 Pac. 54, on an irrigation district as a public municipal corporation and its officers public officers.

Irrigation or drainage as public utility.

Cited in *Rico v. Snider*, 134 Fed. 957, holding reclamation of swamp lands is a public work, control over which his vested in the legislature of the state; *Albuquerque Land & Irrig. Co. v. Gutierrez*, 10 N. M. 237, 61 Pac. 357, holding in arid regions the construction of reservoirs, canals, and ditches for the use of the public in irrigating lands is certainly as much for a public purpose as railroads or public roads; *Lindsay Irrig. Co. v. Mehrstens*, 97 Cal. 679, 32 Pac. 802, holding a legislative declaration that the right of eminent domain may be exercised in supplying water by canals to a farming neighborhood is expressive of a public use; *Prescott Irrig. Co. v. Flathers*, 20 Wash. 459, 55 Pac. 635, holding value of land is enhanced by the use of water, and the public interests benefited; *Laguna Drainage Dist. v. Charles Martin Co.* 144 Cal. 211, 77 Pac. 933, holding it sufficient to constitute a public use, that all within the district will be in common benefited by it.

Cited in note (102 Am. St. Rep. 828, 832) on uses for which power of eminent domain cannot be exercised.

Disapproved in *Bradley v. Fallbrook Irrig. Dist.* 68 Fed. 956, holding the taking of private property by an irrigation district is not such a public use as legally justifies exercise of the right of eminent domain.

Organization of irrigation district.

Cited in *Rothchild Bros. v. Rollinger*, 32 Wash. 310, 73 Pac. 367, holding stat-

ute requiring petition of "fifty or majority of freeholders" complied with by petition signed by forty-two; *Anderson v. Grand Valley Irrig. Dist.* 35 Colo. 533, 85 Pac. 313, upholding law providing for organization and government of irrigation districts; *State ex rel. Harris v. Hanson*, 80 Neb. 731, 115 N. W. 294, holding the formation of a reclamation district, the boundaries of which are fixed by the county commissioners, upon a majority vote of property owners of the district, does not contravene any constitutional provision.

Validity of special laws.

Cited in *Esecondido High School District v. Esecondido Seminary*, 130 Cal. 134, 62 Pac. 401, holding valid act providing sales of land for nonpayment of irrigation assessment not invalidated by misnomer; *Van Harlingen v. Doyle*, 134 Cal. 57, 54 L. R. A. 773, 66 Pac. 44, declaring void, law prohibiting public printing contracts with papers established less than one year; *Skinner v. Garnett Gold Min. Co.* 96 Fed. 743, holding valid, act requiring corporations to pay employees monthly; *Woodward v. Fruitvale Sanitary District*, 99 Cal. 562, 34 Pac. 239, holding act authorizing organization of sanitary districts not void for interference with municipal rights; *People ex rel. Post v. San Joaquin Valley Agri. Asso.* 151 Cal. 802, 91 Pac. 740, holding it within power of state to organize and carry on district agricultural associations; *Nevada Nat. Bank v. Kern County*, 5 Cal. App. 650, 91 Pac. 122, holding statute providing for assessment and levy sufficient to provide for interest on bonds of an irrigation district is not obnoxious to the constitution as to imposition of taxes; *Cullen v. Clendora Water Co.* 113 Cal. 516, 39 Pac. 769, upholding legislation providing for judicial examination and confirmation of bonds of irrigation districts, in advance of any controversy as to rights under them; *Jenison v. Redfield*, 149 Cal. 503, 87 Pac. 62, holding it for the public welfare that protection be afforded certain lands by irrigation district legislation; *Little Walla Walla Irrig. Dist. v. Preston*, 46 Or. 6, 78 Pac. 982, upholding legislation determining the extent of water rights and regulating and controlling the use of water; *Billings Sugar Co. v. Fish*, 40 Mont. 270, 26 L.R.A.(N.S.) 972, 106 Pac. 565, holding legislation providing for improvement and reclamation of agricultural lands is not invalid by reason of its affecting only a portion of the state.

Cited in footnote to *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void.

Cited in note (114 Am. St. Rep. 321) on constitutionality of local option laws.

Distinguished in *State ex rel. Patterson v. Douglass County*, 47 Neb. 450, 66 N. W. 434, holding unconstitutional a statute providing for appointment of trustees who shall be a "body corporate and politic" for purpose of construction and operation of a canal for supplying power and light.

Notice of proceedings to take or burden property.

Cited in *Stumpf v. San Luis Obispo County*, 131 Cal. 368, 82 Am. St. Rep. 350, 63 Pac. 663, holding declaration of supervisors as to organization of sanitary districts nullity, record containing no recital of notice.

Cited in footnotes to *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice for highway repairs valid; *Brown v. Markham*, 30 L. R. A. 84, which holds valid, statute authorizing logger's lien without notice to owner, but giving subsequent opportunity to intervene.

Conclusiveness of decision as to petition.

Cited in *Wilcox v. Engebretsen*, 160 Cal. 293, 116 Pac. 750, holding that in absence of statute provisions, issuance of bonds for street imprisonments shall be conclusive evidence of fact that sufficient petition has been filed; *Alfalfa Irrig. Dist. v. Collins*, 46 Neb. 418, 64 N. W. 1086, holding a proceeding to establish

validity of bonds voted by an irrigation district, is an action in rem, and a decree entered is a bar to a subsequent action to enjoin issue of bonds on account of irregularity in organization of district; *Borchard v. Ventura County*, 144 Cal. 14, 77 Pac. 708, holding where jurisdiction of an inferior tribunal turns upon a disputed question of fact and evidence of that tribunal is not made part of returns, reviewing court may require inferior tribunal to certify evidence upon which it acted; *Murray v. Nixon*, 10 Idaho, 617, 79 Pac. 643, holding fact that certain plats and maps showing description of property are not incorporated as part of findings or judgment is not ground for reversal, where maps are brought up as part of record by stipulation of counsel.

Cited in notes (22 L.R.A.(N.S.) 49, 51, 53, 81, 86) on judicial power over eminent domain; (23 Am. St. Rep. 112) on collateral attack upon judgment; (88 Am. St. Rep. 932, 934; 102 Am. St. Rep. 821) on existence of public use as question for courts.

Distinguished in *People ex rel. Skelton v. Los Angeles*, 133 Cal. 343, 65 Pac. 749, holding conclusive, in absence of fraud, adjudication by city council that petition for annexation was signed by requisite number of electors.

Benefit as basis for assessment.

Cited in *McDonald v. Conniff*, 99 Cal. 391, 34 Pac. 71, holding valid, act for improvement of part of street and assessing cost upon abutters according to frontage; *Rolph v. Fargo*, 7 N. D. 658, 42 L. R. A. 653, 76 N. W. 242, holding legislature may assess paving tax upon abutting property in proportion to frontage; *Arnold v. Knoxville*, 115 Tenn. 219, 3 L. R. A.(N.S.) 845, 90 S. W. 469, 5 A. & E. Ann. Cas. 881, upholding a local assessment tax authorized by statute for improvement of districts within a city; *Duncan v. Ramish*, 142 Cal. 691, 76 Pac. 661, holding validity of an assessment for benefits cannot be attached collaterally by showing land of a particular individual was not benefited to extent of costs apportioned; *Roby v. Shunganunga Drainage Dist.* 77 Kan. 757, 95 Pac. 399, holding the benefits of a highway, levee or a drain may be so peculiar that justice would require cost to be levied upon a part of a township, county or other subdivisions of the state; *Tregea v. Owens*, 94 Cal. 319, 29 Pac. 643, holding assessment may be levied upon all real property within the district without deducting from value of property, amount of any mortgages existing thereon.

Cited in footnotes to *Reinken v. Fuehring*, 15 L. R. A. 624, which holds street-sweeping assessments sustainable only on ground of special benefit to property; *Denver v. Knowles*, 17 L. R. A. 135, which upholds local assessments on basis of frontage; *Oregon & C. R. Co. v. Portland*, 22 L. R. A. 713, which denies right to enforce local assessment on property not benefited; *Asberry v. Roanoke*, 42 L. R. A. 636, which denies right to impose on abutters liability for cost of street improvements in front of their property; *Webster v. Fargo*, 56 L. R. A. 156, which sustains statute charging entire cost of paving on abutters according to frontage; *Ramsey County v. Robert P. Lewis Co.* 53 L. R. A. 421, which sustains annual frontage tax on land in front of which water pipes laid; *Reelfoot Lake Levee District v. Dawson*, 34 L. R. A. 725, which holds tax on land alone in levee district void; *Cincinnati, L. & N. R. Co. v. Cincinnati*, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway on remaining land of same owner; *Crane v. West Chicago Park*, 26 L. R. A. 311, which holds maintenance and repair of boulevards by annual assessments not local improvement; *Schenectady v. Union College*, 26 L. R. A. 614, which holds bed of street not a lot lying on street for paving-assessment purposes; *Hawes v. Chicago*, 30 L. R. A. 225, which holds unjust, ordinance compelling substitution of cement for new plank sidewalk in front of vacant lot; *Rogers v. St. Paul*, 47 L. R. A. 537, which denies right to recover

back money paid on assessment for uncompleted street improvement; *Smith v. Worcester*, 59 L. R. A. 728, which holds conclusive, decision of legislature that landowners within assessment district benefited by sewer; *Sears v. Board of Street Comrs.* 62 L.R.A. 144, which holds that cost and benefit of entire improvement should be considered in assessing property on two streets for cost of building a union passenger station and the extension of such streets; *Iowa Pipe & Tile Co. v. Callanan*, 67 L.R.A. 408, which holds void, assessment for sewer on abutting property only eight feet deep at same front foot rate as full sized lots.

Cited in notes (18 L. R. A. 544) on protection of private rights from interference by public; (24 L. R. A. 412) on right to impose on abutting owners duty or expense of sweeping, sprinkling, or cleaning streets or sidewalks; (28 L. R. A. 499) on charging expense of grading for sidewalk on abutting owner; (34 L. R. A. 200) on municipal taxation of rural lands within limits of corporation.

Alienation of tide lands.

Cited in *Oakland v. Oakland Water Front Co.* 118 Cal. 213, 50 Pac. 277 (dissenting opinion), majority holding state has power to alienate tide lands, subject to navigation rights.

Powers of legislature.

Cited in *Hilborn v. Nye*, 15 Cal. App. 303, 114 Pac. 801, holding that power of legislature is unlimited except as circumscribed by constitution; *Re Sanitary Board*, 158 Cal. 457, 111 Pac. 368, holding that in absence of constitutional restriction legislature has absolute power over organization, dissolution, extent and powers of municipal and other public corporations; *Potter v. Santa Barbara County*, 160 Cal. 356, 116 Pac. 1101, holding that formation of road district is function pertaining purely to legislative branch of government; *Mode v. Beasley*, 143 Ind. 320, 42 N. E. 727, holding the legislature could have authorized board to relocate county seat without any petition whatever authorizing ascertainment of the popular will; *Jackson County v. State*, 147 Ind. 490, 46 N. E. 908, holding the legislature has the right and power to provide for the levy of a tax upon a township in which the county seat was to be relocated; *Robinson v. Linscott*, 12 Cal. App. 433, 107 Pac. 703, on power of the legislature in matters of taxation.

Legislative discretion.

Cited in *People v. Ontario*, 148 Cal. 631, 84 Pac. 205, holding in absence of constitutional provision intimating power to fix boundaries can be conferred only on legislative bodies, question is one purely of policy, upon which determination by the legislature is conclusive; *Re Spencer*, 149 Cal. 400, 117 Am. St. Rep. 137, 86 Pac. 896, 9 A. & E. Ann. Cas. 1105, holding when presumption as to validity of a legislative act depends upon existence or nonexistence of some fact, the determination thereof is primarily for the legislature; *Sisson v. Buena Vista County*, 128 Iowa, 453, 70 L.R.A. 445, 104 N. W. 454; *Paxton & H. Irrigation Canal & Land Co. v. Farmers & M. Irrig. & Land Co.* 45 Neb. 896, 29 L.R.A. 857, 50 Am. St. Rep. 585, 64 N. W. 343,—holding if by any reasonable construction a designed use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court; *State ex rel. McCue v. Northern P. R. Co. (N.D.)* 25 L.R.A.(N.S.) 1006, 120 N. W. 869; *Shasta Power Co. v. Walker*, 149 Fed. 570,—holding in such case the courts will not disturb the judgment of the legislature; *Ex parte Dietrich*, 149 Cal. 107, 5 L.R.A. (N.S.) 874, 84 Pac. 770 (dissenting opinion), on legislative judgment as conclusive on courts.

Construction of statutes.

Cited in *Re Finley*, 1 Cal. App. 200, 81 Pac. 1041, holding power of construction should be exercised with extreme caution when the validity of a statute is

questioned; *Walker v. Shasta Power Co.* 19 L.R.A. (N.S.) 731, 87 C. C. A. 660, 160 Fed. 859, holding where it is uncertain and doubtful whether the use to which property is proposed to be devoted is of a public or private character, the legislative determination of question is of persuasive force; *People ex rel. Mattison v. Nye*, 9 Cal. App. 160, 98 Pac. 241, holding the presumption which attends every act of the legislature is that it is within its power and it rests upon the one drawing it in question to show wherein it is obnoxious.

Construction of statutory powers.

Cited in *Lincoln & D. County Irrig. Dist. v. McNeal*, 60 Neb. 619, 83 N. W. 847, holding resort must be had to statutes providing for irrigation district to determine power of board of directors to incur liability for work done on canal; *Ahern v. Board of Directors*, 39 Colo. 418, 89 Pac. 963, holding where a corporation itself comes into court for examination of regularity of its organization court should require proof of every act which the statute has made requisite; *Re Central Irrig. Dist.* 117 Cal. 389, 49 Pac. 354, holding where confirmation act expressly provides for a review of determination of board of supervisors, claim that decision of board is final, falls.

Statutory debt limit.

Cited in *Robertson v. Alameda Free Public Library*, 136 Cal. 405, 69 Pac. 88, holding a free library of a city does not fall within constitutional provision, as to power of creating indebtedness as it is not a city, county or town, or district, or other body therein described.

Due process of law.

Cited in *Ross v. Wright County*, 128 Iowa, 441, 1 L.R.A. (N.S.) 439, 104 N. W. 506, holding "due process of law" does not necessarily imply judicial procedure in a court of record or right of trial by jury.

14 L. R. A. 773, *RAY v. WILSON*, 29 Fla. 342, 10 So. 613.

Use of official seal on bonds.

Cited in *Stockton v. Powell*, 29 Fla. 78, 15 L. R. A. 55, 10 So. 688, holding seal of circuit court may be used on county bonds.

Mandamus.

Cited in *State ex rel. Atty. Gen. v. Johnson*, 30 Fla. 497, 18 L. R. A. 419, 11 So. 845, holding mandamus will lie to compel suspended tax collector to surrender official property; *Cameron v. Parker*, 2 Okla. 316, 38 Pac. 14, holding mandamus remedy to compel superintendent of public instruction to vacate office; *State ex rel. Concord v. Young*, 31 Fla. 603, 19 L. R. A. 639, 34 Am. St. Rep. 41, 12 So. 673, holding that right to appeal from judge's decision that he is disqualified, does not bar mandamus to compel him to hear case, if qualified; *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 405, 27 So. 225, holding statutory action for penalty for neglect to obey commissioner's order not bar to mandamus; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 668, 13 L.R.A. (N.S.) 326, 40 So. 213, 12 A. & E. Ann. Cas. 359, holding the writ may be issued to specifically enforce performance of a duty imposed by law upon a railroad corporation where no other adequate remedy is provided by law.

— To compel payment.

Cited in *Walker v. Barnard*, 8 Tex. Civ. App. 17, 27 S. W. 726; *Thomas v. Mason*, 39 W. Va. 531, 26 L. R. A. 732, footnote p. 727, 20 S. E. 580; *Wyker v. Francis*, 120 Ala. 521, 24 So. 895,—holding owner of warrant drawn on municipal treasurer may compel payment by mandamus; *State ex rel. Exchange Bank v. Allison*, 155 Mo. 335, 56 S. W. 467 (dissenting opinion), majority holding de-

nial in return to alternative writ of mandamus to compel treasurer to pay warrants must be specific; *State v. Badnelley*, 31 R. I. 383, 79 Atl. 834, holding that mandamus lies to compel town treasurer to pay undisputed claim, where there remains only ministerial duty to pay it.

Cited in footnote to *State ex rel. Badger v. New Orleans*, 37 L. R. A. 540, which denies right to enforce by mandamus disputed claims against city.

Annotation in 14 L. R. A. 773, referred to particularly in *Chatters v. Coahoma County*, 73 Miss. 354, 19 So. 107, holding mandamus to compel supervisors to allow account properly refused as to portion not presented in form required by law.

Distinguished in *Appel v. State*, 9 Wyo. 197, 61 Pac. 1015, holding prima facie right to mandamus shown by allegations that board allowed claim and ordered it paid.

Return to an alternative writ.

Cited in *State ex rel. Kittel v. Jennings*, 47 Fla. 316, 35 So. 989, holding the return to an alternative writ should set up positive denial of facts stated or should so state facts in confession and avoidance as will advise court of all particulars necessary to pass upon return.

14 L. R. A. 781, *FT. WORTH & D. C. R. CO. v. ROBERTSON* (Tex.) 16 S. W. 1093.

Liability for dangerous premises or agencies.

Cited in *Ryan v. Towar*, 128 Mich. 472, 55 L.R.A. 313, 92 Am. St. Rep. 481, 87 N. W. 644, holding owner of an unused pump house is not liable for injuries to a girl of thirteen caused by her efforts to extricate a younger child from the water-wheel though children habitually crossed the premises with consent of owner; *Riedel v. West Jersey & S. R. Co.* 170 Fed. 817, holding railroad companies not liable for injuries to a child falling upon its unboxed third rail where child was attracted by flowers growing upon right of way and not to the character of the track itself.

Cited in footnotes to *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas companies insuring reasonable promptness in detecting leaks; *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Cited in note (26 L. R. A. 687) on liability for dangerous condition of private grounds lying open beside highway or frequented path.

— Of carrier.

Cited in footnotes to *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency so as to make owner of pleasure resort liable for negligence of its owner; *Gay v. Essex Electric Street R. Co.* 21 L. R. A. 448, which holds leaving street car in street not invitation to children to play on same; *Barney v. Hannibal & St. J. R. Co.* 26 L. R. A. 847, which denies duty of railroad company to fence switch yards for protection of children; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Savannah, F. & W. R. Co. v. Waller*, 34 L. R. A. 459, which denies liability of railroad company for injury to seven-year-old boy running under freight car to get ball on request of employee; *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street after

loosening brake; Delaware, L. & W. R. Co. v. Reich, 41 L. R. A. 831, which denies liability for injury to child playing on turntable on owner's private property; Walsh v. Fitchburg R. Co. 27 L. R. A. 724, which holds active vigilance not required to keep children from playing with turntable; Edgington v. Burlington, C. R. & N. R. Co. 57 L. R. A. 561, which holds railroad company liable for injuries to young children by unfastened turntable in unfenced lot near public way; Chicago, B. & Q. R. Co. v. Krayenbuhl, 59 L. R. A. 920, which holds railroad company liable for injury to child on turntable not guarded or properly fastened.

Cited in notes (22 L.R.A. 306) on liability of railroad for accidents caused by wrongful acts of stranger; (4 L.R.A.(N.S.) 81) on liability of railroad for injury to children playing on turntable; (17 L.R.A.(N.S.) 921) on duty of owner of premises to protect licensee against hidden dangers.

Contributory negligence.

Cited in footnote to Springer v. Byram, 23 L. R. A. 244, which holds newsboy riding in passenger elevator in violation of known rule, a trespasser.

14 L. R. A. 785, PENNSYLVANIA CO. v. LOMBARDO, 49 Ohio St. 1, 29 N. E. 573.

Champertous contracts.

Cited in Reece v. Kyle, 49 Ohio St. 488, 16 L. R. A. 728, 31 N. E. 747, holding valid, agreement to collect assigned judgment for half obtained, paying all expenses if successful; Brown v. Ginn, 66 Ohio St. 325, 64 N. E. 123, holding assignment of accounts for collection, assignee having contingent fee and paying costs, champertous; Galusha v. Wendt, 114 Iowa, 615, 87 N. W. 512, holding champertous contract between county and attorney no defense to action for back taxes; Wehmhoff v. Rutherford, 98 Ky. 97, 32 S. W. 288, denying invalidity of agreement between attorney and client defense to action for money lost in gaming; Prosky v. Clark, 32 Nev. 446, 35 L.R.A.(N.S.) 517, 109 Pac. 793, holding that action to recover possession of contract interest in mining claim is maintainable although owner of interest made champertous assignment of portion of such interest to one who joined in action; Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Invest. Co. 49 Colo. 131, 33 L.R.A.(N.S.) 1078, 111 Pac. 834, holding that champertous contract cannot be interposed as defense to action, but only set up between parties on enforcement of contract; Cumberland Teleph. & Teleg. Co. v. Maxberry, 134 Ky. 647, 121 S. W. 447, holding champerty can only be set up by a party thereto when the champertous agreement is sought to be enforced; Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 270, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694, 85 N. E. 504, on attitude of the court toward champertous contracts; Emslie v. Ford Plate Glass Co. 1 Ohio C. C. N. S. 606, 25 Ohio C. C. 551, holding that agreement to pay attorney share of recovery as compensation for his services and that no settlement shall be made without his consent is champertous.

Cited in footnote to Croco v. Oregon Short-Line Ry. 44 L.R.A. 285, which authorizes agreement that attorney's compensation shall depend on successes and be payable out of proceeds of litigation.

Cited in notes (83 Am. St. Rep. 168, 173) on champertous contracts between attorneys and clients; (35 L.R.A.(N.S.) 513) on right of third persons to take advantage of champerty.

14 L. R. A. 787, HAYNES v. NOWLIN, 129 Ind. 581, 28 Am. St. Rep. 213, 29 N. E. 389.

Right of action for alienating husband's affections — Against other woman.

Cited in Adams v. Main, 3 Ind. App. 236, 50 Am. St. Rep. 266, 29 N. E. 792, holding loss of consortium basis of action for alienation of affections; Deitzman v. Mullin, 108 Ky. 614, 50 L. R. A. 810, footnote p. 808, 94 Am. St. Rep. 390, 57 S. W. 247; Beach v. Brown, 20 Wash. 269, 43 L. R. A. 116, 72 Am. St. Rep. 98, 55 Pac. 46; Wolf v. Frank, 92 Md. 140, 52 L. R. A. 104, footnote p. 102, 48 Atl. 132, —upholding wife's right of action against another woman for alienating husband's affections; Sims v. Sims, 79 N. J. L. 580, 29 L.R.A.(N.S.) 845, 76 Atl. 1063, holding that wife may maintain action for alienation of husband's affection in her own name under statute; Hamilton v. McNeill, 150 Iowa, 487, 129 N. W. 480, to the point that guilty party to divorce cannot maintain action for alienation of affections; Nolin v. Pearson, 191 Mass. 290, 4 L.R.A.(N.S.) 649, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding such statutes enable the wife to maintain a cause of action for a criminal conversation with the husband; Quick v. Church, 23 Ont. Rep. 273, holding an action for alienation of husband affections lies against a woman who procures abandonment of wife that husband may live in adultery with her.

Cited in footnotes to Clow v. Chapman, 26 L. R. A. 412, which upholds wife's right of action against other woman for alienating husband's affections; Houghton v. Rice, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections unaccompanied by adultery.

Cited in note (46 Am. St. Rep. 474) on wife's action for alienation of husband's affections.

Distinguished in Kroessin v. Keller, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, denying wife's right to maintain action against another woman in nature of criminal conversation.

Disapproved in Lellis v. Lambert, 24 Ont. App. Rep. 657, holding action will not lie in favor of wife against another woman for alienation of husband's affections and criminal conversation with him.

— Against relative.

Followed in Wolf v. Wolf, 130 Ind. 599, 30 N. E. 308, without discussion.

Cited in Holmes v. Holmes, 133 Ind. 387, 32 N. E. 932, sustaining married woman's right to maintain action in her own name for alienation of husband's affections; Williams v. Williams, 20 Colo. 55, 37 Pac. 614, sustaining recovery for alienation of husband's affections by father's threat to disinherit; Railsback v. Railsback, 12 Ind. App. 662, 40 N. E. 276; Gerner v. Gerner, 185 Pa. 236, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884; Warren v. Warren, 89 Mich. 128, 14 L. R. A. 547, 50 N. W. 842; Price v. Price, 91 Iowa, 698, 29 L. R. A. 152, 51 Am. St. Rep. 360, 60 N. W. 202; Lockwood v. Lockwood, 67 Minn. 484, 70 N. W. 784,—sustaining wife's right of action against father and mother for alienation of husband's affection; Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638, holding wife must allege malice in action against mother for alienation of husband's affections; Workman v. Workman, 43 Ind. App. 386, 85 N. E. 997; Smith v. Gillapp, 123 Ill. App. 123,—holding an action for alienation of husband's affections is maintainable by the wife; Gregg v. Gregg, 37 Ind. App. 215, 75 N. E. 674, holding such action is maintainable although the wife becomes divorced from the husband; Hodge v. Wetzler, 69 N. J. L. 492, 55 Atl. 49, holding at common law a married woman had no right of action for the alienation of her husband's affections; King v. Hanson, 13 N. D. 97, 99

N. W. 1085, holding statutes giving her the same rights and liabilities as before marriage removes the disability which caused a denial of the remedy at common law; *Keen v. Keen*, 49 Or. 365, 10 L.R.A.(N.S.) 505, 90 Pac. 147, 14 A. & E. Ann. Cas. 45, holding by reason of statute removing from wife such civil disabilities as do not affect the husband, a wife may maintain an action for alienation of her husband's affections in her own name.

Cited in footnotes to *Hodgkinson v. Hodgkinson*, 27 L. R. A. 120, which holds one bringing about husband's desertion liable to suit by wife; *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Betser v. Betser*, 52 L. R. A. 630, which sustains wife's right of action against brother-in-law for alienating husband's affection.

Married woman's rights and liabilities on contract.

Cited in *Worth v. Patton*, 5 Ind. App. 276, 31 N. E. 1130, sustaining agreement by husband to convey land in fee to wife in consideration of joining him in deed; *Dickey v. Kalfsbeck*, 20 Ind. App. 293, 50 N. E. 590, holding married woman liable upon covenants of warranty in conveyances of separate estate; *Lackey v. Boruff*, 152 Ind. 377, 53 N. E. 412, holding note and mortgage executed by husband and wife before act of 1881, subsequently renewed, to secure loan to wife for husband's benefit, voidable as to wife.

14 L. R. A. 791, *MULLIGAN v. NEW YORK & R. B. R. CO.* 129 N. Y. 506, 42 N. Y. S. R. 83, 26 Am. St. Rep. 539, 29 N. E. 952.

Master's liability for acts of servant.

Cited in *Smith v. New York C. & H. R. R. Co.* 78 Hun, 526, 29 N. Y. Supp. 540, denying company's liability for injury to bystander caused by employee's explosion of torpedoes for amusement; *Finley v. Hudson Electric R. Co.* 64 Hun, 374, 19 N. Y. Supp. 621, holding assent of company not implied by motorman's invitation to boy to ride in return for opening switch; *Willis v. Metropolitan Street R. Co.* 76 App. Div. 345, 78 N. Y. Supp. 478, holding street car company liable for conductor's striking one who boarded car after being told it was full; *Gardner v. Interborough Rapid Transit Co.* 45 Misc. 425, 90 N. Y. Supp. 373, holding a passenger cannot recover for injuries received through his voluntary and unexcusable interference in a quarrel between porter on train and strangers; *Schmidt v. New Orleans R. Co.* 116 La. 322, 7 L.R.A.(N.S.) 168, 40 So. 714, on liability of master for malicious acts of his servant.

Cited in footnotes to *Stephenson v. Southern P. Co.* 15 L. R. A. 476, which holds railroad company not liable for engineer's moving engine to frighten street car passengers at crossing; *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment.

Cited in notes (27 L.R.A. 163, 195) on master's civil responsibility for wrongful or negligent act of his servant or agent towards one who has no claim on master by reason of contract incipient or perfected; (4 L.R.A.(N.S.) 500) on liability for malicious act of servant when master owes special duty to party injured; (40 L.R.A.(N.S.) 1036, 1050) on liability of carrier for wilful torts of servants to passengers; (26 Am. St. Rep. 134) on liability of principal acting by agent for malicious prosecution of criminal charge; (32 Am. St. Rep. 96, 101) on carrier's duty to protect passengers from assault; (88 Am. St. Rep. 793) on liability of principal for unauthorized acts of agent; (54 Am. St. Rep. 79; 17 Eng. Rul. Cas. 277, 278, 280) on master's liability for acts of servant.

Distinguished in *Tinker v. New York, O. & W. R. Co.* 71 Hun, 434, 24 N. Y.

Supp. 977, holding question of fact whether company liable for act of employees in placing weather-beaten timbers near highway causing fright of horse.

— For procuring arrest.

Approved in *Lubliner v. Tiffany & Co.* 54 App. Div. 328, 66 N. Y. Supp. 659, denying master's liability for arrest, upon superintendent's affidavit, of person to whom customer's lost jewelry had been sold.

Cited in *McLeod v. New York, C. & St. L. R. Co.* 72 App. Div. 119, 76 N. Y. Supp. 347, upholding passenger's right to sue carrier for wrongful arrest on charge of taking money from another passenger; *Markley v. Snow*, 207 Pa. 453, 64 L. R. A. 687, footnote p. 685, 56 Atl. 999, denying liability of master for arrest, long after alleged burning, by employees charged with care of property; *Dupre v. Childs*, 52 App. Div. 311, 65 N. Y. Supp. 179 (dissenting opinion), majority holding proprietor of restaurant liable for manager's arrest of person apparently attempting to evade payment of bill; *Penny v. New York C. & H. R. R. Co.* 34 App. Div. 13, 53 N. Y. Supp. 1043, denying railroad company's liability for unauthorized arrest in station, of person not a passenger; *Mayfield v. St. Louis, I. M. & S. R. Co.* 97 Ark. 29, 32 L.R.A.(N.S.) 528, 133 S. W. 168, holding that railroad is not liable to one arrested by police officer while passenger on its train because conductor pointed him out to officer with apparent authority.

Cited in footnotes to *Gillingham v. Ohio River R. Co.* 14 L. R. A. 798, which holds carrier liable for conductor's false imprisonment of passenger; *Staples v. Schmid*, 19 L. R. A. 824, which holds salesman within scope of employment in causing arrest and search of person for stolen property; *A'Hern v. Iowa State Agri. Soc.* 24 L. R. A. 656, which denies liability of state agricultural society for wilful arrest and assault by its agents; *Central R. Co. v. Brewer*, 27 L. R. A. 63, which denies implied authority of street railway superintendent to cause arrest for giving counterfeit money; *Baltimore & O. R. Co. v. Cain*, 28 L. R. A. 688, which holds officer's arrest of disorderly passenger without warrant in response to telegram by conductor who pointed out person to be arrested, not unlawful; *Atchison, T. & S. F. R. Co. v. Henry*, 29 L. R. A. 465, which holds carrier liable for illegal arrest of passenger without warrant caused by conductor; *Eichengreen v. Louisville & N. R. Co.* 31 L. R. A. 702, which holds carrier liable for false imprisonment procured by railroad detective; *Little Rock Traction & Electric Co. v. Walker*, 40 L. R. A. 473, which denies carrier's liability for arrest for nonpayment of fare of street car passenger by policeman called by conductor, who was only authorized to put delinquent passengers off car; *Palmer v. Maine C. R. Co.* 44 L. R. A. 673, which holds passenger's unreasonable refusal to tell whether name on mileage ticket is own no justification for procuring his arrest; *Brunswick & W. R. Co. v. Ponder*, 60 L. R. A. 713, which denies carrier's liability for failure to prevent illegal arrest by officers, or for stopping train to permit removal; *Markley v. Snow*, 64 L.R.A. 685, which denies liability of a mining partnership for acts of employees in causing arrest for vindication of law of one suspected of having set fire to a building belonging to a partnership; *Daniel v. Atlantic C. L. R. Co.* 67 L.R.A. 455, which holds railroad company not liable for arrest by cashier with power to collect money, give receipts, sell tickets, care for money received and forward it to treasurer, of innocent person whom he suspects of having stolen money which has come into his possession; *Texas Midland Railroad v. Dean*, 70 L.R.A. 943, which holds railroad company liable for act of baggage master in assisting in wrongful arrest at instance of city authorities of passenger awaiting at station for train.

Cited in notes (7 L.R.A.(N.S.) 165) on liability of carrier for arrest of pas-

senger by servant; (4 L.R.A.(N.S.) 284) on liability for arrest or false imprisonment by servant employed as detective, policeman or watchman.

Distinguished in *Palmeri v. Manhattan R. Co.* 133 N. Y. 264, 16 L. R. A. 137, footnote p. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, holding carrier liable for agent's charging purchaser of ticket with passing counterfeit money and detaining her till arrival of officer.

14 L. R. A. 798, *GILLINGHAM v. OHIO RIVER R. CO.* 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243.

Liability for act of agent.

Cited in *Hall v. Norfolk & W. R. Co.* 44 W. Va. 37, 41 L. R. A. 672, 67 Am. St. Rep. 757, 28 S. E. 754, denying carrier's responsibility for unauthorized act of agent in overcharging for ticket; *Smith v. Norfolk & W. R. Co.* 48 W. Va. 70, 35 S. E. 834, sustaining recovery for wilful assault upon passenger by conductor; *McDonald v. Cole*, 46 W. Va. 188, 32 S. E. 1032, holding that false statement of agent that he acts for partnership, when in fact he acts for corporation, does not bind corporation or its members as partners; *Teel v. Coal & Coke R. Co.* 66 W. Va. 316, 66 S. E. 470, holding that carrier is liable for wilful injury to passenger by servant, under provocation, unless justified under law of self-defense; *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 618, 67 S. E. 1103, holding that carrier of passenger is under absolute contractual duty to protect them from unlawful injury at hands of servants; *Taillon v. Mears*, 29 Mont. 174, 74 Pac. 413, 1 A. & E. Ann. Cas. 613, holding as between carrier and passengers the carrier is liable for negligent acts of his servants though outside scope of employment.

Cited in footnote to *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment.

Cited in notes (4 L.R.A.(N.S.) 504) on liability for malicious act of servant when master owes special duty to party injured; (40 L.R.A.(N.S.) 1046, 1051, 1053, 1072, 1073) on liability of carrier for wilful torts of servants to passengers; (32 Am. St. Rep. 90, 96) on carrier's duty to protect passengers from assault; (88 Am. St. Rep. 797) on liability of principal for unauthorized acts of agent; (17 Eng. Rul. Cas. 280) on master's liability for acts of servant.

— For causing arrest.

Cited in *Claiborne v. Chesapeake & O. R. Co.* 46 W. Va. 366, 33 S. E. 262, holding probable cause in passenger's intention to use knife relieves company from punitive damages for conductor's causing arrest; *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 723, 29 L. R. A. 467, footnote p. 465, 41 Pac. 952, holding carrier liable for arrest of passenger without warrant at instance of conductor; *Missouri, K. & T. R. Co. v. Warner*, 19 Tex. Civ. App. 470, 49 S. W. 254, affirming liability for arrest without warrant of one attempting to sell railroad ticket; *Tyson v. Joseph H. Bauland Co.* 68 App. Div. 315, 74 N. Y. Supp. 59, denying damages, when evidence insufficient to show recovery for false imprisonment or malicious prosecution for arrest of customer by special officer; *Mayfield v. St. Louis, I. M. & S. R. Co.* 97 Ark. 28, 32 L.R.A.(N.S.) 528, 133 S. W. 168, holding railroad not liable to one arrested by police officer while passenger on its train because conductor pointed him out to officer with apparent authority; *Rand v. Butte Electric R. Co.* 40 Mont. 415, 107 Pac. 87, holding if wrong was done by the officer during course of his duty as employee, the employer is liable even if act is done in excess of authority.

Cited in footnotes to *Staples v. Schmid*, 19 L. R. A. 824, which holds salesman

within scope of employment in causing arrest and search of person for stolen property; *Central R. Co. v. Brewer*, 27 L. R. A. 63, which denies implied authority of street railway superintendent to cause arrest for giving counterfeit money; *Eichengreen v. Louisville & N. R. Co.* 31 L. R. A. 702, which holds carrier liable for false imprisonment procured by railroad detective; *Little Rock Traction & Electric Co. v. Walker*, 40 L. R. A. 473, which denies carrier's liability for arrest for nonpayment of fare of street car passenger by policeman called by conductor, who was only authorized to put delinquent passengers off car; *Palmer v. Maine C. R. Co.* 44 L. R. A. 673, which holds passenger's unreasonable refusal to tell whether name on mileage ticket is own no justification for procuring his arrest; *Brunswick & W. R. Co. v. Ponder*, 60 L. R. A. 714, which denies carrier's liability for failure to prevent illegal arrest by officer or for stopping train to permit removal; *Markley v. Snow*, 64 L. R. A. 685, denying liability of master for arrest, long after alleged burning, by employees charged with care of property; *Daniel v. Atlantic C. L. R. Co.* 67 L.R.A. 455, which holds railroad company not liable for arrest by cashier with power to collect money, give receipts, sell tickets, care for money received and forward it to treasurer, of innocent person whom he suspects of having stolen money which has come into his possession; *Texas Midland Railroad v. Dean*, 70 L.R.A. 943, which holds railroad company liable for act of baggage master in assisting in wrongful arrest at instance of city authorities of passenger awaiting at station for train.

Cited in notes (14 L.R.A. 795) on master's liability for false arrest, imprisonment, or malicious prosecution by servant; (7 L.R.A.(N.S.) 167) on liability of carrier for arrest of passenger by servant.

Distinguished in *Owens v. Wilmington & W. R. Co.* 126 N. C. 141, 78 Am. St. Rep. 642, 35 S. E. 259, denying company's liability for act of conductor indicating passenger mentioned in telegram to sheriff.

Relation between railroad and police officer protecting its property.

Cited in *McKain v. Baltimore & O. R. Co.* 65 W. Va. 238, 23 L.R.A.(N.S.) 295, 131 Am. St. Rep. 964, 64 S. E. 18, 17 A. & E. Ann. Cas. 634, holding the relation of master and servant may exist between a special police officer and a railroad, where such officer is engaged in special services in protecting railroad property.

Presumption from being in passenger coach.

Cited in *Anderson v. Missouri P. R. Co.* 196 Mo. 459, 113 Am. St. Rep. 748, 93 S. W. 394, holding the presumption is indulged that one in the coach for carriage of passengers at time of collision was lawfully in such coach.

Cited in note (61 Am. St. Rep. 78) on presumption that person on train is passenger.

"Just" or "probable" cause.

Cited in *Davis v. Chesapeake & O. R. Co.* 61 W. Va. 249, 9 L.R.A.(N.S.) 995, 56 S. E. 400, holding an instruction that uses the words, "just cause" instead of the words, "probable cause" is misleading and erroneous.

Liability of corporation for tort.

Cited in *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 615, 56 L. R. A. 807, 88 Am. St. Rep. 895, 40 S. E. 591, holding corporation liable for torts committed in pursuance of conspiracy to ruin business of another; *Standard Oil Co. v. State*, 117 Tenn. 666, 10 L.R.A.(N.S.) 1028, 100 S. W. 705, holding a corporation liable for tortuous act of its agents and officers.

Definition of false imprisonment.

Cited in *Whitman v. Atchison, T. & S. F. R. Co.* 85 Kan. 158, 34 L.R.A.(N.S.) 1033, 116 Pac. 234, to the point that false imprisonment is unlawful physical restraint by one person of another's liberty.

Exemplary damages.

Cited in note (28 Am. St. Rep. 871) on exemplary or punitive damages.

14 L. R. A. 804, FT. WAYNE ELECTRIC LIGHT CO. v. MILLER, 131 Ind. 499, 30 N. E. 23.

Forfeiture of subscription for improvement.

Cited in McClanahan v. Payne, 86 Mo. App. 294, holding establishment, without maintenance, of railroad at agreed point insufficient to enforce payment of subscription.

Distinguished in Hudson v. Archer, 9 S. D. 245, 68 N. W. 541, denying recovery of bonus paid for erection and operation of mill, after breach of contract to run same for five years; Coos Bay R. Co. v. Nosler, 30 Or. 557, 48 Pac. 361, holding mere failure to complete railroad within specified time, not total failure of consideration entitling subscriber to repayment.

Nature of a subscription to a joint enterprise.

Cited in McCleary v. Chipman, 32 Ind. App. 499, 68 N. E. 320, on nature of contract of a subscriber to a joint enterprise.

14 L. R. A. 809, PEOPLE v. MURRAY, 89 Mich. 276, 28 Am. St. Rep. 294, 50 N. W. 995.

Right to public trial by jury.

Cited in People v. Yeager, 113 Mich. 229, 71 N. W. 491, declaring void, statute authorizing exclusion of spectators from court room during specified criminal cases; People v. Warren, 122 Mich. 509, 80 Am. St. Rep. 582, 81 N. W. 360, holding direction of verdict of conviction reversible error; People v. Hartman, 103 Cal. 245, 42 Am. St. Rep. 108, 37 Pac. 153, reversing conviction for violation of accused's right to public trial; People v. Hall, 23 Misc. 484, 49 N. Y. Supp. 158, granting certificate of reasonable doubt for exclusion of public from court room during trial for extortion; State v. Dreany, 65 Kan. 296, 69 Pac. 182, upholding right of one on trial for conspiracy, to have private stenographer present to assist counsel; State v. Osborne, 54 Or. 293, 103 Pac. 62, 20 Ann. Cas. 627, holding that in prosecution with intent to commit rape court may exclude from court room all persons except defendant, attorneys and court officers; Tilton v. State, 5 Ga. App. 64, 62 S. E. 651, holding an order clearing the court of all persons not connected with the case, over defendant's objection, is objectionable though indecent matters are being considered and also citing annotation on this point.

Cited in notes (9 L.R.A.(N.S.) 279) on right to exclude public during criminal trial; (85 Am. St. Rep. 188) on right to public trial.

Distinguished in Jackson v. Com. 100 Ky. 254, 66 Am. St. Rep. 330, 38 S. W. 422, holding accused's rights not prejudiced by use of ticket system for admittance to court room; State v. Callahan, 100 Minn. 68, 110 N. W. 342, holding where court room is crowded with obtrusive spectators much to the embarrassment of the prosecuting witness court may temporarily clear the room to aid in eliciting the required testimony.

Plea of former jeopardy.

Cited in footnote to Com. v. Murphy, 48 L. R. A. 393, which holds sentence imposed after reversal of former sentence on prisoner's application not double jeopardy.

Discretionary power in issuing writ of certiorari.

Cited in People v. James, 155 Mich. 549, 119 N. W. 1073, holding where another

remedy is available and adequate, writ of certiorari will not be granted, except under peculiar circumstances, where denial would involve a failure of justice.

14 L. R. A. 815, SUMMER v. MITCHELL, 29 Fla. 179, 30 Am. St. Rep. 106, 10 So. 562.

Sufficiency of acknowledgment.

Cited in Cleland v. Long, 34 Fla. 357, 16 So. 272, holding attestation clause and oath of witness that grantor signed and sealed instrument for deed and for purposes mentioned, sufficient for record; Jackson v. Haisley, 35 Fla. 600, 17 So. 631, holding sufficient for record, affidavit and attestation clause proving signature and "acknowledgment for purpose therein stated;" Hurst v. Leckie, 97 Va. 563, 75 Am. St. Rep. 798, 34 S. E. 464, holding certificate of acknowledgment signed by commissioner in chancery sufficient; Miller v. Holt, 47 W. Va. 10, 34 S. E. 956, holding signature as "commissioner" of officer taking acknowledgment, sufficient; Ballard v. Orr, 105 Ga. 197, 31 S. E. 554, holding deputy clerk of superior court empowered to attest instruments for record; Green v. Camp, 61 Fla. 260, 54 So. 363, holding that presumption that instrument was sealed will arise from concluding clause, that grantor affixed his seal; Worley v. Adams, 111 Va. 802, 69 S. E. 929, holding that initials N. P. read in connection with certificate of acknowledgment may be considered equivalent of "notary public" and certificate of acknowledgment sufficient; Williams v. Lobban, 206 Mo. 408, 104 S. W. 58, holding it no objection to the acknowledgments that notary merely described his office by the initials "N. P." where his official seal was attached, especially where notary certified he affixed seal at his office; East Coast Lumber Co. v. Ellis-Young Co. 55 Fla. 269, 45 So. 826, holding certified copies of deeds duly recorded need not indicate the presence of the official seal thereon; Halbouer v. Cuenin, 45 Colo. 510, 101 Pac. 763, holding the deputy clerk of court of record, or of the county clerk and recorder, may take an acknowledgment either in the name of his principal by himself as deputy, or in his own name as deputy.

Cited in notes (31 L.R.A.(N.S.) 1077) on constitutionality of statutes curing defective acknowledgments of conveyances; (108 Am. St. Rep. 530, 531, 534, 549) as to when defects in certificate of acknowledgment are fatal.

Acts of deputies.

Cited in notes (19 L.R.A. 179) in whose name acts by deputy officer shall be performed; (106 Am. St. Rep. 828, 830, 831) on same point.

Effect to be given abbreviation of name or office.

Cited in State v. Jahraus, 117 La. 293, 116 Am. St. Rep. 208, 41 So. 575, holding the initials of a fugitive ex-sheriff to a check upon state funds was sufficient indication that he was drawing as tax collector; Griffin v. Erskine, 131 Iowa, 448, 109 N. W. 13, 9 A. & E. Ann. Cas. 1193, holding the abbreviation of "Pres." for "president" is in such common use that the courts will take judicial notice of its meaning.

Necessity of pleading foreign statute.

Cited in Sammis v. Wightman, 31 Fla. 30, 12 So. 526, holding one relying on law of another state must plead same.

Necessity of compliance with statutory form.

Cited in International Kaolin Co. v. Vause, 55 Fla. 649, 46 So. 3, holding it not the policy of our law to nullify records wherever substance is found and there is a substantial compliance with the statutes; Campbell v. Skinner Mfg. Co. 53 Fla. 640, 43 So. 874, holding title to the act in question sufficiently complies with the statute where it gives notice such as should reasonably lead to an

inquiry into the subject of the act; *Platt v. Rowand*, 54 Fla. 244, 45 So. 32, holding merely technical omissions will not vitiate.

Necessity of objection for review on appeal.

Cited in *Sullivan v. Richardson*, 33 Fla. 112, 14 So. 692, holding failure to object to absence of proper execution of deed prevents consideration on appeal; *Hoodless v. Jernigan*, 46 Fla. 218, 35 So. 656, holding reviewing court cannot consider objections to admissibility of evidence, not made in the court below.

Validity of statutes affecting contracts.

Cited in *Burget v. Merritt*, 155 Ind. 149, 57 N. E. 714, holding contract not impaired by statute enacted subsequent to grant, by binding children of former marriage, conveying subject to childless second wife's interest; *Evans-Snyder-Buel Co. v. McFadden*, 58 L. R. A. 911, 44 C. C. A. 512, 105 Fed. 312 (dissenting opinion), majority holding judgment by default against debtor in attachment suit establishes no lien superior to mortgagee, preventing subsequent statute validating mortgages, defeating attachment.

Cited in note (22 L. R. A. 383) on constitutionality of statute legalizing invalid contract.

Judicial notice.

Cited in note (113 Am. St. Rep. 869, 870) on judicial notice of foreign laws.

14 L. R. A. 825, *WILLIAMS v. BENET*, 35 S. C. 150, 14 S. E. 288, 311.

What constitutes a quorum.

Cited in *Aultman v. Utsey*, 35 S. C. 597, 14 S. E. 351, holding two associate justices may determine case without chief justice; *Schuylkill Haven Nominations*, 20 Pa. Co. Ct. 420, holding two members of borough committee no authority to change meeting place.

Cited in footnotes to *Butts v. Armor*, 26 L. R. A. 213, which requires consultation of all judges of court of common pleas upon entering judgment or order after adjournment; *Cowan v. Murch*, 34 L. R. A. 538, which sustains right of two of three members of court to decide cases; *Harroun v. Brush Electric Light Co.* 38 L. R. A. 615, which holds unanimous decision requiring leave to appeal therefrom made when all judges sitting agree.

14 L. R. A. 828, *HAWVER v. WHALEN*, 49 Ohio St. 69, 29 N. E. 1049.

Liability for negligence — Of independent contractor.

Cited in *Fisher v. Tryon*, 15 Ohio C. C. 558, holding owner liable for injuries sustained by one falling into excavation made by plumber in repairing water pipes; *Covington & C. Bridge Co. v. Patrick*, 5 Ohio N. P. 375, affirming owner's liability for injury resulting from contractor's carelessness in razing walls; *Wright v. Big Rapids Door & Blind Mfg. Co.* 124 Mich. 95, 50 L. R. A. 496, footnote p. 495, 82 N. W. 829, denying liability of owner of premises for negligent pilng of lumber taken from car by independent contractor; *Thomas v. Harrington*, 72 N. H. 48, 65 L. R. A. 750, 54 Atl. 285, holding owner not relieved from liability for injury to traveler by independent contractor's failure to guard trench; *Laffery v. United States Gypsum Co.* 83 Kan. 354, — L.R.A.(N.S.) —, 111 Pac. 498, Ann. Cas. 1912 A, 590, holding that owner is liable to third person for injuries caused by work done by independent contractor where contract requires performance of work intrinsically dangerous; *McHarge v. Newcomer*, 117 Tenn. 611, 9 L.R.A.(N.S.) 298, 100 S. W. 700, holding owner of building in populous part of city liable for injuries caused by falling of an awning while repairs were being made by an independent contractor; *Hollis v. Kansas City M. Retail Merchants' Asso.* 205 Mo. 519, 14 L.R.A.(N.S.) 284, 103 S. W. 32, holding

a merchants association of a city is not relieved from liability from fact that an exhibition is provided and conducted by an amusement company, in absence of due precautions to avert injuries; *Hunter v. Southern R. Co.* 152 N. C. 688, 29 L.R.A. (N.S.) 851, 136 Am. St. Rep. 854, 68 S. E. 237, holding railroad liable for negligent blasting by construction contractor; *Coney Island Co. v. Mitsch*, 3 Ohio N. P. N. S. 83, 15 Ohio S. & C. P. Dec. 657, holding owner of summer resort liable for injury to boy thrown from pony through negligence of contractors operating pony track; *Covington & C. Bridge Co. v. Patrick*, 5 Ohio N. P. 375, 7 Ohio S. & C. P. Dec. 401, holding owner liable for negligence of contractor in tearing down wall left in dangerous condition by fire; *Strong v. Pickering Hardware Co.* 9 Ohio C. C. 252, 6 Ohio C. D. 213, on liability of owner for injury to pedestrian falling over fence along outer edge of sidewalk erected by contractors for repair of building; *Gable v. Toledo*, 16 Ohio C. C. 523, 9 Ohio C. D. 68, holding city liable for injury from falling into excavation in street left unguarded by independent contractor; *Lytle v. Conover Bldg. Co.* 12 Ohio S. & C. P. Dec. 350, holding owner not liable for negligence of builder in dropping brick on head of pedestrian on sidewalk; *Vickers v. Kanawha & W. Valley R. Co.* 64 W. Va. 481, 20 L.R.A. (N.S.) 798, 131 Am. St. Rep. 929, 63 S. E. 367, holding that railroad is liable to laborer injured on work train by negligence of independent contractor as to guy-ropes of derrick over tracks.

Cited in footnotes to *Colgrove v. Smith*, 27 L. R. A. 590, which holds persons having franchises to lay water pipes in streets liable for independent contractor's negligence in doing so; *Negus v. Becker*, 25 L. R. A. 667, which holds employer not liable for independent contractor's negligence in raising party wall; *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Hoff v. Shockley*, 64 L. R. A. 538, denying owner's liability for injuries to traveler due to independent contractor's leaving obstructions in street; *Smith v. Milwaukee Builders' & T. Exchange*, 30 L. R. A. 504, which denies liability of employer retaining right of inspection for negligence of independent contractor; *Ketcham v. Newman*, 24 L. R. A. 102, which holds owner of premises contracting for excavations not liable for entry by contractor on adjoining premises; *Bonaparte v. Wiseman*, 44 L. R. A. 482, which requires one employing independent contractor to excavate near neighbor's house to notify neighbor or see that contractor exercises due care; *Berg v. Parsons*, 41 L. R. A. 391, which denies liability for independent contractor's negligence in blasting.

Cited in notes (76 Am. St. Rep. 406; 40 L.R.A. 345) on liability for negligence and torts of independent contractors; (65 L.R.A. 503) as to who are independent contractors; (65 L.R.A. 843) on liability for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed; (16 L.R.A. (N.S.) 255) on liability for torts of independent logging contractor.

Distinguished in *Strong v. Pickering Hardware Co.* 9 Ohio C. C. 252, holding instruction that plaintiff must show contractor's negligence in erecting obstruction, and absence of contributory negligence, error.

— Of landlord.

Cited in *Wertheimer v. Saunders*, 95 Wis. 580, 37 L. R. A. 148, footnote p. 146, 70 N. W. 824, holding landlord liable for carelessness of independent contractor in replacing roof; *Nahm v. Register Newspaper Co.* 120 Ky. 491, 87 S. W. 296, 9 Ann. Cas. 209, holding a landlord cannot relieve himself from liability in interfering with tenant's right to quiet enjoyment by employing an independent contractor.

Cited in footnotes to *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 285, which holds.

landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former though building heated by independent contractor; *Collins v. Lewis*, 19 L. R. A. 822, which holds excavation by adjoining owner breach of landlord's covenant for quiet enjoyment.

— **Of railway company.**

Cited in *Thompson v. Lowell*, L. & H. Street R. Co. 170 Mass. 582, 40 L. R. A. 347, footnote p. 345, 64 Am. St. Rep. 323, 49 N. E. 913, holding street railway company liable for injury to spectator at exhibition of shooting given by independent contractor on company's grounds; *Reilly v. Chicago & N. W. R. Co.* 122 Iowa, 528, 98 N. W. 464, denying company's liability for injury to servant of independent contractor due to train's throwing stone from track against former; *Brady v. Jay*, 111 La. 1073, 36 So. 132, holding owner of a logging road liable for destruction of property by fire, where locomotives were not equipped with spark arresters, though trains were operated by an independent contractor.

Cited in footnotes to *Leavitt v. Bangor & A. R. Co.* 36 L. R. A. 382, which denies liability of railroad company for contractor's negligence in communicating fire from cooking car while cutting wood for railroad company; *Larson v. Metropolitan Street R. Co.* 16 L. R. A. 330, which holds one employing contractor to excavate under supervision of employer's engineer liable for fall of adjoining building; *Erie R. Co. v. Salisbury*, 55 L. R. A. 578, which holds company liable to one injured at crossing by negligent operation of push car by one to whom loaned by foreman of gang of men in company's employ; *Carrico v. West Virginia C. & P. Ry.* 24 L.R.A. 50, which holds carrier liable for injury by obstruction resulting from independent contractor's work; *Sandford v. Pawtucket Street Ry.* 33 L.R.A. 564, which denies liability of street railway company for negligence of contractor building road; *Baltimore & O. & C. Ry. v. Paul*, 28 L. R. A. 216, which holds railroad company not liable for injury to brakeman of other company due to fellow servant's negligence; *Norfolk & W. Ry. v. Stevens*, 46 L. R. A. 367, which denies railroad company's liability for death of brakeman by fall of bridge constructed by independent contractor.

Disapproved in *Vickers v. Kanawha & W. Va. R. Co.* 64 W. Va. 481, 20 L.R.A. (N.S.) 793, 131 Am. St. Rep. 929, 63 S. E. 367 (as referred to in *Norfolk & Weston R. Co. v. Stevens*, 46 L.R.A. 367), holding the positive duties of a railroad company to its employees cannot be discharged by delegation of duties to others, however competent.

Dangerous agencies.

Cited in footnote to *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas company insuring reasonable promptness in detecting leaks.

Liability for injuries in blasting.

Cited in *Hunter v. Southern R. Co.* 152 N. C. 688, 29 L.R.A. (N.S.) 855, 136 Am. St. Rep. 854, 68 S. E. 237, holding that railroad is not relieved from liability for injury from blasting done by independent contractor where such work was inherently dangerous.

Cited in footnotes to *Wadsworth v. Marshall*, 32 L. R. A. 588, which sustains liability for failure to give notice of blast for injuries resulting from frightening horse which has passed place of blast; *Emry v. Roanoke Nav. & Water Power Co.* 17 L. R. A. 699, which holds one blasting on own land not liable for accidental destruction of unremoved buildings of former tenant; *Smith v. Day*, 49 L. R. A.

108, which holds assumption of risk from blasting near by, assumed by one going to sleep on boat at wharf; *Booth v. Rome*, W. & O. Terminal Ry. 24 L.R.A. 105, which holds no liability created by blasting, for injury by mere concussion to another's building.

Cited in notes (17 L. R. A. 729) on duty of those engaged in blasting as to safety of others; (17 L. R. A. 220) on injuries to land and buildings from blasting.

Liability of abutting owner for injury by defects in highway.

Cited in *Monypeny v. Metz*, 32 Ohio L. J. 316, holding owner liable for failure of contractor to guard cellar area; *Fisher v. Tryon*, 15 Ohio C. C. 556, 8 Ohio C. D. 565, holding that charge, in action for injury from falling in unguarded trench within curbstone made by independent contractor, that owner is liable if he had reason to anticipate injury from performance of work, is not error.

Cited in footnote to *Lincoln v. First Nat. Bank*, 60 L. R. A. 923, which holds purchaser at sheriff's sale not liable to city for amount of judgment against it, for injury, three weeks after sheriff's deed issued, from negligently constructed coal hole.

Cited in note (11 L.R.A.(N.S.) 994) on liability for failure to guard opening in sidewalk for commercial purposes, while in use by third person.

Distinguished in *Sammins v. Wilhelm*, 6 Ohio C. C. 568, 3 Ohio C. D. 588, holding abutting owner not liable for injury to person falling through sidewalk out of repair.

14 L. R. A. 836, *Re STEWART*, 131 N. Y. 274, 43 N. Y. S. R. 171, 30 N. E. 184.

Estates subject to collateral-inheritance tax.

Cited in *Re Swift*, 137 N. Y. 83, 18 L. R. A. 711, footnote p. 709, 32 N. E. 1096, holding personal property of resident decedent out of this state subject to tax; *Re Embury*, 19 App. Div. 216, 79 N. Y. S. R. 881, 45 N. Y. Supp. 881, Reversing 20 Misc. 78, 45 N. Y. Supp. 821, holding property of nonresident in this state at time of decease, subsequently removed, not subject to inheritance tax; *Re Walworth*, 66 App. Div. 175, 72 N. Y. Supp. 984 (dissenting opinion), majority holding for purpose of tax, property considered as passing from person exercising power of appointment; *Emmons v. Shaw*, 171 Mass. 413, 50 N. E. 1033, holding donor of power of appointment decedent whose estate subject to tax; *Hoffman's Estate*, 5 Misc. 441, 26 N. Y. Supp. 888, holding collateral-tax law should be strictly construed in favor of legatee; *Fidelity Trust Co. v. McClain*, 113 Fed. 156, holding legacies passing under father's will, not subject to revenue tax enacted during mother's intervening estate; *Re Eldridge*, 29 Misc. 738, 62 N. Y. Supp. 1026, holding interests not determinable not subject to transfer tax; *Hoffman's Estate*, 5 Misc. 443, 26 N. Y. Supp. 888, holding expectant estates taxable upon death of testator; *Re Sloane*, 154 N. Y. 114, 47 N. E. 978, holding transfer tax measured by value of property at death of testator; *Re Wolfe*, 89 App. Div. 351, 85 N. Y. Supp. 949, holding tax upon rejected legacy assessed at same rate as though originally given residuary legatee; *People v. McCormick*, 208 Ill. 445, 64 L. R. A. 779, footnote p. 775, 70 N. E. 350, holding that tax cannot be imposed at testator's death upon corpus of estate when property devised in trust for twenty years.

Cited in footnotes to *Howe v. Howe*, 55 L. R. A. 626, which authorizes transfer on contingent interests not vesting within fixed time for paying tax; *Re Pell*, 57 L. R. A. 540, which holds void, tax on all remainders vesting prior to certain date but not coming into possession till after passage of act; *Re Dows*, 52 L. R. A. 433, which holds real property subject to power of appointment, converted into personalty, subject to transfer tax on personalty; *People v. McCormick*, 64

L.R.A. 775, which holds that a present succession tax cannot be assessed upon a remainder when it cannot be determined who will ultimately be entitled thereto.

Cited in notes (41 Am. St. Rep. 584, 585) on property subject to collateral inheritance tax; (127 Am. St. Rep. 1072; 33 L.R.A.(N.S.) 249) on inheritance or succession tax on property covered by power of appointment.

Distinguished in *Re Curtis*, 142 N. Y. 223, 36 N. E. 887, affirming 73 Hun, 189, 25 N. Y. Supp. 909, holding remainders not subject to collateral tax before termination of life estates.

— **Effect of statutes on estates created prior to enactment.**

Cited in *Re Vanderbilt*, 50 App. Div. 251, 63 N. Y. Supp. 1079, holding property subject to tax, which passed under power of appointment created by will taking effect before passage of transfer-tax act; *Re Langdon*, 153 N. Y. 9, 46 N. E. 1034; *Re Brooks*, 65 N. Y. S. R. 256, 32 N. Y. Supp. 176; *Re Harbeck*, 161 N. Y. 218, 55 N. E. 850, reversing 43 App. Div. 191, 59 N. Y. Supp. 362,—holding bequests, taking effect before passage of transfer-tax act, not subject to inheritance tax; *Re Hitchins*, 43 Misc. 493, 89 N. Y. Supp. 472, holding interest vesting prior to enactment of act not taxable; *Farmer's Loan & T. Co. v. Shaw*, 127 App. Div. 662, 56 Misc. 207, 107 N. Y. Supp. 337, holding that person exercising power acts by virtue of the will unaffected by statute restricting his personal right of disposition of property; *Hoyt v. Hancock*, 65 N. J. Eq. 690, 55 Atl. 1004, holding where fund is created by will with income payable to a person named with a power of appointment by will, the interest of one taking by such appointment is taxable.

Cited in footnote to *Re Delano*, 64 L. R. A. 279, holding power to tax exercise of power of appointment not destroyed because power created prior to act.

Distinguished in *Re Buckingham*, 106 App. Div. 18, 94 N. Y. Supp. 130, holding a transfer by power of appointment is a taxable transfer in same manner as though transfer came directly from the donee by will.

Construction of inheritance tax laws.

Cited in *State ex rel. Gage v. Probate Ct.* 112 Minn. 285, 128 N. W. 18, holding that inheritance tax becoming due when beneficiary takes possession must be computed upon value at time of decedent's death; *State ex rel. Foot v. Bazille*, 97 Minn. 14, 6 L.R.A.(N.S.) 737, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056, holding a statute imposing a tax upon a class of citizens, must be given a fair and reasonable construction; *Beers v. Glynn*, 211 U. S. 483, 53 L. ed. 293, 29 Sup. Ct. Rep. 186, holding a tax is not legally imposed by declaring property taxable but failing to provide for its assessment.

Cited in note (127 Am. St. Rep. 1052, 1055) on construction of inheritance tax laws.

Surrogate's jurisdiction as to validity of devises.

Cited in *Re Ullmann*, 137 N. Y. 408, 33 N. E. 480, holding surrogate has jurisdiction to determine validity of disposition of residuary estate.

14 L. R. A. 841, *MEEKER v. NORTHERN P. R. CO.* 21 Or. 513, 28 Am. St. Rep. 758, 28 Pac. 639.

Proximate cause.

Followed in *Chicago, B. & Q. R. Co. v. Cox*, 51 Neb. 483, 71 N. W. 37, affirming company's liability for injuries to live stock although no actual collision.

Cited in *Mikesell v. Wabash R. Co.* 134 Iowa, 739, 112 N. W. 201, holding where legislature has made it the duty of railroads to fence their right of way, the matter of negligence of its employees in its operation is immaterial; *Meier v. Northern P. R. Co.* 51 Or. 74, 93 Pac. 691, holding a prima facie case made out

in showing injury to a horse was caused either by striking and throwing it upon the fence, or in frightening it so it jumped upon the fence in its efforts to get away.

Cited in footnote to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train.

Cited in notes (9 L.R.A.(N.S.) 361) on duty to fence right of way; (37 L.R.A.(N.S.) 1184) on railroads: liability for injury to stock other than by trains, because of breach of statutory duty to fence.

14 L. R. A. 846, *STATE v. BURGDOERFER*, 107 Mo. 1, 17 S. W. 646.

State's right to appeal.

Cited in *State v. Carr*, 142 Mo. 611, 44 S. W. 776, holding state not entitled to appeal from order quashing information for insufficiency.

Cited in note (19 L. R. A. 347) on right of state to appeal in criminal cases.

Sufficiency of title to act.

Cited in *State ex rel. Wolfe v. Bronson*, 115 Mo. 276, 21 S. W. 1125, sustaining act entitled "act to establish uniform course of books used in public schools, and to reduce price thereof;" *State ex rel. Keshlear v. Slover*, 134 Mo. 18, 31 S. W. 1054, sustaining constitutionality of act entitled "act establishing office of county marshal, defining duties and powers;" *State v. Kingsley*, 108 Mo. 139, 18 S. W. 994, holding "act to protect hotel and innkeepers" not void for lack of reference to liability of one obtaining board by false representations; *State v. Great Western Coffee & Tea Co.* 171 Mo. 643, 94 Am. St. Rep. 802, 71 S. W. 1011, holding body of act forbidding sale of baking powder containing alum not comprehended within title "to prevent use of chemicals in manufacture of foods;" *Williams v. Atchison, T. & S. F. R. Co.* 233 Mo. 677, 136 S. W. 304, to the point that title of act must express subject of act in such terms that members of legislature and people may not be left in doubt as to matter treated of; *State v. Ames*, 47 Wash. 331, 92 Pac. 137, holding the title "to establish pilot regulations" is broad enough to include a penalty for violation of the statute set forth in the act; *State ex rel. Equitable Life Assur. Soc. v. Vandiver*, 222 Mo. 251, 121 S. W. 45 (dissenting opinion), on sufficiency of the title to support act.

Cited in note (64 Am. St. Rep. 97) on sufficiency of title of statute.

Sufficiency of information.

Cited in *State v. Townsend*, 50 Mo. App. 694, sustaining conviction on information charging one with unlawfully recording and keeping devices for betting on races.

Special legislation.

Cited in *State v. Loomis* (Mo.) 21 L. R. A. 795, 20 S. W. 332, upholding act prohibiting mining and manufacturing corporations from issuing in payment of wages, non-negotiable order, payable otherwise than in lawful money.

Cited in note (78 Am. St. Rep. 250) on power of legislature to declare horse-racing criminal.

Distinguished in *State v. Walsh*, 136 Mo. 407, 35 L. R. A. 233, 37 S. W. 1112, holding void, act prohibiting book making except within limits of race course.

Duty of state to individual.

Cited in *State v. Thornton*, 108 Mo. 649, 18 S. W. 841, holding duty of state to pass laws protecting one against his own weakness.

Purposes for which public funds may be used.

Cited in *Deal v. Mississippi County*, 107 Mo. 468, 14 L. R. A. 623, 18 S. W. 24, declaring unconstitutional, act providing bounty for planting forest trees.

Construction of statutes.

Cited in *State v. Squibb*, 170 Ind. 492, 84 N. E. 969, holding the court cannot read into a statute a word which the court may think the legislature ought to have supplied.

14 L. R. A. 858, *KIMBERLAIN v. STATE*, 130 Ind. 120, 30 Am. St. Rep. 208, 29 N. E. 773.

Agreement that decision should control in other cause held not enforceable in *Kimberlin v. Tow*, 133 Ind. 698, 33 N. E. 770.

Vacancy in office.

Cited in *Koerner v. State*, 148 Ind. 167, 47 N. E. 323, holding office of trustee not vacated by failure to file bond as president of school board; *State ex rel. Cook v. Meares*, 116 N. C. 592, 21 S. E. 973, declaring void, election on March 9th to office of judge, created by act not ratified till March 12th; *State ex rel. Richardson v. Henderson*, 4 Wyo. 550, 22 L. R. A. 756, 35 Pac. 517, holding appointment to fill vacancy of state examiner until next meeting of legislature not terminated by meeting of legislature without taking action on governor's nomination; *Chadduck v. Burke*, 103 Va. 699, 49 S. E. 976, holding wherever the law provides for an incumbent holding over until his successor has been appointed and qualified, there is no vacancy in the office at the expiration of the fixed term; *State v. Fabrick*, 16 N. D. 98, 112 N. W. 74, holding the holding over pending the election and qualification of a successor is as much a part of term of office to which superintendent is elected as the two years stated term; *Balantyne v. Bower*, 17 Wyo. 365, 99 Pac. 869, 17 A. & E. Ann. Cas. 82, holding a vacancy is not created, where person elected dies before being qualified, but the incumbent will be entitled to hold over; *State ex rel. Doolittle v. Hays*, 91 Miss. 766, 45 So. 728, holding same where person voted for was not qualified to hold the office; *State ex rel. Hoyt v. Metcalfe*, 80 Ohio St. 265, 88 N. E. 738, holding the resignation of a judge embraced the authority to hold over until a successor should be elected and qualified; *Featherngill v. State*, 33 Ind. App. 686, 72 N. E. 181, holding a truant officer, duly appointed, entitled to the office until his successor was appointed and qualified; *State ex rel. Chenoweth v. Action*, 31 Mont. 41, 77 Pac. 299, holding the incumbent holds over in case of a tie vote until such time as the office is regularly filled.

Criticized in *Maddox v. York*, 21 Tex. Civ. App. 624, 54 S. W. 24, holding death of sheriff elect after expiration of predecessor's term creates vacancy which commissioner's court may fill by appointment.

Right of an officer in the office.

Cited in *Parsons v. United States*, 30 Ct. Cl. 244, holding a district attorney commissioned for a term of four years has no vested right in the office but holds subject to the right of removal.

Meaning of word "elected."

Cited in *State v. Gormley*, 53 Wash. 551, 102 Pac. 435, holding the word "elected" means elected by the same electoral body which elected the incumbent whose terms of office is described in statute.

Effect on bond of officer holding over.

Cited in *Baker City v. Murphy*, 30 Or. 416, 35 L. R. A. 95, 42 Pac. 133, holding sureties responsible for defalcation of city treasurer while holding over; *Grand Haven v. United States Fidelity & Guaranty Co.* 128 Mich. 108, 92 Am. St. Rep. 446, 87 N. W. 104, denying liability of sureties for shortage of city treasurer prior to approval of bond.

Validity of statute extending term of office.

Cited in State *ex rel.* Harrison v. Menaugh, 151 Ind. 273, 43 L. A. 413, 51 N. E. 117, sustaining statute extending town trustee's term of office by change in time of election.

Distinguished in State *ex rel.* Cummings v. Trewhitt, 113 Tenn. 568, 82 S. W. 480, holding legislature cannot extend term of office of a county officer where a constitutional restriction provides "that no county office created by the legislature shall be filled otherwise than by the people."

14 L. R. A. 860, KRELL v. CODMAN, 154 Mass. 454, 26 Am. St. Rep. 260, 28 N. E. 578.

Agreement to give property after death.

Cited in Earle v. Angell, 157 Mass. 296, 32 N. E. 164, sustaining parol agreement to pay money conditioned upon attendance at promisor's funeral; Bromley v. Mitchell, 155 Mass. 511, 30 N. E. 83, sustaining validity of deed executed just before death, of personalty in trust to apply income according to oral instructions; Sheppey v. Stevens, 185 Fed. 153, to the point that contracts which give to one party an interest in death of other party, as where benefit is to accrue to one upon death of other are not void as against public policy; Oswald v. Nehls, 233 Ill. 443, 84 N. E. 619, holding equity will enforce contract to dispose of property by will in a particular way, when a sufficient consideration supports it; Jordan v. Abney, 97 Tex. 303, 78 S. W. 486, on specific enforcement of a verbal contract to adopt.

Cited in footnotes to Miller v. Western College, 42 L. R. A. 797, which holds note given to college not invalidated by provision for payment before date fixed therein in case of donor's death; Svanburg v. Fosseen, 43 L. R. A. 427, which holds oral agreement to leave entire property at death to members of promisor's family taken out of statute of frauds by services rendered and sale of land at sacrifice by them for his benefit; Bryson v. McShane, 49 L. R. A. 527, which holds specifically enforceable, executed oral contract to give entire property for support during life and burial after death; Owens v. McNally, 33 L. R. A. 369, which holds oral contract by uncle to give niece property at death after performance of consideration by her enforceable after his death; Swash v. Sharpstein, 32 L. R. A. 796, which holds parol agreement to convey land by will, void; Wright v. Wright, 23 L. R. A. 196, which holds contract to leave property to adopted child, taken out of statute of frauds by child's complete performance; Jaffee v. Jacobson, 14 L. R. A. 352, which holds unenforceable agreement to will property made by one dying before consideration completed; Kofka v. Rosicky, 25 L. R. A. 207, which holds oral contract to make adopted child heir valid by continuing parental relation until parent's death; King v. King, 52 L. R. A. 157, which authorizes recovery on fully executed promise to care for person for life though accompanied by void promise not to marry; Clancy v. Flusky, 52 L. R. A. 277, which authorizes specific performance of executed oral contract to convey land to son for taking care of father for life, though father left son before his death; Nowack v. Berger, 31 L. R. A. 810, which holds enforceable after performance of consideration, oral contract to adopt child as heir; Emery v. Burbank, 28 L. R. A. 57, which holds unenforceable in Massachusetts oral contract to make will valid in state where made; Sumner v. Crane, 15 L. R. A. 447, which authorizes probate of will attempting to dispose of property in violation of valid contract.

Cited in note (52 Am. St. Rep. 126) on liabilities of estates of decedents on contracts.

Annotation in 14 L. R. A. 860, referred to particularly in Whiton v. Whiton,

76 Ill. App. 570, holding contract based upon good consideration, relating to disposition of property by will, valid.

Consideration necessary to support contract.

Cited in *Hudson v. Miles*, 185 Mass. 586, 102 Am. St. Rep. 370, 71 N. E. 63, on consideration necessary to support bond under seal.

L. R. A. CASES AS AUTHORITIES.

CASES IN 15 L. R. A.

15 L. R. A. 33, **BARNOWSKI v. HELSON**, 89 Mich. 523, 50 N. W. 989.

Inference of negligence from mere happening of event.

Approved in *Schoepper v. Hancock Chemical Co.* 113 Mich. 589, 71 N. W. 1081, holding negligence inferable from explosion following upon first attempt to run unwashed nitro-glycerine through hose; *La Fernier v. Soo River Lighter & Wrecking Co.* 129 Mich. 606, 89 N. W. 353, holding negligence inferred from sinking of old leaky boat; *Horowitz v. Hamburg-American Packet Co.* 18 Misc. 26, 41 N. Y. Supp. 54, holding fall of pile of baggage without apparent cause negligence within rule of *res ipsa loquitur*; *Blanton v. Dold*, 109 Mo. 75, 18 S. W. 1149, holding that evidence of independent starting of machine shows negligence, *prima facie* in its construction or condition; *Westland v. Gold Coin Mines Co.* 41 C. C. A. 198, 101 Fed. 62, holding fall of platform, intended to hold more than twice the weight with which it fell, itself evidence from which negligence may be inferred; *Winkelmann & B. Drug Co. v. Colladay*, 88 Md. 91, 40 Atl. 1078, holding negligence inferable from unexplained breaking of rope holding dumb-waiter; *Alton R. & Illuminating Co. v. Foulds*, 81 Ill. App. 332, holding averment that death from electricity was caused without fault of deceased, by negligence in maintenance of electric light plant, sufficient under rule of *res ipsa loquitur*.

Cited in *Scheurer v. Banner Rubber Co.* 227 Mo. 366, 28 L.R.A.(N.S.) 1214, 126 S. W. 1037, 21 Ann. Cas. 1110, holding that failure of device installed to stop machinery in case a servant becomes caught therein to work when need of it arises is *prima facie* evidence of negligence; *Rogers v. Portland Lumber Co.* 54 Or. 393, 102 Pac. 601, holding that where machine which injured servant was helping to repair, was liable to start automatically, whether it was safe place to work, without safeguarding gearing, was for jury; *Haxer v. Griessel*, 162 Mich. 312, 127 N. W. 309, holding that question of negligence is for jury where painter after being warned not to lift ladder resting on freshly painted surface of house so that it blew down and injured employee of another contractor; *Graaf v. Vulcan Iron Works*, 59 Wash. 329, 109 Pac. 1016, holding that negligence may be inferred from accident, where right-hand wheel of truck dropped off, injuring machinist who was assisting in pushing truck bearing column weighing 1600 pounds; *Gerstler v. Weinberg*, 160 Mich. 269, 125 N. W. 1, holding that presumption of negligence arises from fall of cement wall, where curbing was removed from green cement shortly after wall was constructed; *Jefferys v. Nebraska Bridge Supply & Lumber Co.* 157 Fed. 934, holding where timber inspector was injured by reason of breaking of rope by which a log was being rolled on skids into car which defendant was loading the defendant was *prima facie* guilty of negligence; *Whitten v. Nevada Power, Light & Water Co.* 132 Fed. 786, as to when negligence is presumed; *Price v. St. Louis I. M. & S. R.*

Co. 75 Ark. 492, 112 Am. St. Rep. 79, 88 S. W. 575, holding it for jury where drunken insensible passenger was put in care of conductor and after time unaccountably got up and fell or was thrown from moving train; *Fitch v. Mason City & C. L. Traction Co.* 124 Iowa, 671, 100 N. W. 618, holding fact that passenger on electric car was thrown from his seat and out of car when car rounded a curve prima facie evidence of carrier's negligence; *Huggard v. Glucose Sugar Ref. Co.* 132 Iowa, 737, 109 N. W. 475, holding fact that servant was injured by gas pipe falling upon him from an upper story prima facie evidence of negligence; *Louisville & N. R. Co. v. Davis*, 115 Ky. 276, 71 S. W. 658, holding where track walker was injured by being hit by rocks thrown out from under train and it was shown that a rod under engine or cars was dragged some miles it was prima facie evidence of negligence; *Blickley v. Luce*, 148 Mich. 240, 111 N. W. 752, holding falling of building in course of reconstruction prima facie evidence of landlord's negligence; *Evers v. Wiggins Ferry Co.* 116 Mo. App. 136, 92 S. W. 118, holding breaking of hurricane deck of a boat prima facie evidence of negligence on part of carrier; *Brod v. St. Louis Transit Co.* 115 Mo. App. 210, 91 S. W. 993, holding explosion on electric car sufficient to establish a prima facie case of negligence on part of carrier.

Annotation cited in *Allen v. Northern P. R. Co.* 35 Wash. 230, 66 L.R.A. 808, 77 Pac. 204, holding in a case where the fact of no negligence is fixed by proofs, a mere presumption cannot overcome it; *Le Deau v. Northern P. R. Co.* 19 Idaho, 715, 34 L.R.A.(N.S.) 727, 115 Pac. 502, Ann. Cas. 1912 C, 438, to the point that railroad is under active duty to passengers to take reasonable precautions to remove or prevent obvious dangers whether they be on right of way or beyond right of way.

Cited in footnotes to *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 17 L. R. A. 38, which holds negligence inferable from emission from locomotive of sparks of unusual size and in unusual quantity; *Louisville & N. R. Co. v. Marbury Lumber Co.* 50 L. R. A. 620, which holds presumption of negligence arises from setting of fire by sparks from locomotive; *Spellman v. Lincoln Rapid Transit Co.* 20 L. R. A. 316, which holds negligence presumed from derailment of street car; *St. Louis, I. M. & S. R. Co. v. Neely*, 37 L. R. A. 616, which holds negligence presumed from falling of door from moving freight train on pedestrian; *Howser v. Cumberland & P. R. Co.* 27 L. R. A. 154, which holds presumption of negligence arises from falling of cross-ties from railroad car against person walking beside roadbed; *Shafer v. Lacock*, 29 L. R. A. 254, which holds negligence presumed from burning of house by fire set by sparks of fire-pot placed on roof by workmen; *Dixon v. Pluns*, 20 L. R. A. 698, which holds that presumption of negligence arises from fall of chisel on sidewalk from scaffold; *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance; *Esberg-Gunst Cigar Co. v. Portland*, 43 L. R. A. 435, which holds bursting of water main three times under ordinary pressure, evidence of negligence; *Snyder v. Wheeling Electrical Co.* 39 L. R. A. 499, which holds death of person by stepping on live electric wire fallen to ground raises presumption of negligence; *Budd v. United Carriage Co.* 27 L. R. A. 279, which holds running and kicking of team on public carriage makes prima facie case of negligence as to passenger; *Whalen v. Consolidated Traction Co.* 41 L. R. A. 836, which authorizes presumption of carrier's negligence, where passenger is injured through defect in appliances, or preventable act or omission of servant; *McCullen v. Chicago & N. W. R. Co.* 49 L. R. A. 642, which sustains presumption of negligence from issuance of sparks from locomotive sufficient to kindle fire and destroy adjacent property; *Stearns v. Ontario Spinning Co.* 39 L. R. A. 842, which holds mere happening of accident insufficient to show neg-

ligence; *Harrison v. Sutter Street R. Co.* 55 L. R. A. 608, which denies presumption of negligence from injury to street car passenger by collision of car with vehicle; *Benedick v. Potts*, 41 L. R. A. 478, which denies presumption of negligence from injury, cause of which unknown or undisclosed; *Thomas v. Philadelphia & R. R. Co.* 15 L. R. A. 416, which holds that no presumption of negligence of carrier arises from breaking of passenger's arm by missile thrown through open window; *Wolf v. Downey*, 51 L. R. A. 242, which denies liability of contractor for either carpenter or mason work for injury from fall of brick from unknown cause; *Hart v. Washington Park Club*, 29 L. R. A. 492, which holds no presumption of negligence arises from injury by runaway horse at horse race; *Creamer v. McIlvain*, 45 L. R. A. 531, which holds inference of negligence unjustified by mere running away of horse after accident; *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 22 L. R. A. 351, which denies presumption of negligence from injury to passenger by fall of detached rock on train; *Hawkins v. Front Street Cable R. Co.* 16 L. R. A. 808, which holds that no presumption of negligence arises from injury to street car passenger by collision with wagon; *Gulf, C. & S. F. R. Co. v. Shieder*, 28 L. R. A. 538, which holds negligence not presumed of one driving across side track at point where view of main track is obstructed; *Cassady v. Old Colony Street R. Co.* 63 L.R.A. 295, which holds ordinary burning out of fuse in an electric car not *prima facie* evidence of carrier's negligence.

Cited in notes (13 L.R.A.(N.S.) 601) on presumption of negligence from injury to passenger; (113 Am. St. Rep. 1006, 1011) on presumption of negligence from happening of accident causing personal injuries; (18 Eng. Rul. Cas. 715) on burden of proving negligence.

Distinguished in *Bell v. Refuge Oil Mill Co.* 77 Miss. 390, 27 So. 382, holding negligence not shown by mere proof that hoisting apparatus accidentally jerked by workman when falling from roof fell with and injured him; *Green v. Sansom*, 41 Fla. 104, 25 So. 332, holding negligence of master not presumed from breaking of hoisting rope selected by servant and which was apparently adequate for purpose used.

Liability for injury due to defective structure.

Cited in *McBride v. Scott*, 125 Mich. 530, 84 N. W. 1079, sustaining action against owner, architect, and building contractors for injuries due to collapse of obviously defective building; *Laner v. Palms*, 129 Mich. 684, 58 L. R. A. 73, 89 N. W. 694, holding owner of walls left standing by fire close to street, liable for fall upon traveler.

Statutory liability in cases of railroad fires.

Cited in *Hutto v. Seaboard Air Line R. Co.* 81 S. C. 572, 62 S. E. 835, holding communication of fire by locomotive *prima facie* evidence of negligence.

Cited in footnote to *Boston Excelsior Co. v. Bangor & A. R. Co.* 47 L. R. A. 82, which holds contributory negligence no defense against railroad company's liability for fire, made absolute by statute.

15 L. R. A. 42, *STOCKTON v. POWELL*, 29 Fla. 1, 10 So. 688.

Formalities required in execution of county deeds.

Cited in *Martin v. Townsend*, 32 Fla. 329, 13 So. 887, holding conveyance of county land by commissioners affixing seal of probate court to deed, valid; *Brown v. Castellaw*, 33 Fla. 216, 14 So. 822, holding deed executed by clerk of circuit court as county clerk, with proper seal affixed, compliance with statute requiring execution by county clerk; *Daniel v. Taylor*, 33 Fla. 644, 15 So. 313, holding execution of tax deed by proper officer affixing seal of circuit court substantial compliance with act requiring sealing with seal of county court.

Cited in footnote to *Brown v. Cohn*, 20 L. R. A. 182, as to when county seal properly affixed to tax deeds.

Expenditure of money for county purposes.

Approved in *Duval County v. Jacksonville*, 36 Fla. 217, 29 L. R. A. 419, 18 So. 339, holding employment of half of special county-road tax by municipality upon its streets an expenditure for county purposes.

Limitation upon power of taxation.

Cited in *State ex rel. Bours v. L'Engle*, 40 Fla. 401, 24 So. 539, holding constitutional requirement of school tax of not more than 5 mills deprives legislature of power to authorize levy for such purpose, in excess of such amount; *State ex rel. Milton v. Dickenson*, 44 Fla. 637, 60 L. R. A. 545, 33 So. 514 (dissenting opinion), majority denying power of legislature to require county-levy taxes to support part of state militia.

Transaction of business by public boards — Presumptions.

Approved in *Wayne County v. Wayne Circuit Judges*, 106 Mich. 169, 64 N. W. 42, holding special meeting of board of supervisors presumed to have been legally convened; *Green v. Lancaster County*, 61 Neb. 483, 85 N. W. 439, holding session of county board presumed to be regular.

Cited in footnote to *Honaker v. Board of Education*, 32 L. R. A. 413, which denies power of members of board of education acting separately to bind themselves as board.

Adjourned meetings.

Cited in *Kraus v. Lehman*, 170 Ind. 426, 84 N. E. 769, 15 A. & E. Ann. Cas. 849, holding adjourned meeting of county board operates as a continuation of the former meeting of the board at which order of adjournment is made and any business transacted at such adjourned meeting is as legal as though it had been transacted at meeting or session of which it is a continuation.

Poll taxes.

Cited in note (29 L. R. A. 414) on poll taxes.

Power of state to authorize improvements in navigable waters.

Cited in *Escambia County v. Pilot Comrs.* 52 Fla. 212, 42 So. 697, holding it is competent for the state, acting through counties to protect the ports, harbors, bays and rivers therein, if the control of the general government within its sphere is not thereby interfered with.

Cited in note (67 L.R.A. 825, 850) on right to improve navigability of stream.

Publication of notice of local bills.

Cited in *Rushton v. State*, 58 Fla. 96, 50 So. 486, holding journals of legislature need not affirmatively show that notice of local bills had been duly published.

Conclusiveness of decision of legislature as to legislation.

Cited in *Oklahoma City v. Shields*, 22 Okla. 305, 100 Pac. 559, holding decision of legislature as to existence of emergency conclusive; *State ex rel. Smith v. Brown*, 24 Okla. 446, 103 Pac. 762, to the point that what can be accomplished by general or special legislation is question for legislature.

Power of legislature to authorize issuance of bonds without sinking fund.

Cited in *Potter v. Lainhart*, 44 Fla. 672, 33 So. 251, holding legislature had power to authorize municipality to issue bonds without sinking fund.

Conclusiveness of enrolled bill.

Cited in note (40 L.R.A.(N.S.) 7) on conclusiveness of enrolled bill where journals are silent as to compliance with constitutional requirements.

Irregularities avoiding elections.

Cited in note (90 Am. St. Rep. 90) on irregularities avoiding elections.

15 L. R. A. 56, *TIBBETTS v. HORNE*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145.

Fixtures and mortgage or sale of buildings or crops.

Cited in *Wetherill v. Gallagher*, 211 Pa. 311, 107 Am. St. Rep. 575, 60 Atl. 905; *Union Bank & T. Co. v. Fred W. Wolf Co.* 114 Tenn. 268, 108 Am. St. Rep. 903, 86 S. W. 310, 4 A. & E. Ann. Cas. 1070,—holding where personal property is sold for the purpose of being annexed to the realty, and it is so annexed, an agreement between seller and buyer that it shall not become part of the realty, but shall remain personal property of seller, will not bind or effect a vendee or mortgagee without notice.

Cited in footnote to *Morey v. Hoyt*, 19 L. R. A. 611, which authorizes levy, as on personal property, on fixtures which tenant has right to remove.

Cited in notes (19 L. R. A. 441, 443) on effect of agreement to prevent fixtures from becoming part of realty; (21 L. R. A. 349) on mortgages on buildings on leased premises; (23 L.R.A. 477) on sale of mortgage of future crops; (84 Am. St. Rep. 882, 892, 894) on fixtures retaining by agreement the character of personal property; (37 L.R.A.(N.S.) 120; 1 Brit. Rul. Cas. 665, 690, 691) on rights of seller of fixtures retaining title or lien, as against purchasers or encumbrancers of realty.

15 L. R. A. 63, *BOUTTE v. EMMER*, 43 La. Am. 980, 9 So. 921.

Rights and liabilities of public officers.

Cited in *O'Malley v. Whitaker*, 118 La. 914, 43 So. 545, as to liability of officer making illegal arrest to action for false imprisonment when there was probable cause for the arrest.

Cited in footnotes to *Guild v. Goodwin*, 27 L. R. A. 660, which holds mayor not liable for malicious prosecution in attempting to enforce void ordinance; *State v. Lewis*, 19 L. R. A. 449, which denies officer's right to arrest for breach of peace not committed in his presence; *McCullough v. Greenfield*, 62 L. R. A. 906, holding officer's possession of warrant not justification for arrest by police of another town under telephone direction by officer having warrant.

15 L. R. A. 64, *WILLIAMS v. CITIZENS' R. CO.* 130 Ind. 71, 30 Am. St. Rep. 201, 29 N. E. 409.

Municipal control of streets.

Approved in *Eureka City v. Wilson*, 15 Utah, 64, 48 Pac. 41, holding ordinance prohibiting moving of buildings into streets without permission from city authorities, authorized under power to regulate use of streets and prevent obstructions.

Cited in *Edison Electric Light & P. Co. v. Blomquist*, 185 Fed. 621, holding that ordinance requiring electric companies, at their own expense to remove wires when licensed housemover requests them to do so is void.

Cited in note (125 Am. St. Rep. 351) on grant by city of right to use streets and sidewalks for private purpose.

Denial of corporate existence or powers.

Cited in *Doty v. Patterson*, 155 Ind. 64, 56 N. E. 668, holding that corporate existence cannot be questioned by party to articles of corporate association where there is attempt at compliance with statute and exercise of corporate functions; *Chicago General R. Co. v. Chicago City R. Co.* 87 Ill. App. 27, holding question

of whether street railway has exceeded charter powers by change of motor power, not available to another company as ground for recovery of damages resulting from collision at crossing; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 598, 72 Am. St. Rep. 326, 54 N. E. 407, holding defendant in suit by pretended corporation on contract, not estopped to deny corporate existence at time of contract; *Marion Bond Co. v. Mexican Coffee & Rubber Co.* 160 Ind. 563, 65 N. E. 748, holding that specification of unauthorized powers will not subject *de facto* corporation to collateral attack; *Mitchell v. Dakota Cent. Teleph. Co.* 25 S. D. 417, 127 N. W. 582, holding that telephone company accepting franchise requiring payment to city of portion of receipts is estopped to plead that such requirement was ultra vires; *Western Invest. Co. v. Davis*, 7 Ind. Terr. 177, 104 S. W. 573, 15 A. & E. Ann. Cas. 1134; *Smith v. Cleveland, C. C. & St. L. R. Co.* 170 Ind. 398, 81 N. E. 501,—holding right of existence of a *de facto* corporation not subject to collateral attack.

Distinguished in *Nebraska Teleph. Co. v. Western Independent Long Distance Teleph. Co.* 68 Neb. 777, 95 N. W. 18, holding private suitor may attack right of corporation to create an obstruction in street resulting in a nuisance.

Interference with public interests.

Cited in footnote to *Dashiell v. Grosvenor*, 27 L. R. A. 67, which denies right to enjoin manufacture of cannon in navy yard as infringement of patent.

Use of public streets.

Cited in *Northwestern Teleph. Exch. Co. v. Anderson*, 12 N. D. 592, 65 L.R.A. 775, 102 Am. St. Rep. 580, 98 N. W. 706, 1 A. & E. Ann. Cas. 110, holding privilege of using streets under an ordinance which gave the city benefits created a contractual relation between city and telephone company which could not be impaired by subsequent action of city directly or indirectly annulling it for purposes not public.

Cited in note (50 L. R. A. 143) on privilege of using streets, as a contract, within constitutional provision against impairing obligation of contracts.

Distinguished in *Kalamazoo v. Michigan Traction Co.* 126 Mich. 533, 85 N. W. 1067, holding ordinance requiring street railway to replace "T" with girder rail in street valid under reservation of right to protect public interests, where pavement necessitates change.

— Moving houses.

Cited in *Ft. Madison Street R. Co. v. Hughes*, 137 Iowa, 127, 14 L.R.A.(N.S.) 451, 114 N. W. 10, holding there is no right to move a building along a public street upon which an electric railway has been lawfully constructed, to the serious interference with the operation of the cars and wires by which they are operated; *Kibbie Teleph. Co. v. Landphere*, 151 Mich. 313, 16 L.R.A.(N.S.) 690, 115 N. W. 244, holding the moving of buildings along streets is not within the meaning of the words "other public uses" in a statute granting telephone companies the right to place their wires therein provided they shall not interfere with other public uses; *Edison Electric Light & P. Co. v. Blomquist*, 110 Minn. 167, 124 N. W. 969, holding use of street for moving houses is an unusual and extraordinary one.

Cited in footnote to *Northwestern Telephone Exchange Co. v. Anderson*, 65 L.R.A. 771, which holds that the use of a street for moving houses cannot be permitted so as to destroy the use of the street for travel or necessary public purposes.

Cited in note (14 L.R.A.(N.S.) 448) on interference with wires of public-service corporation in moving house along street.

Distinguished in *Indiana R. Co. v. Calvert*, 168 Ind. 329, 10 L.R.A.(N.S.)

783, 80 N. E. 961, 11 A. & E. Ann. Cas. 635, holding municipal corporation having plenary power over its streets may authorize the moving of a house along them, and require an electric railway company whose wires will be interfered with thereby to move them to permit the house to pass.

15 L. R. A. 68, ROBERTSON v. VANCLEAVE, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781.

Adjudication of title.

Approved in Branson v. Studabaker, 133 Ind. 157, 33 N. E. 98, holding that title may be adjudicated in action akin to trespass *quare clausum fregit*.

Purchase by execution creditor at sale by release of debt.

Approved in Boots v. Ristine, 146 Ind. 77, 44 N. E. 15, holding execution creditor's purchase valid upon delivery of receipt for amount of principal debt in lieu of purchase money where his first right to fund otherwise paid to sheriff not questioned.

Cited in Fuller v. Exchange Bank, 38 Ind. App. 573, 78 N. E. 206, holding payment by receipt to sheriff of amount due makes good purchase by execution creditor.

Statutory right of redemption.

Approved in Scobey v. Kinningham, 131 Ind. 554, 31 N. E. 355, holding only statutory right of redemption left after execution sale.

Rights and liabilities under judicial sales.

Cited in Jarrell v. Brubaker, 150 Ind. 266, 49 N. E. 1050, holding that lien of certificate of sale on foreclosure of mortgage goes back to date of mortgage; Hill v. Swihart, 148 Ind. 324, 47 N. E. 705, holding that certificate of purchase on execution sale does not pass title where no deed is executed after lapse of year for redemption; Fromm v. Lawrence, 28 Ind. App. 392, 62 N. E. 1017, holding assertion of title under sheriff's deed not prevented by decree quieting title in judgment debtor except as to lien under sheriff's certificates for redemptive period; Clapp v. Hadley, 141 Ind. 30, 50 Am. St. Rep. 308, 39 N. E. 504, holding mortgagee's junior lien by virtue of junior mortgage not extinguished as against mortgagor by foreclosure and purchase by mortgagee under senior mortgage so as to entitle mortgagor to surplus; Vendevender v. Moore, 146 Ind. 49, 44 N. E. 3, holding that sheriff's certificate of sale confers no title, but that it is evidence of lien only; Jewett v. Tomlinson, 137 Ind. 329, 36 N. E. 1106, holding that purchaser at sheriff's sale has, for term of year, only a statutory lien; Miller v. Vollmer, 153 Ind. 29, 53 N. E. 949, holding certificate of purchase at sheriff's sale, subject to taxation during period for redemption; White v. Shirk, 20 Ind. App. 593, 51 N. E. 126, holding that sheriff must apply surplus rising from foreclosure sale to satisfaction of junior lien, of which notice appears in writ; Cropper v. Brown, 76 N. J. Eq. 419, 139 Am. St. Rep. 770, 74 Atl. 987, holding that legal title does not vest in purchaser at judicial sale until delivery of deed but he is entitled to any increase in its value; Government Bldg. & L. Inst. v. Richards, 32 Ind. App. 27, 68 N. E. 1039, holding holder of certificate of purchase at mortgage foreclosure sale has no claim or right during the year of redemption other than to be repaid the amount of his bid with interest.

Cited in footnote to Yeazel v. Einspahr, 24 L. R. A. 449, which holds purchaser at execution sale acquires, prior to confirmation, only creditor's lien.

Impairment of obligations of contract.

Cited in Merritt v. Gibson, 129 Ind. 161, 15 L. R. A. 279, 27 N. E. 136, raising, without deciding, question whether contract made prior to redemption act was

affected by its provisions; *Currier v. Elliott*, 141 Ind. 408, 39 N. E. 554, raising, without deciding, question of constitutionality of act exempting wife's third interest in husband's property from sale on execution, so far as applicable to pre-existing contracts; *Watkins v. Glenn*, 55 Kan. 441, 40 Pac. 316, holding that act concerning sale and redemption of land does not impair contracts, if without retroactive effect; *Dowell v. Talbot Paving Co.* 138 Ind. 689, 38 N. E. 389, holding that legislature has control of contractual remedies so long as value of contract is left without substantial depreciation or impairment; *World Bldg. Loan & Invest. Co. v. Marlin*, 151 Ind. 634, 52 N. E. 198, discussing without deciding question of validity of change in redemption law as to existing obligations.

Cited in footnotes to *International Bldg. & L. Asso. v. Hardy*, 24 L. R. A. 284, which denies legislative power to change remedy for enforcing trust deed; *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit without extending period of limitations; *Kirkman v. Bird*, 58 L. R. A. 670, which sustains, as to prior obligations, statute exempting wages for sixty days preceding levy; *Miners' & Merchants' Bank v. Snyder*, 68 L.R.A. 312, which holds corporate creditor's contract rights not impaired by statute requiring all creditors to unite in one suit against all stockholders for equitable distribution of liability fund among creditors.

Suits by or against trustees.

Cited in *Thompson v. Price*, 37 Wash. 398, 79 Pac. 951, as to when suits may be brought by and against trustees without joining the *cestuis que trust*.

Redemption from mortgage foreclosure by judgment creditor.

Cited in *Luken v. Fickle*, 42 Ind. App. 459, 84 N. E. 561, holding redemption by judgment creditor leaves title still in mortgagors as owners.

Cited in note (35 L.R.A.(N.S.) 197) on judgment against mortgage trustee as affecting beneficiary not a party.

15 L. R. A. 75, *EWING v. JONES*, 130 Ind. 247, 29 N. E. 1057.

Followed without discussion, in *Ewing v. Carson*, 130 Ind. 597, 29 N. E. 1061; *Ewing v. Lemcke*, 130 Ind. 600, 29 N. E. 1061, and *Ewing v. Torian*, 130 Ind. 600, 29 N. E. 1061.

Trusts and power to revoke same.

Approved in *Ewing v. Shannahan*, 113 Mo. 196, 20 S. W. 1065, holding trust for benefit of donor and heirs not revoked by subsequent quitclaim deed from trustee to donor, attempting to pass back trust estate; *Monday v. Vance*, 92 Tex. 433, 49 S. W. 516, holding that grantor in voluntary settlement cannot revoke his grant unless power to do so be reserved; *Ewing v. Wilson*, 132 Ind. 224, 19 L. R. A. 771, 31 N. E. 64, holding deed of trust making gift not irrevocable if donor did not intend to make it so; *Clairborne v. Radford*, 91 Va. 531, 22 S. E. 348, holding instrument purporting to be deed, complete in form, and which conveys absolutely specified property to grantee for benefit of grantor during life, irrevocable; *Haxton v. McClaren*, 132 Ind. 240, 31 N. E. 48, sustaining action to enforce trust by beneficiary against trustee, who repudiated trust and turned over trust property to donor's estate of which he was executor.

Cited in *Richards v. Reeves*, 149 Ind. 431, 49 N. E. 348, holding deed of gift conditioned on certain payments, from which reservation of right to revoke is omitted by mistake, revocable; *Ewing v. Bass*, 149 Ind. 9, 48 N. E. 241, and *Ewing v. Clark*, 65 Minn. 77, 67 N. W. 669, holding that *cestui que trust* cannot have trust enforced in equity although irrevocable in form where improvident and unconscionable; *Ellison v. Ganiard*, 167 Ind. 487, 79 N. E. 450, holding where

an absolute power to sell and convey was conferred on trustee by written declaration of trust the fee to the land was lodged in him; *McCleary v. Chipman*, 32 Ind. App. 497, 68 N. E. 320, holding where declaration of trust provided that trustee held land in trust for grantors and was to convey the lots to subscribers entitled thereto under their subscription in aid of a certain enterprise, the trustee was not merely a nominal trustee but held the legal title with power to convey to the subscribers who complied with the contract; *Anderson v. Kemper*, 116 Ky. 348, 76 S. W. 122, holding where a trust has been once created it is beyond the power of the settlor to alter its terms or beneficiaries without consent of cestui que trust.

Cited in footnotes to *Sayre v. Weil*, 15 L. R. A. 544, which holds irrevocable, deposit to one's self as trustee for specified children; *Neal v. Black*, 34 L. R. A. 707, which denies right to revoke voluntary deed by incompetent for protection of estate; *Wilson v. Anderson*, 44 L. R. A. 542, which holds trust deed by intemperate and improvident person without power of revocation, irrevocable; *Neisler v. Pearsall*, 52 L. R. A. 874, which holds settlement of property in trust stated to be irrevocable, not revocable without interposition of duly constituted tribunal; *Reidy v. Small*, 20 L. R. A. 362, which holds want of power of revocation in trust deed not fatal.

Cited in notes (2 L.R.A.(N.S.) 177, 179) on necessity of word "heirs" in deed or devise in trust to pass fee to trustee; (34 Am. St. Rep. 218) on voluntary trusts arising from declarations of trustor.

Validity of deeds.

Cited in *Ewing v. Lutz*, 131 Ind. 361, 30 N. E. 1069, holding deed regular in form, clear in terms, and apparently founded upon valuable consideration prima facie valid.

Legal representatives.

Cited in *Re Riesenbergl*, 116 Mo. App. 313, 90 S. W. 1170, holding that term "legal representatives" may refer either to executors, administrators, alienees or heirs.

Distinguished in *New York L. Ins. Co. v. Kansas City Bank*, 121 Mo. App. 486, 97 S. W. 195, holding where a policy of life insurance stipulated that insurer agreed with the "insured, his executors, administrators and assigns" to pay the amount of the policy to insured's "legal representatives," the insured being at the time of the policy unmarried, the words "legal representatives" meant insured's executors or administrators and not his next of kin.

15 L. R. A. 82, *PEOPLE v. NEW YORK, C. & ST. L. R. CO.* 129 N. Y. 474, 29 N. E. 959.

Consolidation of corporations.

Followed, without discussion, in *People v. Fitchburg R. Co.* 129 N. Y. 654, 29 N. E. 959.

Cited in *Sandham v. Nye*, 9 Misc. 545, 30 N. Y. Supp. 552, holding statute authorizing consolidation of railroads empowered to lay down and operate tracks, not violation of Constitution forbidding private grant of such powers; *Re Kansas City Smelting & Ref. Co.* 13 App. Div. 55, 43 N. Y. Supp. 51, holding that reorganization under one statute of corporation originally incorporated under another does not create liability for organization tax; *Gladling v. St. Matthews' Church*, 25 R. I. 634, 65 L.R.A. 229, 105 Am. St. Rep. 904, 57 Atl. 860, 1 A. & E. Ann. Cas. 537, holding statutes for the consolidation of domestic corporations are treated as acts of incorporation, and on consolidation being effect under

their provisions the constituent companies, unless such intention is excluded by the language of statute, are deemed to be dissolved.

Cited in notes (52 L.R.A. 377) on right of corporations to consolidate; (24 L.R.A.(N.S.) 769) on state authority over consolidated interstate corporation; (89 Am. St. Rep. 616, 617, 654) on effect of consolidation of corporations.

Distinguished in *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 466, 72 N. W. 328, holding consolidation effected by statute subject to constitutional provision then in force reserving right to amend, alter, or repeal charters.

15 L. R. A. 89, *UNION CENT. L. INS. CO. v. SCHEIDLER*, 130 Ind. 214, 29 N. E. 1071.

Election of remedies.

Cited in *Cohoon v. Fisher*, 146 Ind. 588, 36 L. R. A. 195, footnote p. 193, 45 N. E. 787, which holds complaint for rescission of contract for fraud not conclusive election of remedy.

Cited in footnotes to *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 26 L. R. A. 840, which holds mere commencement of attachment suit not binding election of remedy; *Miller v. Hyde*, 25 L. R. A. 42, which holds replevin of horse not defeated by prior attachment suit for trover; *Crompton v. Beach*, 18 L. R. A. 187, which holds conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

Cited in notes (73 Am. St. Rep. 560) on right of mortgagee to foreclose mortgage and to maintain action at law on the debt; (44 L. ed. U. S. 1033) on effect of election of remedies in case of fraudulent purchase.

15 L. R. A. 93, *ALLEN v. SAN JOSE LAND & WATER CO.* 92 Cal. 138, 28 Pac. 215.

Right to change enjoyment of easement.

Cited in *Oliver v. Agasse*, 132 Cal. 298, 64 Pac. 401, holding that mode of enjoying easement upon public domain and over land subsequently patented to private proprietor, cannot be changed by substitution of pipe line for water ditch; *White Bros. & C. Co. v. Watson*, 64 Wash. 670, — L.R.A.(N.S.) —, 117 Pac. 497, to the point that pipe line for carrying water across another's land cannot be substituted for ditch; *Rolens v. Hutchinson*, 83 Kan. 623, 112 Pac. 129, holding that fact that open ditch might result in benefit to person's land will not warrant other party to substitute such ditch for pipes; *Drake v. Russian River Land Co.* 10 Cal. App. 666, 103 Pac. 167, holding an easement for use of the bank and unnavigable stream of another did not entitle owner of easement to use stream or bank for purposes wholly different; *Winslow v. Vallejo*, 148 Cal. 727, 5 L.R.A.(N.S.) 855, 113 Am. St. Rep. 349, 84 Pac. 191, 7 A. & E. Ann. Cas. 851, holding city having right to lay a ten inch pipe across a person's land could not thereafter lay a fourteen inch pipe along side of it; *Vestal v. Young*, 147 Cal. 717, 82 Pac. 381, holding one having easement of irrigation ditch over land could not change location of ditch; *Kern Island Irrig. Co. v. Bakersfield*, 151 Cal. 406, 90 Pac. 1052, holding one having easement over land of another for irrigation ditch could not enlarge size of ditch; *Wutchumna Water Co. v. Ragle*, 148 Cal. 765, 84 Pac. 162; *McCullough v. Board of Exchange*, 101 App. Div. 580, 92 N. Y. Supp. 533 (dissenting opinion); *Joseph v. Ager*, 108 Cal. 520, 41 Pac. 422,—as to right of owner of dominant estate to change nature of easement; *Barrows v. Fox*, 98 Cal. 67, 32 Pac. 811, as to right of person having easement to carry water over another's premises in a ditch to carry same in a pipe.

Cited in footnote to *Smith v. Youmans*, 37 L. R. A. 285, which sustains right of owners of shore to prevent lowering of level of lake by owner of dam.

Cited in notes (10 Eng. Rul. Cas. 178) on right to change use of dominant tenant; (10 Eng. Rul. Cas. 306) on extinguishment of easement by change in dominant tenement.

Distinguished in *Burris v. People's Ditch Co.* 104 Cal. 253, 37 Pac. 922, holding owner of irrigation ditch has a right against owner of land to repair and deepen same.

15 L. R. A. 95, *TRAINOR v. WAYNE COUNTY*, 89 Mich. 162, 50 N. W. 809.

Officers and their removal or suspension.

Approved in *Davis v. Filler*, 47 W. Va. 415, 35 S. E. 6, holding that council, authorized to appoint officer to continue in office during its pleasure, has discretionary power of removal; *Burt v. Iron County*, 108 Mich. 527, 66 N. W. 387, holding petition for removal charging public officers with issuing warrants for unauthorized expenses, specifying items in bill of particulars, sufficiently specific.

Cited in footnotes to *Gillan v. Normal Schools*, 24 L. R. A. 336, which holds power to remove normal-school teacher at pleasure not reviewable by courts; *Speed v. Detroit*, 22 L. R. A. 842, which holds power to remove city counselor not in common council, where mayor has absolute power of appointment for definite term; *Gillan v. Normal Schools*, 24 L. R. A. 336, which denies power of regents, by by-law or contract, to restrict power of board to remove teacher at pleasure; *Atty. Gen. ex rel. Rich v. Jochin*, 23 L. R. A. 699, which authorizes removal of board of canvassers for signing grossly incorrect returns without examination; *Thompson v. Gibbs*, 34 L. R. A. 548, which denies right arbitrarily to dismiss school teacher although right reserved in contract; *People ex rel. Engley v. Martin*, 24 L. R. A. 201, which holds governor's written statement of cause for removal of member of fire and police board conclusive proof of cause, under terms of charter; *Taylor v. Beckham*, 49 L. R. A. 258, which denies power of court to review legislative determination of contest as to office of governor; *Re Advisory Opinion*, 18 L. R. A. 594, which holds right to hold office not affected by suspension from same office during preceding term; *Atty. Gen. ex rel. Rich v. Jochin*, 23 L. R. A. 699, which holds judicial proceeding not required on removal of officer, to constitute due process; *Moore v. Strickling*, 50 L. R. A. 279, which holds public officer a mere public agent removable according to will and appointment of people; *State ex rel. Mial v. Ellington*, 65 L. R. A. 697, which holds one appointed to legislative office for definite time no vested interest therein; *State ex rel. Mial v. Ellington*, 65 L.R.A. 697, which sustains right of legislature to deprive of office during term one appointed to legislative office for definite term.

Cited in note (19 L.R.A.(N.S.) 69) on mandamus to restore to office one illegally removed.

— Notice of changes.

Cited in *Townsend v. Kurtz*, 83 Md. 350, 34 Atl. 1123, holding that state insurance commissioner appointed to hold office for term "unless sooner removed," may be removed without notice; *Brennan v. Kauffman*, 42 Pa. Super. Ct. 201, holding that under power to employ and remove poor directors may remove workman without giving any reason therefor; *State ex rel. Hamilton v. Grant*, 14 Wyo. 58, 1 L.R.A.(N.S.) 595, 116 Am. St. Rep. 982, 81 Pac. 795, holding officers may be removed without notice, where the statute gives such authority and there is no constitutional prohibition of it.

Cited in footnotes to State *ex rel.* Atty. Gen. v. Johnson, 18 L. R. A. 410, which authorizes suspension of officer for neglect of duty without notice; State *ex rel.* Hastings v. Smith, 16 L. R. A. 791, which requires notice and charges before removal of officers appointed for definite term; State *ex rel.* Hitchcock v. Hewitt, 16 L. R. A. 413, which requires notice before removing officer appointed for definite term; Jacques v. Litle, 20 L. R. A. 304, which denies right to remove school-district officer for neglect without notice.

Who are public officers.

Cited in Hartigan v. West Virginia University, 49 W. Va. 23, 38 S. E. 698, holding university professor not a public officer entitled to notice and trial upon severance of contract by university regents; Singleton v. Eureka County, 22 Nev. 96, 35 Pac. 833, holding night watchman, appointable under statute by sheriff of specified county at salary payable by county, a public officer.

Cited in footnote to State v. Loechner, 59 L. R. A. 915, which holds member of city board of education, a ministerial officer.

Cited in note (17 L. R. A. 249) on who are public officers.

15 L. R. A. 102, NORTHWESTERN NAT. BANK v. BANK OF COMMERCE, 107 Mo. 402, 17 S. W. 982.

Effect of indorsement for collection.

Approved in Rossi v. National Bank of Commerce, 71 Mo. App. 160, holding that indorsement for collection account does not release indorser from obligation of warranty of genuineness of payee's indorsement; Midland Nat. Bank v. Roll, 60 Mo. App. 590, holding that indorsement for collection and credit makes indorsee merely agent to collect; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 212, 41 L. R. A. 586, 65 Am. St. Rep. 748, 50 N. E. 723, holding drawee bank liable for negligence in payment of forged check although indorsed for collection by another bank.

Cited in Bank of Williamson v. McDowell County Bank, 66 W. Va. 559, 36 L.R.A.(N.S.) 613, 66 S. E. 761, holding that in taking forged check for collection from unknown person and forwarding it for collection, after indorsement by reputed payee, and placing its own unrestricted indorsement on same bank omits precautionary duty and warrants signature of payee.

Cited in footnote to First Nat. Bank v. Sprague, 15 L. R. A. 498, which holds bank receiving note for collection as accommodation not liable for correspondent's default.

Cited in note (37 L. ed. U. S. 363) on liability of bank for collections.

Payment of draft by drawee.

Cited in Jones v. Miners' & M. Bank, 144 Mo. App. 433, 128 S. W. 829, holding that person who pays to bona fide holder of note to which such person's name is forged as maker, cannot recover amount; National Bank v. Mechanic's American Nat. Bank, 148 Mo. App. 19, 127 S. W. 429, holding that under negotiable instrument law, drawee who pays to bona fide holder of forged check amount of same, cannot recover amount from holder; National Bank v. First Nat. Bank, 141 Mo. App. 726, 125 S. W. 513, holding drawee bank paying check to another bank, which is a bona fide holder, cannot recover though check is a forgery; Bank of Indian Territory v. First Nat. Bank, 109 Mo. App. 672, 83 S. W. 537, holding payment of draft by drawee is conclusive upon him and it does not avail him to show that he was mistaken in supposing he had money in his hands with which to pay it.

Cited in note (10 L.R.A.(N.S.) 51, 52) on right of drawee to recover money paid on forged check or draft.

15 L. R. A. 106, *WICKERSHAM v. BRITTAN*, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51.

Followed without special discussion in *Wickersham v. Murphy*, 93 Cal. 42, 28 Pac. 793.

Elections and appointments to office.

Approved in *Re A. A. Griffing Iron Co.* 63 N. J. L. 175, 41 Atl. 931, holding that jurisdiction of courts to inquire into corporate elections does not extend to cases of appointment of officers by directors.

Cited in footnotes to *Hooper v. Creager*, 35 L. R. A. 202, which holds ordinance for election of officers not authorized by provision for passing ordinance as to manner of "appointing;" *Fox v. McDonald*, 21 L. R. A. 529, which holds power to appoint to fill vacancy not inherent in governor.

Distinguished in *State ex rel. Wagner v. Compson*, 34 Or. 32, 54 Pac. 349, holding constitutional provision that public officers shall hold office until successors elected and qualified includes those chosen by legislative assembly.

Repeal of statutes.

Distinguished in *Crossman v. Kenniston*, 97 Cal. 381, 32 Pac. 448, holding act of March 30, 1874, as to removal of officers, repealed by later statute.

15 L. R. A. 109, *EAST TENNESSEE, V. & G. R. CO. v. ATLANTA & F. R. CO.* 49 Fed. 608.

Exclusiveness of jurisdiction as to receiverships.

Approved in *Baltimore & O. R. Co. v. Flaherty*, 87 Md. 109, 39 Atl. 524, denying jurisdiction of state court over incorporated railroad relief association which had assigned all assets to railroad company subsequently placed under receiver by Federal court, which ordered continuance of such relief department.

Cited in *People v. New York City R. Co.* 57 Misc. 119, 107 N. Y. Supp. 247, holding state court has jurisdiction of an action brought under statute to forfeit the charter and franchises of an insolvent domestic corporation and for appointment of a temporary receiver although receivers of the same corporation have already been appointed in the Federal court to protect corporation's property and franchise.

Cited in note (20 L. R. A. 395) on exclusiveness of jurisdiction by appointment of receiver.

Distinguished in *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 62 Fed. 953, refusing to transfer to receiver appointed by state court property in possession of Federal receiver under bill filed by trustee of bondholders representing most of indebtedness.

Exclusive jurisdiction of state and federal courts.

Cited in *Re Porterfield*, 138 Fed. 197, holding the Federal court having assumed jurisdiction in bankruptcy the state court had no jurisdiction of an action brought under statutes of state to set aside a preference.

Jurisdiction of court to appoint receiver.

Cited in *Cronan v. District Ct.* 15 Idaho, 217, 96 Pac. 768, holding the jurisdiction of the court to appoint receiver of a private corporation does not exist when the corporation is solvent and a "going concern" and where it is apparent that the appointment of a receiver is to prevent creditors from enforcing their claims by due process of law.

— Property in two or more Federal districts.

Cited in *Doscher v. United States Pipe Line Co.* 185 Fed. 962, to the point that suit for appointment of receiver of railroad extending into two Federal jurisdictions within same state may be brought in either district; *Horn v. Pere*

Marquette R. Co. 151 Fed. 632, holding suit by creditor of railroad company to leave property of same situated in different Federal districts of same state operated for benefit of creditors until its debts might be marshaled and its property as a unit brought to a sale may be brought in either district and appointment of receiver attaches all property within state.

Actual seizure of property by receiver.

Cited in *Horn v. Pere Marquette R. Co.* 151 Fed. 632, holding actual seizure by receiver is not necessary to prevent after acquired liens attaching.

Venue of actions.

Approved in *Goddard v. Mailler*, 80 Fed. 423, holding statute providing that suit may be brought in either district of state where one of two or more defendants reside not repealed by provision against suit in district of which defendant not an inhabitant; *Grove v. Grove*, 93 Fed. 870, holding foreclosure maintainable in district where property of jurisdictional amount is situated, parties being of diverse citizenship but not resident in district; *New Jersey Steel & I. Co. v. Chormann*, 105 Fed. 533, raising, without deciding, question whether statute authorizing suit against several defendants of same state but in different districts, was repealed by act prohibiting suit in any district of which defendant not a resident.

Residence of corporations.

Cited in *State v. Bogardus*, 63 Kan. 262, 65 Pac. 251, holding railway company resident of county in which franchise exercised, as to statutes for establishing highways.

Cited in note (69 L.R.A. 433) on localization of corporations.

15 L. R. A. 114, *SIMCOKE v. GRAND LODGE*, A. O. U. W. 84 Iowa, 383, 51 N. W. 8.

Waiver of formalities as to change of beneficiary.

Cited in *Delaney v. Delaney*, 175 Ill. 200, 51 N. E. 961, holding provision for surrender of benefit certificate upon change of beneficiary waived by abandonment of original certificate by both member and society; *Holden v. Modern Brotherhood*, 151 Iowa, 681, 132 N. W. 329; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 405, 126 N. W. 949,—holding that equitable assignment of benefit certificate is effected, where member with right to change beneficiary does all that is necessary to effect change even though he dies before change is made.

Distinguished in *Shuman v. Ancient Order U. W.* 110 Iowa, 645, 82 N. W. 331, holding that original beneficiary acquired vested interest on death of assured whose attempt to change beneficiary was irregular.

Power of insured to change beneficiary.

Cited in *Wandell v. Mystic Toolers*, 130 Iowa, 643, 105 N. W. 448, holding beneficiary in certificate of mutual benefit association has no vested interest in benefit provided for by the certificate, but is subject to provisions of constitution and laws of association with reference to changing beneficiaries; *Leadlay v. McGregor*, 11 Manitoba L. Rep. 20, holding officers of beneficial association had right to refuse to consent to change in beneficiary.

Cited in note (49 L. R. A. 753) on power of insured to destroy rights of beneficiary.

Who may be beneficiaries of insurance contract.

Approved in *Renner v. Supreme Lodge*, B. S. B. S. 89 Wis. 405, 62 N. W. 80, holding stepdaughter within purpose of benefit society to assist orphans; *Faxon v. Grand Lodge B. L. F.* 87 Ill. App. 268, holding that stepmother may be bene-

fiary under statute limiting payment of death benefit to families, blood relations, etc.

Cited in *Mattison v. Sovereign Camp W. W.* 25 Tex. Civ. App. 216, 60 S. W. 897, holding wife "relative" of insured within meaning of benefit certificate; *Tolson v. National Provident Union*, 60 Misc. 463, 115 N. Y. Supp. 534, holding "relative" included brother-in-law of assured; *Smith v. Supreme Tent, K. M. W.* 127 Iowa, 117, 69 L.R.A. 175, 102 N. W. 830, holding niece of dead father's first wife, where insured was son of second wife could not take as beneficiary; *Berdan v. Milwaukee Mut. L. Ins. Co.* 136 Mich. 402, 99 N. W. 411, 4 A. & E. Ann. Cas. 332, holding step-daughter had such insurable interest as to be beneficiary of step-father.

Cited in footnotes to *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee, receiving proceeds of insurance policy, to refuse payment to beneficiaries as having no insurable interest; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds assignee's insurable interest as creditor not condition of recovery on policy; *Smith v. Supreme Tent K. of M.* 69 L.R.A. 174, which holds niece of former wife not relative of child by subsequent wife within meaning of statute relating to benefit certificates.

Distinguished in *Supreme Lodge O. M. P. v. Dewey* (Supreme Lodge O. M. P. v. Nevins) 142 Mich. 671, 3 L.R.A.(N.S.) 338, 113 Am. St. Rep. 596, 106 N. W. 140, 7 A. & E. Ann. Cas. 681, holding step-father who was not a member of step-daughter's family at time of her death not a member of her family under statute and terms of benefit certificate permitting payment to "member of family of assured."

Sufficiency of attestation.

Cited in *Schardt v. Schardt*, 100 Tenn. 279, 45 S. W. 340, raising, without deciding, question whether attestation to surrender certificate required to be in immediate presence of reporter of lodge; *Wandell v. Mystic Tailors*, 130 Iowa, 643, 105 N. W. 448, as necessity of attestation of signature of member in personal presence of secretary.

15 L. R. A. 116, *CHAPIN v. FERRY*, 3 Wash. 386, 28 Pac. 754.

Posse comitatus and militia.

Cited in *Sears v. Gallatin County*, 20 Mont. 466, 40 L. R. A. 407, 52 Pac. 204, holding county not liable in absence of statute for services of sheriff's *posse comitatus*.

Cited in footnotes to *Devlin v. Dalton*, 41 L. R. A. 379, which holds unreviewable on certiorari decision of military examining board as to competency for militia officer; *Nixon v. Reeves*, 33 L. R. A. 506, which denies right of captain of company of national guard summarily to imprison member for disobedience.

Cited in note (23 L. R. A. 510) on power of governor to disband militia.

15 L. R. A. 121, *ROBINSON v. ROBINSON*, 66 N. H. 600, 49 Am. St. Rep. 632, 23 Atl. 362.

Cruelty as ground for divorce.

Approved in *Hart v. Hart*, 68 N. H. 479, 39 Atl. 430, denying right to divorce where only alleged act of personal violence condoned and no reasonable apprehension of repetition or other bodily harm shown; *Ring v. Ring*, 118 Ga. 193, 62 L. R. A. 883, 44 S. E. 861, holding habitual intoxication from excessive use of morphine not "cruel treatment."

Cited in *Easter v. Easter*, 75 N. H. 271, 139 Am. St. Rep. 688, 73 Atl. 30, to the point that whether defendant, without sufficient cause and without consent

abandoned and refused for three years to cohabit with plaintiff are questions of fact to be determined in action for divorce for abandonment; *Pfannebecker v. Pfannebecker*, 133 Iowa, 435, 119 Am. St. Rep. 608, 110 N. W. 618, 12 A. & E. Ann. Cas. 543, holding whether accusations of infidelity of one spouse by the other constitute cruel and inhuman treatment a question of fact; *Williams v. Williams*, 101 Minn. 404, 112 N. W. 528, holding repeated unfounded charges by wife of infidelity of husband and publication of wife of the charges to third persons, resulting in much scandal and humiliation to husband sufficient to constitute cruel and inhuman treatment and to entitle husband to divorce.

Cited in footnotes to *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling house, clothing, and food; *Justice v. State*, 59 L. R. A. 601, which holds refusal to permit administration of medicine to minor children while sick not deprival of necessary sustenance; *Barnes v. Barnes*, 16 L. R. A. 660, which holds mental suffering, although not affecting bodily health, ground for divorce.

Cited in note (65 Am. St. Rep. 71, 76, 78) on cruelty as ground for divorce.

15 L. R. A. 125, *GILBERT v. NEW ZEALAND INS. CO.* 49 Fed. 884.

Residence of corporation.

Cited in note (85 Am. St. Rep. 920, 922) on jurisdiction of foreign corporations.

Disapproved in *Baumgarten v. Alliance Assur. Co.* 153 Fed. 303, holding corporation is a resident of state where incorporated and not of any state where it has an office and engages in transaction of local business.

Actions by and against nonresidents.

Cited in *Patton v. Continental Casualty Co.* 119 Tenn. 372, 104 S. W. 305, holding process having been regularly served upon a foreign corporation it cannot defeat the action on the ground either that plaintiff is a nonresident or that his cause of action depends on a transaction occurring in another state or country.

15 L. R. A. 127, *CLARKE v. WESTERN ASSUR. CO.* 146 Pac. 561, 28 Am. St. Rep. 821, 23 Atl. 248.

Double insurance.

Cited in *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.* 110 Iowa, 433, 80 Am. St. Rep. 311, 81 N. W. 707, holding that "concurrent insurance" includes policies sharing specified risk and covering part of or all of or more than such risk; *West Branch Lumberman's Exchange v. American Cent. Ins. Co.* 183 Pa. 385, 42 W. N. C. 9, 38 Atl. 1081, holding lumberman's policy of insurance on lumber, lath, and pickets piled in specified yard, and policy by owner of such yard on all lumber including lath, shingles, and pickets on such ground, not double insurance; *Meigs v. Insurance Co. of N. A.* 205 Pa. 384, 54 Atl. 1053, Affirming 18 Montg. Co. L. Rep. 171, holding two policies on same property, one covering other property also, without specifying amount on each piece, not double insurance; *P. W. Ziegler Co. v. Commercial Union Assur. Co.* 38 Pa. Super. Ct. 535, holding where insured has a policy covering several parcels of property, and also a specific insurance covering one of said parcels, the latter insurance must be entirely exhausted before the other policies can be called upon for contribution to the loss.

Cited in footnotes to *Heller v. Royal Ins. Co.* 34 L. R. A. 600, which holds insurer against loss from liability for rent while building uninhabitable not relieved by tenant receiving part of landlord's insurance; *Niagara F. Ins. Co. v. Seamon*, 19 L. R. A. 114, which holds provision for apportioning loss ap-

plicable only where same interest covered; *Carleton v. China Mut. Ins. Co.* 46 L. R. A. 166, which holds marine policies issued on different days to take effect on same future day, simultaneous.

Weight of per curiam opinions.

Cited in *Stamm v. Esterly*, 8 Pa. Dist. R. 333, holding decision not less authoritative because *per curiam*.

15 L. R. A. 129 *WESTERN U. TELEG. CO. v. HOUGHTON*, 82 Tex. 561, 27 Am. St. Rep. 918, 17 S. W. 846.

Duty as to delivery of telegram; messages "in care of."

Cited in *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 428, 33 N. E. 800, holding leaving of message with yard-master not sufficient delivery of telegram addressed to one in care of freight yards; *Western U. Teleg. Co. v. Jackson*, 19 Tex. Civ. App. 274, 46 S. W. 279, holding telegraph company not excused from reasonable diligence in making personal delivery, where message sent in care of third party, who was out of town; *Western U. Teleg. Co. v. Wofford*, 94 Tex. 348, 60 S. W. 546, holding delay in delivery of message to sheriff to stop sale, until after sale by deputy, not ground for action unless effectiveness of possible delivery shown; *Western U. Teleg. Co. v. Mitchell*, 91 Tex. 459, 40 L. R. A. 211, footnote p. 209, 66 Am. St. Rep. 906, 44 S. W. 274, holding delivery of telegram to wife of addressee absent from town not sufficient as matter of law; *Western U. Teleg. Co. v. Drake*, 13 Tex. Civ. App. 576, 36 S. W. 786, holding that telegraph company must use reasonable effort to find addressee under contract to transmit and hire special messenger and send message to addressee at country postoffice; *Lefler v. Western U. Teleg. Co.* 131 N. C. 357, 59 L. R. A. 478, footnote p. 477, 42 S. E. 819, sustaining sufficiency of delivery to ticket agent of telegram directed to one in care of railroad company; *Western U. Teleg. Co. v. Rowell*, 153 Ala. 312, 45 So. 73, as to what constitutes proper delivery of message; *Sweet v. Western U. Teleg. Co.* 139 Mich. 331, 102 N. W. 850, 5 A. & E. Ann. Cas. 730, holding addressee of message being out of city telegraph company performed its duty by delivery to person in whose care it was sent; *Western U. Teleg. Co. v. McCaul*, 115 Tenn. 105, 90 S. W. 856, holding telegraph company under no duty to deliver telegram to wife or member of family of person in whose care a message directed to another is sent.

Cited in footnote to *Western U. Teleg. Co. v. Cobb*, 58 L. R. A. 698, which holds delivery of telegram to clerk of hotel where sendee boards, insufficient.

Cited in notes (22 L.R.A.(N.S.) 766) on duty of telegraph company to discover unknown sendee; (38 L. ed. U. S. 883) on damages for error in telegraph message, or failure to deliver.

Distinguishing in *Barefoot v. Western U. Teleg. Co.* 28 Tex. Civ. App. 458, 67 S. W. 912, holding that delivery of message to hotel clerk authorized by addressee to receive same does not relieve from liability to sender for failure to exercise reasonable diligence to find business firm, in whose care message sent.

Excessive damages.

Cited in *Western U. Teleg. Co. v. Evans*, 1 Tex. Civ. App. 300, 21 S. W. 266, holding verdict for \$5,000 for delayed delivery of telegram whereby son reached mother twenty minutes after death instead of twenty-four hours previous, excessive; *Western U. Teleg. Co. v. Piner*, 1 Tex. Civ. App. 302, 21 S. W. 315, holding verdict of \$4,750 excessive as damages for failure to reach dying father's bedside before father became unconscious, because of negligence in delivery of message.

Cited in notes (26 L.R.A. 394) on power of appellate court to interfere with

verdict for excessive damages; (8 Eng. Rul. Cas. 460) on excessive damages as ground for new trial.

15 L. R. A. 131, *PEOPLE ex rel. AHRENS v. ENGLISH*, 139 Ill. 622, 29 N. E. 678.

Right of women to vote.

Cited in *Plummer v. Yost*, 144 Ill. 71, 19 L. R. A. 112, footnote p. 110, 33 N. E. 191, which holds act permitting women to vote for board of education, valid; *Dorsey v. Brigham*, 177 Ill. 255, 42 L. R. A. 810, 69 Am. St. Rep. 228, 52 N. E. 303, holding alien woman not legal voter at school election under Illinois statute; *Collier v. Anlicker*, 189 Ill. 45, 59 N. E. 615, holding statutory requirements as to residence in state, county, and election district applicable to women voting at school elections; *People ex rel. Tilden v. Welsh*, 70 Ill. App. 644, holding right of women to vote at any election of any officer under school laws not inclusive of right to vote on proposition to establish township high school; *Harris v. Burr*, 32 Or. 364, 39 L. R. A. 772, 52 Pac. 17, holding right of women to vote for school director not precluded by Constitution limiting right to vote at all elections authorized by law to male citizens; *Coffin v. Election Comrs.* 97 Mich. 194, 21 L. R. A. 667, 56 N. W. 567, holding act giving women right to vote for village, school, and city officers, invalid under Constitution giving men only right to vote at all elections.

Cited in footnote to *State ex rel. Peters v. Davidson*, 20 L. R. A. 311, which holds women ineligible to office of notary public.

Cited in note (21 L. R. A. 662) on right of women to vote.

Right of legislature to prescribe qualifications for voters.

Cited in *State ex rel. Lamar v. Dillon*, 32 Fla. 567, 22 L. R. A. 134, 14 So. 383, holding that legislature may prescribe qualifications of voters at municipal elections under Constitution prescribing qualifications of electors at all elections under it; *State ex rel. Gibson v. Monahan*, 72 Kan. 495, 115 Am. St. Rep. 224, 84 Pac. 130, 7 A. & E. Ann. Cas. 661, holding constitutional provision that no property qualification shall be required for any office of public trust or for any vote at an election applies only to those elections contemplated by constitution and does not prevent legislature from authorizing creation of drainage districts the powers of which are to be exercised by directors who are required to be freeholders elected by resident tax payers; *Livesley v. Litchfield*, 47 Or. 254, 114 Am. St. Rep. 920, 83 Pac. 142; *Coggeshall v. Des Moines*, 138 Iowa, 737, 128 Am. St. Rep. 221, 117 N. W. 309,—holding legislature may not prescribe qualifications of voters in addition to those fixed in constitution; *Johnson v. Grand Forks County*, 16 N. D. 368, 125 Am. St. Rep. 662, 113 N. W. 1071, holding it incompetent for legislature to prescribe qualifications of voters or candidates in addition to those fixed in constitution; *Solon v. State*, 54 Tex. Crim. Rep. 274, 114 S. W. 349, holding the power of the legislature with reference to providing for the qualifications of voters can be restrained only by a prohibition expressed or implied from some provisions of the constitution.

Liability under civil damage act.

Cited in *Conard v. Crowdson*, 75 Ill. App. 620, sustaining liability for civil damages without previous conviction in criminal prosecution, under provision for fine upon conviction and damages to individual suffering loss.

“Manner.”

Cited in *Logan v. Stephens County*, 98 Tex. 291, 83 S. W. 365, as to definition of manner.

15 L. R. A. 134, *SCHAFFNER v. EHRMAN*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917.

Refusal to pay check and malicious protest.

Cited in *Svendsen v. State Bank*, 64 Minn. 42, 31 L. R. A. 553, footnote p. 552, 58 Am. St. Rep. 522, 65 N. W. 1086, and *Wood v. American Nat. Bank*, 100 Va. 312, 40 S. E. 931, sustaining right of action against bank wrongfully refusing to honor check; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 12, 51 L. R. A. 259, footnote p. 255, 80 Am. St. Rep. 857, 58 S. W. 261; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 496, 67 N. E. 655, sustaining conclusive presumption of damage to trader by bank's wrongful refusal to pay check; *Davis v. Standard Nat. Bank*, 50 App. Div. 215, 63 N. Y. Supp. 764, sustaining verdict for substantial damages for impairment of credit by bank's wrongful refusal to pay check four times in succession; *Bank of Commerce v. Goos*, 39 Neb. 445, 23 L. R. A. 193, footnote p. 190, 58 N. W. 84, which denies right of recovery against bank for arrest and imprisonment of drawer of check, resulting from bank's refusal to pay same; *Park Nat. Bank v. Niblack*, 67 Ill. App. 584, holding that failure of bank and seizure thereof by comptroller stops payment of check; *American Nat. Bank v. Morey*, 113 Ky. 862, 58 L. R. A. 958, footnote p. 956, 69 S. W. 759, as to measure of damages for bank's wrongful refusal to pay check of student in strange city; *Third Nat. Bank v. Ober*, 102 C. C. A. 178, 178 Fed. 679, holding if depositor is not a merchant or trader only nominal damages may be recovered for wrongful refusal to pay check; *Baumgarten v. Alliance Assur. Co.* 159 Fed. 277, as to damages being recoverable for wrongful refusal to pay check; *Metropolitan Supply Co. v. Garden City Banking & T. Co.* 114 Ill. App. 321; *O'Grady v. Stotts City Bank*, 106 Mo. App. 370, 80 S. W. 696,—holding damages for refusal to pay check are not limited to mere nominal sum; *Weller v. Western State Bank*, 18 Okla. 494, 90 Pac. 877, holding action for damages for wrongful refusal to pay check not an action for slander and not barred by statute of limitations of actions for slander; *Lorick v. Palmetto Bank & T. Co.* 74 S. C. 188, 54 S. E. 206, 7 A. & E. Ann. Cas. 818, holding liability of bank to its depositor for wrongful refusal to pay check for substantial damages is generally recognized.

Cited in footnotes to *May v. Jones*, 15 L. R. A. 637, which holds bank not liable for malicious protest by notary; *Mt. Sterling Nat. Bank v. Greene*, 32 L. R. A. 568, which holds bank liable for refusal to pay check of customer.

Cited in notes (5 L.R.A.(N.S.) 870, 872) on character of action by depositor against bank wrongfully refusing to honor check; (80 Am. St. Rep. 866, 867, 868) on liability of bank for refusing to honor checks.

Distinguished in *Hanna v. Drovers Nat. Bank*, 92 Ill. App. 615, holding credit not slandered by bank's refusal to pay depositor himself on his own demand.

Wrongful refusal to satisfy judgment.

Cited in *McLaughlin v. First Nat. Bank*, 72 Ill. App. 481, holding judgment creditor liable to tradesman for refusal or neglect to satisfy judgment of record, upon payment.

Damages for wrongfully disconnecting telephone.

Cited in footnote to *Cumberland Teleph. & Teleg. Co. v. Hendon*, 60 L. R. A. 849, which holds measure of damages for wrongfully disconnecting telephone amount which will compensate for injuries from breach of contract.

15 L. R. A. 138, *SMITH v. RENTZ*, 131 N. Y. 169, 42 N. Y. S. R. 879, 30 N. E. 54.

Second appeal in 73 Hun, 196, 25 N. Y. Supp. 914.

Effect of failure to use books or documents produced on demand.

Cited in *Reed v. Zimmerman*, 1 Misc. 192, 48 N. Y. S. R. 637, 20 N. Y. Supp. 665, holding books or documents produced upon demand not evidence against demandant failing to use same; *Ellis v. Randle*, 24 Tex. Civ. App. 479, 60 S. W. 462, holding that mere inspection of letters produced by opponent upon demand does not make same admissible; *Worrall v. Davis Coal & Coke Co.* 113 Fed. 557, raising, without deciding, question whether inspection of log book by other party makes it evidence for one producing it; *Wimpfheimer v. Harris*, 62 Misc. 7, 114 N. Y. Supp. 441, holding where defendant served notice on plaintiff to produce certain contract it was error for court to admit same in evidence at request of plaintiff after refusing defendant's request to examine same.

Cited in notes (33 L.R.A.(N.S.) 555) on effect of calling for and inspecting document to make it competent; (41 Am. St. Rep. 388) on power to compel party to produce boxes and papers as evidence on examination of adversary.

Admissibility of account books, or entries therein.

Cited in *Shipman v. Glynn*, 31 App. Div. 430, 52 N. Y. Supp. 691, holding entries based on hearsay in books of account, inadmissible; *Dusenbury v. Hoadley*, 49 N. Y. S. R. 562, 20 N. Y. Supp. 911, holding decedent's entry in cash book not competent in favor of his estate; *Healey v. Bauer*, 47 N. Y. S. R. 499, 19 N. Y. Supp. 989, holding entries in plaintiff's books of account by deceased employee some months after work done and shortly before action commenced, inadmissible; *Fowler v. Hebbard*, 40 App. Div. 110, 57 N. Y. Supp. 53, holding guardian's book of account admissible against party admitting correctness of account; *Rathborne v. Hatch*, 80 App. Div. 118, 80 N. Y. Supp. 347, holding rule as to admission of shop books not applicable to broker's books; *Simons v. Steele*, 82 App. Div. 205, 81 N. Y. Supp. 737, denying admissibility of stub entries in check book; *Brown v. Bronson*, 93 App. Div. 315, 87 N. Y. Supp. 872, denying admissibility of entries in cash book and ledger to prove pledge of collateral to secure note; *Rothschild v. Sessell*, 103 Ill. App. 283, denying admissibility of books of account to prove loan of money; *Gregory v. Jones*, 101 Mo. App. 284, 73 S. W. 899, denying admissibility of book account to show payments on note; *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 515, 36 L.R.A.(N.S.) 906, 70 S. E. 113, to the point that book of entries of cash transaction is not admissible under rule admitting account books in evidence; *MacKenzie v. Barrett*, 148 Ill. App. 417, holding in an action against estate of a deceased person entries contained upon stubs of a check book are not evidence of indebtedness.

Cited in notes (52 L.R.A. 703, 708) on what is provable by books of account; (2 L.R.A.(N.S.) 401) on admissibility of account books in evidence in case of loans or payments by party whose books offered; (125 Am. St. Rep. 848, 853) on admissibility in evidence against third person of books, reports and the like other than books of account; (138 Am. St. Rep. 442, 444, 466) on admissibility in evidence of books of account.

Distinguished in *Stephan v. Metzger*, 95 Mo. App. 623, 69 S. W. 625, holding items of book account showing loans of money admissible under statute..

15 L. R. A. 142, *KINNEY v. BALTIMORE & O. EMPLOYEES' ASSO.* 35 W. Va. 385, 14 S. E. 8.

Effect and validity of arbitration agreements.

Cited in *Ball v. Doud*, 26 Or. 20, 37 Pac. 70, holding arbitration or ineffectual attempt thereat, condition precedent to action under contract providing for fixing of disputed value of alterations by arbitration and referring approvingly to annotation in 15 L. R. A. 142; *Florida Athletic Club v. Hope Lumber Co.* 18

Tex. Civ. App. 170, 44 S. W. 10, holding that arbitration clause in contract cannot oust jurisdiction of courts although a valid award thereunder will supersede contract as basis of suit; *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 84, 91 Am. St. Rep. 620, 49 Atl. 387, holding by-law of benefit association requiring contests to be decided by committee whose decision shall be final, invalid; *Lawson v. Williamson Coal & Coke Co.* 61 W. Va. 682, 57 S. E. 258, holding to prevent action at law for breach of contract containing arbitration agreement it must appear that submission to arbitration is made a condition precedent to such right of action.

Cited in footnotes to *Hartford F. Ins. Co. v. Hon*, 60 L. R. A. 436, which holds void, agreement to settle all differences by arbitration without suit; *Broek v. Dwelling House Ins. Co.* 26 L. R. A. 623, which denies right of insurer uniting in appointment of appraisers to claim appointment premature; *Grand Rapids F. Ins. Co. v. Finn*, 50 L. R. A. 555, which holds appraisal of loss not required by policy unless demand made by insurer; *Union Ins. Co. v. Central Trust Co.* 44 L. R. A. 227, which holds deposit to secure payment of award forfeited on revocation of arbitration; *Guild v. Atchison, T. & S. F. R. Co.* 33 L. R. A. 77, which denies right to revoke at pleasure appointment of appraisers to fix price of property sold; *Mittenthal v. Mascagni*, 60 L. R. A. 812, which sustains provision in contract for entertainment tour that suits shall be brought in country of domicile.

Cited in notes (17 L.R.A. 211) on promise to give full satisfaction subject to submissions; (15 L.R.A.(N.S.) 1058) on arbitration as condition precedent to action on insurance policy; (3 Eng. Rul. Cas. 387) on reference to arbitration where contract contains an arbitration clause.

Distinguished in *Baer's Sons Grocer Co. v. Cutting Fruit-Packing Co.* 42 W. Va. 364, 26 S. E. 191, holding seller without liability for defective quality of goods rejected without arbitration, under provision for conclusion of all disputes by arbitration "without damage to either party;" *Turner v. Stewart*, 51 W. Va. 499, 41 S. E. 924, holding that creditor's enforcement of demand by arbitration under agreement that award shall be returned to court for decree, will not alone release surety as granting extension of time.

Relief associations and departments.

Cited in *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 380, 45 So. 761, holding contract whereby employee by accepting relief from relief association releases employer from liability, valid; *Barden v. Atlantic Coast Line R. Co.* 152 N. C. 332, —L.R.A.(N.S.) —, 67 S. E. 971 (dissenting opinion), as to the validity of contract releasing employer from liability by accepting relief from railroad relief association.

Cited in footnotes to *Pittsburg, C. C. & St. L. R. Co. v. Moore*, 44 L. R. A. 638, which sustains contract allowing railroad employee option between action for damages or claim on relief fund; *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 35 L. R. A. 507, which sustains contract that accepting relief from railroad relief association shall release employer from liability; *Oyster v. Burlington Relief Department*, 59 L. R. A. 292, which denies right to recover on certificate of railroad relief department, after recovering full statutory penalty for employee's death.

Cited in note (11 L.R.A.(N.S.) 183, 186) on contracts requiring servant to elect between benefits of relief fund and his action for damages.

15 L. R. A. 145, *STATE ex rel. WATSON v. STANDARD OIL CO.* 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279.

Cited in related case in 173 Fed. 181.

Nature of corporation as legal entity.

Approved in *Re Home Mut. Aid Asso.* 3 Ohio N. P. 150, 4 Ohio S. & C. P. Dec. 272, disregarding legal entity of bankrupt benefit association where urged to give holders of matured certificates preference over other certificate holders; *First Nat. Bank v. F. C. Trebein Co.* 59 Ohio St. 327, 52 N. E. 834, holding fiction of legal entity not applicable to corporation formed to effect conveyance in fraud of creditors; *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 664, holding legal fiction of corporate entity not available for impairment of constitutional rights of property of innocent stockholders; *Buffalo Loan, Trust & S. D. Co. v. Medina Gas & E. L. Co.* 12 App. Div. 210, 42 N. Y. Supp. 781, holding corporation not separate entity so as to relieve it from liability for loan upon its bonds made to an officer who practically owns it.

Cited in *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.* 101 C. C. A. 39, 177 Fed. 829, as to when courts will disregard the doctrine of corporate entity; *Re Rieger*, 157 Fed. 615, holding equity may ignore the doctrine of corporation entity to protect the rights of innocent parties or to prevent fraud; *United States v. Milwaukee Refrigerator Transit Co.* 142 Fed. 254; *Southern Electric Securities Co. v. State*, 91 Miss. 207, 124 Am. St. Rep. 638, 44 So. 785, holding distinction between corporation as a legal entity and its stockholders will not be regarded when invoked by corporation to subvert the public policy of the state; *Milbrath v. State*, 138 Wis. 364, 131 Am. St. Rep. 1012, 120 N. W. 252, holding in a criminal prosecution against a person charged with an offense he cannot in justification plead that he committed the offense as officer of a corporation, nor can he assert that the acts in form of corporate acts were not his acts merely because carried out by him through instrumentality of a corporation; *South Florida Citrus Land Co. v. Waldin*, 61 Fla. 774, 55 So. 862, holding that fiction of law that corporation is separate entity, separate and apart from members does not obtain in equity when to do so would result in enabling corporation to perpetrate fraud; *Keokuk Electric R. & P. Co. v. Wiseman*, 146 Iowa, 688, 126 N. W. 60, to the point that legal fiction that corporation is separate legal entity, cannot be urged to intent and purpose not within reason and policy of organization.

Cited in note (1 L.R.A. (N.S.) 178) on fiction of incorporation to evade law.

Powers of corporation as person.

Cited in *Wheeling Bridge & Terminal Ry. v. Gilmore*, 8 Ohio C. C. 664, 4 Ohio C. D. 369, holding that private corporations are persons within meaning of constitutional guarantee of right of freedom and protection of property; *Norwalk Sav. Bank v. Norwalk Metal Spinning & Stamping Co.* 6 Ohio S. & C. P. Dec. 73, holding that corporation may become member of loan association.

Relationship between stockholders and corporations.

Cited in *Opinion of Justices*, 66 N. H. 630, 33 Atl. 1076, holding that stockholders are the corporation under act of incorporation; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 180, 27 L. R. A. 303, 39 N. E. 651, holding forbidden trade-combination agreement not rendered legal because entered into between corporation and its members; *Hulings v. Hulings Lumber Co.* 38 W. Va. 363, 18 S. E. 620, holding preference to directors of insolvent corporation prima facie fraudulent where ordered by directors at meeting at which such preferred directors were present but did not vote; *Louisville v. McAteer*, 26 Ky. L. Rep. 426, 1 L.R.A. (N.S.) 766, 81 S. W. 698, holding owner of all stock of a corporation does not own its property; *Keokuk Electric R. & P. Co. v. Weisman*, 146 Iowa, 688, 126 N. W. 60, holding that conveyance by owner of practically all stock of power plant, and of adjoining property, over which way existed to plant, of

plant carries with it such right of way; *Cronin v. Potter's Co-op. Co.* 29 Ohio L. J. 52, 11 Ohio Dec. Reprint, 754, denying specific performance of contract by adoption of by-law, by all stockholders, to dissolve corporation at end of ten years; *State v. National Cash Register Co.* 13 Ohio C. C. N. S. 76, 31 Ohio C. C. 640, holding that new corporation, organized by same persons and to succeed old company, party to conspiracy against trade, is responsible for acts of old company; *Cincinnati International R. Co. v. Murray*, 1 Ohio N. P. N. S. 303, holding that reservation in lease of railroad of rent in favor of trustee for benefit of stockholders of lessor is equivalent to reservation of rent in favor of lessor itself; *Dye v. Hermes*, 32 Ohio L. J. 121, 1 Ohio S. & C. P. Dec. 570, holding that where stockholder buys all stock except from one stockholder and converts property of corporation, latter stockholder may bring action against former for accounting.

Cited in footnote to *Leinkauf v. Lombard*, 20 L. R. A. 48, which holds that loose, defective, or irregular way of conducting business by corporate managers will not make contract their individual agreement.

Distinguished in *Goebel v. Herancourt Brewing Co.* 7 Ohio N. P. 230, 2 Ohio S. & C. P. Dec. 377, holding minority directors and corporation separate and distinct bodies; *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.* 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 Fed. 41, holding officers or stockholders not liable for breach of contract by corporation; *Goebel v. Herancourt Brewing Co.* 7 Ohio N. P. 230, 2 Ohio S. & C. P. Dec. 377, holding that illegal act of three out of nine directors is not act of corporation.

Adverse possession by tenant in common.

Cited in *Elder v. McClaskey*, 17 C. C. A. 265, 37 U. S. App. 1, 70 Fed. 542, holding that possession of tenant in common may become adverse to cotenant upon constructive notice of ouster.

Effect of abuse of corporate power.

Approved in *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 487, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding corporation for production of oil and gas may be deprived of franchises for agreement with rival which fixes price and prevents supplying rival's customers; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 393, 61 L. R. A. 474, 96 Am. St. Rep. 515, 73 S. W. 645, holding that court may impose fine, in lieu of forfeiture of charter for entering unlawful combination.

Cited in *State v. Creamery Package Mfg. Co.* 115 Minn. 210, — L.R.A.(N.S.) —, 132 N. W. 268, Ann. Cas. 1912 D, 820, holding that court has no discretion to punish, other than by forfeiture of its license, foreign corporation acting in restraint of trade; *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 73, 98 S. W. 539, as to nature of punishment by judgment of ouster.

Cited in footnote to *People v. Buffalo Stone & Cement Co.* 15 L. R. A. 240, which requires annulment of charter for failure to make annual report and pay in capital stock within prescribed time.

Actions questioning exercise of corporate powers.

Cited in *Willoughby v. Chicago Junction R. & Union Stock-yards Co.* 50 N. J. Eq. 676, 25 Atl. 277, holding question whether corporation can acquire and exercise powers in certificate of incorporation cannot be raised by stockholder in suit prosecuted in behalf of corporation; *Atty. Gen. v. New York, N. H. & H. R. Co.* 197 Mass. 197, 83 N. E. 408, holding attorney general may bring in his own name proceedings in nature of quo warranto against a corporation abusing its corporate franchise or exercising franchise not granted to it.

Distinguished in *Stockton v. American Tobacco Co.* 55 N. J. Eq. 376, 36 Atl.

971, holding that equity cannot restrain corporation from authorized acts because of monopoly intended by incorporators; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 620, 56 L. R. A. 809, 88 Am. St. Rep. 895, 40 S. E. 591, holding combination to do lawful act violative of no duty due to another, not unlawful conspiracy as to latter.

Agreements against public policy.

Approved in *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 581, 9 C. C. A. 664, 27 U. S. App. 1, 61 Fed. 993, holding agreement between railroads to operate as to through traffic as if one corporation, and for division of traffic or gross earnings thereof, void; *Jackson v. Akron Brick Asso.* 53 Ohio St. 306, 35 L. R. A. 288, 53 Am. St. Rep. 637, 141 N. E. 257, holding combination for purpose of controlling price of brick, against public policy; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291, holding contract solely to restrain competition and control prices, void; *Wittenberg v. Mollyneaux*, 60 Neb. 586, 83 N. W. 842, holding covenant in deed that grantee will not use specified property for hotel purposes for two years, valid.

Cited in *McDonald v. Haggerty*, 7 Ohio C. C. 509, holding shares in illegal trade combination not taxable as such; *Stockton v. Central R. Co.* 50 N. J. Eq. 76, 17 L. R. A. 107, 24 Atl. 964, holding that use of nominal lessee to disguise unlawful transfer of franchise will not prevent court reaching substance of transaction; *Collins v. Harrell*, 218 Mo. 336, 118 S. W. 432, to the point that combination whose object is monopoly of business of producing petroleum is contrary to policy of state and void; *Miller, Du B. & P. Mfg. Co. v. Laidlaw-D.-G. Co.* 4 Ohio N. P. N. S. 551, 17 Ohio S. & C. P. Dec. 502, holding that corporation may join association for mutual protection of its members and employees by amicable adjustment of their difficulties; *United States v. MacAndrews & F. Co.* 149 Fed. 834, as to what constitutes a monopoly; *Detroit Salt Co. v. National Salt Co.* 134 Mich. 131, 96 N. W. 1 (dissenting opinion), as to validity of contracts restraining trade; *State v. Creamery Package Mfg. Co.* 110 Minn. 434, 126 N. W. 126, holding fact that corporation taking title subsequently carried on the business in the names of the old concerns and placed agents in the field who pretended to compete with each other but in fact secretly agreed upon prices, is evidence of the intent of the parties to agreement to form a combination in restraint of trade; *Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.* 58 W. Va. 28, 112 Am. St. Rep. 936, 50 S. E. 876, 6 Ann. Cas. 154, holding an agreement between competing public service corporations the consequence of which is the controlling of prices, limiting of production or suppressing competition in things useful to the public is contrary to public policy and void; *State v. Standard Oil Co.* 218 Mo. 350, 116 S. W. 902, on immateriality of malice as an element of illegal restraint of trade; *State v. Standard Oil Co.* 218 Mo. 402, 116 S. W. 902, on a trust arrangement whereby several corporations engaged in the same business are jointly managed as per se an unlawful restraint of trade; *State v. Hocking Valley R. Co.* 12 Ohio C. C. N. S. 58, 31 Ohio C. C. 183, holding that control of coal company by railroad by ownership of stock is illegal; *United States Teleph. Co. v. Middlepoint Home Teleph. Co.* 13 Ohio C. C. N. S. 343, 32 Ohio C. C. 22, holding that contract between local and long distance telephone companies for exclusive interchange of business is not void as against public policy; *Freeman v. Miller*, 9 Ohio N. P. N. S. 31, holding that contracts by manufacturer of proprietary articles with vendees to protect fixed retail price are void as in restraint of trade; *Graf v. Master Horse-shoers' Protective Asso.* 1 Ohio N. P. N. S. 426, 15 Ohio S. & C. P. Dec. 20, holding that combination of persons, engaged in business of horseshoeing, tending

to impair competition and enhance prices, is void; *McDonald v. Haggerty*, 7 Ohio C. C. 509, 4 Ohio C. D. 703, holding that Standard Oil Trust is against public policy and, therefore, void; *National Salt Co. v. United Salt Co.* 12 Ohio S. & C. P. Dec. 399, holding that agreement by one salt company to buy stock of another and give its stock in payment is combination in restraint of trade and void; *Hillenbrand v. Building Trades Council*, 14 Ohio S. & C. P. Dec. 644, granting injunction against labor union whose members maliciously induce or coerce workmen to leave employment, to compel employer to accede to demands of union.

Cited in footnote to *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance, unlawful.

Cited in notes (52 L. R. A.) 381) on right of corporations to consolidate; (16 L.R.A.(N.S.) 1136) on validity of agreements to control voting power of stock; (35 Am. St. Rep. 395) on right to transfer public franchises; (56 Am. St. Rep. 140) on agreements to control future voting of corporate stock; (74 Am. St. Rep. 237, 249, 269, 271) on combinations constituting unlawful trusts; (115 Am. St. Rep. 411) on power of corporation to form partnership with another corporation or individual.

Distinguished in *Cowan v. Fairbrother*, 118 N. C. 414, 32 L. R. A. 835, 54 Am. St. Rep. 733, 24 S. E. 212, holding agreement to refrain from editing or being connected with newspaper in specified county, valid; *Edmunds v. Illinois C. R. Co.* 2 Ill. C. C. 478, holding the fact that defendant is a corporation does not debar it from buying and holding the stock of other corporations or from enjoying all the rights and privileges which accompany such ownership.

Resulting benefits as defense to monopoly.

Approved in *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 736, 39 Atl. 923, holding agreement between producers of three fourths of supply of sanitary ware intended to control prices and prevent competition, void notwithstanding resulting benefits; *Gibbs v. McNeeley*, 60 L. R. A. 155, 55 C. C. A. 70, 118 Fed. 120, holding illegal combination not rendered legal by reasonableness of its prices.

Cited in *Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 106, holding same.

Exceptions in statute of limitations.

Cited in *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* 68 Kan. 591, 75 Pac. 1051, 1 Ann. Cas. 639, holding the enumeration by the legislature of exceptions to a statute of limitations by implication excludes all others.

Quo warranto as remedy for monopoly.

Cited in *Territory v. Long Bell Lumber Co.* 22 Okla. 905, 99 Pac. 911, as to writ of quo warranto being invoked to dissolve corporations violating anti-trust acts.

Limitations of quo warranto proceedings.

Cited in *State v. Bingham*, 14 Ohio C. C. 248, 7 Ohio C. D. 524, holding that proceedings in quo warranto by state to oust city commissioners from offices must be brought within five years.

Cited in notes (14 L.R.A.(N.S.) 339) on effect of laches upon state's right to oust corporation; (52 Am. St. Rep. 315), on statute of limitations in quo warranto proceedings.

Effect of ignorance of rights on limitations.

Cited in notes (55 Am. St. Rep. 516) on ignorance of one's rights as preventing running of statute of limitations; (16 Eng. Rul. Cas. 262) as to when limitations begins to run in case of fraud or concealment.

Disregard of technical claims.

Cited in *State v. Sheets*, 8 Ohio N. P. 255, 11 Ohio S. & C. P. Dec. 183, hold-

ing that court may disregard technical claim of athletic club to be within statute authorizing boxing exhibitions, when it is clearly organized to evade statute.

15 L. R. A. 160, *ROSE v. KING*, 49 Ohio St. 213, 30 N. E. 267.

Civil liability for violation of duty imposed by statute or ordinance.

Approved in *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 418, 45 N. E. 634, holding master liable for damages resulting from malicious delivery of adulterated milk to factory by servant in violation of statute; *Carrigan v. Stillwell*, 97 Me. 254, 61 L. R. A. 166, footnote p. 163, 54 Atl. 389, holding landlord liable for injury due to failure to provide fire-escapes according to statute.

Cited in *Berdos v. Tremont & S. Mills*, 209 Mass. 493, 95 N. E. 876, Ann. Cas. 1912B, 797, holding that any person, who suffered special damage from violation of statute prohibiting employment of children in factories, has right of action against violator of statute; *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 418, 4 L.R.A.(N.S.) 506, 45 N. E. 634, holding where defendant is liable under a criminal statute he is liable to a person directly injured civilly.

Cited in footnotes to *Schmalzried v. White*, 32 L. R. A. 782, which holds failure to comply with ordinance requiring fire-escapes admissible on question of negligence; *Pauley v. Steam Gauge & Lantern Co.* 15 L. R. A. 194, which holds operatives injured by failure to provide fire-escapes as required by law, entitled to recover; *Weeks v. McNulty*, 43 L. R. A. 185, which denies liability of keeper of hotel without fire-escapes for death of guest unless death caused thereby; *Huda v. American Glucose Co.* 40 L. R. A. 411, which holds screwing down of windows landing to fire-escapes not violation of statute.

Cited in notes (21 L.R.A.(N.S.) 178) on liability for injuries from lack or insufficiency of fire escapes; (23 L.R.A. 157) on liability of landlord failing to provide fire escape required by statute; (21 L.R.A.(N.S.) 178, on liability for injuries caused by lack or insufficiency of fire escape.

Liability of landlord for injuries due to defective premises.

Cited in notes (23 L. R. A. 157) on liability of landlord as to condition of part of premises not controlled by tenant; (34 L. R. A. 830) on landlord's liability for injury to tenant by defect in premises.

Tenement house and apartment houses.

Cited in *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 200, 58 N. E. 576, raising, without deciding, question whether dwelling in which rooms are rented to temporary occupants, is tenement house; *Burton v. Stapely*, 4 Ohio N. P. N. S. 71, 17 Ohio S. & C. P. Dec. 6, holding that erection of apartment house is violation of clause in deed requiring use of premises for residence purposes only.

Cited in footnotes to *Hutchinson v. Ulrich*, 21 L. R. A. 391, which construes restriction into "single dwelling" as authorizing apartment house; *Kitching v. Brown*, 70 L.R.A. 742, which holds modern apartment house not within covenant against erection of "tenement house."

Act prescribing fire-escapes.

Cited in *Arms v. Ayer*, 192 Ill. 610, 58 L. R. A. 282, footnote p. 277, 85 Am. St. Rep. 357, 61 N. E. 851, holding that statute providing for effective fire-escapes on specified buildings may invest inspector with discretion as to number, location, material, and construction; *People v. Davis*, 1 Ill. C. C. 280, as to act requiring fire escapes not being inoperative on account of omission to designate upon whom duty rests to provide same.

Cited in footnote to *Carrigan v. Stillwell*, 68 L.R.A. 386, which denies necessity for fire escape for building having above first floor a restaurant kitchen containing three employees.

Liability without statutory notice.

Cited in *Arms v. Ayer*, 192 Ill. 615, 58 L. R. A. 283, 85 Am. St. Rep. 357, 61 N. E. 851, holding notice from inspector not essential to impose duty of placing fire-escape on building of kind for which same prescribed; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 485, 63 N. E. 239, holding guarding of machines not left to discretion of factory inspector by statute requiring employers properly to guard machines; *Woolf v. Nauman Co.* 128 Iowa, 266, 103 N. W. 785, holding notice not necessary under statute requiring guarding of machinery to render employee liable for negligence in failure to guard.

Determination of precautions for safety of persons against fires.

Cited in *Board of Education v. Sawyer*, 7 Ohio N. P. N. S. 415, 19 Ohio S. & C. P. Dec. 13, holding that state may delegate to inspectors determination of precautions necessary for safety of persons against dangers of fires in schoolhouses.

15 L. R. A. 166, *ALLEN v. STATE S. S. CO.* 132 N. Y. 91, 43 N. Y. S. R. 386, 28 Am. St. Rep. 556, 30 N. E. 482.

Negligence in performance of gratuitous services.

Approved in *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 92, 27 L. R. A. 843, 50 Am. St. Rep. 313, 40 N. E. 138; *Eighmy v. Union P. R. Co.* 93 Iowa, 542, 27 L. R. A. 297, 61 N. W. 1056; *Haggerty v. St. Louis, K. & N. R. Co.* 100 Mo. App. 450, 74 S. W. 456, holding corporation voluntarily providing physician for employees not liable for his negligent or tortious act in treatment of those accepting services; *Galveston, H. & S. A. R. Co. v. Scott*, 18 Tex. Civ. App. 324, 44 S. W. 589, holding railway not liable for errors of competent physician employed to attend one injured by its cars; *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 127, 109 Fed. 298; *Joel v. Woman's Hospital*, 89 Hun, 74, 35 N. Y. Supp. 37, holding public charitable institution not liable for negligence of competent nurse; *Collins v. New York Post Graduate Medical School & Hospital*, 59 App. Div. 66, 69 N. Y. Supp. 106, holding post-graduate school not liable for negligence of surgeon selected with due care, to patient paying for room, board, and attendance, but not for services; *Warren v. Merchants Exchange*, 52 Mo. App. 171, holding merchants' exchange providing facilities and rules for trading by members, not liable for negligence of clerk where no negligence in his appointment shown.

Cited in *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 376, 47 C. C. A. 122, 109 Fed. 294, holding charitable hospital not liable for negligence of a nurse; *Barden v. Atlantic Coast Line R. Co.* 152 N. C. 328, — L.R.A.(N.S.) —, 67 S. E. 971, holding railroad company not liable for negligence or malpractice of surgeon of its relief association where there is no evidence that the company was negligent in his selection.

Cited in footnote to *Richardson v. Carbon Hill Coal Co.* 20 L. R. A. 338, which holds employer liable for unfitness of surgeon employed by him to attend servant and paid out of benefit fund created by deductions from wages of employees.

Cited in notes (31 L.R.A. 263) on responsibility of carrier for mistake of competent physician furnished passengers taken ill during journey; (36 L.R.A. (N.S.) 52) on liability of one other than physician or surgeon contracting to provide medical attention; (19 Eng. Rul. Cas. 219) on liability of ship owner for negligence of ship surgeon.

Distinguished in *Kellogg v. Church Charity Foundation*, 128 App. Div. 216, 112 N. Y. Supp. 566, holding charitable hospital liable to pedestrian injured by negligence of driver of its ambulance.

Marketing of poisonous gases.

Cited in *Taintor v. Charles Beseler Co.* 33 Misc. 723, 68 N. Y. Supp. 980, holding that affidavit must show marketing of poisonous gas to sustain attachment against foreign corporation in action for damages due to purchase of such gas because falsely labeled.

Liability of druggist.

Cited in *Willson v. Faxon, Williams & Faxon*, 138 App. Div. 367, 122 N. Y. Supp. 783, holding that druggist was not liable for unintentional consequential injury resulting from lawful act when failure to exercise proper care cannot be imputed.

Cited in note (55 Am. St. Rep. 255, 256) on liability of apothecaries and druggists.

15 L. R. A. 169, *JACOBS v. BALLENGER*, 130 Ind. 231, 29 N. E. 782.

Payment of interest before due.

Cited in footnote to *Skelly v. Bristol Sav. Bank*, 19 L. R. A. 599, which holds interest paid in advance not recoverable.

Application of payments.

Cited in note (96 Am. St. Rep. 54, 69) on application of payments.

15 L. R. A. 172, *SMITH v. REEDER*, 21 Or. 541, 28 Pac. 890.

Re-entry by landlord.

Approved in *Smith v. Detroit Loan & Bldg. Asso.* 115 Mich. 348, 39 L. R. A. 412, 69 Am. St. Rep. 575, 73 N. W. 395, holding that landlord who peaceably regained possession during temporary absence of tenant in default, and with notice of termination of lease, may defend with necessary force against tenant.

Cited in *Myer v. Roberts*, 50 Or. 85, 12 L.R.A.(N.S.) 196, 126 Am. St. Rep. 733, 89 Pac. 1051, 15 A. & E. Ann. Cas. 1031, holding assignment by tenant of nonassignable lease worked forfeiture of lease and authorized landlord to re-enter.

Forceful entry.

Cited in *Steil v. Dessmore*, 3 Alaska, 397, holding if there is no more force used than is implied in every trespass, with nothing to excite fear of personal violence, the entry is not forcible under statute; *Sommer v. Compton*, 52 Or. 178, 96 Pac. 124, holding, defendant in ejectment claiming title to the land, his entry by taking down a fence without plaintiff's permission was not a "forcible entry" under the statute.

Cited in note (8 L.R.A.(N.S.) 429) on forcible entry and detainer against one forcibly dispossessing peaceable possessor in asserting lawful right to possession.

Right of appeal in forcible entry and detainer.

Cited in *Wolfer v. Hurst*, 47 Or. 160, 80 Pac. 419, 8 A. & E. Ann. Cas. 725, as recognizing the right to appeal from justice court in action of forcible entry and detainer.

15 L. R. A. 177, *KINGEN v. KELLEY*, 3 Wyo. 566, 28 Pac. 36.

Acts or decisions not subject to collateral attack.

Approved in *State v. Krohne*, 4 Wyo. 356, 34 Pac. 3, holding that in proceeding upon forfeited bail bond illegality of arrest is no defense.

Cited in *Hollibaugh v. Hehn*, 13 Wyo. 273, 79 Pac. 1044, holding it not competent in habeas corpus proceedings to assail the judgment under which petitioners were imprisoned for any irregularity, error or defect not affecting the jurisdiction of court to render the judgment.

Cited in note (39 L. R. A. 454) on decision against constitutional right as nullity subject to collateral attack.

Sentence to imprisonment beyond state boundaries.

Approved in *McKinney v. State*, 3 Wyo. 730, 16 L. R. A. 715, 30 Pac. 293, sustaining validity of sentence to imprisonment in prison beyond state limits.

Extradition.

Cited in *Re Moyer*, 12 Idaho, 261, 12 L.R.A.(N.S.) 231, 118 Am. St. Rep. 214, 85 Pac. 897, holding fact that a wrong has been committed against a prisoner in manner or method pursued in his extradition no reason why he should not answer charge against him when brought into state where he committed the crime.

Habeas corpus.

Cited in *Hovey v. Sheffner*, 16 Wyo. 265, 15 L.R.A.(N.S.) 230, 125 Am. St. Rep. 1037, 93 Pac. 305, 15 A. & E. Ann. Cas. 318, holding question of former jeopardy or acquittal cannot be raised on habeas corpus; *Ex parte Raicevich*, — Tex. Crim. Rep. —, 36 L.R.A.(N.S.) 244, 140 S. W. 98, holding that one held on governor's warrant in interstate rendition proceedings is not entitled to release because he was forcibly brought into state from foreign country, and then arrested as fugitive, if state officers did not bring him into state.

Cited in note (87 Am. St. Rep. 173, 191) on release of prisoner on habeas corpus after judgment and sentence.

Peace for imprisonment of convicts.

Cited in *Ex parte Tani*, 29 Nev. 397, 13 L.R.A.(N.S.) 523, 91 Pac. 137, holding fixing the place where prisoner is to be confined is not a part of the judgment.

15 L. R. A. 187, *BUCK v. ELLENBOLT*, 84 Iowa, 394, 51 N. W. 22.

Jurisdiction over waters.

Cited in *State v. Faurde*, 54 W. Va. 128, 63 L. R. A. 880, 46 S. E. 269, sustaining right of Ohio to fix rates for ferriage over Ohio river to West Virginia; *Roberts v. Fullerton*, 117 Wis. 226, 65 L. R. A. 962, 93 N. W. 1111, holding states' "concurrent jurisdiction over waters" not applicable to enforcement of fish and game laws; *Cook v. State*, 81 Miss. 150, 32 So. 312, holding that state's jurisdiction over violations of liquor laws extends to centre of boundary river.

Water boundaries.

Cited in footnotes to *McBurney v. Young*, 29 L. R. A. 539, which defines low-water mark as ordinary low-water mark; *State v. Haug*, 29 L. R. A. 390, which holds shallow lake ordinarily without current not part of state boundary; *Cooley v. Golden*, 21 L. R. A. 300, which holds water line of Missouri river boundary of land; *Bigelow v. Nickerson*, 30 L. R. A. 336, which holds sovereignty of Wisconsin extends to Lake Michigan; *Simpson v. State*, 22 L. R. A. 248, which holds person in boat on Georgia side of Savannah river *prima facie* in Georgia.

Cited in notes (23 L. R. A. 522) on boundary of municipality on navigable stream; (18 L. R. A. 698) on ownership as to boundary waters of beds of lakes and ponds; (22 L. R. A. 506) on adoption as to national boundary river, of common law in the United States; (29 L. R. A. 71) on jurisdiction as to taxation of bridge over river forming boundary of state or its divisions; (65 L.R.A. 953, 962) on jurisdiction over boundary rivers; (25 L.R.A.(N.S.) 649) on jurisdiction over sloughs, bays, or lakes connected with river forming interstate boundary.

15 L. R. A. 190, *PEOPLE v. AH TEUNG*, 92 Cal. 421, 28 Pac. 577.

Assisting prisoner to escape.

Cited in *King v. State*, 42 Fla. 265, 28 So. 206, holding information charging

obstruction of officer, and alleging that prisoner was in lawful custody of sheriff sufficient; *Adams v. State*, 121 Ga. 164, 48 S. E. 910, holding it not a penal offense to liberate one from unlawful custody.

Escape as crime.

Cited in *State v. Clark*, 32 Nev. 153, 104 Pac. 593, Ann. Cas. 1912 C, 754, holding that when imprisonment is unlawful, person escaping therefrom is not guilty of a crime.

15 L. R. A. 194, *PAULEY v. STEAM GAUGE & LANTERN CO.* 131 N. Y. 90, 29 N. E. 999.

Duty to provide fire-escapes.

Approved in *Landgraf v. Kuh*, 188 Ill. 495, 59 N. E. 501, holding that statute requiring fire-escapes to be placed upon buildings imposes duty unknown to the common law; *Schmalzried v. White*, 97 Tenn. 42, 32 L. R. A. 784, 36 S. W. 393, holding landlord not liable for failure to provide fire-escapes unless same required by statute or ordinance.

Cited in *People v. Davis*, 1 Ill. C. C. 259, holding statute requiring fire escapes must be strictly construed; *Maiorea v. Myers*, 131 App. Div. 211, 115 N. Y. Supp. 923, holding no duty at common law resting upon owners of building to provide fire escapes; *Yall v. Snow*, 201 Mo. 519, 10 L.R.A.(N.S.) 182, 119 Am. St. Rep. 781, 100 S. W. 1, 9 A. & E. Ann. Cas. 1161, holding at common law the owner of hotel building properly constructed was under no duty to provide fire escapes.

Cited in footnote to *Carrigan v. Stillwell*, 68 L.R.A. 386, which denies necessity for fire escapes for building having above first floor a restaurant kitchen containing three employees.

Cited in notes (15 L.R.A. 162) on liability for injuries caused by lack or insufficiency of fire escapes; (1 L.R.A.(N.S.) 1092) on conclusiveness of official certificate approving fire escapes; (10 L.R.A.(N.S.) 177, 180) on liability for injuries caused by lack or insufficiency of fire escapes.

Civil liability for breach of statutory duty.

Cited in *Johansen v. Eastmans Co.* 44 App. Div. 271, 60 N. Y. Supp. 708, holding failure to comply with statute requiring shafting to be properly guarded, evidence of negligence; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 463, 30 L. R. A. 83, 49 Am. St. Rep. 935, 32 S. W. 460; *Marino v. Lehmaier*, 173 N. Y. 536, 61 L. R. A. 814, footnote p. 812, 66 N. E. 572, holding violation of statute prohibiting employment of children, negligence; *Brown v. Wittner*, 43 App. Div. 137, 59 N. Y. Supp. 385, sustaining injured person's right of action for violation of statutory duty to provide light in hallway; *Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 153, 58 L. R. A. 946, 64 N. E. 610, sustaining master's liability for injuries resulting from failure to comply with statutory duty, although no special remedy provided; *Weeks v. McNulty*, 101 Tenn. 506, 43 L. R. A. 188, footnote p. 185, 70 Am. St. Rep. 693, 48 S. W. 809, denying liability of keeper of hotel without fire-escapes required by ordinance, for death of guest, unless death proximately caused thereby; *Johnson v. Snow*, 102 Mo. App. 240, 76 S. W. 675, denying landlord's liability for injury to lodger through lessee's failure to provide fire-escapes, as required by statute; *Clements v. Potomac Electric Power Co.* 26 App. D. C. 500, holding fact that statute imposes a criminal liability for its breach does not affect right to recover therefor civilly; *Racine v. Morris*, 136 App. Div. 473, 121 N. Y. Supp. 146, holding owner of building who fails to provide guards for elevator as required by statute liable to police officer lawfully on premises injured by reason of such failure; *Rooney*

v. *Brogan Constr. Co.* 107 App. Div. 263, 95 N. Y. Supp. 1, holding when owner of building fails to enclose hoist shafts as required by statute he is liable to laborer injured by reason thereof; *Action v. Reed*, 104 App. Div. 510, 93 N. Y. Supp. 911, holding failure of hotel proprietor to erect standpipe as required by statute gave right of action to one injured by reason of omission.

Cited in footnote to *Carrigan v. Stillwell*, 61 L. R. A. 163, which holds owner of rented building liable for injury for lack of fire-escapes required by statute.

Cited in notes (9 L.R.A.(N.S.) 344, 379, 387, 389) on private action for violation of statute not expressly conferring it; (19 Eng. Rul. Cas. 57) on liability for injury due to neglect of statutory precautions.

Distinguished in *Koch v. Fox*, 71 App. Div. 294, 75 N. Y. Supp. 913, holding owner not liable for negligence of independent contract or under building ordinance relating to "owner or general contractor;" *Huda v. American Glucose Co.* 154 N. Y. 481, 40 L. R. A. 414, footnote p. 411, 40 N. E. 897, same case below 13 Misc. 661, 34 N. Y. Supp. 931, holding employer not negligent in fastening windows leading to fire-escapes when no statute violated thereby and escape not barred; *Knisley v. Pratt*, 148 N. Y. 378, 32 L. R. A. 369, 42 N. E. 986, holding employer not civilly liable for disregard of statutory duty to guard cogwheel, where risk assumed by employee; *Paltey v. Egan*, 122 App. Div. 516, 107 N. Y. Supp. 444, holding in order to recover for breach of statutory duty the one seeking to recover must come within class for whose benefit statute was enacted.

Right to recover for breach of duty.

Cited in *Berdos v. Tremont & S. Mills*, 209 Mass. 493, 95 N. E. 876, Ann. Cas. 1912B, 797, holding that any person who suffers special damage from violation of statute prohibiting employment of minors in factories has right of action against violator of statute; *MacMullen v. Middletown*, 112 App. Div. 86, 98 N. Y. Supp. 145, as to right of anyone interested in performance of duty to recover damages for its breach.

Validity of statutes relating to fire-escapes and business restrictions.

Cited in *Arms v. Ayer*, 192 Ill. 610, 58 L. R. A. 282, footnote p. 277, 85 Am. St. Rep. 357, 61 N. E. 851, which sustains statute requiring fire-escapes on certain kinds of buildings giving factory inspector discretion as to their number, location, etc.; *Racine v. Morris*, 201 N. Y. 244, 94 N. E. 864, holding that legislature may by statute create duty unknown to common law, violation of which statute will give cause of action for damages.

Cited in note (21 L. R. A. 795) on constitutionality of statutes restricting contracts and business.

What constitutes compliance with statutory requirement.

Cited in *Johnson v. Steam Gauge & Lantern Co.* 146 N. Y. 155, 40 N. E. 773, holding proper fire-escapes not supplied, within meaning of statutes where owner negligently leaves stanchions and chute exposed beneath ladder; *Cobb v. Welcher*, 75 Hun, 284, 26 N. Y. Supp. 1068, holding statutory requirement as to guards for machinery fulfilled by furnishing guard sufficient to protect against accidents reasonably apprehended; *Gorman v. McArdle*, 67 Hun, 486, 22 N. Y. Supp. 479, holding employer providing escape over adjoining building equally safe and convenient with outside fire-escape specified by statute, not civilly liable for negligence; *Ekendahl v. Hayes*, 10 App. Div. 490, 42 N. Y. Supp. 226, raising, without deciding, question whether statute requiring machine to be guarded is complied with by placing post in such proximity as to satisfy inspector of its sufficiency.

Defective appliances and machinery.

Distinguished in *Pzepka v. American Glucose Co.* 11 Misc. 132, 31 N. Y. Supp.

1019, sustaining action for employee's injuries from fire resulting from specified defects in appliances and machinery and due wholly to employer's carelessness.

Conclusions amounting to speculation or conjecture.

Cited in Schoepflin v. Coffey, 162 N. Y. 20, 56 N. E. 502, holding libel not shown by mere evidence of statements made to reporter although subsequently published; Shotwell v. Dixon, 163 N. Y. 53, 57 N. E. 178, holding knowledge by creditor of debtor's intention to assign, not inferable from mere fact of transfers to creditors on day preceding assignment; Cassidy v. Uhlmann, 170 N. Y. 534, 63 N. E. 554 (dissenting opinion), majority holding unusual presence of director at bank preceding its failure, evidence of fraud in permitting receipt of deposits after insolvency; Lake v. Wendt, 21 App. Div. 284, 48 N. Y. Supp. 50, holding instruction permitting jury to speculate as to cause of injury, improper; Egan v. Dry Dock, E. B. & B. R. Co. 12 App. Div. 564, 42 N. Y. Supp. 188, holding inspection of boiler by hammer test not established by evidence of such tapping on inside as was usual in cleaning; Johnson v. New York C. & H. R. R. Co. 173 N. Y. 83, 65 N. E. 946, holding allegation of assault in ejecting person from train not sustained by evidence which may be true without impeaching trainman testifying to contrary; Laidlow v. Sage, 158 N. Y. 95, 44 L. R. A. 224, 52 N. E. 679, holding action for injuries from being drawn in front of another to serve as shield from impending explosion, not sustained by mere conjecture as to increase of injuries thereby; Eastwood v. Retsof Min. Co. 86 Hun, 96, 34 N. Y. Supp. 196, holding negligence in failure to prescribe rules may be inferred where danger was so plain as to require them; Caven v. Troy, 32 App. Div. 157, 52 N. Y. Supp. 804, holding freedom from contributory negligence in using defective highway not established in absence of testimony showing care or other circumstances indicating absence of negligence; Smart v. Kansas City, 91 Mo. App. 593, holding municipality not liable for injury which may have resulted either from fall due to defective sidewalk or from pre-existing disease; Weber v. Third Ave. R. Co. 12 App. Div. 520, 42 N. Y. Supp. 789, denying right of recovery for death from consumption on theory that it was contracted as result of injury to knee, where tuberculosis in knee unproven; Seifter v. Brooklyn Heights R. Co. 169 N. Y. 267, 62 N. E. 349 (dissenting opinion), majority holding fractured ankle bone not perforating skin not immediate cause of death from septic pneumonia four months after injury; Purcell v. Lauer, 14 App. Div. 44, 43 N. Y. Supp. 988 (dissenting opinion), majority holding injury to knees proximate cause of death sixteen months later from inflammation of stomach traceable to such injury.

15 L. R. A. 199, STATE v. BOWERS, 35 S. C. 262, 28 Am. St. Rep. 847, 14 S. E. 488.

What constitutes attempt to commit felony.

Approved in Com. v. Peaslee, 177 Mass. 273, 59 N. E. 55, holding mere collection and preparation of materials for setting fire not an attempt.

Cited in State v. Taylor, 47 Or. 460, 4 L.R.A.(N.S.) 420, 84 Pac. 82, 8 A. & E. Ann. Cas. 627, holding if a person endeavors or attempts to commit a felony himself and is interrupted or frustrated he is guilty of an indictable attempt and if he uses another person to accomplish the same purpose and the other fails to carry out design whether purposely or otherwise the result is the same.

Cited in footnotes to Groves v. State, 59 L. R. A. 598, which holds mere preparatory acts for commission of crime not an attempt; People v. Youngs, 47 L. R. A. 108, which holds preparation for committing burglary prevented by arrest while proceeding towards house, not an attempt.

Cited in notes (6 L.R.A.(N.S.) 804) on procuring or providing instrumentalities with intent to commit crime, as an attempt; (101 Am. St. Rep. 28) on attempts to commit arson.

Soliciting commission of crime.

Approved in *Com. v. Hutchinson*, 6 Pa. Super. Ct. 407, 42 W. N. C. 141, holding incitement to incendiarism indictable.

Cited in note (25 L. R. A. 437) on criminality of solicitation to crime which is not consummated.

15 L. R. A. 201, *BANISTER v. WAKEMAN*, 64 Vt. 203, 23 Atl. 585.

Right of court to suggest questions to be asked of witnesses.

Approved in *State v. Noakes*, 70 Vt. 257, 40 Atl. 249, holding that court may properly suggest to state's attorney what questions should be put to witnesses.

Civil liability for judicial acts.

Approved in *Rudd v. Darling*, 64 Vt. 460, 25 Atl. 479, holding immunity to judicial officers from civil liability, justification of the act of adjudication and imprisonment for contempt by municipal judge; *Root v. Rose*, 6 N. D. 583, 72 N. W. 1022, holding that judges of superior courts are never civilly liable for judicial acts, although proceeding from corrupt motive.

Cited in *Goodell v. Tower*, 77 Vt. 64, 107 Am. St. Rep. 745, 58 Atl. 790, holding when justice of the peace or inferior magistrate acts without his jurisdiction in issuing a warrant to the injury of another person he is personally liable; *McIvor v. McGillivray*, 40 N. S. 460, holding magistrate who issued a warrant of commitment imposing punishment which was not authorized by statute, liable.

Motions after mandate of appellate court.

Cited in *Monahan v. Monahan*, 77 Vt. 157, 59 Atl. 176, holding supreme court will not continue a cause after its mandate has been sent down and cause entered on docket of lower court.

15 L. R. A. 205, *COM. ex rel. HENSEL v. FITLER*, 147 Pa. 288, 23 Atl. 568.

Preference of veterans as to positions in civil service.

Cited in footnote to Opinion of Justices, 34 L. R. A. 58, which sustains act preferring veterans to all persons except women in civil service.

Civil service act.

Cited in *Justice v. Philadelphia*, 37 Pa. Super. Ct. 269, as construing act providing for appointment and promotion of employee of city by competitive examinations.

Construction of statutes.

Cited in *Com. v. Harrison*, 35 Pa. Co. Ct. 215, as to how intention of legislature is determined.

Officers, clerks and employees.

Cited in *Hand v. Cook*, 29 Nev. 544, 92 Pac. 3, holding government mineral surveyor not officer, clerk or employee of the United States within act preventing such persons from obtaining government land.

15 L. R. A. 209, *HOLMES v. TLSON*, 147 Pa. 305, 23 Atl. 564.

What constitutes warranty.

Approved in *Herman v. Brinker*, 17 Pa. Super. Ct. 179, holding statement that cow was all right, not warranty of soundness.

Cited in *Wilkinson v. Stettler*, 46 Pa. Super. Ct. 408, holding that statement of vendor of horse that he is "solid, sound, all right and would work any place"

is not warranty; *McAllister v. Morgan*, 29 Pa. Super. Ct. 480, holding question as to whether there was a warranty or not was for the jury.

Cited in note (6 Eng. Rul. Cas. 503) on what constitutes warranty.

Breach of warranty.

Cited in *Hallman v. Good, H. & Co.* 24 Lanc. L. Rev. 198, 16 Pa. Dist. R. 824, holding in order to entitle vendee to recover damages for breach of warranty, he must show breach.

15 L. R. A. 211, *TENNESSEE MFG. CO. v. JAMES*, 91 Tenn. 154, 30 Am. St. Rep. 865, 18 S. W. 262.

Liquidated damages and penalties.

Approved in *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 104 Tenn. 578, 50 L. R. A. 732, 78 Am. St. Rep. 933, 58 S. W. 303, holding carrier liable under penalty clause of shipper's contract of which it has knowledge, for loss sustained by failure to promptly deliver goods; *Kelly v. Fejervary*, 111 Iowa, 697, 83 N. W. 791, holding provision for "liquidated damages" in contract not showing whether intended as damages or penalty enforceable as former where not shown to be latter.

Cited in *New Britain v. New Britain Teleph. Co.* 74 Conn. 333, 50 Atl. 881, holding stipulation in bond providing for payment of certain sum in case of ceasing to compete with another telephone company, liquidated damages; *Wilson v. Godkin*, 136 Mich. 109, 98 N. W. 985, holding contract of employment for fixed term providing that employer might retain a certain number of days' pay till contract was completed, a provision for liquidated damages and not a penalty.

Cited in footnotes to *Wallis Iron Works v. Monmouth Park Asso.* 19 L. R. A. 456, which holds as liquidated damages amount expressly fixed as damages for default in completing grand stand; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract, that purchaser wrongfully using electrotype plates shall pay fine of ten times their price; *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per 100 feet for logs not delivered by specified date, one for liquidated damages; *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time, liquidated damages; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable.

Cited in notes (108 Am. St. Rep. 59) on agreements purporting to liquidate damages; (6 Eng. Rul. Cas. 561) as to when stipulation in contract is for a penalty and when for liquidated damages.

Relinquishment by father of right to earnings of minor.

Cited in *Biggs v. St. Louis, I. M. & S. R. Co.* 91 Ark. 126, 120 S. W. 970, holding father may relinquish right to earnings of minor child by express or implied emancipation.

Cited in note (113 Am. St. Rep. 114) on emancipation of infants.

15 L. R. A. 215, *BLAECHINSKA v. HOWARD MISSION & HOME FOR LITTLE WANDERERS*, 130 N. Y. 497, 29 N. E. 755.

Contracts by or between husband and wife.

Approved in *Re Callister*, 153 N. Y. 301, 60 Am. St. Rep. 620, 47 N. E. 268, Modifying 88 Hun, 90, 34 N. Y. Supp. 628, holding that wife cannot enforce promise by husband of payment for services as clerk; *Talcott v. Thomas*, 50

N. Y. S. R. 622, 21 N. Y. Supp. 1064, holding that husband cannot incur indebtedness for board in wife's restaurant which can be preferred to claims of his creditors; *Conger v. Corey*, 39 App. Div. 244, 57 N. Y. Supp. 236, holding contract between husband and wife for compensation of latter for household services and any payment thereunder, void as to husband's creditors; *Graf v. Feist*, 9 Misc. 481, 30 N. Y. Supp. 241, holding husband entitled to recover for wife's services where both worked for another and their joint earnings were used for support of family; *Re Dailey*, 43 Misc. 559, 89 N. Y. Supp. 538, holding married woman entitled to recover for her services when husband foregoes right to them; *Lashow v. Croissant*, 88 Hun, 209, 34 N. Y. Supp. 667, holding that wife may enforce claim for services and meals against third person with consent of husband that she should retain compensation therefor; *Carver v. Wagner*, 51 App. Div. 50, 64 N. Y. Supp. 747, holding that wife has action for stipulated compensation for taking her sister into household under agreement to which husband consented; *Re Kaufmann*, 104 Fed. 768, holding that contract to pay wife for services outside of domestic duties does not create debt provable in bankruptcy; *Emerson-Talcott Co. v. Knapp*, 90 Wis. 36, 62 N. W. 945, holding note signed by wife with husband to secure his debt and procure new contract in their joint names void, where intended to make her surety.

Cited in *Gorman v. New York, C. & St. L. R. Co.* 128 App. Div. 415, 113 N. Y. Supp. 219, holding husband is entitled to recover for services of wife rendered to a third person outside of and beyond her household duties; *Hardwick v. Salzi*, 46 Misc. 4, 93 N. Y. Supp. 265, holding under statute husband could convey directly to his wife his interest in land held by them as tenants in entirety; *Stevens v. Cunningham*, 181 N. Y. 460, 74 N. E. 434, holding under statute wife could recover for services rendered under contract to a third person.

Cited in footnote to *Dempster Mill Mfg. Co. v. Bundy*, 56 L. R. A. 739, which holds void, contract that product of joint labor of husband and wife shall belong to wife.

Cited in notes (20 L.R.A.(N.S.) 216) on right of married woman to recover for loss of time, services, wages, or impaired capacity to labor; (58 Am. St. Rep. 494, 496) on agreements to compensate husband or wife for services, or to relinquish claims on earnings or profits.

Distinguished in *Cornelius v. Rieser*, 44 N. Y. S. R. 493, 18 N. Y. Supp. 113, holding that wife may recover for helping in business of third person under contract made through husband; *Root v. Strang*, 77 Hun, 17, 28 N. Y. Supp. 273, holding that wife has right to compensation for services to third party where husband subscribed as witness to instrument given in payment therefor.

Criticized in *Klapper v. Metropolitan Street R. Co.* 34 Misc. 530, 69 N. Y. Supp. 955, holding that mere performance of services for third persons does not make wife's earnings for benefit of separate estate.

Damages for married women's loss of earnings or services.

Cited in *Kujek v. Goldman*, 9 Misc. 37, 29 N. Y. Supp. 294, sustaining action for loss of wife's services from premarital pregnancy by defendant in suit for fraud in inducing marriage; *Cullar v. Missouri, K. & T. R. Co.* 84 Mo. App. 350, holding that husband may recover damage to value of wife's domestic services from personal injury; *Thuringer v. New York C. & H. R. R. Co.* 71 Hun, 531, 24 N. Y. Supp. 1087, holding that husband has action for all loss of household services occasioned by wife's injuries, although not living with her; *Brown v. Third Ave. R. Co.* 19 Misc. 509, 43 N. Y. Supp. 1094, holding that wife's earnings presumptively belong to husband unless acquired in separate business or from separate estate; *Texas & P. R. Co. v. Humble*, 38 C. C. A.

508, 97 Fed. 843 (dissenting opinion), majority holding that married woman may recover for impairment of earning capacity; *Kirkpatrick v. Metropolitan Street R. Co.* 129 Mo. App. 532, 107 S. W. 1025 (dissenting opinion), as to right of husband to recover for loss of services of wife; *Standen v. Pennsylvania R. Co.* 214 Pa. 200, 63 Atl. 467, 6 A. & E. Ann. Cas. 408; *Norfolk R. & Light Co. v. Williar*, 104 Va. 681, 52 S. E. 380,—holding at common law and under statute husband entitled to recover for loss of wife's services.

Cited in footnote to *Harmon v. Old Colony R. Co.* 30 L. R. A. 658, which holds impairment of capacity to labor element of damages for injury to married woman.

Cited in note (28 Am. St. Rep. 80) on measure of damages for injury to wife.

Distinguished in *Texas & P. R. Co. v. Humble*, 181 U. S. 66, 45 L. ed. 752, 21 Sup. Ct. Rep. 526, holding that wife may recover loss of earnings in separate business, in action for personal injury; *Healey v. P. Ballantine & Sons*, 66 N. J. L. 351, 49 Atl. 511, holding that married woman may recover damages sustained by her in respect to separate business, from personal injury.

Liability of charitable corporation for negligence.

Cited in *Hordern v. Salvation Army*, 199 N. Y. 237, 32 L.R.A.(N.S.) 65, 139 Am. St. Rep. 889, 92 N. E. 626, to the point that recovery was had against charitable organization for injury resulting from negligence in maintenance of vault in sidewalk.

15 L. R. A. 218, *WELLS v. ALEXANDRE*, 130 N. Y. 642, 29 N. E. 142.

Validity of contracts in respect to certainty.

Cited in *East v. Cayuga Lake Ice Line*, 50 N. Y. S. R. 365, 21 N. Y. Supp. 887, holding accepted offer to furnish all ice needed in party's business, not to exceed a certain amount for one year at price specified, valid contract; *Warden Coal Washing Co. v. Meyer*, 98 Ill. App. 644, holding that acceptance of offer to supply coal at specified price with understanding of having acceptor's trade until specified date, obligates offerer to furnish amount required by acceptor's trade; *Manhattan Oil Co. v. Richardson Lubricating Co.* 113 Fed. 925, holding agreement between parties to respectively sell and buy all specified oil required for purchaser's use for twelve months from date, valid; *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 287, 62 N. E. 367, holding acceptance of offer to pay specified price for all iron in mill or on premises which acceptor desires to sell, valid; *Levey v. New York C. R. Co.* 4 Misc. 421, 24 N. Y. Supp. 124, holding acceptance of bid to furnish certain supplies for one year imposes duty of ordering under the contract all needed supplies covered thereby; *Horton v. Hall C. Mfg. Co.* 94 App. Div. 407, 88 N. Y. Supp. 73, holding agreement to continue manufacture of cotton goods implied in contract of employment to sell during specified year; *Excelsior Wrapper Co. v. Messenger*, 116 Wis. 556, 93 N. W. 459, upholding contract to furnish all roll-rag paper needed by party during year; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* 61 L. R. A. 405, footnote p. 402, 58 C. C. A. 222, 121 Fed. 298, holding purchase of acid phosphate by fertilizer manufacturer instead of manufacture of same, substantial breach of contract to take entire consumption of phosphate rock for fixed time at fixed price for purpose of manufacture of phosphate; *Hoffman v. Maffioli*, 104 Wis. 643, 47 L. R. A. 432, footnote p. 427, 80 N. W. 1032 (dissenting opinion), majority holding that agreement to furnish paving contractor crushed stone in "such quantities as may be desired" does not require furnishing of all stone needed; *Hickey v. O'Brien*, 123 Mich. 615, 49 L. R. A. 596, foot-

note p. 594, 81 Am. St. Rep. 227, 82 N. W. 241, which sustains contract by sellers of ice to purchase all ice necessary to carry on business for five years; *Boden v. Maher*, 105 Wis. 543, 81 N. W. 661, holding that meaning of stipulation to perform all work desired to have done before given time may be shown by parol; *El Dorado Ice & Planing Mill Co. v. Kinard*, 96 Ark. 188, 131 S. W. 460, holding that contract for sale of entire output of mill of known capacity for definite period and at certain prices is binding; *Golden Cycle Min. Co. v. Rapson Coal Min. Co.* 112 C. C. A. 95, 188 Fed. 183, holding that agreement by one party to purchase all coal of stated kind second party "may use" in operation of mine during limited period is valid; *Rozier v. St. Louis & S. F. R. Co.* 147 Mo. App. 298, 126 S. W. 532, holding that where railroad agreed with quarry company to take all material latter company could get out during specified period, it was bound to take such material; *Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co.* 89 C. C. A. 520, 162 Fed. 851, holding agreeing to effect that plaintiff is to furnish defendant with its entire consumption of coal, valid; *Lima Locomotive & Mach. Co. v. National Steel Castings Co.* 11 L.R.A. (N.S.) 719, 83 C. C. A. 593, 155 Fed. 79, holding contract to buy all that one shall require in manufacturing business, at specified prices, for a definite time, valid; *Mebius & D. Co. v. Mills*, 150 Cal. 237, 88 Pac. 917, holding contract for sale of salt giving buyer right to order all or any of several different grades named in contract, valid; *Bache v. Coppes, Z. & M. Co.* 35 Ind. App. 358, 111 Am. St. Rep. 171, 74 N. E. 41, holding contract for shipment of goods as specified and ordered from time to time as plaintiffs' "requirements" might demand them, valid; *Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co.* 210 Mo. 732, 109 S. W. 47, holding an accepted offer to furnish or deliver such articles of personal property as shall be needed, required or consumed by established business of the acceptor during a limited time binding; *Hardwick v. American Can Co.* 113 Tenn. 666, 88 S. W. 797, holding where defendant's predecessor had been purchasing stoves of plaintiff and a contract for purchase of stoves was in force when defendant succeeded to the business a subsequent contract between plaintiff and defendant for purchase of "5,000 or more stoves" within one year from date was sufficiently certain.

Cited in footnotes to *Davie v. Lumberman's Min. Co.* 24 L. R. A. 357, which holds indefinite, contract to mine ore at fixed price as long as it can be made to "pay;" *Minnesota Lumber Co. v. Whitebreast Coal Co.* 31 L. R. A. 529, which holds contract to buy "requirements" of coal for season not void for uncertainty; *Genet v. Delaware & H. Canal Co.* 19 L. R. A. 127, which holds agreement implied that lessee will not wilfully incapacitate itself to take out more than minimum quantity of coal per year; *Schwanebeck v. Smith*, 24 L. R. A. 168, which holds contract between abutters as to division and purchase of street about to be closed unenforceable for indefiniteness; *Stanton v. Singleton*, 47 L. R. A. 334, which denies right to specific performance of contract for "opening and developing" mining property.

Cited in notes (17 L. R. A. 178) on essentials to valid sale of goods; (11 L.R.A.(N.S.) 715, 717) on mutuality of accepted proposition to furnish such material as one needs.

Distinguished in *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 57 L. R. A. 699, footnote p. 696, 52 C. C. A. 29, 114 Fed. 81, which holds void, accepted offer to deliver at specified prices during specified period articles in such amounts as acceptor may desire; *Rafolovitz v. American Tobacco Co.* 73 Hun, 88, 25 N. Y. Supp. 1036, holding agreement to allow certain commission in consideration of purchase and sale of its product, without mutuality; *Wheel-*

ing Steel & L. Co. v. Evans, 97 Md. 313, 55 Atl. 373, holding order for tack plate without designating size, incomplete; A. Santaella & Co. v. Otto F. Lang Co. 84 C. C. A. 145, 155 Fed. 722, holding an accepted offer to sell or deliver, or to buy at specified prices, during a limited time, in such quantities as buyer may need or desire in his business, without any specification of quantity or amount, void; Jackson v. Alpha Portland Cement Co. 122 App. Div. 349, 106 N. Y. Supp. 1052, holding contract between manufacturer and dealer providing that latter in consideration of a lower rate than other dealers was to give preference to manufacturer's brand of article and "sell as much as possible," manufacturer agreeing to furnish all dealer required, invalid; Plumb v. J. W. Hallauer & Sons Co. 145 App. Div. 24, 130 N. Y. Supp. 147, holding that contract to buy as many apples as produce buyer could ship is void.

Effect of general assignment upon existing contract.

Approved in Vandergrift v. Cowles Engineering Co. 161 N. Y. 444, 48 L. R. A. 688, 55 N. E. 941, holding that general assignment for creditors does not abrogate or constitute breach of contract to build boat.

Construction of contracts.

Cited in Commercial Wood & Cement Co. v. Northampton Portland Cement Co. 115 App. Div. 393, 100 N. Y. Supp. 960, as to when covenant will be read into a contract where there is no express agreement to perform; Hearn v. Stevens, 111 App. Div. 106, 97 N. Y. Supp. 566, holding contract must be interpreted in view of conditions existing at time the arrangement was entered into, and if the continuance of those conditions is necessary to the proper performance of the contract, a provision will be implied that neither party is voluntary to change those conditions to the detriment of the other.

15 L. R. A. 221, LEONARD v. SOUTHERN P. CO. 21 Or. 555, 28 Pac. 887.

Admissibility of experiments or demonstrations.

Approved in Kramer v. Messner, 101 Iowa, 94, 69 N. W. 1142, holding evidence of amount of radiation of new heating plant and results therefrom admissible upon issue as to failure of original apparatus properly to heat greenhouse.

Cited in Peterson v. Standard Oil Co. 55 Or. 524, 106 Pac. 337, Ann. Cas. 1912 A, 625, holding that court may permit experiments to be made before jury and its ruling will not be disturbed unless there is abuse of discretion; State v. Nowells, 135 Iowa, 60, 109 N. W. 1016; Spires v. States, 50 Fla. 124, 39 So. 181, 7 A. & E. Ann. Cas. 214,—holding it within judicial discretion of trial court whether to permit experiments relevant to the issue to be made before jury during trial.

Annotation cited in Langdon-Creasy Co. v. Rouse, 139 Ky. 655, 72 S. W. 1113, Ann. Cas. 1912 B, 292, holding that court properly refused to permit expert witness to practically demonstrate before jury manner of fitting and lighting lamp which caused injury complained of.

Cited in footnotes to Chicago, St. L. & P. R. Co. v. Champion, 23 L. R. A. 861, which holds admissible, evidence of experiment as to effect of suddenly releasing brake on moving car; People v. Searcey, 41 L. R. A. 157, which holds box of sand containing tracks made with shoes of accused person admissible.

Cited in note (53 Am. St. Rep. 375, 377, 380) on experiments as evidence.

15 L. R. A. 226, *Ex parte* McNEELY, 36 W. Va. 84, 32 Am. St. Rep. 831, 14 S. E. 436.

Prosecution of crimes begun in one jurisdiction and consummated in another.

Cited in Coleman v. State, 83 Miss. 298, 64 L. R. A. 810, footnote p. 807, 35

So. 937, denying right of state to begin in one county prosecution for crime consummated in several counties, then to dismiss and prosecute in another; *State v. McAllister*, 65 W. Va. 101, 131 Am. St. Rep. 955, 63 S. E. 758, holding under constitution and laws of the state, a crime can be prosecuted and punished only in the state and county where the alleged offense was committed.

Cited in footnotes to *State v. Cutshall*, 16 L. R. A. 130, which holds bigamous marriage in one state not punishable in another in absence of cohabitation; *Graham v. People*, 47 L. R. A. 731, which requires institution of prosecution for obtaining money by confidence game in county where offense consummated; *Hargis v. Parker*, 69 L.R.A. 270, which sustains right to try in either county crime begun in one and consummated in another.

Cited in notes (34 L. R. A. 852) on time when homicide is deemed to be committed; (7 L.R.A.(N.S.) 670, 673) on power to provide for indictment in county or district other than where crime alleged to have been committed; (39 L.R.A.(N.S.) 824) on jurisdiction of homicide where wound inflicted in one place and death occurs in another; (44 Am. St. Rep. 80, 82) on place where crime is committed.

Jurisdiction of crimes committed partly in two different states.

Approved in *State v. Caldwell*, 115 N. C. 802, 20 S. E. 523, sustaining validity of statute providing for prosecution and punishment in county where death happens from injury inflicted beyond state limits.

Cited in footnote to *Coleman v. State*, 64 L.R.A. 807, which denies right of state to dismiss prosecution commenced in one of several counties having jurisdiction of crime partly consummated in each, and commence another in another county.

Sufficiency of indictment.

Cited in *Roberson v. State*, 42 Fla. 216, 28 So. 427 (dissenting opinion), majority sustaining indictment alleging death, within year and day, from wound in specified county without stating county or state where death occurred.

Reasonable doubt as to validity of statute.

Approved in *State v. Ellison*, 49 W. Va. 75, 38 S. E. 574, holding that reasonable doubt must be resolved in favor of constitutionality of statute.

15 L. R. A. 231, *FIRST UNIVERSALIST SOC. v. BOLAND*, 155 Mass. 171, 29 N. E. 524.

Estates created by deed or will.

Approved in *Weed v. Woods*, 71 N. H. 585, 53 Atl. 1024, holding reservation of building and land on which situated so long as a particular association may want it, creates determinable fee in estate retained; *Hunter v. Murfee*, 126 Ala. 133, 28 So. 7, holding fee simple absolute conveyed by deed to college trustees and successors for use of said college; *Hopkins v. Grimshaw*, 165 U. S. 356, 41 L. ed. 744, 17 Sup. Ct. Rep. 401, holding trust resulting to grantor's heirs upon failure of express trust in deed, not invalidated by rule against perpetuities.

Cited in *Carney v. Kain*, 40 W. Va. 816, 23 S. E. 650, holding that testator's heirs have possibility of resulting trust, where no provision is made for contingency of unborn beneficiaries not coming into existence; *Wilson v. Linder*, 18 Idaho, 448, 138 Am. St. Rep. 213, 110 Pac. 274, holding that under devise to "J," but in case of his death without wife or children, then to other children of testator, "J" took limited estate, subject to vesting of fee simple on his leaving him surviving wife or child; *Hanby v. Bailey*, 11 Del. Co. Rep. 373, to the point that unless reversion of determinable fee is limited to grantor it will be void.

for remoteness; *Pond v. Douglass*, 106 Me. 88, 75 Atl. 320, to the point that estate known as base, determinable or qualified fee may be created and is descendible; *North v. Graham*, 235 Ill. 181, 18 L.R.A.(N.S.) 627, 126 Am. St. Rep. 189, 85 N. E. 267, holding deed conveying land to a church organization, which provides that said tract of land shall "revert to the party of the first part whenever it ceases to be used or occupied as a meeting house or church," creates a determinable fee, which continues so long as the land is devoted to purposes of a meeting house or church; *Lyford v. Laconia*, 75 N. H. 225, 22 L.R.A.(N.S.) 1065, 139 Am. St. Rep. 680, 72 Atl. 1085, as to determinable fees being possible of creation.

Cited in footnotes to *Slegel v. Herbine*, 15 L. R. A. 547, which holds determinable fee created by absolute deed reserving to grantor right to profits; *Schultze v. Schultze*, 19 L. R. A. 90, which holds interest vested in nonresident alien heirs by power to sell within specific time fee determinable by nonexercise of power; *Flaten v. Moorhead*, 19 L. R. A. 195, which holds absolute, title in fee not passed by deed to municipality for public park forever; *Gannon v. Peterson*, 55 L. R. A. 701, which holds devise to one and heirs and assigns forever, to go to others upon death without issue, creates determinable fee in former; *Rowzee v. Pierce*, 40 L. R. A. 402, which holds land dedicated for ornamental public park cannot be used for schoolhouse; *Murphy v. Whitney*, 24 L. R. A. 123, which holds agreement that land descending to brothers and sisters shall, on death of last survivor, pass to child of only married one, not void as perpetuity.

Cited in notes (19 L. R. A. 267) on condition in deed that land is to be used for specified charitable, public, or quasi-public purposes; (11 L.R.A.(N.S.) 511, 520) on effect of specifying use of real estate in devise to religious society; (79 Am. St. Rep. 752) on what words create condition subsequent; 49 Am. St. Rep. 134) on rule against perpetuities; (23 Eng. Rul. Cas. 119) on time of accrual of title to reversionary property of a married woman.

Distinguished in *Hamlin v. Particular Baptist House*, 103 Me. 350, 69 Atl. 315, holding a conveyance to a committee named and to their successors in office as trustee for religious society, to their use and behoof forever, granted a fee simple in trust and not a determinable fee, although no words of limitations as to heirs were used.

Separate provisions in will.

Cited in *Peabody v. Tyszkiewicz*, 191 Mass. 322, 77 N. E. 839, holding a provision for income was separate and not to be resorted to for construction of the separate gift of the corpus.

15 L. R. A. 235, *GAMBEL v. TRIPPE*, 75 Md. 252, 32 Am. St. Rep. 388, 23 Atl. 461.

Requests for charitable purposes.

Cited in footnotes to *Woman's Foreign Missionary Soc. v. Mitchell*, 53 L. R. A. 711, which holds legacy to Board of Managers of Foreign Missionary Society of M. E. Church properly paid to Woman's Foreign Missionary Society; *Johnson v. Johnson*, 22 L. R. A. 179, which holds devise to trustees for some charitable purpose with preference for something of educational nature, bad for indefiniteness; *People v. Powers*, 35 L. R. A. 502, which holds trust to dispose of property among such charitable and benevolent institutions as trustee shall choose, void for indefiniteness; *Crerar v. Williams*, 21 L. R. A. 454, which holds arbitrary powers not given trustees of charity by authority to set aside amount of income to pay expenses; *Harrington v. Pier*, 50 L. R. A. 307, which

holds bequest for promotion of temperance work in certain city not fatally indefinite; *Thompson v. Brown*, 62 L. R. A. 398, upholding devise of fund to be distributed by executor "to poor" in his discretion.

Cited in notes (12 L.R.A.(N.S.) 1183) on validity of devise or bequest for such charitable purposes as executor or trustee may select; (14 L.R.A.(N.S.) 125, 134) on enforcement of general bequest for charity or religion; (64 Am. St. Rep. 756, 758, 761, 768) on certainty and unity required in charitable trusts; (5 Eng. Rul. Cas. 578) on invalidity of charitable bequest for indebtedness.

Distinguished in *Keith v. Scales*, 124 N. C. 516, 32 S. C. 809, holding charity for Moravian church and school in specified town, to be managed and controlled by Moravian church of another specified town, sufficiently specific.

Effect of death of trustee upon trust.

Cited in *Hadley v. Hadley*, 147 Ind. 429, 46 N. E. 823, holding devise to specified persons for charitable institution "if thought practicable," void upon death of trustee before trust takes effect; *Smith v. Floyd*, 56 Misc. 200, 107 N. Y. Supp. 231, holding where estate is given to executors in trust appointed by testator because of personal confidence and trust and peculiar fitness to carry out provisions of trust, powers given do not, unless so provided for, devolve upon successors.

Cited in note (130 Am. St. Rep. 523, 524) on who may execute a trust after death of one or all of trustees.

15 L. R. A. 236, *CRAIG v. SUMMERS*, 47 Minn. 189, 49 N. W. 742.

Liability or lien for taxes.

Cited in footnotes to *Gotthelf v. Stranahan*, 20 L. R. A. 455, which holds subsequent local assessments not within vendor's contract to convey free from encumbrances; *San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.* 18 L. R. A. 465, which holds mortgagee's duty to pay tax not discharged by assignment before tax levied; *Robinson v. Bierce*, 47 L. R. A. 275, which holds lien for taxes defeated by eight years unexplained delay in prosecuting suits for same; *Pettebone v. Smith*, 17 L. R. A. 423, which holds sewer and street assessments not within covenant for payment of all taxes by lessee.

Assignment of lease.

Approved in *McLennan v. Grant*, 8 Wash. 608, 36 Pac. 682, holding that grantee in quitclaim deed from one having entire interest of original lessee is mere assignee; *Ohio Iron Co. v. Auburn Iron Co.* 64 Minn. 407, 67 N. W. 221, holding lessee transferring and assigning whole term without reserving reversionary interest, can have no right of re-entry for breach of condition subsequent; *Lewis v. Richardson*, 2 Ind. Terr. 347, 51 S. W. 969, holding that transfer of all right, title, and interest in leasehold constitutes assignment of unexpired term.

Cited in *B. Roth Tool Co. v. Champ Spring Co.* 93 Mo. App. 539, 67 S. W. 967, holding that only such covenants in original lease as run with the land are binding upon assignee; *Herzig v. Blumenkrohn*, 122 App. Div. 761, 107 N. Y. Supp. 570, holding that where tenant conveys whole term but reserves right of re-entry for condition broken, such reservation is not of any reversion in term in land sufficient to make instrument sublease; *Weander v. Claussen Brewing Asso.* 42 Wash. 228, 114 Am. St. Rep. 110, 84 Pac. 735, 7 A. & E. Ann. Cas. 536, holding conveyance of entire interest by lessor an assignment of term; *Cameron Tobin Baking Co. v. Tobin*, 104 Minn. 334, 116 N. W. 838, on effect of parting with entire interest by lessee though in form of sublease.

Cited in note (117 Am. St. Rep. 98) on sub-letting of leased premises.

Distinguished in *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.* 135 Mo. 190, 33 L. R. A. 612, 36 S. W. 602, holding "lease" not a sublease or assignment transferring liability on original lease, where no unconditional liability to pay rent is created and original lessee retains all substantial and beneficial interest.

15 L. R. A. 240, *PEOPLE v. BUFFALO STONE & CEMENT CO.* 131 N. Y. 140, 29 N. E. 947.

Proceedings against corporations.

Approved in *State Invest. & Ins. Co. v. Superior Court*, 101 Cal. 149, 35 Pac. 549, holding that, upon revocation of franchise in state's proceeding authorized for that purpose, no further action can be had; *Murray v. American Surety Co.* 17 C. C. A. 142, 33 U. S. App. 43, 70 Fed. 345, holding that in proceedings instituted to enjoin transaction of business by bank, receiver cannot be appointed.

Cited in *People v. Bleeker Street & F. Ferry R. Co.* 140 App. Div. 615, 125 N. Y. Supp. 1045, holding that court is vested with discretion to grant or withhold leave to bring suit to annul franchise of corporation.

Effect of failure to file corporation report.

Cited in footnote to *Gold v. Clyne*, 17 L. R. A. 767, which holds directors not personally liable for failure to file report for debt coming into existence after termination of corporate existence.

15 L. R. A. 243, *STATE v. MOUNTS*, 36 W. Va. 179, 14 S. E. 407.

Validity of statute authorizing appointment of jury commissioners by judiciary.

Approved in *State v. Kendle*, 52 Ohio St. 356, 39 N. E. 947, holding act requiring common pleas judges to appoint jury commissioners, valid.

Cited in *Moore v. Nation*, 80 Kan. 686, 23 L.R.A.(N.S.) 1123, 103 Pac. 107, holding the power of selection of jurors is a court function; *State ex rel. Gubbins v. Anson*, 132 Wis. 476, 112 N. W. 475, holding there is no imposition of executive power in authorizing the courts or the judges thereof to select or direct machinery for obtaining jurors.

Cited in note (23 L.R.A.(N.S.) 1117) on power of legislature to impose upon judges duty to assist in drawing jurors.

— Other officers appointable by judges.

Cited in *Re Appointment of Revisor*, 141 Wis. 615, 124 N. W. 670, holding the legislature may delegate to courts or judges the right to appoint assistants and other officers to perform administrative acts in aid of court's judicial functions; *Re Counties Comprising Seventh Judicial Dist.* 22 Okla. 447, 98 Pac. 557, holding courts in discharge of their duty may appoint commissioners to apportion and assess damages for the opening of a highway or for a right of way.

Function of jury commissioners.

Cited in *Re Brenner*, 35 Misc. 220, 70 N. Y. Supp. 744, holding jury commissioner not county officer but local officer aiding in administration of justice.

Computation of time.

Cited in *Quinn v. Cambridge*, 187 Mass. 509, 73 N. E. 661, holding where an assessment is to be made within two years from passage of ordinance that under statute two years begins to run from time of approval by mayor; *State v. Williams*, 173 Ind. 417, 140 Am. St. Rep. 261, 90 N. E. 754, 21 Ann. Cas. 986, holding that term "after passage of this act" means after time at which act takes effect; *Sawyer v. Gallagher*, 151 Iowa, 69, 130 N. W. 173, to the point

that "time of passage of act" refers to time when it received votes of legislature, and not to date when approved by executive.

Cited in footnotes to *Sammis v. Bennett*, 22 L. R. A. 48, which holds that statute took effect sixty days after final adjournment; *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for appearance.

Cited in note (49 L.R.A. 244) on rule as to first and last days in computation of time.

Commencement of term of office.

Approved in *State v. Scott*, 36 W. Va. 706, 15 S. E. 405, sustaining appointment of jury commissioners June 10, 1891, for terms corresponding with unexpired terms commencing June 1, 1891, under provision that term shall commence June 1, next after appointment.

15 L. R. A. 249, *HUBBARD v. PRESTON*, 90 Mich. 221, 30 Am. St. Rep. 426, 51 N. W. 209.

Right to kill dogs.

Approved in *Thorne v. Mead*, 122 Mich. 273, 80 Am. St. Rep. 568, 80 N. W. 1080, holding that sheep owner may shoot sheep-killing dogs found in inclosure, without waiting for depredations; *Hagerstown v. Witmer*, 86 Md. 303, 39 L. R. A. 666, 37 Atl. 965, holding statute providing for summary destruction of dogs running at large contrary to law, within police power; *Walker v. Towle*, 156 Ind. 642, 53 L. R. A. 751, 59 N. E. 20, holding ordinance providing for killing of unmuzzled dogs, valid exercise of power to protect life, health, and property; *Nesbett v. Wilbur*, 177 Mass. 201, 58 N. E. 586, holding that dog engaged in killing hens may be killed in defense of property rights.

Cited in *Miller v. State*, 5 Ga. App. 465, 63 S. E. 571, holding a dog which has acquired the habit of killing sheep may be killed though not found at place where sheep were attacked; *McChesney v. Wilson*, 132 Mich. 254, 93 N. W. 627, 1 A. & E. Ann. Cas. 191, holding the killing of a dog justified which had killed a person's chickens and continually committed nuisances about his premises.

Cited in footnotes to *Hodges v. Causey*, 48 L. R. A. 95, which denies right to kill trespassing dog whose owner notified to keep him from premises; *Bowers v. Horan*, 17 L. R. A. 773, which holds barking and chasing of cats and tracking of newly painted porch not justification for killing of dog; *Patton v. State*, 24 L. R. A. 732, which holds malicious killing of dog not indictable; *Simmonds v. Holmes*, 15 L. R. A. 253, which authorizes killing of dog destroying tender plants in garden; *Jenkins v. Ballantyne*, 16 L. R. A. 689, which holds valid, ordinance for killing unregistered dog; *Nehr v. State*, 17 L. R. A. 771, which authorizes killing of dog without collar.

Cited in notes (38 L. R. A. 334) on municipal power over nuisance, as to right to kill dogs; (39 L. R. A. 677), on municipal power over nuisance affecting highways and streets as to animals running at large; (40 L. R. A. 510, 511) on property rights in dogs; (7 L.R.A.(N.S.) 349) on barking dogs as nuisance; (21 L.R.A.(N.S.) 700) on validity of statute permitting summary killing of domestic animals at large, other than dogs; (67 Am. St. Rep. 294, 295) on property in dogs and remedies for its enforcement; (9 Eng. Rul. Cas. 688) on property rights in, and liability for, injuries by dogs.

Liability for injury to trespasser by dangerous instrumentalities.

Cited in note (25 Eng. Rul. Cas. 114) on liability for injury to trespasser by dangerous instrumentalities.

15 L. R. A. 253, *SIMMONDS v. HOLMES*, 61 Conn. 1, 23 Atl. 702.

Assignment of error.

Approved in *Norwalk ex rel. Fawcett v. Ireland*, 68 Conn. 15, 35 Atl. 804, holding assignment embracing several distinct claims, defective; *Turner's Appeal*, 72 Conn. 319, 44 Atl. 310, holding assignment asserting error in charge as to burden of proof or other general topic, insufficient.

Cited in *Anderson v. Husted*, 79 Conn. 540, 66 Atl. 7, holding an assignment too general which alleges error in charging the jury as stated in plaintiff's proposed findings of facts, and as stated in findings of the court; *Beattie v. McMullen*, 82 Com. 497, 74 Atl. 767, holding assignment asserting error "in charging as court did, touching subject-matter" of such request, is too indefinite; *State ex rel. Lynch v. Whitehouse*, 80 Conn. 123, 67 Atl. 503, holding assignment covering instructions, some unexceptional and some in compliance with objector's written requests, as well as those complained of, is improper; *Chase v. Waterbury Sav. Bank*, 77 Conn. 299, 69 L.R.A. 335, 59 Atl. 37, 1 A. & E. Ann. Cas. 96, holding an assignment which fails to point out the particular errors complained of, in a charge covering twelve pages of printed record, raises no question court is bound to review.

Right to kill dogs.

Cited in *Ford v. Glennon*, 74 Conn. 10, 49 Atl. 189, holding one liable for shooting registered dog as he stood with paws against tree looking at cat; *Miller v. State*, 5 Ga. App. 465, 63 S. E. 571, holding when dog acquires the egg-sucking or sheep-killing habit, he becomes a nuisance and may be destroyed as such.

Cited in footnotes to *Nehr v. State*, 17 L. R. A. 771, which authorizes killing of dog without collar; *Hodges v. Causey*, 48 L. R. A. 95, which denies right to kill trespassing dog whose owner notified to keep him from premises; *Bowers v. Horan*, 17 L. R. A. 773, which holds barking and chasing of cats and tracking newly painted porch not justification for killing of dog.

Cited in notes (15 L. R. A. 252) on right to kill dogs; (40 L. R. A. 511) on property rights in dogs; (67 Am. St. Rep. 294) on same point.

Liability for injury to trespasser by dangerous instrumentalities.

Cited in note (25 Eng. Rul. Cas. 114) on liability for injury to trespasser by dangerous instrumentalities.

15 L. R. A. 257, *CARSON v. FEDERAL STREET & P. VALLEY R. CO.* 147 Pa. 219, 30 Am. St. Rep. 727, 23 Atl. 369.

Failure to look for approaching cars.

Cited in *Everett v. Los Angeles Consol. Electric R. Co.* 115 Cal. 124, 34 L. R. A. 355, 43 Pac. 207, holding bicyclist between rails of electric street railway, bound to look out for and endeavor to avoid cars following.

Cited in footnote to *Marden v. Portsmouth, K. & Y. Street Railway*, 69 L.R.A. 300, which holds failure to look and listen before crossing street car track at public crossing not negligence per se.

Cited in note (15 L.R.A.(N.S.) 257) on duty to look and listen before crossing electric road.

— Pedestrian.

Cited in *Smith v. City & Suburban R. Co.* 29 Or. 543, 46 Pac. 136, holding attempt to cross street railway track in daytime without looking, negligence; *Flynn v. Wilkes-Barre & W. Valley Traction Co.* 9 Kulp, 32, holding pedestrian, possessed of senses, negligent in standing so near track as to be struck by projection of car in daytime; *McGee v. Consolidated Street R. Co.* 102 Mich. 114, 26 L. R. A. 303, 47 Am. St. Rep. 507, 60 N. W. 293, holding going upon electric street railway

track without looking or listening, after leaving curb 14 feet away, negligence; *McCauley v. Philadelphia Traction Co.* 13 Pa. Super. Ct. 357, holding aged woman struck by car just as she stepped upon track at place where view was unobstructed, negligent; *Young v. Citizens' Street R. Co.* 148 Ind. 60, 44 N. E. 927, holding one walking along track 25 feet without looking back, negligent, where struck by car coming at 12 Miles an hour; *Beerman v. Union R. Co.* 24 R. I. 281, 52 Atl. 1090, holding a person crossing an electric or steam track, must exercise ordinary care for his own safety to exonerate him from the charge of contributory negligence.

Cited in footnotes to *Newark Pass. R. Co. v. Bloch*, 22 L. R. A. 374, which holds one crossing electric railway track not required to look beyond distance within which cars moving at lawful speed would endanger him; *Kansas City-Leavenworth R. Co. v. Gallagher*, 64 L. R. A. 344, holding it not negligence to cross tracks in front of approaching electric car which is clearly visible.

— Drivers.

Cited in *Davidson v. Denver Tramway Co.* 4 Colo. App. 288, 35 Pac. 920, holding failure of driver of wagon to use senses to discover approach of street car, negligence; *Potter v. Scranton R. Co.* 19 Pa. Super. Ct. 446, holding driver who looked up and down street railway track when 20 or 30 feet distant and then drove upon track looking but in one direction, negligent; *Smith v. Electric Traction Co.* 187 Pa. 113, 42 W. N. C. 352, 40 Atl. 966, holding person injured by street car in attempting to drive across track in front of approaching car, because he reached crossing first, negligent; *Hellriegel v. Southern Traction Co.* 23 Pa. Super. Ct. 394, sustaining recovery for injuries from collision with electric car approaching without signals in narrow curved street; *Carter v. Central Vermont R. Co.* 72 Vt. 203, 47 Atl. 797, holding it contributory negligence to attempt to drive across track after train came in sight though crossing signal not given; *Omslaer v. Pittsburg & B. Traction Co.* 168 Pa. 521, 47 Am. St. Rep. 901, 32 Atl. 50, holding driving upon street railway track without stopping to listen or wait for abatement of noise preventing hearing car approach, negligence; *Christensen v. Union Trunk Line*, 6 Wash. 81, 32 Pac. 1018, holding driver knowingly attempting to cross track in front of rapidly approaching electric car, negligent; *Citizens Street R. Co. v. Helvie*, 22 Ind. App. 520, 53 N. E. 191, holding driver struck before going 10 feet, by approaching car in plain view for 1,000 feet, negligent; *Garrity v. Detroit Citizens' Street R. Co.* 112 Mich. 372, 37 L. R. A. 531, 70 N. W. 1018, holding approach to crossing of street car line, by driver of fire truck without ability to stop in time to prevent collision, negligence; *McCormick v. Ottumwa R. & Light Co.* 146 Iowa, 126, 124 N. W. 889, holding that driving on railroad at point other than crossing without looking for approaching train constitutes contributory negligence; *Speakman v. Philadelphia & W. C. Traction Co.* 42 Pa. Super. Ct. 564, holding that it is contributory negligence for person to drive automobile at speed of 15 miles per hour so close to street car tracks that car could not pass and without looking back to see if car was following; *Kennedy v. Consolidated Traction Co.* 210 Pa. 217, 59 Atl. 1005, holding a case for the jury, shown where evidence tends to show driver of wagon checked his team to look for cars before crossing and motorman could have stopped car after seeing a collision would take place had he been running at ordinary speed.

Cited in footnotes to *Ehrisman v. East Harrisburg City Pass. R. Co.* 17 L. R. A. 448, which holds failure to look for approaching electric car, negligence; *Winter v. Federal Street & P. Valley R. Co.* 19 L. R. A. 232, which holds it negligence to obstruct electric street railway track while unloading safe.

Cited in note (25 L. R. A. 509) on injury by street car collision with vehicle or horses.

Distinguished in *Downey v. Pittsburgh, A. & M. Traction Co.* 161 Pa. 134, 34 W. N. C. 380, 28 Atl. 1019, holding question whether driver of heavy wagon was negligent who stopped, looked, and listened before going on track upon which electric car approaching at high rate of speed, one for jury.

Negligence of motormen.

Cited in *Fenner v. Wilkes-Barre & W. Valley Traction Co.* 202 Pa. 370, 51 Atl. 1034, holding motorman having unobstructed view of track for 200 yards from point where team standing on track, negligent in not giving warning of approach; *Kennedy v. Consolidated Traction Co.* 210 Pa. 217, 59 Atl. 1005, to the point that it is duty of street railway motormen to use all reasonable precautions to give notice of their approach.

Imputed negligence of driver to passenger.

Cited in notes (110 Am. St. Rep. 297; 8 L.R.A.(N.S.) 637) on imputed negligence of driver, servant to passenger, master.

15 L. R. A. 259, *ELIOT v. ELIOT*, 81 Wis. 295, 51 N. W. 81.

False representation of infant as to age.

Cited in footnote to *Slayton v. Barry*, 49 L. R. A. 560, which denies infant's liability in tort for obtaining credit by false representations as to age.

15 L. R. A. 262, *TURNER v. CROSS*, 83 Tex. 218, 18 S. W. 578.

Statutory liabilities and remedies.

Cited in *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 18, 55 L. R. A. 872, 93 Am. St. Rep. 804, 64 S. W. 923, holding express company operating on railroad under contract, not within statute imposing liability for death caused by act of servant, on proprietor, owner, charterer, or hirer of any railroad for conveyance of goods; *Johnson v. Farmer*, 89 Tex. 613, 35 S. W. 1062, denying survival of action not begun before death of wrongdoer, under statute providing for revival where defendant dies pending suit; *Fidelity & C. Co. v. Dorough*, 46 C. C. A. 368, 107 Fed. 393, holding statute imposing additional liability on life or health insurance companies, not applicable to accident insurance company; *Missouri, K. & T. R. Co. v. Freeman*, 97 Tex. 403, 79 S. W. 9, 1 A. & E. Ann. Cas. 481, holding statute covering either railroad hazards or negligence of defendant would not support recovery where death resulted either from negligence not attributable to defendant or from a cause not in course of the operation of a railroad.

Cited in footnote to *Fleming v. Texas Loan Agency*, 26 L. R. A. 250, which holds corporation a "person" within statute creating liability for death of one person by another.

Cited in note (63 L. R. A. 233) on liability of trustee for torts or negligence of servants.

Distinguished in *Gulf, C. & S. F. R. Co. v. Moore*, 28 Tex. Civ. App. 604, 68 S. W. 559, holding that right of action under statute for personal injuries not resulting in death does not abate at death.

Construction of statutes by the courts.

Cited in *Michael v. Michael*, 34 Tex. Civ. App. 631, 79 S. W. 74, holding residence under statute, providing for divorce actions, means physical presence; *Galveston, H. & S. A. R. Co. v. Walker*, 48 Tex. Civ. App. 54, 106 S. W. 705, holding the rule that a statute in derogation of the common law is to be strictly construed has been abolished by state statute.

Statutory liability of receivers.

Cited in *Yoakum v. Selph*, 83 Tex. 608, 19 S. W. 145; *Texas & P. R. Co. v. Collins*, 84 Tex. 122, 19 S. W. 365; *Texas & P. R. Co. v. Gay*, 86 Tex. 608, 25 L. R. A. 67, 26 S. W. 599; *Texas & P. R. Co. v. Gay*, 88 Tex. 113, 30 S. W. 543; *Texas & P. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 89, 20 S. W. 1135; *Allen v. Dillingham*, 8 C. C. A. 547, 23 U. S. App. 167, 60 Fed. 176; *Burke v. Dillingham*, 9 C. C. A. 256, 23 U. S. App. 153, 60 Fed. 730,—holding receiver of railway operating it not liable under statute relating to proprietor, owner, charterer, or hirer; *Bonner v. Franklin Co-op. Asso.* 4 Tex. Civ. App. 167, 23 S. W. 317, holding penal statute forbidding unjust discrimination in freight rates by railway companies, inapplicable to receivers thereof; *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 52, 23 S. W. 1020, holding railroad not liable for penalty imposed thereon for acts of officers, agents, or employees, where alleged liability occurred during receivership; *Campbell v. Cook*, 86 Tex. 635, 40 Am. St. Rep. 878, 26 S. W. 486, holding receivers of railway corporations not “railway corporations” within act defining who are fellow servants in the service of any railway corporation; *Parker v. Dupree*, 28 Tex. Civ. App. 343, 67 S. W. 185, denying receiver’s liability for death resulting from failure to insulate electric wires; *McGhee v. McCarley*, 44 C. C. A. 258, 103 Fed. 61, *Pardee*, Ch. J., dissenting, as to whether receivers are within statute giving action for wrongful act, omission, or negligence of any person or corporation or his or their servants or agents; *Kirby Lumber Co. v. Owens*, 56 Tex. Civ. App. 376, 120 S. W. 936, to the point that receiver of railroad could not be held liable as proprietor, owner, charterer or hirer, but must be specially named in statute.

Cited in footnotes to *St. Louis Trust Co. v. Riley*, 30 L. R. A. 456, which denies right to prefer claim for personal injuries over mortgage debt in receiver’s earnings; *Peirce v. Van Dusen*, 69 L.R.A. 705, which holds Federal railroad receiver subject to state rule imposing on railroad companies liability for negligence of superior employees.

Cited in notes (63 L.R.A. 230, 234) on liability of receivers for torts or negligence of servants; (31 Am. St. Rep. 374) on liability of railroad receivers.

Distinguished in *Peoples v. Yoakum*, 7 Tex. Civ. App. 90, 25 S. W. 1001, holding statute declaring priorities of specified items of receivers’ liability does not restrict liability to items specified; *Texas & P. R. Co. v. Cox*, 145 U. S. 606, 36 L. ed. 833, 12 Sup. Ct. Rep. 905, holding cause of action founded upon foreign statute creating receivers’ liability enforceable in Federal court of another jurisdiction notwithstanding local decisions to the contrary under similar statutes.

Disapproved in *Hornsby v. Eddy*, 5 C. C. A. 575, 12 U. S. App. 404, 56 Fed. 464, holding statute providing for liability of every railroad company for negligence of employees, applicable to railroad operated by receiver; *Wall v. Platt*, 169 Mass. 402, 48 N. E. 270, holding receivers, authorized to operate and manage railroad, liable under statutory provision for damages from fire communicated by engines of railroad corporation; *Rouse v. Redinger*, 1 Kan. App. 366, 41 Pac. 433, and *Rouse v. Harry*, 55 Kan. 599, 40 Pac. 1007, holding act relating to killing or wounding of stock by railroads, applicable to receivers operating same; *Hunt v. Conner*, 26 Ind. App. 46, 59 N. E. 50, holding employer’s liability act applicable to receivers of corporations; *Powell v. Sherwood*, 162 Mo. 613, 63 S. W. 485, holding “fellow servant” statute applicable to receiver of railroad.

Who is an “owner” of real estate.

Approved in *McLain v. Maricle*, 60 Neb. 359, 83 N. W. 85, holding that wife’s homestead interest in husband’s land does not make her an owner of real estate.

15 L. R. A. 268, *STATE v. MATHERS*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590.

Admissibility of evidence illegally obtained.

Approved in *Barrett v. Fish*, 72 Vt. 20, 51 L. R. A. 757, 82 Am. St. Rep. 914, 47 Atl. 174, denying injunction against use in evidence of letters obtained by breach of trust; *Cluett v. Rosenthal*, 100 Mich. 198, 43 Am. St. Rep. 446, 58 N. W. 1009, holding testimony as to contents of books obtained while same were in possession of sheriff under unauthorized attachment, admissible for one not responsible for such tort; *Sullivan v. Nicoulin*, 113 Iowa, 81, 84 N. W. 978, holding evidence of condition of plastering inspected by illegal order of court admissible in action for services.

Cited in *People v. Campbell*, 160 Mich. 113, 34 L.R.A.(N.S.) 65, 136 Am. St. Rep. 417, 125 N. W. 42; *Imboden v. People*, 40 Colo. 180, 90 Pac. 608,—holding courts can take no notice of how papers offered in evidence were obtained, nor will they form a collateral issue to try that question; *Sullivan v. Nicoulin*, 113 Iowa, 81, 84 N. W. 978, holding it not the policy of courts to enter into a collateral inquiry as to whether a wrong has been perpetrated in obtaining the information imparted by the witness.

Cited in footnote to *Hammons v. State*, 68 L.R.A. 234, which holds admissible letter written by accused to his wife and intercepted in transmission.

Cited in notes (94 Am. St. Rep. 345) on manner of obtaining evidence as affecting its admissibility; (136 Am. St. Rep. 141) on admissibility of evidence wrongfully obtained.

Distinguished in *State v. Slamon*, 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097, holding paper obtained by unlawful search and seizure inadmissible against one invoking such constitutional right.

Loss of privilege in respect to written confidential communications.

Cited in *State v. Sysinger*, 25 S. D. 115, 125 N. W. 879, Ann. Cas. 1912 B., 997, holding that letters by husband to wife lose their character as privileged communications where delivered by her to prosecuting officers; *O'Toole v. Ohio-German F. Ins. Co.* 159 Mich. 193, 24 L.R.A.(N.S.) 806, 23 N. W. 795, holding where the communication has, without collusion or voluntary disclosure, escaped control of the party communicating, it is not privileged; *Hammons v. State*, 73 Ark. 498, 68 L.R.A. 236, 108 Am. St. Rep. 66, 84 S. W. 718, 3 A. & E. Ann. Cas. 912, holding a letter written by an accused husband to his wife admitting criminality and appealing for help, is admissible in evidence where it falls into another's hands without aid of wife.

Cited in footnote to *People v. Hayes*, 23 L. R. A. 830, which holds privilege as to confidential communication from wife to husband in letters, lost when given to third person.

Cited in note (33 L.R.A.(N.S.) 479, 480) on effect upon privileged character of communication of third person's power of disclosure.

15 L. R. A. 270, *BERGMAN v. COMMERCIAL UNION ASSUR. CO.* 92 Ky. 494, 18 S. W. 122.

Interest of mortgagee or assignee under insurance policy.

Approved in *Georgia Home Ins. Co. v. Stein*, 72 Miss. 950, 18 So. 414, holding appraisal of loss by persons selected by insurer and insured under provision of policy, not binding upon mortgagee to whom loss made payable; *American Spelter Co. v. Manchester Fire Assur. Co.* 71 Mo. App. 661, holding that indorsement on fire policy of loss, if any, payable to another, constitutes assignment of all beneficial interest; *McKinney v. Western Assur. Co.* 97 Ky. 480, 30 S. W. 1004,

holding mortgagee purchasing at foreclosure without right to insurance under fire policy conditioned to be void upon change in interest, title, or possession.

Cited in footnotes to *Hathaway v. Orient Ins. Co.* 17 L. R. A. 514, which holds mortgagee's interest in policy not defeated by accord and satisfaction between owner and insurer; *Collinsville Savings Soc. v. Boston Ins. Co.* 69 L.R.A. 924, which denies mortgagee's right to participate in arbitration proceedings to fix amount of loss under open mortgage clause attached to insurance policy providing for payment of loss to a mortgagee as his interest may appear.

Cited in notes (18 L. R. A. 137) on effect on assignee of insurance policy of acts of forfeiture by assignor; (19 L. R. A. 321) on effect of settlement between insurer and mortgagor upon rights of mortgagee to whom loss is made payable as his interest may appear; (25 L.R.A.(N.S.) 742) on effect of award under terms of insurance policy upon mortgagee not a party; (135 Am. St. Rep. 760) on fire insurance as security for a mortgagee or other lien holder.

Disapproved in *Collinsville Sav. Soc. v. Boston Ins. Co.* 77 Conn. 684, 69 L.R.A. 927, 60 Atl. 647, holding appraisal of loss by appraisers appointed by insured and insurer, under a standard policy of the "open mortgage clause" is binding upon mortgagee.

15 L. R. A. 273, *ROBERTSON v. SMITH*, 129 Ind. 422, 28 N. E. 857.

Estoppel to assert irregularity in proceeding.

Approved in *Rhodes-Burford Furniture Co. v. Mattox*, 13 Ind. App. 224, 40 N. E. 545, holding party procuring restraining order, regular on its face, and benefiting thereby, estopped to assert its invalidity in action on bond for damages; *Davis v. Bickel*, 25 Ind. App. 382, 58 N. E. 207, holding plaintiff in garnishment estopped from asserting, in action on bond, that writ was improperly issued; *Harless v. Consumers' Gas Trust Co.* 14 Ind. App. 547, 43 N. E. 456, holding persons procuring restraining order to be wrongfully issued, and receiving benefits thereof, estopped to deny its execution.

Distinguished in *Midland R. Co. v. Eller*, 7 Ind. App. 218, 33 N. E. 265, holding allegation in action on delivery bond that plaintiffs "recovered judgment," not equivalent to statutory allegation that judgment "was duly given or made;" *Bensch v. Farnsworth*, 9 Ind. App. 552, 37 N. E. 284, raising, without deciding, question as to enforceability of replevin bond where value of property above jurisdictional limit.

Expenses recoverable in suit on injunction bond.

Cited in *Binford v. Grimes*, 26 Ind. App. 481, 59 N. E. 1085, and *Jameson v. Bartlett*, 63 Neb. 642, 88 N. W. 860, holding attorney's fees allowable as damages in action upon injunction bond; *Hyatt v. Washington*, 20 Ind. App. 149, 50 N. E. 402, holding attorney's fees for defending injunction suit at trial on merits recoverable in action on bond although injunction not sole object of action.

Cited in notes (18 L.R.A. 275) on right to recover damages caused by injunction; (16 L.R.A.(N.S.) 56, 72) on recovery on injunction bond of attorney's fees necessarily expended in dissolving injunction.

Jurisdiction over equity cases.

Cited in *Littleton v. Burgess*, 16 Wyo. 67, 16 L.R.A.(N.S.) 59, 91 Pac. 832, holding the district court possesses original equity jurisdiction.

15 L. R. A. 277, *MERRITT v. GIBSON*, 129 Ind. 155, 27 N. E. 136.

Appointment of receiver in foreclosure.

Cited in *Harris v. United States Sav. Fund & Invest. Co.* 146 Ind. 269, 45 N. E. 328, holding allegations showing security insufficient, debtor insolvent, mortgagor

not in possession, and security in peril from lapse of insurance and maturity of taxes, support appointment of receiver; *Sellers v. Stoffel*, 139 Ind. 474, 39 N. E. 52, refusing receiver upon mere allegation that mortgaged premises can be rented for from \$8 to \$12 per month; *Russell v. Bruce*, 159 Ind. 555, 64 N. E. 602, holding mortgagee purchasing at foreclosure for less than judgment entitled to rents collected by receiver during year of redemption as against owner; *Moncrieff v. Hare*, 38 Colo. 233, 7 L.R.A.(N.S.) 1012, 87 Pac. 1082, holding an equity court may appoint receiver to collect rents and have same applied on mortgage any time after filing of foreclosure suit where security is inadequate and rents and profits were specifically pledged.

Cited in notes (7 L.R.A.(N.S.) 1005, 1009) on power of equity where mortgage does not convey title, to impound rents and profits pending foreclosure; (27 Am. St. Rep. 796) on appointment of receiver of rents of mortgaged property; (72 Am. St. Rep. 75) as to when appointment of receiver is proper.

Explained in *World Bldg. Loan & Invest. Co. v. Marlin*, 151 Ind. 632, 52 N. E. 198, refusing receiver of rents and profits during year of redemption where sale brought sufficient to pay judgment and decree.

Construction of statutes.

Approved in *Markover v. Krauss*, 132 Ind. 299, 17 L. R. A. 808, 31 N. E. 1047, holding that "children alive by a former wife" include one adopted by man and such wife.

15 L. R. A. 287, *LYNCH v. METROPOLITAN ELEV. R. CO.* 129 N. Y. 274, 26 Am. St. Rep. 523, 29 N. E. 315.

Equitable jurisdiction and actions.

Followed without discussion in *Bergman v. Manhattan R. Co.* 129 N. Y. 637, 29 N. E. 1031; *Herold v. Metropolitan Elev. R. Co.* 129 N. Y. 636, 29 N. E. 319; *Sears v. Metropolitan Elev. R. Co.* 129 N. Y. 648, 29 N. E. 1032, and *Minton v. New York Elev. R. Co.* 130 N. Y. 340, 29 N. E. 319.

Cited in *Ingalsbe v. Murphy*, 84 Hun, 185, 32 N. Y. Supp. 569, holding amount unlawfully retained by mortgagee as trustee for mortgagor's children after mortgagor's death will be deducted in foreclosure proceedings; *Barker v. Laney*, 90 Hun, 112, 35 N. Y. Supp. 626, holding that suit for accounting gives jurisdiction to set off existing judgment against decree therein obtained; *Rich v. Manhattan R. Co.* 46 N. Y. S. R. 674, 19 N. Y. Supp. 543, holding that action for injury to property praying that maintenance and operation of elevated railroad be restrained is one in equity for injunctive relief; *Frank v. Davis*, 135 N. Y. 278, 17 L. R. A. 307, 31 N. E. 1100, holding judgment under junior mortgage for deficiency "after sale" not prevented by sale under senior mortgage, pending appeal from junior foreclosure judgment; *Doyle v. Metropolitan Elev. R. Co.* 136 N. Y. 512, 32 N. E. 1008, Affirming 1 Misc. 377, 20 N. Y. Supp. 865, holding that question of damages in suit for injunction and damages cannot be referred as collateral issue not arising under pleadings; *Westphal v. New York*, 177 N. Y. 144, 69 N. E. 369, holding right to appraisal by commissioners waived by appeal to equity in action for diminution of water supply.

— Suits for injunction and damages.

Cited in *Woodworth v. Brooklyn Elev. R. Co.* 29 App. Div. 6, 51 N. Y. Supp. 323, holding action for injunction and damages maintainable against elevated railroad and its receiver; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 161, 22 N. Y. Supp. 321, sustaining suit to restrain operation of steam railroad in street upon plaintiff's premises until right thereto acquired, and for past damages; *Inderlied v. Whaley*, 85 Hun, 67, 32 N. Y. Supp. 640, holding action for dam-

ages after action begun and before judgment for injunction and damages, barred by such judgment; *Loomis v. Decker*, 4 App. Div. 411, 39 N. Y. Supp. 441, holding purchaser's action to restrain gathering of crops by vendors unlawfully retaining possession, and for permanent injunction and damages, within jurisdiction or equity; *Emigrant Mission Committee v. Brooklyn Elev. R. Co.* 20 App. Div. 600, 47 N. Y. Supp. 344, holding that past damages may be awarded as incidental to main relief in equity; *Hunter v. Manhattan R. Co.* 141 N. Y. 284, 36 N. E. 400, holding that in well-founded injunction suit, court may assess damages on assigned claims; *Shepard v. Manhattan R. Co.* 131 N. Y. 222, 30 N. E. 187, holding determination of past or rental damages within jurisdiction of equity in action to restrain operation of railroad; *Pegram v. New York Elev. R. Co.* 147 N. Y. 145, 41 N. E. 424, holding that demand for past damages with prayer for judgment does not affect equitable nature of abutter's injunction suit against elevated railway; *Kelly v. Webster*, 143 App. Div. 739, 128 N. Y. Supp. 58, to the point that in action to restrain interference with wharf damages for trespass thereon are incidental to real subject of action; *Russell Hardware & Implement Mfg. Co. v. Utica Drop Forge & Tool Co.* 195 N. Y. 60, 87 N. E. 788; *Southern P. R. Co. v. United States*, 66 C. C. A. 581, 133 Fed. 657,—holding where court of equity has taken jurisdiction over a cause for any purpose, it may retain the cause for all purposes within the scope of the equities to be enforced; *Shaw v. Rochester, S. & E. R. Co.* 131 App. Div. 531, 115 N. Y. Supp. 1026, holding an injunction should not be granted restraining a street car company from operating cars on private property where no objection was made to such construction, unless there was a refusal to pay damages assessed; *Miller v. Edison Electric Illuminating Co.* 184 N. Y. 27, 3 L.R.A.(N.S.) 1067, 76 N. E. 734, 6 A. & E. Ann. Cas. 146, 35 N. Y. Civ. Proc. Rep. 256 (dissenting opinion), on scope of equity action after jurisdiction is taken.

Cited in note (36 L.R.A.(N.S.) 826) on abutter's right to compensation for railroads in streets.

Disapproved in *Norton v. Colusa Parrot Min. & Smelting Co.* 167 Fed. 204, holding damages should not be allowed for past injury to land in action to enjoin pollution of stream.

— Money judgment sole relief.

Cited in *Van Allen v. New York Elev. R. Co.* 144 N. Y. 178, 38 N. E. 997, holding jurisdiction of equity over abutter's suit for damages not lost by elimination of right to injunction by subsequent conveyance; *Moss v. Burnham*, 50 App. Div. 303, 63 N. Y. Supp. 947, holding action to set aside release as fraudulent, within jurisdiction of equity although sole relief will be recovery of sum of money; *Stiefel v. New York Novelty Co.* 14 App. Div. 374, 43 N. Y. Supp. 1012, holding actions to set aside transfers in fraud of creditors, and to recover such assets, within jurisdiction of equity although money judgments only relief practicable; *Hoffman v. Manhattan Elev. R. Co.* 1 Misc. 156, 20 N. Y. Supp. 625, 48 N. Y. S. R. 712, and *Wallach v. Manhattan R. Co.* 170, 28 N. Y. 60 N. Y. S. R. Supp. 483, holding action by abutting owner for injunctive relief against operation of elevated railroad with accessory claim for past damage fails where premises are conveyed pending suit; *Thorne v. French*, 4 Misc. 438, 24 N. Y. Supp. 694, discussing, without deciding, question whether equity should retain jurisdiction in action for injunction and damages after claim for injunctive relief fails but no motion to dismiss is made.

Cited in note (20 L. R. A. 755) on damages in lieu of injunction.

Juries and right to jury trial.

Cited in *Shapira v. D'Arcy*, 180 Mass. 378, 62 N. E. 412, holding constitutional

right of trial by jury not applicable to suit for specific performance; *Cantoni v. Forster*, 12 Misc. 344, 33 N. Y. Supp. 565, holding defendant not entitled to jury trial in action for specific performance and to restrain prosecution of claims accruing prior to contract; *Miller v. Edison Electric Illuminating Co.* 78 App. Div. 391, 80 N. Y. Supp. 319, holding action for perpetual injunction against private nuisance and for past damages, not within statutory provision that actions for nuisances should be tried by jury; *Barnard & L. Mfg. Co. v. Monett Mill. Co.* 79 Mo. App. 156, holding jury not demandable of right to assess allowance for garnishee's trouble and expense in answering as provided by statute; *Lefrois v. Monroe County*, 88 Hun, 112, 34 N. Y. Supp. 612, holding that in action to abate nuisance and recover damages occasioned thereby, defendant may demand jury as matter of right; *Brooklyn Elev. R. Co. v. Brooklyn, B. & W. E. R. Co.* 23 App. Div. 42, 48 N. Y. Supp. 665, holding jury demandable in action for injunction and damages from breach of contract; *Christensen v. Hollingsworth*, 6 Idaho, 93, 96 Am. St. Rep. 256, 53 Pac. 211, denying right to trial by jury of issues in action to reform and foreclose mortgage; *Mogollon Gold & Copper Co. v. Stout*, 14 N. M. 255, 91 Pac. 724, holding that suit for damages where injunction is asked, and action is brought primarily for recovery of money, is triable by jury.

Cited in footnotes to *State ex rel. Rhodes v. Saunders*, 18 L. R. A. 646, which denies right to jury trial in equity case; *Hall v. Armstrong*, 20 L. R. A. 366, which denies right to jury trial in actions of book account; *McRae v. Grand Rapids, L. & D. R. Co.* 17 L. R. A. 750, which holds act authorizing court to discharge part of jurors after trial commenced unconstitutional; *Chessman v. Hale*, 68 L.R.A. 410, which sustains plaintiff's right to have questions as to existence of nuisance and amount of damages tried by jury in suit to enjoin the nuisance and for damages.

Cited in notes (15 L. R. A. 614) on constitutional right to jury for assessment of damages on default; (16 L. R. A. 358) on statute allowing plea of guilty in capital case.

Multiplicity of suits.

Cited in *Rowley v. Neelis*, 41 Misc. 319, 84 N. Y. Supp. 841, denying right to bring new action to enforce deficiency judgment after foreclosure; *New York L. Ins. Co. v. Bread*, 80 Fed. 67, holding that judgment creditors may maintain bill against several stockholders to enforce statutory double liability and liability for unpaid stock; *Younkin v. Milwaukee, Light, Heat & Traction Co.* 112 Wis. 23, 87 N. W. 861, holding that abutters may unite in action to restrain unlawful use of street, but not for recovery of damages.

Distinguished in *Dudley v. Congregation of St. Francis*, 138 N. Y. 459, 34 N. E. 281, holding plaintiff in foreclosure cannot recover upon bond after failing to establish validity of mortgage security for same; *Thomas v. Grand View Beach R. Co.* 76 Hun, 603, 28 N. Y. Supp. 201, holding action for injunctive relief not maintainable against operation or continuance of railway constructed upon plaintiff's land without his consent.

Consideration on appeal of questions not raised below.

Cited in *Hirsh v. Manhattan R. Co.* 84 App. Div. 378, 82 N. Y. Supp. 754, holding that defense of another action pending not raised at trial cannot be heard on appeal.

Who may recover damages to leasehold.

Approved in *Sposato v. New York*, 75 App. Div. 305, 78 N. Y. Supp. 168, holding that lessor's action for damages from withdrawal of surface and sub-surface water from premises precludes action by lessee therefor.

15 L. R. A. 292, *Re KAUFMAN*, 131 N. Y. 620, 30 N. E. 242.

Implied revocation of woman's will.

Cited in *Re Comassi*, 107 Cal. 7, 28 L. R. A. 416, 40 Pac. 15, and *Re McLarney*, 153 N. Y. 420, 60 Am. St. Rep. 664, 47 N. E. 817, holding married woman's will not revoked by remarriage after widowhood; *Re Burton*, 4 Misc. 516, 25 N. Y. Supp. 826, holding married woman's will not revoked by dissolution of marriage and her second marriage; *Colcord v. Conroy*, 40 Fla. 108, 23 So. 561, holding will purporting to convey all property of unmarried woman and not in contemplation of marriage, revoked by marriage; *Booth's Will*, 40 Or. 158, 66 Pac. 710, holding removal of civil disabilities, no repeal of provision that marriage revoked will of feme sole; *Re Mann*, 51 Misc. 318, 100 N. Y. Supp. 1100, holding under the statutes the marriage of testatrix operated, eo instante as a revocation of a will made by her before marriage.

Distinguished in *Baacke v. Baacke*, 50 Neb. 21, 69 N. W. 303, holding revocation of will not implied by divorce granted to testator's wife and settlement of her property rights.

"Unmarried."

Cited in *Hopper v. Denver & R. G. R. Co.* 84 C. C. A. 21, 155 Fed. 275, holding on construction of "unmarried" as including widow.

15 L. R. A. 294, *GOLDSBROUGH v. GABLE*, 140 Ill. 269, 29 N. E. 722.

Liability of tenant holding over.

Reaffirmed on subsequent appeal in 152 Ill. 596, 38 N. E. 1025, Reversing 49 Ill. App. 557, holding agreement to reduce rent of tenant holding over, after termination of lease, without new consideration, invalid.

Approved in *Hately v. Myers*, 96 Ill. App. 224, holding tenant holding over with consent of landlord and paying of rent at old rate, entitled to notice prescribed by law in cases of tenancy from year to year; *Pusheck v. Frances E. Willard N. T. H. Asso.* 94 Ill. App. 195, and *German State Bank v. Herron*, 111 Iowa, 27, 82 N. W. 430, holding tenant holding over bound to payment of rent according to terms of original lease.

Cited in *Eppstein v. Kuhn*, 225 Ill. 122, 10 L.R.A.(N.S.) 124, 80 N. E. 80, holding tenant under a term of years lease, who holds over without new contract is made a tenant from year to year by landlord's accepting a month's rent; *Weber v. Powers*, 213 Ill. 385, 68 L.R.A. 616, 72 N. E. 1070, holding rule as to effect of holding over has no application where there is a new contract between landlord and tenant, under which the latter remains in possession.

Cited in footnotes to *Valentine v. Healey*, 43 L. R. A. 667, which holds lease not renewed by temporary retention of leased premises, under permit, by tenant in common, who is member of lessee firm; *Byxbee v. Blake*, 57 L. R. A. 222, which holds tenant liable for another month's rent, by keeping keys and remaining in possession five days to clean up rubbish; *Herter v. Mullen*, 44 L. R. A. 703, which denies liability for new term by retention of one room occupied by sick member of family.

Cited in note (25 L.R.A.(N.S.) 857, 858) on rent period as criterion of term implied by holding over.

Parol evidence relating to sealed instruments.

Cited in *J. C. Winship Co. v. Wineman*, 77 Ill. App. 163, and *Jones v. Chamberlain*, 97 Ill. App. 330, holding parol evidence tending to show alteration of sealed executory contract, inadmissible; *Becker v. Becker*, 250 Ill. 124, 95 N. E. 70, Ann. Cas. 1912 B, 275, holding that sealed executory contract cannot be altered, changed or modified by parol agreement; *McConaughty v. Huston*, 142

Ill. App. 232, holding a new contract in writing based on a new consideration, is necessary to bind the landlord to make any other repairs than those enumerated in lease; Doyle v. Dunne, 144 Ill. App. 23, holding oral agreement to modify one under seal and executory a mere nudum pactum and is not susceptible of being enforced.

Distinguished in Alschuler v. Schiff, 164 Ill. 302, 45 N. E. 424, holding that surrender of written lease, not sealed, can be shown by parol; Snow v. Griesheimer, 220 Ill. 109, 77 N. E. 110, holding an oral agreement to reduce rent may be made as to holding over after lease under seal.

Consideration for new promise.

Cited in note (34 L. R. A. 36) on performance of existing contract as consideration for new promise.

15 L. R. A. 296, OSKALOOSA WATER CO. v. BOARD OF EQUALIZATION, 84 Iowa, 407, 51 N. W. 18.

Nature of property for purpose of taxation.

Approved in Colorado Fuel & Iron Co. v. Pueblo Water Co. 11 Colo. App. 357, 53 Pac. 232, holding water mains, pipes, and hydrants in highways, and connected machinery necessary to waterworks plant, realty for purpose of taxation.

Cited in Doe v. Tenino Coal & I. Co. 43 Wash. 526, 86 Pac. 938, holding pumps, boilers, engines, cars, etc. used, or for use, in connection with operation of mines, constituted a taxable improvements upon the real estate.

Cited in footnotes to United R. & Electric Co. v. Baltimore, 52 L. R. A. 772, which holds railroad right of way and tracks not within provision as to increase of taxation on "landed property;" Newport Illuminating Co. v. Tax Assessors, 36 L. R. A. 266, which holds electric light dynamos and wires personalty for purpose of taxation; Shelbyville Water Co. v. People, 16 L. R. A. 505, which holds water mains and electric wires taxable as personalty.

Cited in notes (17 L. R. A. 93) on what property is part of franchise of a corporation for purposes of taxation; (66 L.R.A. 51) on nature of railroad as realty or personalty; (69 L.R.A. 432) on citus, for taxing purposes, of tangible personalty of domestic corporations; (22 Eng. Rul. Cas. 750, 752) on valuation of land as affected by machinery thereon for purpose of rating or taxation.

Disapproved in Paris v. Norway Water Co. 85 Me. 330, 21 L. R. A. 527, footnote p. 525, 35 Am. St. Rep. 371, 27 Atl. 143, holding water mains, pipes, etc., to be realty taxable where located.

Taxation of public-service appliances.

Cited in Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 482, 76 N. W. 728, raising, without deciding, question whether suburban car tracks should be included in assessment as appurtenant to property in city.

Cited in footnote to Fond du Lac Water Co. v. Fond du Lac, 16 L. R. A. 581, which holds assessment of pumping station and works apart from water mains, franchises, and other property constituting water plant, erroneous.

Cited in note (60 L. R. A. 854, 855) on taxation of municipal waterworks.

15 L. R. A. 300, FRENCH v. FRENCH, 84 Iowa, 655, 51 N. W. 145.

Second appeal in 91 Iowa, 140, 59 N. W. 21.

Next of kin and evidence of transactions with decedents.

Followed in Campbell Bkg. Co. v. Cole, 89 Iowa, 213, 56 N. W. 441, holding testimony of interested party as to communications with defendant's wife, since deceased, inadmissible.

Cited in Nordman v. Meyer, 118 Iowa, 512, 92 N. W. 693, holding evidence of

heirs as to parol agreement with wife releasing interest, inadmissible against husband as wife's devisee; *Thompson v. Deeds*, 93 Iowa, 231, 35 L. R. A. 57, 61 N. W. 842, discussing, without deciding, who is next of kin having right to dispose of decedent's remains; *Barnett v. First Nat. Bank*, 148 Iowa, 669, 127 N. W. 1012, holding that statute precluding evidence of personal transaction between witness and one since deceased does not apply to mere agent of real party in interest; *McAleer v. McNamara*, 140 Iowa, 114, 117 N. W. 1122, holding a mere allegation that plaintiff is donee, and testator delivered gift to defendant to turn over, without alleging an assignment, is not sufficient to exclude testimony on that issue even though it relates to transactions between witness and deceased.

Cited in footnotes to *Johnstone v. Taliaferro*, 45 L. R. A. 95, which denies interest of illegitimate child in deed of trust executed before his birth under provision for mother for life, with remainder to her "children;" *Western U. Teleg. Co. v. McGill*, 21 L. R. A. 818, which holds husband not next of kin to wife; *Re Devoe*, 57 L. R. A. 536, which holds beneficiary's widow not entitled to share under will directing payment to his next of kin.

Distinguished in *French v. French*, 91 Iowa, 140, 59 N. W. 21, holding testimony of continued ownership of note given by administratrix in renewal of one by deceased, not concerning transaction with decedent.

Limited and distinguished in *Clark v. Ross*, 96 Iowa, 410, 65 N. W. 340, holding payee's testimony touching personal transactions with decedent admissible in action to make legatee and executrix personally liable on notes of partnership of which decedent was member.

Nature of distributive share of widow.

Cited in *Re Kuhn*, 125 Iowa, 451, 101 N. W. 151, 2 A. & E. Ann. Cas. 657, holding the distributive share which the widow takes under the code goes to her as a matter of contract and right, and not by inheritance.

Validity of note in settlement of disputed claim.

Cited in *Morey v. Laird*, 108 Iowa, 674, 77 N. W. 835, holding note in settlement of disputed claim made with knowledge of all material facts, valid although claim of doubtful validity; *Rowe v. Barnes*, 101 Iowa, 306, 70 N. W. 197, holding note in consideration of deed executed for removal of supposed cloud on title, supported by sufficient consideration, although grantor's claim without valid foundation; *Robinson v. Robinson*, 147 Iowa, 619, 125 N. W. 216, holding that new note given to avoid litigation on old note, is supported by valid consideration; *Rogers v. Mercantile Adjuster Pub. Co.* 118 Mo. App. 14, 93 S. W. 328, holding where payee claiming fraud in amount enters into compromise and gives new notes for a reduced amount payment may be enforced over a defense that compromise was brought about by fraud; *Armijo v. Henry*, 14 N. M. 191, 25 L.R.A.(N.S.) 286, 89 Pac. 305, holding a note given in settlement of differences, presumably to avoid litigation, is supported by a good consideration in absence of fraud.

Cited in note (25 L.R.A.(N.S.) 277, 286) on void, invalid, or unfounded claim as subject of valid compromise.

Promise to pay another's debt.

Approved in *Lessenich v. Pettit*, 91 Iowa, 611, 60 N. W. 192, holding agreement made by one in part for his own benefit, as organizer and prospective manager of proposed manufacturing company, to pay debt of another, original undertaking; *Sponhaur v. Malloy*, 21 Ind. App. 299, 52 N. E. 245, holding widow not bound by note given for debt of husband, who left insolvent estate.

Cited in *Williams Shoe Co. v. Gotzian*, 130 Iowa, 713, 107 N. W. 807, holding

agreement of a creditor to pay pro rata share of another creditor's claim, in consideration of transfer to him of debtor's property, is a direct original promise; *Blake v. Robinson*, 129 Iowa, 198, 105 N. W. 401, holding where alleged promise to pay debt of another was in fact made to subserve defendant's own objects and purposes, and profit was made by him thereby, such promise is not affected by the statute of frauds.

Presumption of payment.

Distinguished in *Sarraille v. Calmon*, 142 Cal. 656, 76 Pac. 497, holding that maker's special loan to payee after maturity of notes raises inference of payment.

Legislative intent as governing statutory construction.

Approved in *Re Shonkwiler*, 104 Iowa, 70, 73 N. W. 479, construing statute assessing liquor tax against persons other than registered pharmacists holding permits, as not applicable to pharmacists selling in violation of such permits.

Payment by commercial paper.

Cited in note (35 L.R.A.(N.S.) 16) on payment by commercial paper, where it was agreed that debt should be discharged by notes.

15 L. R. A. 305, *SWENTZEL v. PENN BANK*, 147 Pa. 140, 30 Am. St. Rep. 718, 23 Atl. 405.

Duties and liabilities of corporation officers.

Approved in *Hibernia Bldg. Asso. v. McGrath*, 154 Pa. 304, 35 Am. St. Rep. 828, 32 W. N. C. 235, 26 Atl. 377, holding treasurer of building association serving without pay gratuitous bailee not liable for misappropriation of money by secretary; *North Hudson Bldg. & L. Asso. v. Childs*, 82 Wis. 477, 33 Am. St. Rep. 57, 52 N. W. 600, holding officers and directors of building and loan corporation not liable for mere passive negligence; *Cockrill v. Cooper*, 29 C. C. A. 536, 57 U. S. App. 576, 86 Fed. 14, sustaining jurisdiction of equity of suit against directors of national bank under statute creating liability for excessive loans; *Com. ex rel. McCormick v. Anchor Bldg. & L. Asso.* 20 Pa. Super. Ct. 109, holding directors of loan association not liable for error in maturing stock, resulting in financial ruin of the corporation; *Campbell v. Watson*, 62 N. J. Eq. 436, 50 Atl. 120, holding bank directors liable for fraudulent overdrafts and loans on insufficient security.

Cited in *Rathfon v. Locher*, 27 Lanc. L. Rev. 340, holding that bank directors are not personally liable for losses fraud of president, who deceived them by untrue reports; *Stone v. Rottman*, 183 Mo. 574, 82 S. W. 76, holding bank directors are personally liable for losses resulting from gross negligence or want of ordinary diligence in administration; *Mason v. Moore*, 73 Ohio St. 293, 4 L.R.A. (N.S.) 606, 76 N. E. 932, 4 A. & E. Ann. Cas. 240, holding attesting officers of a bank report are not liable to purchasers who suffer loss in reliance upon such report, where it does not appear they had reason to know report was false.

Cited in footnotes to *Warner v. Penoyer*, 44 L. R. A. 761, which denies it to be bank directors' duty to procure periodical expert examination of books before declaring dividend; *Utey v. Hill*, 49 L. R. A. 323, which denies liability of directors for deceit for false statements in reports to secretary of state believed to be true; *Gerner v. Mosher*, 46 L. R. A. 244, which holds bank directors attesting false report liable to person purchasing stock in reliance on same.

Cited in notes (55 L.R.A. 756, 770, 773) on liability of directors to corporation; (4 L.R.A.(N.S.) 598) on liability of directors for default or negligence of cashier; (38 Am. St. Rep. 774) on care required of bankers acting as agents or bailees; (54 Am. St. Rep. 732) on liability of bank directors for loss of deposit.

Profiting out of trust relation.

Cited in *Kauffman v. Keiper*, 18 Pa. Co. Ct. 184, 5 Pa. Dist. R. 622, denying right of recovery by director of corporation, on note given to secure withdrawal of his opposition to purchase by corporation; *Jenkins v. Rushbrook Coal Co.* 8 Northampton Co. Rep. 332, 8 Lack. Legal News, 270, holding amount of president's secret bonus from lessee for effecting lease of corporate property improperly set off against claim for salary.

Distinguished in *James Clark Co. v. Colton*, 91 Md. 238, 49 L. R. A. 713, 46 Atl. 386 (dissenting opinion), majority holding payment by insolvent bank of note to company largely owned by bank's president, unlawful preference.

Costs.

Followed in *Schwartz v. Duss*, 43 C. C. A. 330, 103 Fed. 561, Affirming 46 Pittsb. L. J. N. S. 274, 93 Fed. 528, holding that costs follow decree in favor of defendants where allegations of conspiracy, fraud, and immorality have been successfully combated, but not withdrawn.

What constitutes renunciation of control.

Cited in *Honsucle v. Ruffin*, 172 Mass. 423, 52 N. E. 538, discussing, without deciding, question whether placing money in corporation's safe constituted payment for stock.

Set off against insolvent.

Cited in *Brown v. Sheldon State Bank*, 139 Iowa, 89, 117 N. W. 289, holding it is not material that the indebtedness, sought to be cancelled by off-set, is not due at the time.

15 L. R. A. 317, *COM. v. RYAN*, 155 Mass. 523, 30 N. E. 364.

What constitutes larceny.

Cited in *Com. v. Rubin*, 165 Mass. 454, 43 N. E. 200, holding one obtaining possession of horse from bailee by trick or fraud, and misappropriating same, guilty of larceny; *Com. v. McDonald*, 187 Mass. 584, 73 N. E. 852, on distinction between larceny at common law and embezzlement; *Minor v. State*, 55 Fla. 87, 46 So. 297, on the distinction between custody and possession in a servant.

Cited in notes (87 Am. St. Rep. 33, 34) on embezzlement; (88 Am. St. Rep. 576, 582, 583) on larceny.

15 L. R. A. 319, *LONG v. CHICAGO, K. & W. R. CO.* 48 Kan. 28, 30 Am. St. Rep. 271, 28 Pac. 977.

Liability for communicating disease.

Cited in *Bogard v. Illinois C. R. Co.* 144 Ky. 654, 36 L.R.A.(N.S.) 340, 139 S. W. 855, holding that passenger cannot recover for injury caused by contagious disease contracted on train from another passenger where carrier's servant had no knowledge that such other passenger had disease.

Cited in footnote to *Missouri, K. & T. R. Co. v. Wood*, 56 L. R. A. 592, which holds railroad company liable for communication of smallpox by employee negligently permitted to escape while being cared for.

Cited in notes (19 L.R.A. 726) on liability for communicating contagious disease; (36 L.R.A.(N.S.) 337) on liability of carrier for contraction of contagious disease by passenger (40 L.R.A.(N.S.) 1019) on liability of carrier for wilful torts of servants to passengers; (47 Am. St. Rep. 552) on liability for exposing human being to contagion; (93 Am. St. Rep. 841, 846) on liability of persons communicating contagious or infectious disease to others.

Disapproved in *Missouri, K. & T. R. Co. v. Raney*, 44 Tex. Civ. App. 521, 99

S. W. 589, holding knowledge of a railroad ticket agent that he was afflicted with contagious disease was imputable to his principal, the railroad company.

15 L. R. A. 321, RUSHVILLE v. RUSHVILLE NATURAL GAS CO. 132 Ind. 575, 28 N. E. 853.

Scope of grant of privilege of laying pipes in streets.

Approved in Vincennes v. Citizens' Gaslight Co. 132 Ind. 124, 16 L. R. A. 489, 31 N. E. 573, holding exclusive use of streets for gas pipes not implied by ordinance granting privilege of laying gas mains and pipes and also constituting contract for certain quantity of gas.

Provisions of statute or ordinance taking effect in future.

Approved in Logan Natural Gas & Fuel Co. v. Chillicothe, 65 Ohio St. 208, 64 N. E. 122, holding that different provisions of statute may be made to take effect at different times.

Cited in New Orleans v. Murat, 119 La. 1103, 44 So. 898, upholding an ordinance whose provisions are to take effect in the future or upon a contingency.

Regulation of franchises and property devoted to public use.

Approved in Knoxville v. Knoxville Water Co. 107 Tenn. 672, 61 L. R. A. 895, 64 S. W. 1075, sustaining legislative power to regulate public utilities and rates for public service.

Cited in Cram v. Chicago, B. & Q. R. Co. 84 Neb. 612, 26 L.R.A.(N.S.) 1024, 122 N. W. 31, holding property affected with a public interest subject to regulation coextensive with such interest and upholding law fixing speed to be made by live stock trains.

Cited in note (29 L. R. A. 792) on police regulations of business in which patents are used.

Cited as overruled in Citizens' Street R. Co. v. City R. Co. 64 Fed. 652, holding authorized franchise to have track in street not repealed by law creating new board with power to authorize street car companies to use any street.

Power to fix rates.

Cited in Horner v. Oxford Water & Electric Co. 153 N. C. 539, 138 Am. St. Rep. 681, 69 S. E. 607, holding that rates made by public service corporations may be regulated by municipal ordinances for public benefit; Rushville v. Rushville Natural Gas Co. 164 Ind. 165, 73 N. E. 87, 3 A. & E. Ann. Cas. 86, reaffirming validity of ordinance of July 19th, 1889, granting a franchise to defendant and holding same to be not impairable by regulating rates.

Cited in footnote to Muncie Natural Gas Co. v. Muncie, 60 L. R. A. 822, which sustains city's power to stipulate as to maximum rates for gas.

Cited in notes (33 L.R.A. 181) on legislative power to fix tolls, rates, or prices; (18 L.R.A.(N.S.) 1198) on power of municipality to fix gas rates as incident of power to authorize laying of mains; (33 L.R.A.(N.S.) 760) on power of municipality, apart from contract, to regulate public service rates; (62 Am. St. Rep. 295) on regulation of rates.

Cited as overruled in *Re Pryor*, 55 Kan. 729, 29 L. R. A. 400, 49 Am. St. Rep. 280, 41 Pac. 958, holding power to regulate laying of gas company's mains not inclusive of power to regulate prices; Noblesville v. Noblesville Gas & Improv. Co. 157 Ind. 166, 60 N. E. 1032, holding that power to ordain reasonable regulations for safe supply, distribution, and consumption of natural gas, not inclusive of power to regulate prices.

Overruled in Lewisville Natural Gas Co. v. State, 135 Ind. 52, 21 L. R. A. 735, footnote p. 734, 34 N. E. 702, holding that price cannot be regulated under gen-

eral power to provide reasonable regulations for safe supply, distribution, and consumption of natural gas.

Duty of public service corporations to public — Gas.

Cited in *Coy v. Indianapolis Gas Co.* 146 Ind. 660, 36 L. R. A. 536, footnote p. 535, 46 N. E. 17, holding natural gas company liable in damages for breach of contract to supply natural gas to consumer; *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 668, 51 L. R. A. 747, footnote p. 744, 58 N. E. 1049, holding unreasonable, charge of 20 cents per 1,000 feet from those using natural gas for both fuel and light and only 12½ cents for those using it for fuel only; *Vanderberg v. Kansas City Missouri Gas Co.* 126 Mo. App. 607, 105 S. W. 17, holding a gas company under legal obligations to serve all the members of the public contributing to its asserted rights impartially.

Cited in footnotes to *Indiana Natural & Illuminating Gas Co. v. State*, 57 L. R. A. 761, which denies right of natural gas company to discriminate against single consumer by enforcing meter rate instead of flat rate, against him; *Portland Natural Gas & Oil Co. v. State*, 21 L. R. A. 639, which authorizes mandamus to compel company to furnish gas; *State ex rel. Wood v. Consumers' Gas Trust Co.* 55 L. R. A. 245, which authorizes mandamus to compel natural gas company to permit participation in gas furnished.

— Water.

Cited in *Crumley v. Watauga Water Co.* 99 Tenn. 426, 41 S. W. 1058, holding that water company cannot refuse to supply resident refusing to pay debt for which it extended credit; *Hatch v. Consumers Co.* 17 Idaho, 221, 40 L.R.A. (N.S.) 271, 104 Pac. 670, holding a corporation receiving a franchise to supply a city with water must serve all persons without distinction or discrimination.

Cited in footnotes to *American Waterworks Co. v. State*, 30 L. R. A. 447, which sustains power to compel private water company to furnish water to patrons without discrimination; *Wood v. Auburn*, 29 L. R. A. 376, which denies city's right to shut off water to compel payment of old claim after acceptance of rates; *State ex rel. Milsted v. Butte City Water Co.* 32 L. R. A. 697, which denies right of water company to refuse to supply water to tenant; *Bienville Water-Supply Co. v. Mobile*, 33 L. R. A. 59, which authorizes injunction against water company shutting off supply of water for public purposes; *Ladd v. Boston*, 40 L. R. A. 171, which upholds removal of water meter though fixtures so arranged as to cost consumer, after removal, twenty times as much as others pay; *Kelsey v. Fire & Water Comrs.* 37 L. R. A. 675, which denies owner's right to require supply of water to each tenant as separate consumer; *Souther v. Gloucester*, 69 L.R.A. 309, which sustains right to charge higher rates for water furnished owners of summer cottages in outlying districts.

Distinguished in *Watauga Water Co. v. Wolfe*, 99 Tenn. 431, 63 Am. St. Rep. 841, 41 S. W. 1060, holding that waterworks company may refuse to serve applicant refusing to keep hydrant closed when not using water.

— Transportation.

Cited in footnotes to *Kirby v. Western U. Teleg. Co.* 30 L. R. A. 612, which holds it carrier's duty to carry whatever properly offered; *Jacobson v. Wisconsin, M. & P. R. Co.* 40 L. R. A. 389, which sustains making of joint rates for through shipments over connecting railroads; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 18 L. R. A. 394, which holds railroad company not obliged to furnish facilities to express company; *Seasongood, S. K. & Co. v. Tennessee & O. River Transp. Co.* 49 L. R. A. 270, which holds carrier refusing to accept freight tendered, liable for loss by theft; *Memphis News Pub. Co. v. Southern R. Co.* 63

L.R.A. 150, which denies right to exclude other newspaper publishers from use of train run at solicitation of particular publisher.

Cited in note (18 L. R. A. 105) on right of carrier at common law to discriminate between passengers or shippers.

— **Telegraph and telephone.**

Cited in *Central U. Teleph. Co. v. Swoveland*, 14 Ind. App. 352, 42 N. E. 1035, holding telephone company's rule making its messengers agents of patrons not within its power to make rules and regulations.

Cited in footnotes to *State ex rel. Gwynn v. Citizens' Teleph. Co.* 55 L. R. A. 139, which authorizes mandamus to compel furnishing telephone and connections to customer; *Com. v. Western U. Teleg. Co.* 57 L. R. A. 614, which holds delivery of telegrams containing necessary information at place used for pool selling, not a common nuisance; *People ex rel. Cairo Teleph. Co. v. Western U. Teleg. Co.* 36 L. R. A. 637, which denies right to compel telegraph company to receive messages by telephone; *Godwin v. Carolina Teleph. & Teleg. Co.* 67 L.R.A. 251, which holds telephone company not required to furnish service to a bawdy house.

Cited in note (24 L. R. A. 166) on power of state to control or impose burdens on interstate telegraph or telephone companies.

Injunction against enforcement of ordinance or statute.

Cited in *Davis & F. Mfg. Co. v. Los Angeles*, 115 Fed. 539, denying injunction against criminal prosecution under ordinance alleged to be void, although property rights involved; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 329, 51 Am. St. Rep. 566, 32 S. W. 649, holding injunctive relief against invalid ordinance authorized where multiplicity of suits thereby prevented; *State ex rel. Kenamore v. Wood*, 155 Mo. 479, 48 L. R. A. 610, 56 S. W. 474 (dissenting opinion), majority denying right to injunction against enforcement of alleged unconstitutional statute for inspection of beer, enforceable only by criminal proceedings; *Bastings v. Minneapolis*, 112 Minn. 308, 140 Am. St. Rep. 490, 127 N. W. 1131, holding that injunction lies to restrain enactment of ordinance only where by mere enactment, irreparable damage will immediately follow, cause multiplicity of suits or violate contract rights; *Princess Amusement Co. v. Metzger*, 169 Ind. 381, 82 N. E. 758, holding mere fact that an ordinance is void, does not furnish sufficient ground for enjoining its enforcement.

Cited in footnotes to *Agua Pura Co. v. Las Vegas*, 50 L. R. A. 224, which holds compliance with water company's valid contract not condition to injunctive relief against interference with same by city ordinance; *State ex rel. Rose v. Superior Court*, 48 L. R. A. 819, which denies right to injunction against passage of ordinance creating contract; *General Electric R. Co. v. Chicago, I. & L. R. Co.* 58 L. R. A. 231, which sustains right of railroad company to injunction against construction under invalid ordinance of street railway which would specially injure former company; *Paul v. Washington*. 65 L.R.A. 902, which denies right to enjoin enforcement of municipal ordinance on ground that it is unreasonable and void; *Ramsey v. Shelbyville*, 68 L.R.A. 300, which sustains right of taxpayers to maintain action to annul ordinance accepting gift and obligating city for its maintenance though it has not yet taken effect.

Cited in notes (21 L.R.A. 88) on injunction against criminal proceedings; (2 L.R.A.(N.S.) 633) on injunction against prosecution of criminal or quasi criminal nature; (118 Am. St. Rep. 373, 375) on judgment against enforcement of void municipal ordinance.

— **Against impairment of franchise.**

Cited in *Bessemer v. Bessemer City Waterworks*, 152 Ala. 403, 44 So. 663,

holding equity has jurisdiction to protect a vested franchise from unlawful invasion, upon ground of irreparable injury, or injury which cannot be adequately estimated at law; *Tyler v. Story*, 44 Tex. Civ. App. 253, 97 S. W. 856, holding where intervention of equity becomes necessary to protect the franchise of a public service corporation there is ground for an exception of rule that equity will not enjoin prosecution of a criminal or quasi criminal nature.

Cited in note (49 L. ed. U. S. 170) on injunction against criminal prosecutions under void municipal ordinances affecting property rights or franchises.

Grounds for equitable interference.

Cited in *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 237, 87 N. E. 47, holding prevention of costs merely in bringing separate suits at law is not sufficient ground for equitable interference.

15 L. R. A. 326, *WORTHINGTON v. CENTRAL VERMONT R. CO.* 64 Vt. 107, 23 Atl. 590.

When negligence a question of law or fact.

Cited in *Boyden v. Fitchburg R. Co.* 72 Vt. 92, 47 Atl. 409, holding that court should direct verdict for defendant in action for negligence unless intestate is shown to have been in exercise of due care and prudence; *Germond v. Central Vermont R. Co.* 65 Vt. 133, 26 Atl. 585, holding question of negligence for jury where circumstances do not preclude difference of opinion; *Dumas v. Stone*, 65 Vt. 444, 25 Atl. 1097, holding question of contributory negligence on evidence leaving room for opposing inferences one for jury; *Howrigan v. Bakersfield*, 79 Vt. 254, 64 Atl. 1130, 9 A. & E. Ann. Cas. 282, holding question of negligence, when standard is not prescribed, becomes one of law only when facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it; *Miller v. Chicago, St. P. M. & O. R. Co.* 135 Wis. 250, 17 L.R.A.(N.S.) 161, 128 Am. St. Rep. 1021, 115 N. W. 794, holding one guilty of contributory negligence as a matter of law, in riding from choice on platform of a nonvestibuled railroad car against positive rules of company; *Morgan v. Lake Shore & M. S. R. Co.* 138 Mich. 635, 70 L.R.A. 613, 101 N. W. 836 (dissenting opinion), on negligence as a matter of law in riding in place of danger.

Distinguished in *Woods v. Southern P. Co.* 9 Utah, 152, 33 Pac. 628, holding carrier's negligence as to one riding upon platform question for jury where injury might have happened as well had plaintiff been inside the car.

What constitutes negligence.

Cited in *Goodwin v. Boston & M. R. Co.* 84 Me. 212, 24 Atl. 816, holding riding on platform of passenger car negligence, although cars uncomfortable, and no objection to use of platform made by conductor; *Carter v. Central Vermont R. Co.* 72 Vt. 193, 47 Atl. 797, holding attempting to drive team across track in front of rapidly approaching train, negligence; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 155, 34 L. R. A. 143, 44 N. E. 1106, holding that going from car in which there is plenty of standing room to lower step of platform when train running at 25 miles an hour, negligence; *Magoon v. Boston & M. R. Co.* 67 Vt. 185, 31 Atl. 156, holding attempt to pass over buffers between cars standing at crossing but liable to be moved at any moment, negligence; *Kilpatrick v. Grand Trunk R. Co.* 72 Vt. 267, 82 Am. St. Rep. 939, 47 Atl. 827, holding attempting to climb upon car moving at rate of 8 or 9 miles an hour by getting hold of ladder and passing to top, negligence; *Louisville & N. R. Co. v. Massie*, 138 Ky. 456, 128 S. W. 330, to the point that it is prima facie negligence for passenger to ride on platform or step of car; *Rolette v. Great Northern R. Co.* 91 Minn. 20, 97 N. W. 431, 1 A. & E. Ann. Cas. 313, holding a passenger cannot,

in going into a place of well-known danger, recover for injuries received, because a seat was not furnished him; *Carleton v. Central R. Co.* 155 Ala. 329, 46 So. 495, 16 A. & E. Ann. Cas. 445, holding if conditions were such as to render it dangerous for one to pass from one car to another, and he is forced or ordered by conductor out of car, a recovery may be had from the carrier; *Milbourne v. Arnold Electric Power Station Co.* 140 Mich. 326, 70 L.R.A. 600, 103 N. W. 821 (dissenting opinion), on contributory negligence by hazarding danger without particular knowledge thereof.

Cited in notes (24 L.R.A. 710) on duty of carrier permitting cars to become overcrowded; (29 L.R.A.(N.S.) 327) on riding on platform of railroad car as negligence.

15 L. R. A. 332, *EMRY v. RALEIGH & G. R. CO.* 109 N. C. 589, 14 S. E. 352.

Instructions and questions for court or jury.

Approved in *Chesson v. John L. Roper Lumber Co.* 118 N. C. 68, 23 S. E. 925, holding refusal of specific instruction as to what constituted reasonable diligence, error; *Knight v. Albemarle & R. R. Co.* 110 N. C. 61, 14 S. E. 650, holding instruction that if circumstances were such that man of ordinary care and prudence would have so acted, plaintiff is not guilty of contributory negligence, error; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 715, 25 L. R. A. 793, 41 Am. St. Rep. 799, 19 S. E. 730, holding instruction as to "ordinary care" unattended with explanation, error; *Whitford v. Newbern*, 111 N. C. 277, 16 S. E. 327, holding that failure to instruct as asked, that plaintiff's testimony showed contributory negligence, is not available error where this instruction substantially given; *Waters v. Melson*, 112 N. C. 95, 16 S. E. 918, holding failure to instruct as asked, as to prudence required of receiver under circumstances in evidence, not prejudicial error where court instructed that burden of poof of diligence was on receiver, and there was no evidence on the point; *Dibbrell v. Georgia Home Ins. Co.* 110 N. C. 214, 28 Am. St. Rep. 678, 14 S. E. 783, holding question of reasonable time for production of certain papers, question of law for court; *State ex rel. Joyner v. Roberts*, 114 N. C. 392, 19 S. E. 645, holding question of reasonable inquiry by register issuing marriage license, one of law for court; *Kahn v. Atlantic & N. C. R. Co.* 115 N. C. 641, 20 S. E. 169, holding it erroneous to leave question of ordinary care to jury without other instruction than that ordinary care was such care as an ordinarily prudent man would have used to protect his own property.

Cited in *State v. Yellowday*, 152 N. C. 797, 67 S. E. 480, holding an omission of the court to charge as to a certain matter should be called to the attention of the court by a prayer for instruction.

Cited in footnotes to *Gratiot v. Missouri P. R. Co.* 16 L. R. A. 189, which holds question of negligence for jury where facts or inferences doubtful; *Shoberbert v. May*, 55 L. R. A. 810, which holds question of negligence for jury though facts undisputed if some degree of care shown.

Distinguished in *Sherrill v. Western U. Teleg. Co.* 116 N. C. 657, 21 S. E. 429, holding instruction that evidence rebuts prima facie case of negligence, invades province of jury; *Ruffin v. Atlantic & N. C. R. Co.* 142 N. C. 127, 55 S. E. 86, holding a prayer for instruction of jury that if they find certain facts grouped therein there was no negligence is objectionable where court treats negligence as a question of fact for the jury.

Overruled in *Hinshaw v. Raleigh & A. Air Line R. Co.* 118 N. C. 1055, 24 S. E. 426, holding contributory negligence in alighting at place some distance from station, known to be dangerous, at conductor's direction, for jury.

Cited as overruled in *Russell v. Carolina C. R. Co.* 118 N. C. 1110, 24 S. E. 512,

holding question of negligence for jury where testimony conflicting or more than one inference may be drawn; *McCracken v. Smathers*, 119 N. C. 620, 26 S. E. 157, holding that trial court must instruct as to ordinary care where no request for application of law to testimony is made.

What constitutes negligence.

Approved in *Russell v. Monroe*, 116 N. C. 728, 47 Am. St. Rep. 823, 21 S. E. 550, holding use of sidewalk after knowledge of defect, not negligence; *Haynes v. Raleigh Gas Co.* 114 N. C. 209, 26 L. R. A. 813, 41 Am. St. Rep. 786, 19 S. E. 344, holding touching of live guy wire hanging near sidewalk by boy of ten years, not negligence; *St. Louis, I. M. & S. R. Co. v. Martin*, 61 Ark. 555, 33 S. W. 1070, holding one going heedlessly upon railroad track at night and standing there to talk, negligence.

Cited in notes (59 L.R.A. 904) on liability for damming back water of stream; (33 L.R.A. (N.S.) 371) on failure to protect property against wrongfully diverted surface water as contributory negligence.

Distinguished in *Knight v. Albemarle & R. R. Co.* 111 N. C. 86, 15 S. E. 929, holding planting of crops on lands subject to overflow, not negligence.

Recovery of present and prospective damages.

Distinguished and limited in *Ridley v. Seaboard & R. R. Co.* 118 N. C. 1006, 32 L. R. A. 711, 24 S. E. 730, which holds that both present and prospective damages for insufficient culvert in railroad embankment are recoverable in single action.

15 L. R. A. 341, *PUTERBAUGH v. PUTERBAUGH*, 131 Ind. 288, 30 N. E. 519.

Later appeal in 7 Ind. App. 297, 33 N. E. 808.

Statute of frauds.

Approved in *Daily v. Minnick*, 117 Iowa, 569, 60 L. R. A. 843, 91 N. W. 913, holding naming child for grantor, sufficient performance of consideration to take oral agreement to convey lands to him therefor out of statute of frauds.

Sufficiency of consideration.

Approved in *Horner v. Clark*, 27 Ind. App. 11, 60 N. E. 732, holding consideration for conveyance of real estate not impaired because containing element of affection.

Cited in footnote to *Fisher v. Union Trust Co.* 68 L.R.A. 987, which holds love and affection and desire to provide for grantee after grantor's death not sufficient consideration to entitle grantee to enforce executory promise in deed to satisfy an incumbrance on the property.

Possession as creating tenancy.

Approved in *Starkey v. Starkey*, 136 Ind. 356, 36 N. E. 287, holding tenancy not created by possession given to one who, under agreement was to have deed in fee simple upon performance of condition to share crops with grantor until latter in better circumstances.

Effect of indefiniteness of time for performance.

Approved in *Horner v. Clark*, 27 Ind. App. 11, 60 N. E. 732, holding contract to convey land not invalidated by indefiniteness of time for making deed.

Right to jury trial.

Approved in *Monnett v. Turple*, 132 Ind. 484, 133 Ind. 426, 32 N. E. 328, holding jury demandable in action to quiet title; *Lindley v. Sullivan*, 133 Ind. 592, 32 N. E. 738, holding overruling of general objection to submission to jury at inception of trial, where legal and equitable defenses joined, not erroneous because evidence introduced only under equitable issue; *Jennings v. Moon*, 135 Ind. 173, 34 N. E. 996, sustaining right to jury trial under complaint settling

up claim to land with prayer to quiet title, notwithstanding further prayer for lien if title refused.

Cited in *Harmon v. Pohle*, 46 Ind. App. 373, 92 N. E. 119, holding that action for recovery of possession of leased premises by reason of breach of condition subsequent, and for damages, is triable by jury, though there is prayer for cancellation of lease; *Baxter v. Baxter*, 46 Ind. App. 521, 92 N. E. 881, holding that suits to quiet title are triable by jury; *Adams v. Betz*, 167 Ind. 164, 78 N. E. 649, holding a suit under statute to quiet title to real estate is triable by a jury.

Nature of proceeding to quiet title to realty.

Cited in *Seymour Water Co. v. Seymour*, 163 Ind. 124, 70 N. E. 514, holding the proceeding to quiet title is essentially statutory and legal in nature.

Sufficiency of special verdict.

Approved in *La Porte County v. Ellsworth*, 9 Ind. App. 569, 37 N. E. 22, holding verdict finding facts from which notice would be constructively chargeable, sufficient under averment of notice; *Becknell v. Hosier*, 10 Ind. App. 8, 37 N. E. 580, holding judgment for malpractice not supported by special verdict leaving in doubt whether want of care and skill was in reducing dislocation or subsequent treatment; *Jonas v. Hirshburg*, 18 Ind. App. 596, 48 N. E. 656, sustaining sufficiency of verdict stating evidentiary facts where latter may be disregarded and no contradictions appear.

Cited in note (24 L.R.A.(N.S.) 26, 29, 41, 48) on what special verdict must contain.

Effect of erroneous ruling upon one paragraph of complaint where verdict supports another.

Approved in *Laughery Turnp. Co. v. McCreary*, 147 Ind. 529, 46 N. E. 906, holding error in ruling upon two paragraphs of complaint harmless where verdict supports another paragraph.

15 L. R. A. 347, *TEXAS & P. R. CO. v. JAMES*, 82 Tex. 306, 18 S. W. 589.

Carrier's duty as to safety and comfort of passenger.

Approved in *Missouri, K. & T. R. Co. v. Perry*, 8 Tex. Civ. App. 82, 27 S. W. 496, holding passenger carried past destination through his own negligence assumes risk in voluntarily getting off from train while in motion; *Texas & P. R. Co. v. Woods*, 8 Tex. Civ. App. 466, 28 S. W. 416, holding passenger carried beyond destination through his own negligence assumes risk in voluntarily jumping from platform; *St. Louis Southwestern R. Co. v. McCullough*, 18 Tex. Civ. App. 538, 45 S. W. 324, holding carrier not liable for damages due to passenger's failure to alight at junction point where he knew of necessity of changing cars, if customary announcement of station made; *St. Louis S. W. R. Co. v. Ricketts*, 22 Tex. Civ. App. 518, 54 S. W. 1090, holding railway not obliged to keep depot warm for an hour after departure of train, for one alighting there when carried beyond destination through his own negligence; *United R. & Electric Co. v. Hardesty*, 94 Md. 668, 57 L. R. A. 278, 51 Atl. 406, holding second demand for fare not necessary before ejecting passenger tendering, on first demand, worthless ticket which he was informed was insufficient; *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 362, 66 L. R. A. 624, 70 N. E. 857, holding street car company liable for conductor's insulting remarks to lady passenger, who asked for change.

Cited in *Texas & P. R. Co. v. Dffenbach*, 92 C. C. A. 501, 167 Fed. 47, holding one riding on freight train without permission and beyond station at which he was ordered to get off and buy ticket is not a passenger and company has a right to treat him as a trespasser.

Cited in footnotes to *Church v. Chicago, M. & St. P. R. Co.* 26 L. R. A. 616, which holds that carrier's failure to notify through passenger to change cars at junction does not entitle her to travel by more circuitous route; *Chattanooga, R. & C. R. Co. v. Lyon*, 15 L. R. A. 857, which holds passenger with ticket to flag station not required to notify conductor of destination before ticket called for.

Cited in note (17 L.R.A.(N.S.) 1226) on measure of damages for carrying passenger beyond destination.

Damages recoverable.

Cited in footnotes to *Mabry v. City Electric R. Co.* 59 L. R. A. 590, which holds carrier liable for injury to feelings and sensibilities of passenger wrongfully ejected without physical injury; *Lewis v. Holmes*, 61 L. R. A. 274, which authorizes for breach of contract for wedding trousseau, recovery for bride's mortification and humiliation, and inability to attend entertainments planned for her; *Davis v. Tacoma R. & P. Co.* 66 L.R.A. 802, which holds that damages for being wrongfully ordered to leave place of public resort may include compensation for sense of wrong suffered, feeling of humiliation, and disgrace, and mental suffering.

Reversal for refusal to instruct.

Cited in *Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 446, 42 So. 706, on refusal of instructions covered by other charges given.

15 L. R. A. 350, *GRAND LODGE, A. O. U. W. v. NOLL*, 90 Mich. 37, 30 Am. St. Rep. 419, 51 N. W. 268.

Changing beneficiary or his rights in benefit certificate.

Approved in *Grand Lodge, A. O. U. W. v. Kohler*, 106 Mich. 123, 63 N. W. 897, sustaining change of beneficiary by will where certificate was delivered for safe keeping to original beneficiary who refused to surrender same, and local lodge declined to permit change without its production; *McGowan v. Supreme Court, I. O. F.* 104 Wis. 181, 80 N. W. 603, holding change of beneficiaries accomplished where insured had substantially performed every required act, and only formal acts by the society remained unperformed; *Woodruff v. Tilman*, 112 Mich. 190, 70 N. W. 420, holding that insured may charge beneficiary by will with payment of debt from proceeds of certificate, unless prohibited by certificate or association's rules.

Cited in *Gordon v. Gordon*, 117 Ill. App. 96, holding change of beneficiary must be made in manner provided in absence of waiver by the company or proof of inability of compliance by the insured; *Farra v. Braman*, 171 Ind. 541, 86 N. E. 843, holding equity may perfect an attempted substitution of beneficiaries where fraud of beneficiary named prevents substitution; *Allgemeiner Arbeiter Bund v. Adamson*, 132 Mich. 88, 92 N. W. 786, holding when second certificate is issued without surrender of prior one it cannot properly be said existence of first certificate was not known when stub of certificate book shows such fact.

Cited in footnotes to *Lahey v. Lahey*, 61 L. R. A. 791, which denies right of original beneficiary to fund notwithstanding failure to effect change from his refusal to surrender old certificate; *Jory v. Supreme Council A. L. of H.* 26 L. R. A. 733, which sustains member's right to change beneficiary without surrendering certificate; *Hoelt v. Supreme Lodge K. of H.* 33 L. R. A. 174, which denies right of former beneficiary in proceeds because of fraud in inducing change; *Thomas v. Cochran*, 46 L. R. A. 160, which holds interest in benefit certificate goes to representative of beneficiary dying before insured; *Carson v.*

Vicksburg Bank, 37 L. R. A. 559, which denies right to substitute other person for wife as beneficiary of endowment certificate.

Cited in notes (49 L.R.A. 754) on power of insured to destroy rights of beneficiary; (4 L.R.A.(N.S.) 942) on right to change beneficiary by will; (52 Am. St. Rep. 564) on change of beneficiary of mutual or membership life or accident insurance.

Distinguished in *Independent Foresters v. Keliher*, 36 Or. 507, 78 Am. St. Rep. 785, 59 Pac. 324, holding that holder of benefit certificate must substantially comply with rules for change of beneficiary when possible; *Grand Lodge, A. O. U. W. v. Fisk*, 126 Mich. 364, 85 N. W. 875, holding disposal of benefit by will after death of original beneficiary, ineffective where insured possessed certificate and lived eight months thereafter, without attempting to change by prescribed method; *Modern Woodmen v. Little*, 114 Iowa, 112, 86 N. W. 216, denying right to change beneficiary by letter when by-laws require surrender of certificate.

15 L. R. A. 354, *COLUMBUS WATER CO. v. COLUMBUS*, 48 Kan. 99, 28 Pac. 1097.

Extent of municipal power to contract.

Approved in *State ex rel. Atty. Gen. v. Seattle Gas & Electric Co.* 28 Wash. 504, 68 Pac. 946, holding that municipal power to provide for lighting system and to regulate and control use thereof and of highways, includes authority to authorize others to furnish same; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 524, 22 C. C. A. 179, 40 U. S. App. 257, 76 Fed. 271, and *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 228, 69 Pac. 176, both holding that authority of city to contract for and procure construction of waterworks for domestic, manufacturing, and other purposes includes authority to grant franchise for establishment of waterworks and to agree to pay rental for hydrants.

Cited in *Tahlequah v. Quinn*, 5 Ind. Terr. 513, 82 S. W. 886, holding taxpayers cannot maintain action to restrain contracts under an ordinance granting exclusive privileges of supplying town with water.

Cited in note (61 L. R. A. 70) on establishment and regulation of municipal water supply.

Distinguished in *Westminster Water Co. v. Westminster*, 98 Md. 556, 64 L. R. A. 633, footnote p. 630, 56 Atl. 990, denying power of municipality to contract to pay water company amount in perpetuity equal to 5 cents on \$100 of valuation.

Power of public officers to make contracts binding on successors or for term of years.

Cited in *Reed v. Anoka*, 85 Minn. 299, 88 N. W. 981, holding contract with city for electric lights and waterworks not invalid because covering period of thirty-one years; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 526, 22 C. C. A. 184, 40 U. S. App. 257, 76 Fed. 274, holding municipal waterworks contract for twenty-one years within discretionary power of city to determine term of such contract.

Cited in footnote to *Westminster Water Co. v. Westminster*, 64 L.R.A. 630, which holds that perpetual contract for municipal water supply cannot be construed as having been intended to exist only for the life time of the water company.

Cited in note (16 L. R. A. 258) on power of public officers to make contracts binding on their successors or for a term of years.

Estoppel of municipality to question validity of executed contract.

Approved in *Kansas City v. Wyandotte Gas Co.* 9 Kan. App. 331, 61 Pac. 317, holding that city cannot avoid liability under authorized contract for accepted

benefits, under plea of *ultra vires*; Willis v. Wyandotte County, 30 C. C. A. 450, 58 U. S. App. 665, 86 Fed. 877, holding county estopped to deny liability on improvement certificates as to money collected from property owners before enabling statute declared unconstitutional; Illinois Trust & Sav. Bank v. Arkansas City, 34 L. R. A. 531, 22 C. C. A. 194, 40 U. S. App. 257, 76 Fed. 271, holding city estopped to assert invalidity of contract under which hydrant rentals are due and paid without protest for fourteen months, where waterworks built under direction of and accepted by city council; Baxter Springs v. Baxter Springs Light & P. Co. 64 Kan. 598, 68 Pac. 63, holding light company not prevented from recovery for service rendered by failure to file written acceptance of ordinance and failure of contract to specify number of lights; London & N. Y. Land Co. v. Jellico, 103 Tenn. 323, 52 S. W. 995, holding city liable for benefits received under grading contract entered into at illegal meeting of aldermen; Greenville v. Greenville Waterworks Co. 125 Ala. 640, 27 So. 764, holding city liable for rental of fire plugs, without regard to its power to contract therefor for a long term of years, where authorized to contract.

Cited in note (19 L. R. A. 619) on limitation of doctrine of *ultra vires* in respect to municipal corporations.

Attack upon franchise.

Approved in Illinois Trust & Sav. Bank v. Arkansas City, 34 L. R. A. 525, 22 C. C. A. 181, 40 U. S. App. 257, 76 Fed. 281, holding that exclusive nature of waterworks franchise cannot be questioned after substantial performance by grantee, by one not infringing or threatening to infringe same.

15 L. R. A. 361, MORE v. BENNETT, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888.

Combination in restraint of trade.

Cited in Bishop v. American Preservers' Co. 157 Ill. 310, 48 Am. St. Rep. 317, 41 N. E. 765, holding trust agreement whereby all trade in particular line is controlled and prices raised or depressed at will of trustees, void; United States v. Addyston Pipe & Steel Co. 46 L. R. A. 132, 29 C. C. A. 154, 54 U. S. App. 723, 85 Fed. 285, holding contract solely to restrain competition and enhance or maintain prices void; Harding v. American Glucose Co. 152 Ill. 617, 64 L. R. A. 764, 74 Am. St. Rep. 189, 55 N. E. 577, holding combination of interests of stockholders in competing corporations, void; Greer v. Payne, 4 Kan. App. 163, 46 Pac. 190, holding combination among live-stock commission merchants to prevent competition and maintain uniform minimum prices for their service, void; Nester v. Continental Brewing Co. 161 Pa. 482, 24 L. R. A. 251, 34 W. N. C. 390, 41 Am. St. Rep. 894, 29 Atl. 102, holding combination of brewers to stifle competition in two counties and to fix minimum price for sales to another's customer or to new trade, void; Jackson v. Stanfield, 137 Ind. 610, 23 L. R. A. 595, 36 N. E. 345, holding combination of retail lumber dealers to prevent wholesalers from selling to brokers and commission dealers, void; Brown v. Jacobs Pharmacy Co. 115 Ga. 434, 57 L. R. A. 550, footnote p. 548, 41 S. E. 553, sustaining right to injunction against combination of merchants to prevent sales to dealer unless he sells at fixed prices; People *ex rel.* McIlhenny v. Chicago Live Stock Exchange, 170 Ill. 567, 39 L. R. A. 376, 62 Am. St. Rep. 404, 48 N. E. 1062, holding by-law of live-stock exchange which limits number of solicitors to each member, enforceable by fine, suspension, or expulsion, void; Milwaukee Masons & Builders' Assn. v. Niezerowski, 95 Wis. 136, 37 L. R. A. 130, 60 Am. St. Rep. 97, 70 N. W. 166, holding by-laws requiring competing bidders to submit bids and add 6 per cent at least to lowest bid before being submitted in competition, void; Bailey v. Master Plumbers' Assn. 103 Tenn. 107, 46 L. R. A. 563, 52 S. W. 853, holding by-law of plumbers' association requiring weekly re-

ports of work done by each member and certain payments for work done in competition with other members, void; *Froelich v. Musicians Mut. Ben. Asso.* 93 Mo. App. 391, holding combination which restricts employment in particular trade to members thereof, void; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 123, 50 L. R. A. 178, 85 Am. St. Rep. 125, 28 So. 669, holding contract by ice manufacturer to discontinue production for five years, made without sale of business and in consideration of payment by owner of only other ice plant in the town, where product of both plants marketable, void; *Union Strawboard Co. v. Bonfield*, 96 Ill. App. 416, holding vendor's agreement not to engage in or be interested in manufacture of certain articles within state or where purchaser's business interest would be interfered with for twenty-five years, void; *Andrews v. Kingsbury*, 112 Ill. App. 522, upholding contract not to engage in newspaper business in specified city for five years; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 70, 71 S. W. 691, holding agreement among breweries not to sell to one indebted to member, illegal; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 47, 45 L. R. A. 377, 52 S. W. 595, holding contract between insurers for maintenance of rates, not within constitutional guaranty of life, liberty, and property; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 388, 61 L. R. A. 473, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination to control prices of beef, illegal; *Standard Oil Co. v. State*, 117 Tenn. 661, 10 L.R.A.(N.S.) 1027, 100 S. W. 705, holding all that is necessary to constitute a violation of the statute, is that the agreement was made for the purpose of and had a tendency to lessen competition; *Knight & J. Co. v. Miller*, 172 Ind. 38, 87 N. E. 823, holding all contracts which have a tendency to stifle competition are void as against public policy; *Dunbar v. American Teleph. & Teleg. Co.* 224 Ill. 23, 115 Am. St. Rep. 132, 79 N. E. 423, 8 A. & E. Ann. Cas. 57, affirming 3 Ill. C. C. 10, holding a tendency in the direction of restraint of competition is sufficient to condemn the transaction as unlawful; *McCarter v. Firemen's Ins. Co.* 70 N. J. Eq. 292, 61 Atl. 705, holding the principle that condemns agreements in restraint applied not only to transactions of trade and commerce but other transactions; *Kemp v. Division No. 241*, A. A. S. & E. R. E. 153 Ill. App. 369, to the point that all parties to conspiracy are liable for all overt acts illegally done pursuant to conspiracy and for subsequent loss whether they are active participants or not; *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 449, 73 N. E. 770, holding a combination to regulate and fix price at which coal should be sold in northern Illinois unlawful; *Purington v. Hinchliff*, 219 Ill. 167, 2 L.R.A.(N.S.) 827, 109 Am. St. Rep. 322, 76 N. E. 47, holding no person or combination of persons can legally by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business; *Purington v. Hinchliff*, 120 Ill. App. 532, holding agreements between contractors and manufacturers of brick whereby former agree to buy and latter to sell exclusively and bricklayers agree to use only such brick as forms subject-matter of agreement, are unlawful as against public policy; *Arnold & Co. v. Jones Cotton Co.* 152 Ala. 505, 12 L.R.A.(N.S.) 154, 44 So. 662; *Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 113,—holding the number who may be implicated in the combination in restraint is not material, nor the extent of territory covered; *State v. Standard Oil Co.* 218 Mo. 461, 116 S. W. 902, holding a combination to control and limit trade in refined products of petroleum sold in state, unlawful and charter and licenses of guilty parties subject to forfeiture; *Cleland v. Anderson*, 66 Neb. 264, 5 L.R.A.(N.S.) 143, 92 N. W. 306, holding an association of retail lumber dealers an unlawful combination which tended to compel wholesale lumber dealers to sell only to its members or pay penalty; *Dickinson v. Board of Trade*, 114 Ill. App. 304, upholding rule of Chicago Board of Trade which prohibits members from

charging less than specified commission, where such prohibition was entirely in interest of members of board.

Cited in footnote to *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance, unlawful.

Cited in notes (23 L.R.A.(N.S.) 1263) on combination to control price of personal service as violation per se of antimonopoly statute; (74 Am. St. Rep. 264, 265) on combinations constituting unlawful trusts.

Distinguished in *Queen Ins. Co. v. State*, 86 Tex. 273, 22 L. R. A. 495, 24 S. W. 397, holding combination of insurers to establish uniform rates of insurance and commissions, not restriction on trade; *Fire Underwriters v. Johnson*, 133 Ky. 806, 24 L.R.A.(N.S.) 157, 119 S. W. 153, holding a regulation of a voluntary unincorporated association of fire underwriters prohibiting members from taking agency of a company already represented in a city, is not in violation of public policy.

Disapproved in *State v. Board of Trade*, 107 Minn. 549, 23 L.R.A.(N.S.) 1282 121 N. W. 395, holding a combination for purpose of fixing charges for personal services is not unlawful.

Law of association as contract between society and members.

Cited in *Carson v. Vicksburg Bank*, 75 Miss. 174, 37 L. R. A. 560, 65 Am. St. Rep. 596, 22 So. 1, holding benefit certificate not payable to creditor contrary to express provision of Constitution.

Cited in notes (1 Brit. Rul. Cas. 96; 5 L.R.A.(N.S.) 892) on obligation of members of labor union as to political matters.

15 L. R. A. 365, *BOWES v. BOSTON*, 155 Mass. 344, 29 N. E. 633.

Sufficiency of notice as to place of accident.

Cited in *Hoffman v. North Milwaukee*, 118 Wis. 281, 95 N. W. 274, holding notice given in good faith, stating that accident occurred at side of 600-foot block, sufficient; *Veno v. Waltham*, 158 Mass. 283, 33 N. E. 398, discussing, without deciding, question whether notice of place of highway accident is sufficient, although ambiguous; *Chisholm v. Manhattan R. Co.* 116 App. Div. 325, 101 N. Y. Supp. 622, holding service of a complaint in action for causing wrongful death does not satisfy statute as to notice.

Independent actions for injuries.

Approved in *Worcester & Suburban Street R. Co. v. Travelers Ins. Co.* 180 Mass. 265, 57 L. R. A. 630, 91 Am. St. Rep. 275, 62 N. E. 364, holding administrator's action for use of widow and children independent of statutory action for bodily injury; *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 238, 47 Pac. 183, denying abatement of action for personal injuries resulting in death; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 615, 50 L. R. A. 710, 36 S. E. 881, holding action for homicide of husband or father by injury not maintainable where he settled with and discharged wrongdoers.

Cited in *Smith v. Thompson-Houston Electric Co.* 188 Mass. 376, 74 N. E. 664, holding under statute all causes of action must be united and referring to special statutory liability of particular corporations; *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 409, 14 L.R.A.(N.S.) 898, 83 N. E. 601, holding there may be two actions maintained for damages for personal injuries resulting in death.

Cited in notes (34 L.R.A. 801) on how many distinct causes of action arise from injury resulting in death; (70 Am. St. Rep. 683) on abatement of actions for death of human being.

Distinguished in *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 339, 43 L. R. A. 572, 75 N. W. 1066 (concurring opinion), and *Lubrano v. Atlantic Mills*, 19 R. I.

131, 34 L. R. A. 801, 32 Atl. 205, holding action for damages resulting from death exclusive of administrator's action for pain and expense.

Proximate cause.

Cited in *Miller v. Boston & N. Street R. Co.* 197 Mass. 539, 83 N. E. 990, holding where negligence of street railway in depositing snow, caused runner of sleigh to be caught in the switch, fact that injuries take place a short time later while trying to extricate sleigh is not material.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Joliet v. Shufelt*, 18 L. R. A. 750, which holds unsafe condition of street proximate cause of injury from horse becoming unmanagable on loosening of bit; *Mueller v. Milwaukee Street R. Co.* 21 L. R. A. 721, which holds sudden stopping of street car in front of funeral procession cause of injury to first carriage by pole of second; *Kieffer v. Hummelstown*, 17 L. R. A. 217, which holds borough not liable for injury to one thrown on stone pile on roadside by fall of horse due to struggles of other horse frightened by shooting.

Liability for defective highway and frightening horses in highway.

Cited in *Dunn v. Barnwell*, 43 S. C. 402, 49 Am. St. Rep. 843, 21 S. E. 315, holding town not liable for fright of horse by goods displayed for sale in street; *Hadden v. Somerville*, 197 Mass. 482, 83 N. E. 1105, holding in an independent action for death under the statutes it must be proved the municipality failed to maintain the way in a reasonably safe condition for the use of travellers.

Cited in footnotes to *Hall v. Concord*, 58 L. R. A. 455, which denies city's liability for negligent management of steam roller in repairing city street under supervision of state superintendent; *Topeka Water Co. v. Whiting*, 39 L. R. A. 90, which holds that drivers may assume street in constant use to be reasonably safe for ordinary travel; *Lynn v. Hooper*, 47 L. R. A. 752, which sustains liability for frightening of horse by hay cap near highway.

Cited in notes (18 L.R.A. 102) on effect on right of recovery, of fact that horse was frightened when accident occurred on defective highway; (20 L.R.A.(N.S.) 741, 746, 759) on liability of municipality for defects or obstructions in streets; (28 L.R.A.(N.S.) 943) on liability of public service company for frightening horses by construction apparatus in street.

"Keep in repair."

Cited in *Rice v. Whitby*, 28 Ont. Rep. 600, on construction of words of statute "keep in repairs."

15 L. R. A. 369, *GREENWOOD CEMETERY LAND CO. v. ROUTT*, 17 Colo. 156, 31 Am. St. Rep. 284, 28 Pac. 1125.

When mandamus lies.

Cited in *Howell v. Cooper*, 2 Colo. App. 532, 31 Pac. 523, holding that mandamus lies to compel action by military board; *People ex rel. Eaton v. District Court*, 18 Colo. 37, 31 Pac. 339, granting mandamus against secretary of state compelling him to certify tickets as required by law; *Lewis v. Denver City Waterworks Co.* 19 Colo. 239, 41 Am. St. Rep. 248, 34 Pac. 993, holding that courts will not interfere with authorized legislative act by municipal council; *Corthell v. Mead*, 19 Colo. 394, 35 Pac. 741, holding that mandamus will lie to compel justice of the peace to enter judgment; *Keefe Mfg. & Invest. Co. v. Board of Education*, 33 Colo. 515, 81 Pac. 257, holding mandamus will not lie to control the discretion of a public officer; *Orman v. People*, 18 Colo. App. 306, 71 Pac. 430,

holding board of canvassers in the canvassing of election returns is in the discharge of political and governmental duties and its action cannot be controlled by mandamus; *State ex rel. Irvine v. Brooks*, 14 Wyo. 413, 6 L.R.A.(N.S.) 766, 84 Pac. 488, 7 A. & E. Ann. Cas. 1108, holding the duty of giving certificate of election by the governor to a state officer is merely ministerial and subject to mandamus.

Cited in footnotes to *State ex rel. Miller v. Barber*, 27 L. R. A. 45, which holds secretary subject to mandamus to compel affixing of great seal to commission used by governor; *Turnbull v. Giddings*, 19 L. R. A. 853, which holds unenforceable by mandamus legislator's right to have protest entered on journal.

Cited in notes (58 L.R.A. 866, 868) on original jurisdiction of court of last resort in mandamus cases; (16 Eng. Rul. Cas. 787; 98 Am. St. Rep. 875) on mandamus as proper remedy against public officers; (125 Am. St. Rep. 502, 509, 511) on duties, performance of which may be compelled by mandamus.

Distinguished in *State ex rel. Marsh v. State Land Comrs.* 7 Wyo. 491, 53 Pac. 292, denying mandamus to compel state board to cancel one lease and execute another.

— To governor.

Cited in *State ex rel. Wright v. Savage*, 64 Neb. 699, 90 N. W. 898; *State ex rel. Rawlinson v. Ansel*, 76 S. C. 406, 57 S. E. 185, 11 A. & E. Ann. Cas. 613,— on jurisdiction of court to issue writ of mandamus against the governor.

Cited in note (6 L.R.A.(N.S.) 753) on mandamus to governor.

Disapproved in *Rice v. The Governor* (*Rice v. Draper*) 207 Mass. 579, 32 L.R.A.(N.S.) 358, 93 N. E. 821, holding that mandamus does not lie to compel governor to pay over money which has been placed in his hands by Federal government to be paid to officers who served under Federal government.

— Against state land commissioners.

Cited in *Colorado Fuel & Iron Co. v. State Land Comrs.* 14 Colo. App. 93, 60 Pac. 367, holding that mandamus lies against state land commissioners to compel execution of lease agreed upon and under which lessee has vested rights; *State Land Comrs. v. Carpenter*, 16 Colo. App. 437, 66 Pac. 165, holding that mandamus lies against state land commissioners to compel cancelation of later invalid lease and reinstatement of former one.

Power of courts to interfere with executive acts.

Cited in *State ex rel. Taylor v. Lord*, 28 Or. 523, 31 L. R. A. 480, 43 Pac. 471, refusing to interfere by injunction with location and construction of public building by commission of which governor is member; *People ex rel. Engley v. Martin*, 19 Colo. 573, 24 L. R. A. 203, 36 Pac. 543, holding executive rights of governor not infringed by judicial determination of validity of his exercise of statutory power of removal; *Frost v. Thomas*, 26 Colo. 225, 77 Am. St. Rep. 259, 56 Pac. 899 (dissenting opinion), majority denying right to injunction against executive act under statute alleged to be unconstitutional; *Ex parte Anderson*, 46 Tex. Crim. Rep. 392, 81 S. W. 973, on the omnipotence of the legislature in absence of inhibition.

Cited in footnotes to *People ex rel. Broderick v. Morton*, 41 L. R. A. 231, which denies right to mandamus to compel performance of act by governor; *State ex rel. Cromelien v. Boyd*, 19 L. R. A. 227, which denies right to mandamus to compel governor to issue election proclamation.

Disapproved in *State ex rel. Robb v. Stone*, 120 Mo. 436, 23 L. R. A. 196, 41 Am. St. Rep. 705, 25 S. W. 376, denying right to mandamus to compel governor to perform ministerial act.

Court's power over ordinance.

Cited in *Tebbetts v. People*, 31 Colo. 472, 73 Pac. 869, denying jurisdiction of court to enjoin passage of ordinance granting franchise to street car company.

Limit of powers of separate branches of government.

Cited in *People ex rel. Connor v. Stapleton*, 18 Colo. 583, 23 L. R. A. 792, 33 Pac. 167, denying unlimited power of courts in cases of contempt.

Payment or tender of price for public land.

Reaffirmed on second appeal in 18 Colo. 141, 31 Pac. 858, holding right of petitioners to make full payment or tender balance of purchase price settled on former appeal.

15 L. R. A. 375, *MOTT v. CHERRYVALE WATER & MFG. CO.* 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989.

Breach of contract for public water supply.

Cited in *Winfield v. Winfield Water Co.* 51 Kan. 83, 32 Pac. 663, holding it duty of city to enforce terms of its contract for public water supply; *Boston Safe-Deposit & T. Co. v. Salem Water Co.* 94 Fed. 240; *Stoner v. Uniontown Water Co.* 4 Pa. Dist. R. 432, 16 Pa. Co. Ct. 331, 13 Lanc. L. Rev. 157; *House v. Houston Waterworks Co.* 88 Tex. 239, 28 L. R. A. 533, 31 S. W. 179; *Bush v. Artesian Hot & Cold Water Co.* 4 Idaho, 622, 43 Pac. 69; *Nichol v. Huntington Water Co.* 53 W. Va. 354, 44 S. E. 290,—holding citizen without right of action for loss from fire in consequence of breach of water company's contract with city; *Ukiah v. Ukiah, Water & Improv. Co.* 142 Cal. 178, 64 L. R. A. 234, 100 Am. St. Rep. 107, 75 Pac. 773, holding that mere acceptance of water company's services in furnishing water for fire purposes does not render company liable for failure of supply; *Lutz v. Tahlequah Water Co.* 29 Okla. 180, 36 L.R.A. (N.S.) 573, 118 Pac. 128, holding that citizen cannot maintain action against waterworks company for loss by fire from failure to supply water contracted, for by town; *Lovejoy v. Bessemer Waterworks Co.* 146 Ala. 380, 6 L.R.A. (N.S.) 431, 41 So. 76, 9 A. & E. Ann. Cas. 1068; *Holloway v. Macon Gas, Light & Water Co.* 132 Ga. 394, 64 S. E. 330; *Peck v. Sterling Water Co.* 118 Ill. App. 536; *Hone v. Presque Isle Water Co.* 104 Me. 226, 21 L.R.A. (N.S.) 1026, 71 Atl. 769; *Ancrum v. Camden Water, Light & Ice Co.* 82 S. C. 299, 21 L.R.A. (N.S.) 1034, 64 S. E. 151,—holding contract between city and water company to furnish water does not render water company liable at suit of individual for damages due to negligent breach; *Metropolitan Trust Co. v. Topeka Water Co.* 132 Fed. 703, holding there is no such privity of contract between taxpayer and city that he may recover damages from water company for failure to fulfill its contract with the city; *Greenville Water Co. v. Beckham*, 55 Tex. Civ. App. 92, 118 S. W. 889, to the point that nothing can be implied from contract by city with water company, which could not have been lawfully expressed in contract.

Cited in footnote to *Eaton v. Fairbury Waterworks Co.* 21 L. R. A. 653, which denies water company's liability for destruction of property by failure of water supply.

Cited in notes (23 L. R. A. 146) on liability for loss by fire due to lack of adequate water supply; (61 L. R. A. 96-98) an establishment and regulation of municipal water supply; (81 Am. St. Rep. 480, 482) on liability of water companies.

Disapproved in *Mugge v. Tampa Waterworks Co.* 52 Fla. 378, 6 L.R.A. (N.S.) 1176, 42 So. 81, holding a water company liable to a taxpayer for damages caused by its negligence in failing to supply water in accordance with its contract.

Authority of city to indemnify against losses.

Cited in *Allen & C. Mfg. Co. v. Shreveport Waterworks Co.* 113 La. 1109, 68 L.R.A. 659, 104 Am. St. Rep. 525, 37 So. 980, 2 A. & E. Ann. Cas. 471, holding city not authorized to indemnify the inhabitants against losses that might result from a negligent fire service.

Who may enforce contract with municipality.

Cited in *Jenree v. Metropolitan Street R. Co.* 86 Kan. 485, 39 L.R.A.(N.S.) 1116, 121 Pac. 510, holding that person may recover from railway for injury from defective condition of sidewalk which railway agreed with city to keep in repair.

15 L. R. A. 377, *KOCH v. NORTH AVE. R. CO.* 75 Md. 222, 23 Atl. 463.

Effect of act recognizing validity of defective charter.

Approved in *North Baltimore Pass. R. Co. v. North Ave. R. Co.* 75 Md. 246, 23 Atl. 466, holding defects in charter cured by recognition of its validity in subsequent statute.

Cited in note (33 Am. St. Rep. 180) on defective formation of corporations.

Distinguished in *State ex rel. Crow v. Lincoln Trust Co.* 144 Mo. 595, 46 S. W. 593, holding that recognition of power in trust companies to receive general deposits, ineffective to create right thereto.

Use of streets by railroads.

Approved in *North Baltimore Pass. R. Co. v. North Ave. R. Co.* 75 Md. 246, 23 Atl. 466; *Green v. City & Suburban R. Co.* 78 Md. 307, 44 Am. St. Rep. 288, 28 Atl. 626; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 142, 43 L. R. A. 235, 24 So. 502,—holding electric street railway not additional servitude upon highway; *Lonaconing Midland & F. R. Co. v. Consolidation Coal Co.* 95 Md. 636, 53 Atl. 420, holding electric passenger railway on highway leaving sufficient room for ordinary travel, not additional servitude; *Offutt v. Montgomery County*, 94 Md. 122, 50 Atl. 419, holding change of highway grade not invalid because for railway purposes; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 228, 26 Atl. 788, holding right of street railway to use “any” motive power, not restricted to known systems at time when charter was granted; *Limburger v. San Antonio Rapid Transit Street R. Co.* 88 Tex. 85, 53 Am. St. Rep. 730, 30 S. W. 533, holding use of street for electric railway not distinguishable from use for horse railway; *Peck v. Schenectady R. Co.* 170 N. Y. 311, 63 N. E. 357 (dissenting opinion), majority holding electric street railway on highway constitutes additional servitude.

Cited in *Donner v. Metropolitan Street R. Co.* 133 Mo. App. 534, 113 S. W. 669, holding that electric street railway laid to grade is not additional servitude, and does not infringe on rights of abutters on street; *Jeffers v. Annapolis*, 107 Md. 277, 68 Atl. 553, holding use of electricity for propelling street cars is only a new and improved motive power, and its use does not impose a new servitude so as to entitle abutting lot owners to additional compensation; *Indianapolis Street R. Co. v. Tenner*, 32 Ind. App. 319, 67 N. E. 1044 (dissenting opinion), on street railways as creating additional burden upon lands dedicated to highway purposes.

Cited in footnotes to *State, Kennelly, Prosecutor, v. Jersey City*, 26 L. R. A. 281, which holds authorized street car line a proper street use; *De Geofroy v. Merchant's Bridge Terminal R. Co.* 64 L. R. A. 959, sustaining abutter's right to damages for erection of track on pillars 15 to 25 feet above surface of street.

Cited in notes (17 L.R.A. 477, 478) on what use of street or highway constitutes an additional burden; (37 L. ed. U. S. 157; 36 L.R.A.(N.S.) 723, 804) on abutter's right to compensation for railroads in streets.

Distinguished in *Jaynes v. Omaha Street R. Co.* 53 Neb. 643, 39 L. R. A. 755, 74 N. W. 67, sustaining abutter's action for damage from poles and wires of electric railway; *Baltimore County Water & Electric Co. v. Dubreuil*, 105 Md. 430, 9 L.R.A.(N.S.) 687, 66 Atl. 439, holding the laying of water pipes in the bed of a country road to connect with pipes at a distance is an additional servitude that can be acquired only through consent of abutting owners or condemnation.

— **Elevated railroads.**

Approved in *North Baltimore Pass. R. Co. v. North Ave. R. Co.* 75 Md. 246, 23 Atl. 466, holding railway structure 20 feet above street within prohibition of unauthorized elevated street railways.

Cited in *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. 162 (dissenting opinion), majority holding that repeal of accepted elevated railroad franchise constitutes impairment of contract.

Cited in footnotes to *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 246, which holds elevated railroad a "railway;" *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *Tudor v. Chicago & S. S. Rapid Transit R. Co.* 36 L. R. A. 379, which holds ordinance removing restrictions of prior ordinance as to width of right of way for elevated railroad applicable to pending proceedings; *Doane v. Lake Street Elev. R. Co.* 36 L. R. A. 97, holding elevated railway not additional servitude upon street.

15 L. R. A. 381, *EXUM v. STATE*, 90 Tenn. 501, 25 Am. St. Rep. 700, 17 S. W. 107.
State jurisdiction over lands of United States.

Cited in note (17 L. R. A. 721) on state jurisdiction over lands of the United States within the state.

15 L. R. A. 384, *PITTSBURG & L. E. R. CO. v. HENLEY*, 48 Ohio St. 608, 29 N. E. 575.

Duty to provide safe appliances.

Cited in *Louisville & N. R. Co. v. Boland*, 96 Ala. 631, 18 L. R. A. 262, 11 So. 667, and *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 458, 66 Am. St. Rep. 456, 71 N. W. 42, holding hauling of foreign cars with different patterns of couplings, not negligence; *Benson v. New York, N. H. & H. R. Co.* 23 R. I. 155, 49 Atl. 689, holding evidence of similar running boards on cars of other railroads admissible in action for injuries, upon question as to their safety; *Frank v. Herancourt Brewing Co.* 5 Ohio N. P. N. S. 292, 18 Ohio S. & C. P. Dec. 42, holding master is not required to furnish absolutely safe appliances, nor to insure their perfect condition.

Cited in footnote to *Chicago, M. & St. P. R. Co. v. Voelker*, 70 L.R.A. 264, which holds it actionable negligence for railroad company to permit use of car whose coupler is so defective that it cannot be prepared for use without going between drawbars of cars using both hands and consuming extra amount of time.

Cited in notes (6 L.R.A.(N.S.) 496) on standard of master's duty as to selection between different styles or makes of appliances; (98 Am. St. Rep. 293) on liability to servant for injuries due to defective machinery and appliances; (38 L. ed. U. S. 375) on liability for injuries received by employee in coupling cars.

15 L. R. A. 386, *FIRST NAT. BANK v. SECURITY NAT. BANK*, 34 Neb. 71, 33 Am. St. Rep. 618, 51 N. W. 305.

Rights of holder of negotiable paper.

Cited in *Kaup v. Schinstock*, 88 Neb. 98, 129 N. W. 184, to the point that past due notes cannot be assigned free from equities existing between parties.

Cited in note (46 L. R. A. 809) on right of holder of negotiable paper transferred after maturity.

Effect of indorsement without recourse.

Approved in *McDonald v. Aufdengarten*, 41 Neb. 51, 59 N. W. 762, holding indorsement of notes "without recourse" insufficient to charge purchaser with notice of informalities.

Maturity of certificates of deposit.

Cited in *Mereness v. First Nat. Bank*, 112 Iowa, 14, 51 L. R. A. 411, 84 Am. St. Rep. 318, 83 N. W. 410, holding that statute of limitations runs on demand certificate of deposit from its date, and referring particularly to the annotation in 15 L. R. A. 386.

Cited in footnote to *Towle v. Starz*, 36 L. R. A. 463, which requires demand on last day of grace on expiration of six months on certificate of deposit containing provision for leaving six months, and not bearing interest after maturity.

Cited in notes (1 L.R.A.(N.S.) 1130) as to when demand must be made on certificate of deposit to prevent bar of limitations; (29 L.R.A.(N.S.) 689) as to when statute begins to run on certificate of deposit; (32 L.R.A.(N.S.) 486) as to when statute begins to run against action on contract payable on demand; (75 Am. St. Rep. 50) on maturity of certificate of deposit.

Set-off against negotiable paper.

Cited in note (23 L. R. A. 328) on set-off against assignee of commercial paper of claim against assignor.

Indorsement destroying negotiability.

Cited in *Kirkwood v. First Nat. Bank*, 40 Neb. 491, 24 L. R. A. 447, footnote p. 444, 42 Am. St. Rep. 683, 58 N. W. 1016, holding negotiability of certificates of deposit not destroyed by being made payable on return properly indorsed.

Cited in note (75 Am. St. Rep. 53) on negotiability of certificate of deposit.

15 L. R. A. 391, *KEMPSTER v. EVANS*, 81 Wis. 247, 51 N. W. 327.

Jurisdiction to modify judgments in cases of divorce.

Approved in *Bassett v. Bassett*, 99 Wis. 346, 67 Am. St. Rep. 863, 74 N. W. 780, holding that court cannot open judgment not providing for alimony or make additional judgment for alimony where statute only authorizes such revision after judgment providing for alimony; *Martin v. Martin*, 112 Wis. 318, 87 N. W. 232, holding that supreme court cannot review portion of judgment in divorce, from which no appeal is taken in time prescribed by law.

Cited in *Renner v. Renner*, 127 Wis. 374, 106 N. W. 846, holding that court has power, under statute, to modify judgment of divorce and division of property so as to provide for support of minor children.

Alimony.

Cited in *Nixon v. Wright*, 146 Mich. 232, 109 N. W. 274, 10 A. & E. Ann. Cas. 547, holding that action at law will not lie to enforce payment of alimony under decree in action for divorce; *Fournier v. Clutton*, 146 Mich. 299, 7 L.R.A.(N.S.) 180, 117 Am. St. Rep. 638, 109 N. W. 425, 10 A. & E. Ann. Cas. 392, holding decree for alimony not assignable; *Re Smith*, 30 N. Y. Civ. Proc. Rep. 104, holding decree for alimony not discharged by discharge in bankruptcy proceeding; *Brenger v. Brenger*, 142 Wis. 35, 26 L.R.A.(N.S.) 391, 135 Am. St. Rep. 1050, 125 N. W. 109, on alimony as not being such indebtedness as can be reached by creditors.

Cited in footnotes to *Noyes v. Hubbard*, 15 L. R. A. 394, which holds decree for alimony not discharged by discharge in insolvency; *Wetmore v. Wetmore*, 48 L. R. A. 666, which holds right to alimony from income of testamentary trust for support of former husband terminated by remarriage of divorced woman; *Living-*

ston v. Livingston, 61 L. R. A. 800, which holds unchangeable provision for alimony in divorce decree cannot be impaired by subsequent statute empowering courts to modify same.

Cited in notes (7 L.R.A.(N.S.) 179) on assignability of decree for alimony; (32 L.R.A.(N.S.) 273) on liability of alimony for debts.

15 L. R. A. 394, NOYES v. HUBBARD, 64 Vt. 302, 33 Am. St. Rep. 928, 23 Atl. 727.

Alimony.

Approved in Stearns v. Stearns, 66 Vt. 189, 44 Am. St. Rep. 836, 28 Atl. 875, holding alimony not barred by antenuptial contract by which each party was to claim no right in other's property; Audubon v. Shufeldt, 181 U. S. 579, 45 L. ed. 1011, 21 Sup. Ct. Rep. 735, and Barclay v. Barclay, 184 Ill. 377, 51 L. R. A. 352, footnote p. 351, 56 N. E. 636, holding alimony not debt provable in bankruptcy.

Cited in Re Smith, 30 N. Y. Civ. Proc. Rep. 100, holding judgment for weekly instalments of alimony not discharged by a discharge in bankruptcy.

Cited in footnote to Fite v. Fite, 53 L. R. A. 265, which holds judgment for future instalments of alimony discharged by discharge in bankruptcy.

Debts discharged in bankruptcy.

Cited in footnotes to Macdonald v. Tefft-Weller Co. 65 L.R.A. 106, which holds obligation of married woman to pay for goods forming part of her stock in trade, a debt within provision of bankruptcy act; Dight v. Chapman, 65 L.R.A. 793, which holds liability of stockholders for corporate debts a debt provable in bankruptcy proceedings.

15 L. R. A. 395, FISCHER v. MILLS, 55 Ark. 344, 18 S. W. 237.

Effect of pardon.

Cited in Spellings v. State, 99 Tenn. 203, 41 S. W. 444, holding that pardon for misdemeanor releases from sentence, but not from costs.

Cited in footnote to Dale v. Com. 38 L. R. A. 808, which holds forfeiture of bail bond for departure from court not affected by pardon of accused.

15 L. R. A. 397, HOPKINS v. LEWIS, 84 Iowa, 690, 51 N. W. 255.

What constitute original packages.

Cited in McGregor v. Cone, 104 Iowa, 474, 39 L. R. A. 487, 65 Am. St. Rep. 522, 73 N. W. 1041, holding pine box in which individual packages of cigarettes are packed for convenience in shipment, constitutes original package; Austin v. Tennessee, 179 U. S. 359, 45 L. ed. 232, 21 Sup. Ct. Rep. 132, holding paper packages containing 10 cigarettes each, thrown loosely into baskets, not original packages.

15 L. R. A. 399, FINNEGAN v. CHICAGO, ST. P. M. & O. R. CO. 48 Minn. 378, 51 N. W. 122.

Liability to passenger.

Cited in footnotes to Conroy v. Chicago, St. P. M. & O. R. Co. 38 L.R.A. 419, which denies right to recover, by passenger unnecessarily exposing himself, for injuries from explosion of burning oil tank on track; Chicago, R. I. & P. R. Co. v. Sattler, 57 L. R. A. 890, which holds carrier not liable for death of passenger caused by leaving for his own purpose, car standing on sidetrack; Allen v. Northern Pac. R. Co. 66 L.R.A. 805, which holds that passenger attempting re-enter train which he left while it was crossing ferry injured by being thrown by sudden starting forward of train against appliance necessary for operation of ferry

within 26 inches of car cannot charge carrier with negligence because of its location where it had no reason to believe that passengers would attempt to enter cars at such point and no notice of his attempt.

Cited in notes (28 L.R.A.(N.S.) 312) on rights of one going to station to deposit baggage; (28 L.R.A.(N.S.) 612) on duty to traveler on wrong train through own mistake.

15 L. R. A. 401, *HUTCHINSON & S. R. CO. v. FOX*, 48 Kan. 70, 30 Am. St. Rep. 273, 28 Pac. 1078.

Estoppel of municipality.

Approved in *Chicago, K. & W. R. Co. v. Chase County*, 49 Kan. 409, 30 Pac. 456, holding county estopped to deny sufficiency of petition for vote upon question of subscribing for railroad stock after vote taken and benefit received.

Cited in *Meistrell v. Ellis County*, 76 Kan. 324, 91 Pac. 65, holding taxpayers standing by and permitting letting of contract and construction of bridge, estopped to enjoin county commissioners from paying for it on ground of irregularities in letting such contract.

Cited in footnote to *Independent School District v. Rew*, 55 L. R. A. 364, which holds municipal corporation estopped to deny truth of recitals in bonds held by innocent purchaser; *Huron v. Second Ward Sav. Bank*, 49 L. R. A. 534, which holds city estopped by recitals in bonds as to purpose of issuance.

Cited in notes (7 Eng. Rul. Cas. 371) on presumption of performance of everything necessary to make executed contract acted upon by corporation a binding one; (11 Eng. Rul. Cas. 101) on estoppel by conduct.

Distinguished in *Salt Creek Twp. v. King Iron Bridge & Mfg. Co.* 51 Kan. 527, 33 Pac. 303, holding township not liable upon contract appearing invalid upon face of records.

15 L. R. A. 413, *Re BUFFALO*, 131 N. Y. 293, 27 Am. St. Rep. 592, 43 N. Y. S. R. 278, 30 N. E. 233.

Compensation for property taken for public use.

Cited in *Re Brook Ave.* 40 App. Div. 523, 58 N. Y. Supp. 163, holding abutters entitled to compensation if street, taken in fee, be used for other than highway purposes; *Mattlage v. New York Elev. R. Co.* 14 Misc. 294, 35 N. Y. Supp. 704, holding that owner of land subject to use as highway, has substantial rights therein as against elevated railway; *Hymes v. Esty*, 133 N. Y. 346, 31 N. E. 105, holding abutter evicted from land previously dedicated to public use as street, not entitled to fee value as damages in action for breach of covenant of quiet enjoyment; *Re Edgecomb Road*, 36 Misc. 121, 72 N. Y. Supp. 1073, holding city laying out street 80 feet wide through strip 100 feet wide already subject to right of way in many adjoining owners, liable for some substantial damages to remaining strips of 10 feet, although not for value of unburdened fee; *Re One Hundred & Sixteenth Street*, 1 App. Div. 444, 37 N. Y. Supp. 508, holding that owner of land condemned for highway is entitled to value subject to any easement of passage; *Re Ninety-Fourth Street Opening*, 22 Misc. 36, 49 N. Y. Supp. 600, holding that upon absolute condemnation of land subject to reciprocally created private easements of passage in abutters, damages will be more than nominal, but not full value; *Re New York*, 81 App. Div. 221, 80 N. Y. Supp. 732, Reversing on other grounds, 35 Misc. 58, 71 N. Y. Supp. 24, holding owner of land subject to easements of private passage entitled to substantial damages upon taking for public street; *Re One Hundred & Seventy-Third Street*, 78 Hun, 491, 29 N. Y. Supp. 205, holding owner of fee subject to right of passage by abutters is entitled upon taking of fee by legislative authority to substantial damages; *Smith v. Chicago*, 107

Ill. App. 281, holding city liable for value of private waterworks system laid in streets of which it assumed control upon annexation of subdivision; *Wright v. Mt. Vernon*, 44 App. Div. 576, 60 N. Y. Supp. 1017, holding owner of fee to land dedicated to public use as highway, entitled to compensation for destruction of private sewers by construction of municipal drainage system; *Pratt v. New York C. & H. R. R. Co.* 77 Hun, 144, 28 N. Y. Supp. 463, holding damages for injury to abutter's fee in street by railroad, nominal only; *Re New York*, 89 App. Div. 493, 85 N. Y. Supp. 858, holding depreciation of abutting property basis of award where land already dedicated is condemned for street purposes; *Re New York*, 71 Misc. 483, 130 N. Y. Supp. 510, holding that owner of fee of street subject to public easement is entitled to substantial damages where city takes fee; *Rasch v. Nassau Electric R. Co.* 198 N. Y. 390, 36 L.R.A.(N.S.) 647, 91 N. E. 785, holding owner of fee in street who also owns abutting property, entitled to substantial damages for the taking of the street; *People ex rel. Winthrop v. Delany*, 120 App. Div. 806, 105 N. Y. Supp. 746, holding abutting owner entitled to compensation for interference with street in front of his property though he has no title to the fee therein; *Duncan v. Nassau Electric R. Co.* 127 App. Div. 254, 111 N. Y. Supp. 210, holding owner entitled to value of property taken and also to compensation for damages to the residue caused by such taking; *People ex rel. Washburn v. Gloversville*, 128 App. Div. 49, 112 N. Y. Supp. 387, holding owner entitled to nominal damages only, where private street is condemned for public use, the fee remaining in the owner.

Cited in notes (18 L.R.A. 543) on protection of private rights from interference by public; (101 Am. St. Rep. 107, 117) on rights, obligations, and remedies of persons over whose land a highway runs; (37 L.R.A.(N.S.) 281, 282, 283) on damages on condemnation of fee of land occupied by highway.

Distinguished in *Olean v. Steyner*, 135 N. Y. 347, 17 L. R. A. 643, footnote p. 640, 32 N. E. 9, and *Re Ethel Street*, 3 Misc. 406, 24 N. Y. Supp. 689, holding owner of land subject to easement of private passage, entitled only to nominal damages upon condemnation of easement for highway; *Allen v. Chicago*, 176 Ill. 121, 52 N. E. 33, holding owner of easement for private way sustains no damage by taking of fee for street; *Re New York*, 131 App. Div. 149, 115 N. Y. Supp. 208, holding owner of fee in street who has disposed of all the abutting lots, entitled to nominal damages only for the taking of the fee by the city; *Re New York*, 45 Misc. 163, 91 N. Y. Supp. 894, holding proceeding to acquire and open street not maintainable by city as to street already established by dedication; *Re New York*, 196 N. Y. 291, 37 L.R.A.(N.S.) 285, 89 N. E. 829, reversing 133 App. Div. 321, 17 N. Y. Supp. 855, holding owner of fee of street and abutting owners entitled to nominal damages only where fee of street is taken by city by condemnation proceedings; *Smith v. Smith*, 120 App. Div. 281, 104 N. Y. Supp. 1106, holding that where lots are sold abutting on a street shown on plat, the purchaser acquires an easement over such street as a property right.

Land bounded by highway.

Cited in *Hennessy v. Murdock*, 137 N. Y. 322, 33 N. E. 330, holding deed of lot described as bounded on alley conveys fee to center of alley subject to easement of passage; *Graham v. Stern*, 51 App. Div. 410, 64 N. Y. Supp. 728, holding description bounding land by "southwesterly line or side" of proposed street does not convey to center thereof; *Paige v. Schenectady R. Co.* 38 Misc. 386, 77 N. Y. Supp. 889, holding grant by public authorities of land bounded by highway, not presumed to convey fee to street.

Cited in note (125 Am. St. Rep. 344) on grant by city to abutter of right to use streets and sidewalks for private purpose.

15 L. R. A. 416, THOMAS v. PHILADELPHIA & R. R. CO. 148 Pa. 180, 23 Atl. 989.

Accident as raising presumption of negligence.

Approved in *Fleming v. Pittsburgh*, C. C. St. L. R. Co. 158 Pa. 136, 22 L. R. A. 352, 33 W. N. C. 213, 38 Am. St. Rep. 835, 27 Atl. 858, denying presumption of negligence from injury to passenger by fall of rock from natural hillside 300 feet from top of cut; *Spencer v. Chicago*, M. & St. P. R. Co. 105 Wis. 314, 81 N. W. 407, holding carrier not presumed negligent from unexplained fact that stream of water entered window of car; *Saunders v. Chicago & N. W. R. Co.* 6 S. D. 45, 60 N. W. 148, holding that "fearful shock" to passenger standing in open door of coach raises no presumption of negligence; *Ault v. Cowan*, 20 Pa. Super. Ct. 625, holding that injury to passenger by missile thrown through window by explosion does not raise presumption of negligence.

Cited in *Ammon v. Conestoga Traction Co.* 25 Lanc. L. Rev. 98, holding that no presumption of negligence arises from passenger cutting hand by broken window glass while raising window where glass was broken but short time; *Zercher v. Philadelphia Rapid Transit Co.* 20 Pa. Dist. R. 18, holding that negligence might be inferred from happening of accident where person was struck by trolley pole while standing on street waiting for car; *Barlick v. Baltimore & O. R. Co.* 41 Pa. Super. Ct. 91, holding that no presumption of railroad's negligence arises where passenger is injured by piece of glass from empty bottle which another passenger threw out of window; *Stanford v. Chester Traction Co.* 11 Del. Co. Rep. 242, holding that in action by passenger for injury merely showing presence of banana peel in car does not import negligence, unless put there by employees; *McRae v. Metropolitan Street R. Co.* 125 Mo. App. 569, 102 S. W. 1032, holding that presumption of negligence arises where passenger is injured by an electric shock while riding on a street car; *Clark v. Lehigh Valley R. Co.* 24 Pa. Super. Ct. 612, holding that presumption of negligence arises from injury caused by derailment of a train; *Cline v. Pittsburg R. Co.* 226 Pa. 588, 27 L.R.A.(N.S.) 937, 75 Atl. 850, holding that no presumption of negligence against street car company arises from mere injury to passenger by lurch of the car while passing a curve; *Kern v. Snider*, 76 C. C. A. 203, 145 Fed. 329, on sufficiency of evidence of negligence to sustain a verdict; *Midland Valley R. Co. v. Fulgham*, — L.R.A.(N.S.) —, 104 C. C. A. 151, 181, Fed. 95, holding that substantial evidence of defect in left pin lever and coupler, which was basis of cause of action for injury to servant was necessary to sustain verdict.

Cited in footnotes to *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance; *Harrison v. Sutter Street R. Co.* 55 L. R. A. 608, which denies presumption of negligence from injury to street car passenger by collision of car with vehicle; *Budd v. United Carriage Co.* 27 L. R. A. 279, which holds running and kicking of team on public carriage makes prima facie case of negligence as to passenger.

Cited in notes (6 L.R.A.(N.S.) 344) on *res ipsa loquitur*, as between master and servant; (7 L.R.A.(N.S.) 232) on presumption of negligence from injury to passenger by missile from outside; (13 L.R.A.(N.S.) 618) on presumption of negligence from injury to passenger.

Distinguished in *New York, N. H. & H. R. Co. v. Baker*, 50 L. R. A. 203, 39 C. C. A. 239, 98 Fed. 696, holding railroad company not liable for negligence of employees of state board in handling derrick near track.

Accidents caused by wrongful act of stranger.

Approved in *Fredericks v. Northern Canada R. Co.* 157 Pa. 127, 22 L. R. A. 313, 27 Atl. 689, holding railroad not liable for injury to passenger from act of

stranger in releasing brakes from car on switch left open; *Fewings v. Mendenhall*, 88 Minn. 342, 60 L. R. A. 604, 97 Am. St. Rep. 519, 93 N. W. 127, denying street railway company's liability for injury to passenger from stone thrown by striker.

Cited in *Woas v. St. Louis Transit Co.* 198 Mo. 681, 7 L.R.A.(N.S.) 236, 96 S. W. 1017, 8 A. & E. Ann. Cas. 584, holding street railway company not liable for injury to passenger from missile thrown by stranger at motorman but which missed him and struck the passenger; *Ginn v. Pennsylvania R. Co.* 220 Pa. 554, 69 Atl. 992, denying recovery where passenger sitting at window was injured by a missile where no evidence connected the accident with any negligence of the railroad; *Bosworth v. Union R. Co.* 26 R. I. 313, 58 Atl. 982, 3 A. & E. Ann. Cas. 1080, holding street railway company not liable for injury to a passenger caused by a mob, where there was no indication of danger prior to the occurrence.

Cited in notes (22 L.R.A. 306) on liability of railroad for accidents caused by wrongful act of stranger; (3 L.R.A.(N.S.) 321) on liability for injury to passenger by wrongful act of stranger directed against cars or passengers therein.

Burden on carrier of disproving negligence.

Cited in *Le Deau v. Northern P. R. Co.* 19 Idaho, 716, 34 L.R.A.(N.S.) 727, 115 Pac. 502, Ann. Cas. 1912 C, 438; *Sutton v. Pennsylvania R. Co.* 230 Pa. 526, 79 Atl. 719; *Burns v. Pennsylvania R. Co.* 233 Pa. 307, 82 Atl. 246,—holding that to cast burden upon carrier of showing that injury to passenger did not occur from its negligence, it must first be shown that injury resulted from something improper or unsafe in conduct of business or appearances.

15 L. R. A. 418, *WATERMAN v. CHICAGO & I. R. CO.* 139 Ill. 658, 32 Am. St. Rep. 228, 29 N. E. 689.

Salaries of officers.

Approved in *Kreitz v. Behrensmeyer*, 149 Ill. 504, 24 L. R. A. 63, 36 N. E. 983, holding that *de jure* officer may recover fees or salary paid to *de facto* officer; *Stephens v. Campbell*, 67 Ark. 492, 55 S. W. 856, holding night watchman *de facto* of city, not entitled to fees.

Cited in *Sandoval v. Albright*, 14 N. M. 351, 93 Pac. 717, holding that in action by *de jure* officer for fees of office received by incumbent holding in good faith, reasonable expenses of incumbent in administering office should be allowed him; *Morel v. Sylvania & G. R. Co.* 134 Ga. 690, 68 S. E. 588, holding that one claiming to be a *de facto* officer of a corporation cannot pay to himself salary out of the corporate funds without authority from the company.

Cited in footnote to *Eaton v. Robinson*, 29 L. R. A. 100, which requires officers to account for salaries voted and paid to deprive stockholders of rights.

Corporate by-laws.

Cited in notes (18 L.R.A. 583, 584) on regulation by by-laws of elections by private corporations; (7 Eng. Rul. Cas. 352) on necessity and sufficiency of notice of corporate meeting.

De facto officers.

Cited in *Donaldson v. Dieterich*, 157 Ill. App. 40, to the point that in order to make person officer *de facto*, he must in some way be put into office and should have secured such holding thereof as to be considered in peaceable possession.

15 L. R. A. 423, *STATE v. TENANT*, 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387.

Arbitrary discretion as to exercise of police power.

Approved in *Sioux Falls v. Kirby*, 6 S. D. 68, 25 L. R. A. 623, 60 N. W. 156, holding penal ordinance prohibiting any building or addition within city limits

without permit of inspector, who may grant or refuse same without appeal, invalid; *St. Louis v. Russell*, 116 Mo. 257, 20 L. R. A. 728, 22 S. W. 470, holding delegation of power by city to owners of one half of block to determine whether livery stable may be created thereon, invalid; *State v. Gerhardt*, 145 Ind. 484, 33 L. R. A. 328, 44 N. E. 469 (dissenting opinion), majority sustaining validity of statute authorizing county commissioners to permit other business to be carried on in room where intoxicants are sold.

Cited in *Richmond v. Model Steam Laundry*, 111 Va. 761, 69 S. E. 932, holding that ordinance which confers on city council purely arbitrary power to grant or refuse permit for erection and use of furnaces and steam engines, is void; *State v. Eubanks*, 154 N. C. 632, 70 S. E. 466, on validity of ordinances regulating granting of permits for repairing buildings in incorporated village; *Shelbyville v. Glover*, 106 C. C. A. 376, 184 Fed. 244, on validity of ordinance prohibiting building without permission of aldermen; *Montgomery v. West*, 149 Ala. 314, 9 L.R.A. (N.S.) 662, 123 Am. St. Rep. 33, 42 So. 1000, 13 A. & E. Ann. Cas. 651, holding invalid ordinance prohibiting the operation of steam engines, mills foundries or blacksmith shops without first obtaining consent of city council; *Elkhart v. Murray*, 165 Ind. 305, 1 L.R.A. (N.S.) 943, 112 Am. St. Rep. 228, 75 N. E. 593, 6 A. & E. Ann. Cas. 748, holding invalid ordinance prohibiting use of street cars without a certain kind of fender or one equally as good to be approved by the city council; *Collings v. Crepeau*, 29 R. I. 342, 71 Atl. 449, holding invalid ordinance prohibiting labor in or about the construction of any building without permit from the town council; *State v. Williams*, 146 N. C. 631, 17 L.R.A. (N.S.) 304, 61 S. E. 61, 14 A. & E. Ann. Cas. 562, holding unconstitutional statute forbidding carrying more than a specified amount of intoxicating liquor into a county where sale as a beverage was prohibited but its use for certain purposes was permitted.

Cited in footnote to *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

Cited in notes (13 L.R.A. (N.S.) 738) on power of municipality to require building permit; (28 Am. St. Rep. 184) on validity of municipal ordinance; (93 Am. St. Rep. 407) on constitutionality of building regulations; (123 Am. St. Rep. 47) on test of validity of municipal ordinance as denying equal protection of the laws; (132 Am. St. Rep. 94) on power of municipality to prevent or regulate use of property for advertising purposes.

Distinguished in *Re Flaherty*, 105 Cal. 569, 27 L. R. A. 533, 38 Pac. 981 (dissenting opinion), majority sustaining ordinance giving officer power to grant permission to beat drum in street when in his judgment purpose of ordinance prohibiting same not violated.

Judicial knowledge of infectiousness of disease.

Approved in *People v. Shurly*, 124 Mich. 647, 83 N. W. 595, holding varying degrees of infectiousness not subject of judicial knowledge.

Uniformity of taxation.

Distinguished in *Rosenbaum v. Newbern*, 118 N. C. 97, 32 L. R. A. 125, 24 S. E. 1, holding tax of \$4 per month upon dealer in second-hand clothing and additional tax on occupation of selling general merchandise, not violative of requirement of uniformity.

Covenants relating to building.

Cited in footnote to *Peabody Heights Co. v. Willson*, 36 L. R. A. 393, which holds covenant requiring vendee to build according to approved designs not strictly enforceable as to rebuilding structure destroyed.

15 L. R. A. 426, NEW YORK, L. E. & W. R. CO. v. LEAMON, 54 N. J. L. 202, 23 Atl. 691.

Duties imposed upon carriers by statute.

Approved in *Hackett v. New York, L. E. & W. R. Co.* 58 N. J. L. 5, 32 Atl. 265, holding railroad not liable for failure to give crossing signals other than those prescribed by law; *Philadelphia & R. R. Co. v. State*, 61 N. J. L. 73, 38 Atl. 820, holding railroad company giving statutory crossing signals not liable for crossing accidents, in absence of peculiarly dangerous features occasioned by construction of its road or buildings; *New York & G. L. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 56, 38 L. R. A. 518, 38 Atl. 627, holding railroad company negligent upon failure to give statutory signals as train approached crossing; *Bittle v. Camden & A. R. Co.* 55 N. J. L. 621, 23 L. R. A. 285, footnote p. 283, 28 Atl. 305, holding actionable, malicious blowing of locomotive whistle frightening horse, although at place where whistle required; *West Jersey R. Co. v. Abbott*, 60 N. J. L. 154, 37 Atl. 1104, holding that legislative regulations as to precautions against escape of fire from smoke stacks, define and limit duty of railroad in respect thereto.

Cited in *Horandt v. Central R. Co.* 78 N. J. L. 195, 73 Atl. 93, holding that railroad is bound to use extra precautions at crossing of extra danger, only when situation has been created by railroad; *Newark v. Erie R. Co.* 75 N. J. Eq. 27, 71 Atl. 620, holding that grade crossings cannot be condemned as illegal structures, in view of legislation recognizing that railroads may cross streets at grade; *Latham v. Staten Island R. Co.* 150 Fed. 236, holding that duty of railroad to keep flagman at crossing, cannot be inferred simply from fact that it ran trains over the crossing at high rate of speed; *Goodwin v. Central R. Co.* 73 N. J. L. 578, 64 Atl. 134, on giving signals required by statute as constituting the whole duty of railroad as to warnings; *Camden & T. R. Co. v. United States Cast Iron Pipe & Foundry Co.* 68 N. J. Eq. 291, 59 Atl. 523, on steam railways being governed by positive statutes as to rights and duties at public crossings.

Cited in footnotes to *Vandewater v. New York & N. E. R. Co.* 18 L. R. A. 772, which holds that engineer's failure to give statutory signals at crossing does not render company liable *per se*; *Wragge v. South Carolina & G. R. Co.* 33 L. R. A. 191, which holds company liable for failure to give crossing signal contributing to collision; *Butcher v. West Virginia & P. R. Co.* 18 L. R. A. 519, which holds company not liable for failure to give crossing signal unless injury proximate result; *English v. Southern P. Co.* 35 L. R. A. 155, which holds mere statutory compliance with statutory crossing signals not necessarily sufficient; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, which holds requirement for lookout on engine not applicable to one getting on track immediately in front of engine; *Stewart v. Cincinnati, W. & M. R. Co.* 17 L. R. A. 539, which holds railroad company continuing farm crossing required to use care to make it safe.

Cited in note (69 L.R.A. 552) on duty to warn sick, infirm or helpless persons, with whom no contract relation is sustained.

Distinguished in *Danskin v. Pennsylvania R. Co.* 76 N. J. L. 663, 22 L.R.A. (N.S.) 237, 72 Atl. 32, on duty of railway to adopt extraordinary precautions where it has created extra danger.

Limited in *Pennsylvania R. Co. v. Miller*, 39 C. C. A. 644, 99 Fed. 531, holding that railroads must take such precautions additional to those required by law at public crossings, as circumstances make necessary.

Relation of separate powers of government.

Distinguished in *Palmyra v. Pennsylvania R. Co.* 62 N. J. Eq. 611, 50 Atl. 369, sustaining court's power to determine whether crossing dangerous, and to direct erection of safeguards.

15 L. R. A. 431, *BOURN v. HART*, 93 Cal. 321, 27 Am. St. Rep. 203, 28 Pac. 951.

Taxation and purposes for which public money may be used — Municipal and county.

Cited in *Powell v. Phelan*, 138 Cal. 275, 71 Pac. 335, holding void, act providing for payment of trial jurors who served before fees therefor authorized; *Taylor v. Mott*, 123 Cal. 500, 56 Pac. 256, holding act requiring municipalities to set apart relief fund for disabled exempt firemen irrespective of service performed in particular municipality providing fund, void; *Conlin v. San Francisco*, 99 Cal. 22, 21 L. R. A. 476, footnote p. 474, 37 Am. St. Rep. 17, 33 Pac. 753, holding void, act for relief of street contractor.

Cited in footnotes to *Conlin v. San Francisco*, 33 L. R. A. 752, which denies legislative right to direct use of city money to pay claim based on merely moral obligation; *Wasson v. Wayne County*, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; *Clark v. Sheldon*, 19 L. R. A. 138, which holds suit maintainable, to compel investment of taxes from railroads in sinking fund to pay railroad aid bonds; *Institution for Education of Mute & Blind v. Henderson*, 18 L. R. A. 398, which holds invalid act for paying bounties by county treasurer; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *People ex rel. Einsfeld v. Murray*, 32 L. R. A. 344, which holds valid, excise law graduating according to population of cities excise taxes which are divided between cities and state; *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional, act authorizing board of education to levy tax to pay claim for which no obligation exists; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation; *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes toll bridge owned by private corporation.

— State.

Cited in *Molineux v. State*, 109 Cal. 381, 50 Am. St. Rep. 49, 42 Pac. 34, holding retrospective law conferring right to recover legal interest from maturity on non-interest bearing coupons, void; *Allen v. State Auditors*, 122 Mich. 328, 47 L. R. A. 119, 80 Am. St. Rep. 573, 81 N. W. 113, holding payment for wrongful conviction and imprisonment, gratuity subject to constitutional prohibition of appropriations for private purposes; *Cutting v. Taylor*, 3 S. D. 15, 15 L. R. A. 693, footnote p. 691, 51 N. W. 949, holding appropriation to reward fire companies complying with specified conditions not a donation.

Cited in footnotes to *Re Stanford*, 45 L. R. A. 788, which holds statute exempting certain persons from liability for inheritance tax invalid; *Patty v. Colgan*, 18 L. R. A. 744, which holds appropriation for sufferers from flood illegal; *Opinion of Justices*, 49 L. R. A. 564, which holds legislative right to appropriate money for widow, heirs, etc., of deceased officer dependent on whether public good will be served.

Cited in notes (42 L.R.A. 35, 64) on what claims constitute valid demands against a state; (18 L.R.A. 544) on protection of private rights from public interference.

Liability of state for wrongful acts of its officers.

Cited in *Moody v. State Prison*, 128 N. C. 14, 53 L. R. A. 855, 38 S. E. 131, holding state not liable for injuries to prison guard compelled to use defective ladder by officers in charge of state's prison; *Melvin v. State*, 121 Cal. 23, 53 Pac. 416, holding state not liable for negligent injury by board of agriculture; *Denning v. State*, 123 Cal. 324, 55 Pac. 1000, holding state not liable to firemen employed by harbor commissioners; *Elmore v. Fields*, 153 Ala. 350, 127 Am. St. Rep. 31, 45 So. 66, holding it to be no defense to action for trespass, that defend-

ant was warden of the state prison and that the act complained of was committed within the scope of his duties as warden.

Distinguished in *Chapman v. State*, 104 Cal. 693, 43 Am. St. Rep. 158, 38 Pac. 457, holding state liable for negligence of harbor commissioners for service on consideration of wharfage and dockage paid.

15 L. R. A. 434, *LITTLE ROCK & FT. S. R. CO. v. LAWTON*, 55 Ark. 428, 29 Am. St. Rep. 48, 18 S. W. 543.

Carrier's duty to stranger assisting or attending passenger.

Cited in *International & G. N. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 104, 38 S. W. 401, holding railway company not liable for injury to one getting off of train to which he has assisted infirm passenger, unless it has notice of his intention to get off; *Oxsher v. Houston E. & W. F. R. Co.* 29 Tex. Civ. App. 423, 67 S. W. 550, denying carrier's liability to stranger who entered train to assist passenger and was injured by jumping off; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 113 Mo. 578, 18 L. R. A. 602, footnote p. 599, 21 S. W. 1, which holds time to leave train need not be given person entering merely to assist passengers; *Huchingson v. Texas C. R. Co.* 55 Tex. Civ. App. 234, 118 S. W. 1123, holding that person entering passenger train to assist passenger on board is entitled to reasonable care from railway with respect to opportunity for alighting; *Dunne v. New York, N. H. & H. R. Co.* 99 App. Div. 573, 91 N. Y. Supp. 145; *Louisville & N. R. Co. v. Wilson*, 124 Ky. 848, 8 L.R.A.(N.S.) 1021, 100 S. W. 290,—holding railroad not bound to give time to alight to one who without its knowledge enters to assist passenger; *Chesapeake & O. R. Co. v. Paris*, 107 Va. 411, 59 S. E. 398, holding carrier not bound to hold train nor to give notice of its starting to one who without the knowledge of the carrier enters to assist a passenger; *St. Louis, I. M. & S. R. Co. v. Grimsley*, 90 Ark. 70, 117 S. W. 1064, holding that carriers owe ordinary care to keep depot premises reasonably safe for persons coming to meet passengers; *Atlantic & B. R. Co. v. Owens*, 123 Ga. 395, 51 S. E. 404, holding that railway company owes to one coming to its depot to meet a passenger, ordinary care, and is liable to him for negligence causing injury; *Fortune v. Southern R. Co.* 150 N. C. 698, 64 S. E. 759, holding railroad company liable where wife, who was seeing husband off, was injured while on platform of car before starting, by another car violently running into it; *Cooper v. Atlantic Coast Line R. Co.* 78 S. C. 566, 59 S. E. 704, holding that where railroad has notice that one enters to assist passenger it owes him the duty to give him time to get off; *The City of Seattle*, 10 L.R.A.(N.S.) 971, 80 C. C. A. 279, 150 Fed. 540, 10 A. & E. Ann. Cas. 159, holding it to be the duty of a vessel going on long journey to give visitor on board opportunity to land though he may have been negligent in not giving heed to signals.

Cited in notes (21 L.R.A. 354) on injuries in getting on and off railroad trains; (61 Am. St. Rep. 97; 3 L.R.A.(N.S.) 433) on duty of carrier to one assisting passenger on train.

Distinguished in *Earl v. Chicago, R. I. & P. R. Co.* 109 Iowa, 16, 77 Am. St. Rep. 516, 79 N. W. 381, holding railway company not liable for negligence, to person in caboose visiting passenger where his presence unknown; *Arkansas & L. R. Co. v. Sain*, 90 Ark. 285, 22 L.R.A.(N.S.) 914, 119 S. W. 659, holding that person entering train at station out of curiosity only is a mere licensee and railway owes him the duty only to avoid injuring him after discovering his peril.

Duty as to stoppage of trains.

Cited in *Barringer v. St. Louis, I. M. & S. R. Co.* 73 Ark. 551, 85 S. W. 94, on duty of carrier to stop long enough at stations to permit passengers reasonable time to get on and off the train.

Meaning of "negligence" in pleading.

Cited in *Robbins v. Baltimore & O. R. Co.* 62 W. Va. 537, 59 S. E. 512, on "negligence" as implying a duty as well as its breach.

15 L. R. A. 438, *MORGAN v. HODGES*, 89 Mich. 404, 50 N. W. 876.

Validity of compromise.

Cited in *McGlynn v. Scott*, 4 N. D. 29, 58 N. W. 460, holding compromise of bona fide controversy, good consideration for note; *Western & S. L. Ins. Co. v. Quinn*, 130 Ky. 401, 113 S. W. 456, holding valid a compromise under insurance policy where its validity was in question on account of false statement in application.

Cited in footnote to *Smith v. Farra*, 20 L. R. A. 115, which authorizes compromise of claim honestly believed to be doubtful.

Cited in notes (5 L.R.A.(N.S.) 726) on cancelation of invalid contract as consideration for a promise; (7 L.R.A.(N.S.) 175) on legality of contract to pay thief for return of stolen property; (25 L.R.A.(N.S.) 276) on void, invalid, or unfounded claim as subject of valid compromise.

15 L. R. A. 441, *MILLER v. COM.* 88 Va. 618, 14 S. E. 161, 342, 14 S. E. 979.

Juries and right to jury trial.

Cited in *Alford v. State*, 170 Ala. 209, 54 So. 213, Ann. Cas. 1912 C, 1093, holding that statute providing for trial without jury, but which gives unconditional right of appeal to common law jury preserves right of trial by jury; *Bash v. Howald*, 27 Okla. 463, 112 Pac. 1125, holding that motion to dissolve attachment and to have property restored may be disposed of by judge at chambers, without jury.

Cited in footnotes to *State v. Gerry*, 38 L. R. A. 228, which holds right to jury trial not satisfied by jury trial on appeal; *Hall v. Armstrong*, 20 L. R. A. 366, which denies right to jury trial in actions of book account; *McRae v. Grand Rapids, L. & D. R. Co.* 17 L. R. A. 750, which holds act authorizing court to discharge part of jurors after trial commenced, unconstitutional.

Cited in notes (15 L. R. A. 614) on constitutional right to jury for assessment of damages on default; (16 L. R. A. 358) on statute allowing plea of guilty in capital case; (43 L. R. A. 33, 48) on number and agreement of jurors necessary to constitute valid verdict.

Overruled in *Brown v. Epps*, 91 Va. 734, 27 L. R. A. 678, footnote p. 676, 21 S. E. 119, which holds right to jury trial in criminal case satisfied by right to jury on appeal from justice of peace.

15 L. R. A. 447, *SUMNER v. CRANE*, 155 Mass. 483, 29 N. E. 1151.

Effect of invalid bequest on probate of will.

Cited in *McClary v. Stull*, 44 Neb. 183, 62 N. W. 501, holding will admissible to probate notwithstanding invalid bequest; *Clearspring Twp. v. Blough*, 173 Ind. 23, 88 N. E. 511, holding that where probate courts have no power to construe wills, their admission of will to probate does not determine its validity and effect.

Cited in note (34 L.R.A.(N.S.) 968) on contents of will as affecting right to probate.

Validity of wills and codicils.

Cited in *Stewart v. Stewart*, 177 Mass. 496, 59 N. E. 116, holding that instrument containing power of attorney *inter vivos* may be codicil to will; *Davenport v. Johnson*, 182 Mass. 273, 65 N. E. 392, holding instruction that will void if aged and diseased testatrix devised property to confidential adviser with whom she lived, no error.

Revocability of mutual will.

Cited in note (27 L.R.A.(N.S.) 509) on revocability of mutual will.

15 L. R. A. 449, *NORTHWESTERN MUT. L. INS. CO. v. BARBOUR*, 92 Ky. 427, 17 S. W. 796.

Subsequent appeal in 96 Ky. 130, 28 S. W. 156.

Paid-up insurance and forfeiture of policies.

Approved in *McLaughlin v. Equitable Life Assur. Soc.* 38 Neb. 734, 57 N. W. 557, and *Cravens v. New York L. Ins. Co.* 148 Mo. 611, 53 L. R. A. 313, 71 Am. St. Rep. 628, 50 S. W. 519, both holding surrender of receipted policy within six months after default, condition precedent to right to demand paid-up insurance; *Employer's Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 237, 35 S. W. 869, holding accident policy issued in consideration of order for monthly payments, by pay master, forfeited by nonpayment because insured left employment.

Cited in footnotes to *Goodwin v. Provident Sav. Life Assur. Soc.* 32 L. R. A. 473, which holds clause in agreement in application that suicide not covered, governed by clause making incontestable except for fraud; *Drury v. New York L. Ins. Co.* 61 L. R. A. 714, which holds right to extended insurance for term earned by premium paid, not surrendered by failure to pay premium note.

Cited in note (8 L.R.A.(N.S.) 194) on failure to apply for paid-up insurance within time stipulated.

Overruled in *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 83, 39 L. R. A. 505, 80 Am. St. Rep. 343, 42 S. W. 1097, holding surrender of original policy not condition precedent to obtaining paid-up policy.

Cited as overruled in *Manhattan L. Ins. Co. v. Patterson*, 109 Ky. 627, 53 L. R. A. 379, footnote p. 378, 95 Am. St. Rep. 393, 60 S. W. 383, holding time not of essence of provision for issuance of paid-up policy upon surrender within six months after default; *Washington L. Ins. Co. v. Miles*, 112 Ky. 758, 66 S. W. 740, holding that delay in applying for paid-up policy does not forfeit right thereto; *Washington L. Ins. Co. v. Lyne*, 119 Ky. 167, 83 S. W. 122, holding insured entitled to paid-up policy in action brought within 15 years where demand for it was made within 5 years, though policy required demand within six months; *Union C. L. Ins. Co. v. Spinks*, 119 Ky. 274, 69 L.R.A. 268, 83 S. W. 615, 7 A. & E. Ann. Cas. 913, on the penal nature of a limitation of time in which to demand a paid-up policy.

15 L. R. A. 456, *PEOPLE v. WALSEN*, 17 Colo. 170, 28 Pac. 1119.

Custody of public funds.

Cited in *Maloy v. Bernalillo County*, 10 N. M. 658, 52 L.R.A. 130, footnote p. 126, 62 Pac. 1106, which denies defaulting county treasurer's liability to county for interest paid to him by bank, in which public money deposited, after he has paid county; *Moulton v. McLean*, 5 Colo. App. 459, 39 Pac. 78, holding restrictions upon county treasurer as custodian of funds, illegal; *State use of Overton County v. Copeland*, 96 Tenn. 312, 31 L. R. A. 848, 54 Am. St. Rep. 840, 31 S. W. 427, holding officer not insurer of safety of public funds in his hands on bond faithfully to perform his duties; *Arapahoe County v. Hall*, 9 Colo. App. 545, 49 Pac. 370, raising, without deciding, question of ownership of interest on public funds; *Adams v. Williams*, 97 Miss. 143, 30 L.R.A.(N.S.) 868, 52 So. 865, Ann. Cas. 1912 C, 1129, holding that interest collected by treasurer of levee board on money deposited in bank comes into his hands by virtue of office, and he and his sureties are liable therefor.

Cited in footnote to *Wilkes Barre v. Rockafellow*, 30 L. R. A. 393, which holds city treasurer liable on bond for failure to turn over to successor interest paid to him as treasurer.

Cited in notes (30 L.R.A.(N.S.) 855, 861) on liability of public officer or his

bond for interest received; (91 Am. St. Rep. 527) on acts for which sureties on official bonds are liable.

Distinguished in *Gartley v. People*, 24 Colo. 162, 49 Pac. 272, holding inability to turn over public funds because deposited in insolvent bank which subsequently failed, no defense for failure to deliver over to successor; *Wilson v. People*, 19 Colo. 204, 22 L. R. A. 453, 41 Am. St. Rep. 243, 34 Pac. 944, holding clerk of court not liable for loss of money prudently deposited in bank of reputed solvency; *Re Kohler*, 15 Wash. 617, 55 Am. St. Rep. 904, 47 Pac. 30, holding executor not liable for depreciation of trust funds from failure of bank where deposited in good faith to credit of estate; *Rhea v. Brewster*, 130 Iowa, 732, 107 N. W. 940, 8 A. & E. Ann. Cas. 389, holding party entitled to funds held by clerk of court in his official capacity also entitled to interest earned while deposited by the clerk.

Distinguished and Disapproved in *State v. McFetridge*, 84 Wis. 518, 20 L. R. A. 237, footnote p. 223, 54 N. W. 1, holding state treasurer not entitled to interest on public funds as perquisites.

15 L. R. A. 459, *STEVENS v. NICHOLS*, 155 Mass. 472, 29 N. E. 1150.

Liability for injuries due to dangerous ways or grounds.

Cited in *Harobine v. Abbott*, 177 Mass. 60, 58 N. E. 284, holding landowner not liable for defect in private way, to licensee with notice that he must assume risk, if going upon it; *Foard v. Rath*, 33 Pa. Super. Ct. 188, holding that person, entering factory office by usual way and after leaving it going to other parts of the building where he has no business, cannot recover for injury sustained while trying to return to office; *Davis v. Joslin Mfg. Co.* 29 R. I. 108, 69 Atl. 65, holding defendant not liable for drowning of child in trench crossed by private path and bridge, where public not invited to use it and child had been warned to keep away; *Leffler v. Anheuser-Busch Brewing Asso.* 127 Mo. App. 498, 106 S. W. 105, holding that master's duty in furnishing safe place for servant to work, is limited to such places as the servant may reasonably be expected to go.

Cited in notes (26 L.R.A. 693) on liability for dangerous condition of private grounds lying open beside highway or frequented path; (6 L.R.A.(N.S.) 310) on negligence in case of private way; (21 L.R.A.(N.S.) 977) on liability for condition of private way; (31 Am. St. Rep. 524) on owner's liability to persons coming on his premises.

Distinguished in *D'Amico v. Boston*, 176 Mass. 601, 58 N. E. 158, holding city liable for injury from use of discontinued highway where safe way not provided pending construction of new one.

Invitation to use by public.

Cited in *Plummer v. Dill*, 156 Mass. 429, 32 Am. St. Rep. 463, 31 N. E. 128, holding fitting building for particular business, not invitation to strangers to visit same for purposes of their own; *Chenery v. Fitchburg R. Co.* 160 Mass. 213, 22 L. R. A. 577, 35 N. E. 554, holding invitation to public to cross railroad at particular place exists only where circumstances indicate to prudent men a public crossing place; *Moffatt v. Kenny*, 174 Mass. 315, 54 N. E. 850, holding merely permissive, use by public of way opened for private benefit; *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 539, 32 L. R. A. 534, 50 Am. St. Rep. 124, 34 Atl. 491, discussing, without deciding, question whether invitation given to use particular crossing; *De Grilleau v. Frawley*, 48 La. Ann. 195, 19 So. 151, holding mere use of alley by those having business with landowner, no indication of public use; *Bowler v. Pacific Mills*, 200 Mass. 366, 21 L.R.A.(N.S.) 978, 128 Am. St. Rep. 432, 86 N. E. 767, holding that persons using private street have only the rights of licensees where notices were posted at various points that street was private.

Liability to licensee.

Cited in *Brehmer v. Lyman*, 71 Vt. 103, 42 Atl. 613, denying liability of owner of building to one therein by invitation of former licensee; *Flaherty v. Nieman*, 125 Iowa, 548, 101 N. W. 280, holding that tenant using premises adjoining those leased is mere licensee and landlord is not liable for injury from defect therein; *Barry v. Calvary Cemetery Asso.* 106 Mo. App. 363, 80 S. W. 709, holding cemetery association not liable to licensee injured by stepping into hole while walking in cemetery outside of paths provided therein; *Davis v. Bonaparte*, 137 Iowa, 205, 114 N. W. 896, on licensee using private way accepting risks incident to such use; *Glaser v. Rothschild*, 221 Mo. 222, 22 L.R.A.(N.S.) 1060, 120 S. W. 1, 17 A. & E. Ann. Cas. 576, prior appeal 106 Mo. App. 425, 80 S. W. 332 (dissenting opinion), on invitee as distinguished from licensee and duty owed to each.

Cited in notes (17 L.R.A.(N.S.) 917) on duty of owner of premises to protect licensee against hidden dangers; (36 L.R.A.(N.S.) 497) on liability to trespasser or bare licensee from active negligence; (19 Eng. Rul. Cas. 101) on liability to licensee for injury by defective or dangerous premises.

15 L. R. A. 462, *VONDERBANK v. SCHMITT*, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 So. 616.

Right to use of name or tradename.

Cited in *Millspaugh Laundry v. First Nat. Bank*, 120 Iowa, 4, 94 N. W. 262, holding that mortgagee purchasing plant conducted as "Millspaugh Laundry" may use name "National Laundry, formerly owned by Millspaugh," and referring with approval to annotation in 15 L.R.A. 462; *Sieward v. Denechaud*, 120 La. 725, 45 So. 561, holding that where a name was given to hotel business by tenant of property in which located, he might change the name without the consent of the owner of the building.

Cited in footnotes to *Knoedler v. Glaenger*, 20 L. R. A. 733, and *Ranft v. Reimers*, 60 L. R. A. 291, which hold seller of good will of business entitled to resume business under own name; *Fish Bros. Wagon Co. v. Fish*, 16 L. R. A. 453, which holds that names of individuals conducting business pass with transfer of business and good will; *Slater v. Slater*, 61 L. R. A. 796, which holds firm name an asset of partnership which executor of deceased partner has right to have sold; *Snyder Mfg. Co. v. Snyder*, 31 L. R. A. 657, which sustains right of purchaser of good will of dissolved partnership to use firm name; *Bingham School v. Gray*, 41 L. R. A. 243, which holds school carried on by widow and children of man formerly conducting it lawful as against other member of family conducting school under family name in other part of state; *Bagby & R. Co. v. Rivers*, 40 L. R. A. 632, which denies assignability of continuing partner's right to use retiring partner's name; *Millbrae Co. v. Taylor*, 25 L. R. A. 193, which holds that exclusive right to use name "Millbrae" does not pass on division of milk business with partner; *Watkins v. Landon*, 19 L. R. A. 236, which holds purchaser of formula of unpatented medicine not entitled exclusively to appropriate name of original manufacturer; *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 44 L. R. A. 841, which denies right to use own name so as to deceive public as to business rightfully engaged in by another; *Chas. S. Higgins Co. v. Higgins Soap Co.* 27 L. R. A. 42, which denies right to use name "Higgins Soap Co." where name "Chas. S. Higgins Co." previously used by manufacturers of soap; *Grand Lodge, A. O. U. W. v. Graham*, 31 L. R. A. 133, which denies right of incorporated seceding body to claim right to use name "Grand Lodge of the Ancient Order of United Workmen" to the exclusion of original incorporated body; *Illinois Watch Case Co. v. Pearson*, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name; *Le Page Co. v.*

Russia Cement Co. 17 L. R. A. 354, which holds that transfer of trade-mark including surname prevents subsequent use by transferrer.

Transfer of good will.

Cited in *Webster v. Webster*, 180 Mass. 315, 62 N. E. 383, holding one selling partnership assets to partner entitled to solicit trade of firm's customers.

Cited in footnotes to *Philbrook v. Newman*, 34 L. R. A. 265, which holds that good will passes to surviving partners on purchase of interest of deceased; *Brass & Iron Works Co. v. Payne*, 19 L. R. A. 82, which holds good will of partnership transferred on dissolution by one partner's transfer of interest to other partners; *Lobeck v. Lee-Clarke-Andreesen Hardware Co.* 23 L. R. A. 795, which upholds surviving member's right to carry on business without accounting for good will to deceased partner's legal representative; *Merchants' Ad-Sign Co. v. Sterling*, 46 L. R. A. 142, which holds stockholder's attempt to transfer good will of corporation with stock, invalid.

Cited in notes (12 Eng. Rul. Cas. 463; 19 L.R.A.(N.S.) 762, 765) on sale of business and good will as limitation upon right of vendor to compete; (96 Am. St. Rep. 614) on good will of partnership as means of making it productive on dissolution.

15 L. R. A. 470, *HOSPES v. NORTHWESTERN MFG. & CAR CO.* 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117.

Corporate assets as trust fund, and stockholder's liability.

Cited in *Hawkins v. Donnerberg*, 40 Or. 107, 66 Pac. 691, holding that creditor's claim against unpaid capital stock is same as the corporation's; *Turner v. Bailey*, 12 Wash. 643, 42 Pac. 115, denying stockholder's liability upon depreciation of property applied in payment of capital stock; *Durlacher v. Frazer*, 8 Wyo. 75, 80 Am. St. Rep. 918, 55 Pac. 306, holding use of capital in payment of president's individual debt, void as to creditors; *American Exch. Nat. Bank v. Ward*, 55 L.R.A. 359, 49 C. C. A. 611, 111 Fed. 787, holding that insolvency ipso facto does not transform corporate assets into trust fund for creditors; *O'Bear Jewelry Co. v. Volfr*, 106 Ala. 224, 28 L. R. A. 714, 54 Am. St. Rep. 31, 17 So. 525, holding property of insolvent corporation not trust fund except for administration for equal benefit of creditors; *Shaw v. Robinson & S. Co.* 50 Neb. 416, 69 N. W. 947, holding that insolvent corporation may transfer or encumber assets in good faith for proper purposes; *Ballin v. Merchants' Exch. Bank*, 89 Wis. 289, 27 L. R. A. 361, 46 Am. St. Rep. 834, 61 N. W. 1118, protecting lien of attachment creditor of insolvent corporation against claims of other creditors in later action; *Bent v. Underdown*, 156 Ind. 518, 60 N. E. 307, denying right of creditor to collect from stockholder more than amount of subscription; *Luedecke v. Des Moines Cabinet Co.* 140 Iowa, 228, 32 L.R.A.(N.S.) 621, 118 N. W. 456, holding that one corporation buying entire assets of another and issuing therefor its own stock to president of latter individually is liable to creditor of selling corporation; *Billmyer Lumber Co. v. Merchants' Coal Co.* 66 W. Va. 705, 26 L.R.A.(N.S.) 1108, 66 S. E. 1073, holding that assumption by one corporation of debts of another as consideration for all its assets renders assets so transferred liable to debts of latter corporation; *Knight & W. Co. v. Tampa Sand Lime Brick Co.* 55 Fla. 740, 46 So. 285, holding that when corporation has been adjudged bankrupt creditor may sue to enforce stockholder's liability without exhausting remedy against corporation; *Downer v. Union Land Co.* 113 Minn. 416, 129 N. W. 777, holding that judgment creditor of corporation may sue to compel stockholders to pay difference between par value of stock and what they paid for it so far as necessary to satisfy judgment.

Cited in notes (57 Am. St. Rep. 65, 66, 67) on capital stock as trust fund.

Distinguished in *Jones v. Whitworth*, 94 Tenn. 609, 30 S. W. 736, holding that unpaid stock subscriptions inure to benefit of all creditors regardless of when debts contracted; *Gilman v. Gross*, 97 Wis. 228, 72 N. W. 885, holding one receiving capital stock as security not liable for debts created before such issuance; *Shields v. Clifton Hill Land Co.* 94 Tenn. 156, 26 L. R. A. 520, 45 Am. St. Rep. 700, 28 S. W. 668, holding creditor whose claim accrued before subscription to stock of corporation, entitled by statute to enforce liability for unpaid subscriptions.

— Preferences.

Cited in *John V. Farwell Co. v. Sweetzer*, 10 Colo. App. 425, 51 Pac. 1012, holding that insolvent corporation may prefer creditors; *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. 686, sustaining preference to directors for bona-fide debt created for legitimate purposes; *Singer Piano Co. v. Barnard, W. & Co.* 113 Iowa, 669, 83 N. W. 725, holding corporation's mortgage enabling incorporators to pay delinquent subscriptions, void as to creditors; *Corey v. Wadsworth*, 118 Ala. 524, 44 L. R. A. 779, 25 So. 503, sustaining preference to director participating in such transaction; *Worthen v. Griffith*, 59 Ark. 580, 43 Am. St. Rep. 50, 28 S. W. 286, holding assignment of corporation with preferences for notes upon which directors were indorsers, valid; *Adams & W. Co. v. Deyette*, 8 S. D. 138, 31 L. R. A. 505, 59 Am. St. Rep. 751, 65 N. W. 471 (dissenting opinion), majority holding preference by corporation of creditors who loaned money to directors with knowledge that funds were for purchase of stock in itself, void; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 442, 11 So. 370, holding unauthorized transfer of property of insolvent corporation by director to pay for which he is surety, void; *State v. Bank of Ogalalla*, 65 Neb. 24, 90 N. W. 961, holding certificates of deposit issued without consideration, by insolvent bank to its stockholders, invalid as against receiver and creditors; *Beaman v. Stewart*, 19 Colo. App. 231, 74 Pac. 344, holding, in absence of legislative prohibition, that a corporation, though insolvent, has same power to make preferences as a natural person; *Durlacher v. Frazer*, 8 Wyo. 75, 80 Am. St. Rep. 918, 55 Pac. 306, holding a corporation cannot give away its property, or transfer it, unless in good faith, for value, if its creditors would be left thereby unsecured.

Distinguished in *Slack v. Northwestern Nat. Bank*, 103 Wis. 64, 74 Am. St. Rep. 841, 79 N. W. 51, holding invalid, preference by insolvent bank to owners; *Jahn v. Champagne Lumber Co.* 157 Fed. 414, holding mere fact that small consideration passed from complainant did not bring case within rule of the cited case.

Fraud in issuance of stock; bonus stock.

Cited in *Wallace v. Carpenter Electric Heating Mfg. Co.* 70 Minn. 328, 68 Am. St. Rep. 530, 73 N. W. 189, and *Hastings Malting Co. v. Iron Range Brewing Co.* 65 Minn. 32, 67 N. W. 652, holding issuance of stock for property overvalued to knowledge of parties, fraudulent as to subsequent creditors; *Northwestern Rail-roader Co. v. Prior*, 68 Minn. 98, 70 N. W. 869, holding creditor's action upon liability for stock issued for inadequate consideration, founded in fraud; *Van Cleve v. Berkey*, 143 Mo. 126, 42 L. R. A. 601, 44 S. W. 743, holding purchaser of stock with knowledge of its issuance for worthless invention liable to creditor as for unpaid subscription; *Holman v. Thomas*, 171 Fed. 222, holding that under statute of Minnesota, scheme to dispose of capital stock of corporation, giving to each purchaser as bonus amount of stock equal to that paid for, was invalid; *Macbeth v. Banfield*, 45 Or. 567, 106 Am. St. Rep. 670, 78 Pac. 693, holding basis of stockholder's liability for benefit of creditors in case of overvalued property is fraud; *Lea v. Iron Belt Mercantile Co.* 147 Ala. 427, 8 L.R.A.(N.S.) 282, 119

Am. St. Rep. 93, 42 So. 415, holding subsequent creditor with full knowledge that stock was issued for over-valued property cannot compel difference to be paid.

Cited in note (38 L. R. A. 494) on bonus stock of corporations.

Distinguished in *Smith v. Prior*, 58 Minn. 251, 59 N. W. 1016, holding action on stock issued for grossly overvalued property, not one founded on contract in favor of corporation; *Easton Nat. Bank v. American Brick & Tile Co.* 70 N. J. Eq. 744, 8 L.R.A.(N.S.) 278, 64 Atl. 917, 7 A. & E. Ann. Cas. 84, reversing 69 N. J. Eq. 326, 60 Atl. 54, where statute absolutely prohibited agreements for issue of stock for less than par, and afforded relief to all creditors without distinction.

Effect of assignment of claim against insolvent.

Cited in *Wilson v. St. Louis & W. R. Co.* 120 Mo. 59, 25 S. W. 527, denying stockholder's liability for unpaid subscription to assignee of judgment against corporation, without consideration; *Fish v. Smith*, 73 Conn. 391, 84 Am. St. Rep. 161, 47 Atl. 711, raising, without deciding, question whether claim for unpaid subscription should fail because bought for a low price for speculative purpose.

Distinguished in *Palmer v. Bank of Zumbrota*, 72 Minn. 280, 75 N. W. 380, holding purchaser of claims against insolvent bank entitled to dividend where he was without fiduciary relation to bank and the consideration was not unconscionably inadequate; *Mendenhall v. Duluth Dry Goods Co.* 72 Minn. 315, 75 N. W. 232, holding that assignee of claim "for value received" need not allege consideration.

Presumption as to creditor's reliance on professed capital stock.

Cited in *Security Trust Co. v. Ford*, 75 Ohio St. 334, 8 L.R.A.(N.S.) 269, 79 N. E. 474, holding, where claim is made that creditors had actual notice of issue of stock as fully paid stock, that burden of showing that is on stockholders; *Dwinnell v. Minneapolis F. & M. Mut. Ins. Co.* 97 Minn. 346, 106 N. W. 312, holding in action by creditors or receiver to recover from stockholders amounts unpaid on stock, whether issued as bonus stock or otherwise, that it will be presumed that professed capital stock was relied on.

Limitation against liability on contingent claim.

Cited in footnotes to *Swearingen v. Sewickley Dairy Co.* 53 L.R.A. 471, which holds limitation runs against stockholder's liability from time of insolvency of corporation; *West v. Topeka Sav. Bank*, 63 L.R.A. 137, which holds that statute of limitations does not begin to run against stockholder's liability for installment of subscription until a call is made; *Bennett v. Thorne*, 68 L.R.A. 114, which holds that liability imposed on stockholders of insolvent bank accrues at time of insolvency.

Cited in notes (58 L.R.A. 85) on contingency of claim as affecting limitation of time for its presentation; (96 Am. St. Rep. 978) on statute of limitations in actions against corporate officers and stockholders.

What constitute contingent claims.

Cited in footnote to *Wight v. Gottschalk*, 43 L. R. A. 189, which holds claim on covenant of warranty not provable in bankruptcy as "contingent liability."

Liability of incorporator as partner.

Cited in *Wechselberg v. Flour City Nat. Bank*, 26 L. R. A. 475, 12 C. C. A. 56, 24 U. S. App. 308, 64 Fed. 95, holding one signing article of incorporation liable as partner where business conducted under assumed name of the unperfected corporation.

Legal and equitable estates as elements in a trust.

Cited in *Allen v. Rees*, 136 Iowa, 426, 8 L.R.A.(N.S.) 1139, 110 N. W. 583, holding generally that one person is a trustee holding legal title while another is cestui que trust; *Sims v. Morrison*, 92 Minn. 345, 100 N. W. 88, holding public lands cannot be impressed with a trust in favor of an equitable title; *Watkins v. Bigelow*, 93 Minn. 225, 100 N. W. 1104, holding a gift, vesting both legal title and beneficial ownership in the donee, is not one in trust, even if it be a conditional gift.

Equitable jurisdiction.

Cited in *Gianella v. Bigelow*, 96 Wis. 201, 71 N. W. 111, holding that equitable jurisdiction of circuit court necessarily extends to case where county court could not afford adequate remedy.

15 L. R. A. 475, *STEPHENSON v. SOUTHERN P. CO.* 93 Cal. 558, 27 Am. St. Rep. 223, 29 Pac. 234.

Master's liability for servant's act.

Cited in *Trabing v. California Nav. & Improv. Co.* 121 Cal. 141, 53 Pac. 644, holding carrier liable for wanton act of captain of steamboat in causing passenger to be handcuffed and chained to post; *Branch v. International & G. N. R. Co.* 92 Tex. 292, 71 Am. St. Rep. 844, 47 S. W. 974, holding railroad not liable for negligence of servant in using hand car on private errand; *Alsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 347, 56 L. R. A. 752, footnote p. 748, 88 N. W. 841, sustaining liability of carrier for injuries caused by engineer operating blow-off cock to frighten children; *Higgins v. Williams*, 114 Cal. 185, 45 Pac. 1041, holding employer liable for injury to employee from defective machine used by superintendent, though master had no actual knowledge of its use and did not own the machine; *Savannah Electric Co. v. Hodges*, 6 Ga. App. 477, 65 S. E. 322, holding street railway company not liable for injury to employee from being struck by car which was unintentionally started by another employee while engaged in play; *Louisville & N. R. Co. v. Gillen*, 166 Ind. 324, 76 N. E. 1058, holding that master is not liable for acts of servant unless done in the line of his duty; *Warner v. Southern P. Co.* 113 Cal. 111, 54 Am. St. Rep. 327, 45 Pac. 187, on liability of master for malicious act of servant.

Cited in footnote to *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw at boys playing on cotton bales.

Cited in notes (27 L.R.A. 186) on master's civil responsibility for wrongful or negligent act of servant or agent towards one who has no claim on master by reason of contract incipient or perfected; (10 L.R.A.(N.S.) 396, 400, 402) on liability for injury by servant to third person in use of dangerous agency; (13 L.R.A.(N.S.) 1194) on liability of master for injury from sportive manner in which servant performs duty; (88 Am. St. Rep. 792, 796) on liability of principal for unauthorized acts of agent; (133 Am. St. Rep. 871) on liability of railroad company for injuries due to frightening of animals by emission of steam; (54 Am. St. Rep. 82, 85, 86; 17 Eng. Rul. Cas. 282) on master's liability for acts of servant.

Distinguished in *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L. R. A. 715, 48 C. C. A. 419, 109 Fed. 375, Affirming 103 Fed. 844, holding telegraph company liable for loss due to false telegram wilfully sent by its operator.

Distinguished and disapproved in *Stewart v. Cary Lumber Co.* 146 N. C. 81, 59 S. E. 545, holding railroad liable for injury resulting where trainmen maliciously blew whistle for purpose of scaring plaintiff's mule also citing annotation on this point.

15 L. R. A. 477, *STATE v. SCOUGAL*, 3 S. D. 55, 44 Am. St. Rep. 756, 51 N. W. 858.

Acts limiting right to engage in banking.

Cited in *Marymont v. Nevada State Bkg. Board*, — Nev. —, 32 L.R.A.(N.S.) 483, 111 Pac. 295, holding that state cannot limit transaction of ordinary banking business to corporations; *First State Bank v. Shallenberger*, 172 Fed. 1001, holding invalid an act prohibiting banking except through corporation which has contributed to depositor's guaranty fund.

Cited in footnotes to *Youngblood v. Birmingham Trust & Sav. Co.* 20 L. R. A. 58, which holds valid, act prohibiting banker from discounting paper at more than specified rate per cent; *Ex parte Whitwell*, 19 L. R. A. 727, which denies right to prohibit maintenance of private asylum; *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, which denies right of legislature to prevent transfer of property in payment of debt while solvent.

Cited in notes (25 L. R. A. 239) on restrictions on insurance business, unincorporated associations, or individuals; *Lloyd's associations*; (53 L. R. A. 763, 764) on constitutionality of statute attempting to grant monopoly; (5 L.R.A. (N.S.) 875) on power to prohibit or impose conditions upon right of individuals to engage in banking; (135 Am. St. Rep. 61) on business of banking as a proper subject for legislative regulation; (55 L. ed. U. S. 130) on prohibiting or restricting private banking.

Distinguished in *Blaker v. Hood*, 53 Kan. 510, 24 L. R. A. 857, footnote p. 854, 36 Pac. 1115, which holds imposition of reasonable regulations on banks of deposit and discount not prohibited by constitutional provisions as to banks of circulation; *Noble State Bank v. Haskell*, 22 Okla. 79, 97 Pac. 590, holding valid act requiring banks to guarantee deposits.

Disapproved in *Brady v. Mattern*, 125 Iowa, 163, 106 Am. St. Rep. 291, 100 N. W. 358, holding valid statute requiring building and loan associations to be incorporated before engaging in certain kinds of business; *Weed v. Bergh*, 141 Wis. 574, 25 L.R.A.(N.S.) 1219, 124 N. W. 664, holding valid act requiring incorporation as condition for doing banking business.

Franchises and franchise tax.

Cited in *Evans v. Hughes County*, 3 S. D. 249, 52 N. W. 1062, holding legislative authorization of ferry franchise ineffective where pertaining to territory within Federal jurisdiction.

Cited in footnote to *Spring Valley Waterworks v. Barber*, 21 L. R. A. 416, which denies right to franchise tax against water company in county where it has only water pipe and right of way.

What constitutes "banking."

Cited in *Williams v. Lewis Invest. Co.* 110 Iowa, 642, 82 N. W. 332, holding investment company receiving deposits, not banking institution; *Re Surety Guarantee & T. Co.* 56 C. C. A. 655, 121 Fed. 74, holding incorporated company engaged in buying and selling securities not "private banker."

Cited in footnote to *Du Quoin v. Kelly*, 43 L. R. A. 644, which holds private bank not "regularly organized bank" within statute as to deposit of public funds.

15 L. R. A. 487, *HOLLINS v. DEMOREST*, 129 N. Y. 676, 29 N. E. 1093.

Easements and railroad rights of way.

Approved in *Weed v. McKeg*, 37 Misc. 110, 74 N. Y. Supp. 250, holding that building not interfering with reasonable and proper use of easement may be placed over alley by servient owner; *Perry v. Lehigh Valley R. Co.* 9 Misc. 520, 30 N. Y. Supp. 140, holding covenant to construct under-crossing in deed granting

right of way for railway, not broken by placing branch track and depot near same, so as to render it more inconvenient by reason of noise, smoke, etc.

Cited in footnote to *Carpenter v. Capital Elec. Co.* 43 L. R. A. 645, which denies right to extend electric light wires and cross arm attached to poles over private alley.

Cited in notes (22 L. R. A. 542) on American law as to easements of light, air, and prospect; (16 L.R.A.(N.S.) 193) on building over right of way.

15 L. R. A. 489, *AKERSLOOT v. SECOND AVE. R. CO.* 131 N. Y. 599, 30 N. E. 195.

Duty of street railway to passenger entering car.

Cited in *Citizens Street R. Co. v. Merl*, 26 Ind. App. 292, 59 N. E. 491, holding giving of signal to start before passenger in place of safety, negligence; *Dochtermann v. Brooklyn Heights R. Co.* 32 App. Div. 15, 52 N. Y. Supp. 1051, holding that starting car before passenger seated may be negligence; *Wallace v. Third Ave. R. Co.* 36 App. Div. 59, 55 N. Y. Supp. 132, holding sudden starting of car while passenger entering door, negligence; *Lansing v. Coney Island & B. R. Co.* 16 App. Div. 149, 45 N. Y. Supp. 120, holding negligence inferable from fact that child was thrown from car before parent could put her in place of safety; *Pfeffer v. Buffalo R. Co.* 4 Misc. 470, 24 N. Y. Supp. 490, holding starting of street car before passenger entering by front steps reaches safe place, negligence; *Kellegher v. Forty-Second Street, M. & St. N. Ave. R. Co.* 171 N. Y. 313, 63 N. E. 1096, holding instruction that conductor was negligent in starting car if jury believed plaintiff's witnesses, erroneous; *Stoddard v. St. Louis & M. River R. Co.* 105 Mo. App. 521, 80 S. W. 33; *Morrow v. Brooklyn Heights R. Co.* 119 App. Div. 23, 103 N. Y. Supp. 998; *Fine v. Interurban Street R. Co.* 45 Misc. 589, 91 N. Y. Supp. 43,—holding it negligence to start street car before passenger getting on has had time to place himself in position of security; *Clark v. Durham Traction Co.* 138 N. C. 82, 107 Am. St. Rep. 526, 50 S. E. 518, holding street car company liable where one entering car was injured by its starting before he was fully on the car.

Cited in footnote to *Steege v. St. Paul City R. Co.* 16 L. R. A. 379, which holds starting of street car before passenger reaches safe place on car, negligence.

Cited in note (42 L. R. A. 295) on starting car before passenger is seated.

— To passenger leaving car.

Cited in *Kroner v. St. Louis Transit Co.* 107 Mo. App. 46, 80 S. W. 915, holding street car company liable for injury to passenger caused by starting the car before giving reasonable time to alight.

15 L. R. A. 490, *BLOOD v. KANE*, 130 N. Y. 514, 29 N. E. 994.

Trust relation of executors and administrators.

Cited in *Re Mullon*, 145 N. Y. 104, 39 N. E. 821, Affirming 74 Hun, 364, 26 N. Y. Supp. 683, holding administrators who take assets as residuary legatees believing all charges paid, but without discharge, liable to subsequent claimant only for assets so applied; *Re Te Culver*, 22 Misc. 221, 49 N. Y. Supp. 820, holding administrators liable to next of kin for balance of account paid to surrogate and by him misappropriated; *Re Smith*, 46 App. Div. 322, 61 N. Y. Supp. 716, holding residuary estate paid to executor legatee after payment of specific bequests and setting apart portion pertaining to life estates, not liable for co-executor's embezzlement; *Haebler v. John Eichler Brewing Co.* 25 Misc. 578, 55 N. Y. Supp. 1071, holding that alternative legatee upon taking bequest given on condition of payment of testator's debts must secure original legatee and executor

against creditors' claims; *Beecher v. Yale*, 79 N. Y. S. R. 624, 45 N. Y. Supp. 622, holding executor without power to execute trust created by special bequest but omitting to name trustee; *Lane v. Albertson*, 78 App. Div. 614, 79 N. Y. Supp. 947, and *Lediger v. Canfield*, 78 App. Div. 598, 79 N. Y. Supp. 758, which hold that executors have qualified legal title to personalty as trustees for creditors and beneficiaries; *Morschauser v. Pierce*, 64 App. Div. 560, 72 N. Y. Supp. 328, holding that administrator took unqualified legal title to insurance policy assigned to testator; *Hart v. Goadby*, 138 App. Div. 165, 123 N. Y. Supp. 166; *Re Culver*, 2 Gibbons, Sur. Rep. 321,—holding that upon appointment administrator becomes vested with legal title to personal property of decedent as trustee for creditors and next of kin; *Huyler v. Dolson*, 101 App. Div. 86, 91 N. Y. Supp. 794; *Re Silkman*, 121 App. Div. 209, 105 N. Y. Supp. 872; *Re Maccafil*, 127 App. Div. 25, 111 N. Y. Supp. 315; *Re Avery*, 45 Misc. 533, 92 N. Y. Supp. 974; *Re Prince*, 56 Misc. 227, 107 N. Y. Supp. 296,—on executor as trustee for creditors and distributees; *Cronk v. Crandall*, 137 App. Div. 443, 121 N. Y. Supp. 805, holding that although assignee of legatee of deceased partner has no legal title to assets of firm, he has equitable interest which entitles him to sue surviving partner for accounting; *Porter v. Baldwin*, 139 App. Div. 281, 123 N. Y. Supp. 1043, holding that where executors of deceased partner and legatee of partnership interest made contract under seal with surviving partner for accounting assignee of legatee cannot sue for breach of contract without joining executors as plaintiffs.

Cited in note (112 Am. St. Rep. 729) on nature of executor's title.

Merger of trust and beneficial interests in estates of decedents.

Followed without discussion in *Rush v. Klein*, 35 Misc. 854, 72 N. Y. Supp. 1126.

Cited in *Hauptmann v. First Nat. Bank*, 83 Hun, 82, 31 N. Y. Supp. 364, holding that one who is executor and sole legatee has legal title to beneficial interest in personalty, subject only to debts; *Thomas v. Troy City Nat. Bank*, 19 Misc. 475, 44 N. Y. Supp. 1039, and *Chester v. Buffalo Car Mfg. Co.* 70 App. Div. 457, 75 N. Y. Supp. 428, which hold executor's qualified title to personalty merged in title as specific legatee when no others interested; *Re Robinson*, 37 Misc. 337, 75 N. Y. Supp. 490, holding the legal title in legacy of mortgage, subject to life interest in income, where not charged with debts and estate solvent, passes direct; *Linthicum v. Caswell*, 19 App. Div. 543, 46 N. Y. Supp. 610, specific legacy needs only assent of executor to vest title in legatee, even where latter is himself executor; *Cabble v. Cabble*, 111 App. Div. 427, 97 N. Y. Supp. 773, holding that after debts are paid title to remaining personalty vests in legatees; *Re Kinsella*, 50 Misc. 237, 100 N. Y. Supp. 485, holding that executrix who is sole legatee may after debts are paid, appropriate the personal property without any decree or settlement; *Martin v. Andrews*, 59 Misc. 307, 111 N. Y. Supp. 40, holding that executors may not sell securities after all debts are paid and distributees have given notice of election to take them in specie; *Dickinson v. Hoes*, 33 N. Y. Civ. Proc. Rep. 104, 84 N. Y. Supp. 152, holding that sole distributee may appropriate the estate without administration where no debts exist against the estate; *Re McCarthy*, 26 N. Y. Civ. Proc. Rep. 399, 47 N. Y. Supp. 1127, on liability of property in hands of legatees for testator's debts; *Re Hurst*, 111 App. Div. 464, 97 N. Y. Supp. 697, on legal title of executor to personalty.

Distinguished in *Lawyers' Surety Co. v. Reinach*, 25 Misc. 156, 54 N. Y. Supp. 205, denying that trust estate merged in beneficial estate where are other distributees; *Dutcher v. Dutcher*, 88 Hun, 225, 34 N. Y. Supp. 653, denying right of widow afterwards becoming administratrix to dispose of property of deceased husband in consideration of her support, as against children not consenting.

Limited in *Carey v. Roosevelt*, 81 Fed. 610, holding legatees not bound by judgment against administrators after relation terminated.

Set-off in settlement of estates.

Cited in footnotes to *Webb v. Fuller*, 22 L. R. A. 177, which authorizes set-off of amount due by legatee against distributive share; *Oxsheer v. Nave*, 37 L. R. A. 98, which sustains right to set off indebtedness of distributee against distributive share although purchased by creditor; *Ainsworth v. Bank of California*, 39 L. R. A. 686, which authorizes setting off against claim due estate debt due from deceased though not matured at time of death.

Liability for expenses incurred after estate passes.

Cited in *Re Flint*, 15 Misc. 601, 38 N. Y. Supp. 188, denying liability of executor or administrator to holder of claim for decedent's funeral expenses; *Re Ginsburg*, 27 Misc. 755, 59 N. Y. Supp. 656, holding assignee for creditors personally liable for rents unnecessarily incurred by him.

Cited in note (33 L. R. A. 663) on liability of decedent's estate for funeral expenses.

Necessity of administration.

Annotation approved in *Bowden v. Jacksonville Electric Co.* 51 Fla. 155, 41 So. 400, 7 A. & E. Ann. Cas. 859, on appointment of administrator of estate of deceased minor.

Annotation cited in *Bryan v. McCann*, 55 W. Va. 378, 47 S. E. 143, on when an administrator is necessary.

15 L. R. A. 498, *FIRST NAT. BANK v. SPRAGUE*, 34 Neb. 318, 33 Am. St. Rep. 644, 51 N. W. 846.

Bank collections.

Approved in *Bedell v. Harbine Bank*, 62 Neb. 342, 86 N. W. 1060, holding bank not liable for negligence or default of collecting bank selected with owner's assent; *Irwin v. Reeves Pulley Co.* 20 Ind. 115, 48 N. E. 601, holding bank accepting for collection draft payable at distant bank, not liable for default of correspondent selected with due care; *Waterloo Mill. Co. v. Kuenster*, 158 Ill. 268, 29 L. R. A. 797, 49 Am. St. Rep. 156, 41 N. E. 906, holding bank receiving draft for collection discharged of liability by duly transmitting to suitable agent at drawee's residence with necessary instructions.

Cited in *Crilly v. Ruyle*, 87 Neb. 372, 127 N. W. 251, holding that bank charged with duty of collecting draft is drawer's agent.

Cited in footnotes to *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment; *Beal v. Somerville*, 17 L. R. A. 291, which holds no title to check passes by depositing for collection; *Wilson v. Carlinville Nat. Bank*, 52 L. R. A. 632, which holds depositor of check for collection estopped to object to sending check directly to drawee bank in accordance with custom known to him; *Second Nat. Bank v. Merchants' Nat. Bank*, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker, without hearing from similar note previously sent.

Cited in notes (38 Am. St. Rep. 777) on care required of bankers acting as agents or bailees; (3 Eng. Rul. Cas. 777) on liability of bank for money received by correspondent bank.

Distinguished in *First Nat. Bank v. First Nat. Bank*, 55 Neb. 308, 75 N. W. 840, holding bank made liable by instruction to give credit for amount collected.

Disapproved in *Bailie v. Augusta Sav. Bank*, 95 Ga. 282, 51 Am. St. Rep. 74,

21 S. E. 717, holding bank liable for negligence of correspondent bank to which it sent check for collection.

15 L. R. A. 501, *AYRES v. MOAN*, 34 Neb. 210, 51 N. W. 830.

Petitions for change of county seat.

Cited in *Crews v. Coffman*, 36 Neb. 834, 55 N. W. 265, holding interested parties entitled to examine original petition in office of county clerk before election; *Hoffman v. Nelson*, 1 Neb. (Unof.) 220, 95 N. W. 347, holding no error to count as in favor of removal of county seat petitioners who signed remonstrance but afterwards withdrew; *Rickey v. Williams*, 8 Wash. 487, 36 Pac. 480, holding commissioners' determination as to sufficiency of signature of county-seat removal petition, not conclusive; *State ex rel. Hawley v. Polk County*, 88 Wis. 365, 60 N. W. 206, holding that supervisors cannot arbitrarily strike names from petition for removal because differing from poll list.

Cited in footnote to *State ex rel. Little v. Langlie*, 32 L. R. A. 723, which holds two-thirds majority of votes polled on proposal to relocate county seat, sufficient.

Donation to secure county seat or state institution.

Cited in footnote to *Lund v. Chippewa County*, 34 L. R. A. 131, which sustains donation by county to secure site for state institution for feeble minded.

Duty as to petitions.

Cited in *Hindman v. Boyd*, 42 Wash. 33, 84 Pac. 609, holding it to be the duty of city council to scrutinize and examine petition for submission of charter to voters, to ascertain if it had sufficient number of qualified signers.

Review of action of board.

Cited in *Mathews v. Hedlund*, 82 Neb. 829, 119 N. W. 17, holding that order revoking a physician's license to practice is reviewable by the court.

15 L. R. A. 505, *CONSUMERS GAS TRUST CO. v. HARLESS*, 131 Ind. 446, 29 N. E. 1062.

Equal privileges and immunities.

Cited in *Barrett v. Millikan*, 156 Ind. 516, 83 Am. St. Rep. 220, 60 N. E. 310, holding mechanic's lien law not class legislation; *Chander Coal Co. v. Sams*, 170 Ind. 629, 85 N. E. 341, holding valid statute requiring coal mine operators to maintain lamps though it excepts mines where electric lights are used and mines employing less than ten men.

Local or special laws.

Cited in *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 237, 61 N. E. 197, holding act making allegation or proof of absence of contributory negligence unnecessary, in action for negligent killing or injury, not local or special; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. 223, holding act affecting franchises of street railways in cities of certain population in 1890, of which there was one, special and local; *Pennsylvania Co. v. State*, 142 Ind. 440, 41 N. E. 937, holding act requiring blackboard schedule in railway stations having telegraph office, not special and local; *Young v. Tipton County*, 137 Ind. 326, 36 N. E. 1118, holding act authorizing bond issued by counties contracting for courthouse before past date, not local and special; *Strange v. Grant County*, 173 Ind. 645, 91 N. E. 242, holding that law which applies generally to particular class of cases is not local or special law; *Bumb v. Evansville*, 168 Ind. 274, 80 N. E. 625, holding constitutional an act applying only to cities having more than 50,000 people and less than 100,000; *Rushville v. Hayes*, 162 Ind. 204, 70 N. E. 134, holding unconstitu-

tional an act authorizing issuance of bonds by school city having not more than 4,545 and not less than 4,540 inhabitants.

Cited in footnote to *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local.

Sufficiency of payment.

Cited in *Travis County v. Trogdon*, 88 Tex. 308, 31 S. W. 358, holding provision for compensation made or secured before exercise of eminent domain, complied with by payment or deposit of sum awarded, notwithstanding appeal.

Cited in footnotes to *Harrisburg, C. & C. Turnp. Road Co. v. Harrisburg & M. Elec. R. Co.* 34 L. R. A. 439, which holds payment into court of award appealed from in eminent domain case insufficient; *Steinhart v. Superior Court*, 59 L. R. A. 404, which holds payment into court of sufficient money to compensate landowner, not payment authorizing giving possession of land sought to be condemned.

Necessity of condemnation.

Cited in *Bigelow v. Draper*, 6 N. D. 165, 69 N. W. 570, holding question as to necessity of condemnation for railroad purposes, for court; *Richland School Twp. v. Overmyer*, 164 Ind. 386, 73 N. E. 811; *Westport Stone Co. v. Thomas*, 175 Ind. 322, 35 L.R.A.(N.S.) 650, 94 N. E. 406; *Speck v. Kenoyer*, 164 Ind. 433, 73 N. E. 896,—holding that question of necessity of exercising power of eminent domain for a particular public use is legislative.

Cited in notes (1 L.R.A.(N.S.) 606) on condemnation of shares of minority stockholders; (22 L.R.A.(N.S.) 10, 13, 57, 65, 88, 136) on judicial power over eminent domain.

Acceptance of award as estoppel.

Cited in *Missouri P. R. Co. v. Gruendel*, 3 Kan. App. 61, 44 Pac. 439, denying right of appeal from award in condemnation proceedings after voluntary compliance therewith; *Smith v. Cleveland, C. C. & St. L. R. Co.* 170 Ind. 400, 81 N. E. 501, holding valid provision permitting railroad to take possession of lands under condemnation proceeding, before final settlement of appeal; *Cincinnati, R. & M. R. Co. v. Wabash R. Co.* 162 Ind. 309, 70 N. E. 256; *Cleveland, C. C. & St. L. R. Co. v. Nowlin*, 163 Ind. 502, 72 N. E. 257; *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 35 Ind. App. 542, 74 N. E. 531,—holding railroad not estopped to prosecute appeal from award in condemnation proceedings though it has paid the amount into court and has taken possession of the land; *Macfarland v. Poulos*, 32 App. D. C. 564, holding that where in proceeding to condemn land for street, the award is confirmed, and paid and the benefits assessed, the street commissioners cannot appeal.

Distinguished in *Burns v. Chicago, Ft. M. & D. M. R. Co.* 102 Iowa, 12, 70 N. W. 728, holding acceptance of award no bar to acceptance of larger award on appeal procured by railroad.

What is public use for exercise of eminent domain.

Cited in *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 450, 5 L.R.A.(N.S.) 648, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182, holding that generation of electricity, for sale to the public, by water power is such public use as to warrant power of eminent domain; *Detroit & T. S. L. R. Co. v. Campbell*, 140 Mich. 387, 103 N. W. 856, on power of eminent domain being granted to railroads because for a public use.

Interference with interstate commerce.

Cited in *Haskell v. Cowham*, 109 C. C. A. 235, 187 Fed. 411, holding that state may not prevent interstate commerce in natural gas within it by preventing use to transport it of pipe lines across highways.

Cited in note (35 L.R.A.(N.S.) 1194, 1196) on right of state to forbid exportation of natural resources.

15 L. R. A. 509, *BROWN v. BRADLEE*, 156 Mass. 28, 32 Am. St. Rep. 430, 30 N. E. 85.

Liability of principal or agent.

Approved in *Isham v. Burgett*, 157 Mass. 546, 32 N. E. 907, holding order with individual signature followed by "Mark. The Dover Electric Light Co.," on its face creates individual liability; *Crawford v. Moran*, 168 Mass. 449, 47 N. E. 132, sustaining admission of oral evidence to charge real party in interest under written contract with agent.

Cited in *Metropolitan Coal Co. v. Bontell Transp. & Towing Co.* 196 Mass. 84, 81 N. E. 645, holding contract signed by agent with "manager" after his name, binds his principal if within the scope of his authority; *Eustis Mfg. Co. v. Saco Brick Co.* 198 Mass. 217, 84 N. E. 449, on liability of both principal and agent on contract signed by the latter.

Cited in footnote to *Lundy v. Delmas*, 26 L. R. A. 651, which denies individual liability of university regents for negligence.

Cited in note (19 L. R. A. 681) on personal liability of officers on note made for corporation.

Admissibility of judgment in other action.

Cited in *Arkansas S. W. R. Co. v. Dickinson*, 78 Ark. 488, 115 Am. St. Rep. 54, 95 S. W. 802, holding that offer of reward for conviction of any person obstructing track for purpose of causing derailment, means conviction of the offense under statute.

Cited in footnote to *State v. Bradneck*, 43 L. R. A. 620, which holds judgment of dismissal in divorce suit for adultery inadmissible in criminal prosecution for nonsupport of wife.

Power to offer reward for apprehension of criminals.

Cited in *People ex rel. Atty. Gen. v. Holly*, 119 Mich. 638, 44 L. R. A. 678, 75 Am. St. Rep. 435, 78 N. W. 665, holding offering of reward for apprehension of incendiaries within power of municipality to make regulations for safety and general welfare.

15 L. R. A. 513, *RIDER v. FRITCHEY*, 49 Ohio St. 285, 30 N. E. 692.

Demands enforceable as "dues."

Cited in *Flenniken v. Marshall*, 43 S. C. 84, 28 L. R. A. 404, footnote p. 402, 20 S. E. 788, holding demand *ex delicto* enforceable against corporate stockholders as "dues;" *Henley v. Myers*, 76 Kan. 729, 17 L.R.A.(N.S.) 782, 93 Pac. 168, holding that "dues" as used in constitution on individual liability of stockholders includes liability on judgment rendered against corporation in tort action.

Liability for tort as debt.

Cited in *Moore v. P. C. C. & St. L. R. Co.* 7 Ohio N. P. N. S. 370, 18 Ohio S. & C. P. Dec. 710, holding that joint tort feasons are not joint debtors until judgment or other liquidation of liability and, therefore, discharge of one releases others.

Cited in note (22 L.R.A.(N.S.) 256) as to whether statutory liability for debts of corporation includes liability for torts.

Judicial notice.

Approved in *Keck v. Cincinnati*, 3 Ohio N. P. 254, 4 Ohio S. & C. P. Dec. 324, holding that police court may take judicial notice of local ordinances.

15 L. R. A. 516, *SEVILLE v. STATE*, 49 Ohio St. 117, 30 N. E. 621.

What constitutes prize fighting.

Cited in *State v. Patton*, 159 Ind. 251, 64 N. E. 850, holding information alleging engagement in fight with fists for wager, sufficient; *State v. Hobart*, 8 Ohio N. P. 254, 11 Ohio S. & C. P. Dec. 194, holding that boxing match for prize is prize fight.

Cited in footnotes to *State v. Olympic Club*, 24 L.R.A. 452, which holds glove contest not within prohibition against prize fights; *Com. ex rel. Pratt v. McGovern*, 66 L.R.A. 280, which holds that use of gloves in prize fight does not diminish character of offense.

Admissibility of subsequent acts or declarations.

Cited in *People v. Hall*, 51 App. Div. 64, 64 N. Y. Supp. 433, holding admissible, acts and declarations of conspirators after act charged but in pursuance of same conspiracy; *Lamb v. State*, 69 Neb. 218, 95 N. W. 1050, holding declarations of conspirator evidence against coconspirators where made during the prosecution of the unlawful enterprise.

Negating exceptions in criminal statute.

Cited in *Smythe v. State*, 2 Okla. Crim. Rep. 297, 101 Pac. 611, holding that exception need not be negated in indictment unless it is found in the enacting or prohibiting clause of the statute.

Powers of cities.

Cited in *Cleveland v. Painter*, 6 Ohio N. P. N. S. 131, holding that city can purchase land outside city for parks.

15 L. R. A. 520, *TIPPECANOE COUNTY v. MITCHELL*, 131 Ind. 370, 30 N. E. 409.

Public contracts for services.

Cited in *Garrigus v. Howard County*, 157 Ind. 109, 60 N. E. 948, sustaining power of county board to employ expert accountants for discovery and collection of claims: *State ex rel. Tippecanoe County v. Flynn*, 161 Ind. 563, 69 N. E. 159, holding bondsmen of clerk of court not liable for latter's failure to turn over money paid for unofficial services; *State ex rel. Dearborn County v. Shutts*, 161 Ind. 591, 69 N. E. 397, sustaining county clerk's right to allowance given by board of commissioners for reproduction of records; *Baker v. Crook County*, 9 Wyo. 57, 59 Pac. 797, sustaining county commissioners' contract with coroner to supply medical services and supplies to paupers; *Chase v. Boulder County*, 37 Colo. 272, 86 Pac. 1011, 11 A. & E. Ann. Cas. 483, holding that county has no authority to employ "tax ferrets" to look up property which has escaped taxation; *Starr v. Delaware County*, 40 Ind. App. 14, 79 N. E. 390, holding that no fee can be collected by sheriff for keeping the jail or caring for prisoners therein in absence of statute.

Cited in footnotes to *Buck v. Eureka*, 30 L. R. A. 409, which holds void, contract to pay city attorney other compensation than salary for conducting litigation for city; *Spearman v. Texarkana*, 22 L. R. A. 855, which upholds right of member of board of health to recover for professional services under direction of board; *Tacoma v. Lillis*, 18 L. R. A. 372, which holds councilman not entitled to compensation for extra services in official capacity.

Cited in note (3 L.R.A.(N.S.) 850) on power of municipal board or committee to employ member as attorney.

Distinguished in *Howard County v. Garrigus*, 164 Ind. 606, 74 N. E. 249, holding that contract by county commissioners with expert accountants must be spread of record by the board before recovery can be had thereon.

Effect of interest of official on validity of public contract.

Cited in footnotes to *Findlay v. Pertz*, 29 L. R. A. 188, which holds void, contract for sale of property to city through officer receiving commissions from other party; *Sylvester v. Webb*, 52 L. R. A. 518, which sustains contract to erect school building by member of building committee and selectman of town; *Berka v. Woodward*, 45 L. R. A. 420, which denies right of recovery by officer on implied contract with city for materials furnished it; *Capital Gas Co. v. Young*, 29 L. R. A. 463, which upholds right to enforce payment for gas from city, though mayor stockholder and president of gas company; *Scott v. School Dist. No. 9*, 27 L. R. A. 588, which holds one who is prudential committee of school district, empowered to hire teachers, no right to act as teacher.

Cited in note (18 L. R. A. 368) on validity of vote of common council or similar body as affected by personal interest of members.

Liability of city to official for negligence.

Cited in footnote to *Danville v. Robinson*, 55 L. R. A. 162, which sustains right of member of city council to recover for injuries by defect in street.

15 L. R. A. 524, *MILLER v. JOHNSON*, 92 Ky. 589, 18 S. W. 522.

Enactment of constitutions and amendments.

Followed without discussion in *Downs v. Com.* 92 Ky. 606, 18 S. W. 526.

Cited in *Durfee v. Harper*, 22 Mont. 364, 56 Pac. 582, holding void, amendment to Constitution not entered upon legislative journals as prescribed; *State ex rel. McClurg v. Powell*, 77 Miss. 566, 48 L. R. A. 655, 27 So. 927, holding that questions as to whether proposed amendment conforms to Constitution in form and method of adoption are judicial; *McConaughy v. Secretary of State*, 106 Minn. 411, 119 N. W. 408, holding that courts have jurisdiction to determine whether constitutional amendment has been legally submitted to and adopted by the people; *Arie v. State*, 23 Okla. 169, 1 Okla. Crim. Rep. 253, 670, 100 Pac. 23, 33, holding that court will not declare separate constitutional question invalid for improper submission to the people where party assailing it fails to point out the particulars in which improper.

Annotation approved in *Kadderly v. Portland*, 44 Or. 132, 74 Pac. 710, holding that question of the lawful adoption of an amendment to the constitution is a judicial one.

Cited in footnotes to *State ex rel. Torryson v. Grey*, 19 L. R. A. 134, which holds publication of proposed constitutional amendments sixteen to eighteen months before election allowable; *State, Bott, Prosecutor, v. Wurts*, 45 L. R. A. 251, which holds provision for counting uncanceled propositions for, and canceled propositions against, constitutional amendments, sufficient submission to separate votes; *Worman v. Hagan*, 21 L. R. A. 716, which holds governor's proclamation of adoption of constitutional amendment conclusive; *Edwards v. Lesueur*, 31 L. R. A. 815, which holds proposed constitutional amendment for changing location of seat of state government not invalidated by new conditions imposed.

15 L. R. A. 531, *SHACKLEFORD v. HAMILTON*, 93 Ky. 80, 40 Am. St. Rep. 166, 19 S. W. 5.

Disease excusing breach of marriage contract.

Approved in *Sanders v. Coleman*, 97 Va. 695, 47 L. R. A. 582, footnote p. 581, 34 S. E. 621, and *Trammell v. Vaughan*, 158 Mo. 222, 51 L. R. A. 856, footnote p. 854, 81 Am. St. Rep. 302, 59 S. W. 79, which holds breach of marriage contract justified by development of grave malady without fault, making marriage dangerous to life; *Vierling v. Binder*, 113 Iowa, 340, 85 N. W. 621, holding incapacity or

unfitness for marital relation unknown at or arising, without fault, after contract, excuse for breach.

Cited in *Grover v. Zook*, 44 Wash. 496, 7 L.R.A.(N.S.) 589, 87 Pac. 638, 12 A. & E. Ann. Cas. 192, holding that fact that one of the parties was seriously afflicted with pulmonary tuberculosis is a good defense to action for breach of promise to marry; *Beans v. Denny*, 141 Iowa, 59, 117 N. W. 1091, holding that existence of incurable venereal disease in one party will excuse performance of contract to marry by the other party unless made with knowledge of the disease.

Cited in footnote to *Smith v. Smith*, 41 L. R. A. 800, which authorizes annulment of marriage because husband afflicted with syphilis, probably incurable.

Cited in notes (66 L.R.A. 801) on refusal or failure to keep agreement for marriage at specified time or place as breach of marriage contract; (7 L.R.A. (N.S.) 585) on ill health as defense to breach of promise action; (33 L.R.A. (N.S.) 701) on effect upon contract obligation of failure of third person to take action essential to performance.

Disapproved in *Smith v. Compton*, 67 N. J. L. 552, 58 L. R. A. 482, footnote p. 480, 52 Atl. 386, which requires illness, to excuse breach of marriage promise, to be such as renders marital intercourse impossible.

15 L. R. A. 534, *COUPLAND v. HOUSATONIC R. CO.* 61 Conn. 531, 23 Atl. 870.

Variance.

Cited in *Mears v. New York, N. H. & H. R. Co.* 75 Conn. 174, 56 L. R. A. 887, 96 Am. St. Rep. 193, 52 Atl. 610, holding no variance existed where plaintiff's pleading was consistent throughout; *Normile v. Oregon Nav. Co.* 41 Or. 181, 69 Pac. 928, holding claim against carrier on common-law liability and proof of contract limiting liability, fatal variance.

Carrier's Liability for Injury to freight.

Cited in *Faucher v. Wilson*, 68 N. H. 339, 39 L. R. A. 432, 38 Atl. 1002, holding carrier not liable for bursting of hogshead of molasses from fermentation; *Louisville & N. R. Co. v. J. Rash & Co.* 141 Ky. 229, 132 S. W. 553, holding that carrier is liable for injuries to live stock resulting from defects in car in which they were shipped; *Nicholson v. St. Louis & S. F. R. Co.* 141 Mo. App. 204, 124 S. W. 573, holding carrier not liable for injury to corn caused by shipping it in stock car, where shipper had opportunity to select car for the purpose; *Lewis v. Pennsylvania R. Co.* 70 N. J. L. 134, 56 Atl. 128, 1 A. & E. Ann. Cas. 156, on nonliability of carrier for injuries resulting to animals from their own natural propensities.

Cited in footnotes to *Lake Erie & W. R. Co. v. Holland*, 63 L.R.A. 948, which holds carrier liable for failure properly to provide for live stock knowingly taken without caretaker; *Illinois C. R. Co. v. Harris*, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported; *Betts v. Chicago, R. I. & P. R. Co.* 26 L. R. A. 248, which holds carrier liable for injuries to live stock by breaking of slats.

Cited in notes (18 L.R.A.(N.S.) 91) on carrier as insurer of live stock; (18 L.R.A.(N.S.) 511) on duty of carrier to furnish car adapted to subject of shipment; (19 L.R.A.(N.S.) 956) on effect of shipper's negligence in loading, or as to condition of car, upon carrier's common-law liability; (39 L.R.A.(N.S.) 642) on duty of carrier to take precaution to prevent loss threatened without its antecedent fault; (63 Am. St. Rep. 561, 566) on respective duties of carriers and shippers of livestock; (130 Am. St. Rep. 438, 446, 462) on carrier's liability for loss of, or injury to, livestock; (37 L. ed. U. S. 296) on duty and liability as carrier of live stock.

— Burden of proof.

Cited in *Church v. Chicago, B. & Q. R. Co.* 81 Neb. 617, 116 N. W. 520, holding delivery of animals at destination in bad condition makes prima facie case of liability against carrier who then has burden of showing that it is not liable.

Assumption of risk in using box car for animals.

Approved in *Huston Bros. v. Wabash R. Co.* 63 Mo. App. 677, holding that one shipping cattle in box car knowing that stock car could be had following day, assumed risk thereof.

Limitation of liability.

Approved in *Candee v. New York, N. H. & H. R. Co.* 73 Conn. 669, 49 Atl. 17, sustaining validity of carrier's limitation of liability not relieving it from ordinary care; *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 192, 34 S. W. 41, Affirming 68 Mo. App. 272 (separate opinion), holding shipper not bound by limitation of value not based on special rates; *O'Malley v. Great Northern R. Co.* 86 Minn. 383, 90 N. W. 974, sustaining limitation of value of goods in consideration of rates charged, if fairly and honestly made; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 157, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, sustaining limitation of liability for loss, to value basis agreed upon.

Cited in *Hanson v. Great Northern R. Co.* 18 N. D. 333, 138 Am. St. Rep. 768, 121 N. W. 78, holding that under statute carrier may by special contract limit or modify its common-law liability, except that it cannot exonerate itself from liability for loss resulting from negligence, fraud or wilful wrong.

Cited in footnote to *Lake Erie & W. R. Co. v. Holland*, 63 L.R.A. 948, which holds that carrier cannot free itself from duty of furnishing safe car by exacting a contract requiring the shipper to inspect and select his car.

Cited in note (88 Am. St. Rep. 107) on limitation of carrier's liability in bills of lading.

15 L. R. A. 542, *VAN CLEAF v. BURNS*, 133 N. Y. 540, 30 N. E. 661.

Conflict of laws as to divorce.

Cited in note (59 L. R. A. 181) on conflict of laws on subject of divorce.

Divorce as affecting — Right of dower.

Cited in *Starbuck v. Starbuck*, 62 App. Div. 448, 71 N. Y. Supp. 104, holding dower rights in New York not lost by Massachusetts divorcee for cruelty, against husband served in former state; *Moretts v. Bostwick*, 56 Misc. 143, 106 N. Y. Supp. 1102, holding dower not barred by decree of divorce granted for cruel and inhuman treatment.

Cited in footnotes to *Brown's Appeal*, 49 L. R. A. 144, which denies right of divorced wife to dower if later lawful wife survives; *Beaty v. Richardson*, 46 L. R. A. 517, which denies forfeiture of right of dower of woman living in adultery after husband's abandonment for another woman; *Wood v. Wood*, 28 L. R. A. 157, which holds dower barred by divorce from wife.

— Curtesy.

Cited in footnotes to *Meacham v. Bunting*, 28 L. R. A. 618, which holds tenancy by the curtesy initiate not defeated by obtaining divorce from wife; *Burgess v. Muldoon*, 24 L. R. A. 798, which holds inchoate interest of curtesy destroyed by absolute divorce; *Doyle v. Rolwing*, 55 L. R. A. 332, which holds right of curtesy defeated by divorcee for wife's fault.

15 L. R. A. 544, *SAYRE v. WEIL*, 94 Ala. 466, 10 So. 546.

Trust in bank deposits.

Cited in *Millholland v. Whalen*, 89 Md. 217, 44 L. R. A. 207, 43 Atl. 43, holding

deposit in trust for owner and another as joint owners, subject to order of either, survivor to take balance, constitutes declaration of trust; *Merigan v. McGonigle*, 205 Pa. 326, 54 Atl. 994, holding trust sustained by depositor's statement that "she had taken out book" in niece's name; *McMahon v. German-American Nat. Bank*, 111 Minn. 317, 29 L.R.A. (N.S.) 71, 127 N. W. 7, holding that bank is not responsible for use of trust funds deposited by trustee unless it knowingly participated in breach of trust or profits by fraud; *Candee v. Connecticut Sav. Bank*, 81 Conn. 375, 22 L.R.A. (N.S.) 570, 71 Atl. 551, holding that title to principal on deposit in savings bank, where bankbook had been lost, passes by an absolute order to pay it to donee, accepted by the bank.

Cited in notes (32 L.R.A. 374) on effect of depositing money in bank in trust for third person; (1 L.R.A. (N.S.) 792) on bank deposit for other person as gift or transfer of title; (29 L.R.A. (N.S.) 68) on payment of deposit to credit of minor to person other than guardian.

Appropriation of trust deposits by banks.

Cited in footnotes to *Kimmel v. Bean*, 64 L.R.A. 785, which uphold banker's right to apply on past-due debt principal's money deposited by agent in own name; *Interstate Nat. Bank v. Claxton*, 65 L.R.A. 820, which denies right of bank to apply funds deposited by factor in his own name on claim against him individually, where it has means of knowing that the funds belong to his principal.

Trust in choses in action.

Cited in *Johnson v. Anderson*, 140 Ala. 348, 37 So. 273, holding that taking stock as trustee with expressed intention that it is to be held in trust for his son, creates a trust enforceable in equity.

Meaning of word "trustee."

Cited in *Johnson v. Amberson*, 140 Ala. 348, 37 So. 273, holding that word "trustee" in certificate of stock after name, indicates that it is held in trust and is notice to purchaser.

Findings.

Cited in *Broek v. Louisville & N. R. Co.* 114 Ala. 432, 21 So. 994, holding judgment cannot be entered where written statement of findings not made.

15 L. R. A. 547, *SLEGEL v. HERBINE*, 148 Pa. 236, 23 Atl. 996.

Limited estates in land.

Cited in *Swoyer v. Schaeffer*, 2 Pa. Dist. R. 750, 13 Pa. Co. Ct. 348, holding grant to two congregations for joint buildings and burial grounds, not terminable upon cessation of joint use; *Young v. Mahoning County*, 51 Fed. 598, holding grant forever in conformity with statute pertaining to graveyards creates determinable fee; *Riggs v. New Castle*, 229 Pa. 493, 140 Am. St. Rep. 733, 78 Atl. 1037, holding that declaration in grant to corporation that land is conveyed for certain purposes does not necessarily import limitation of fee; *Hanby v. Bailey*, 11 Del. Co. Rep. 373, to the point that right of creator of determinable fee may be termed a reversion and may pass by grant of land; *Smith v. Myers*, 12 Luzerne Leg. Reg. Rep. 185, holding that beneficiaries take a base fee with executory devise over, where land was devised in trust for children until a certain one should become of age or die, when trust should cease and property go to remaining children.

Cited in footnotes to *Flaten v. Moorhead*, 19 L. R. A. 195, which holds that absolute title in fee does not pass by deed to municipality for public park forever; *Schultze v. Schultze*, 19 L. R. A. 90, which holds interest vested in non-

resident alien heirs by power to sell within specific time fee determinable by non-exercise of power.

Cited in note (19 L. R. A. 267) on condition in deed that land is to be used for specified charitable public or quasi-public purpose.

Distinguished in *McCalla's Estate*, 16 Pa. Super. Ct. 206, 17 Lanc. L. Rev. 364, holding devise "for a home" not dependent upon such use; *Stuart v. Easton*, 170 U. S. 394, 42 L. ed. 1082, 18 Sup. Ct. Rep. 650, 6 Northampton Co. Rep. 253, holding fee not limited by habendum "in trust" for purpose specified in statute enabling acquisition of land for public benefit; *Harmon v. Romberger*, 18 Pa. Dist. R. 489, 34 Pa. Co. Ct. 597, holding that devise of land to trustees for use of church, which has vested in possession, will not be divested upon a subsequent disbanding of the congregation.

Presumption of compliance with enabling statute.

Cited in *Frame v. Felix*, 167 Pa. 53, 27 L. R. A. 805, 31 Al. 375, holding ordinance authorizing public works presumed to have intended compliance with enabling statute.

Easements.

Cited in *Foster v. Smith*, 10 Kulp, 383, holding that easement is liberty, privilege, or advantage in another's land without profit; *Berlew v. Dickinson*, 11 Kulp, 96, holding that owner's construction and use of road during lifetime imposed servitude in favor of heirs; *Casey v. Canning*, 17 Pa. Dist. R. 388, on definition of easement.

Force of implications in statute or contract.

Cited in *Com. v. Reifsnyder*, 3 Pa. Dist. R. 195, 14 Pa. Co. Ct. 355, holding proprietor of theater required by implication to pay license tax where statute fails to specify who is to pay same; *Com. ex rel. Luden v. Kutz*, 6 Pa. Dist. R. 574, holding power to issue licenses implied from manner provided for paying therefor; *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. 535, 43 W. N. C. 140, 41 Atl. 523, holding assumption of specified burdens for first ten years of establishment of certain enterprise by party inducing its location in borough implies reciprocal agreement to continue such enterprise at least ten years; *New Idea Pattern Co. v. Whitner*, 215 Pa. 195, 64 Atl. 518, on that which is implied being as much a part of the contract as that which is expressed.

Equitable jurisdiction.

Approved in *Yonkers v. Warden*, 8 Pa. Super. Ct. 404, sustaining jurisdiction of equity to remove cloud on title.

Cited in *Graeff v. Felix*, 24 Pa. Co. Ct. 665, sustaining jurisdiction of equity to restrain illegal acts of municipal officers at taxpayer's suit; *Fellbush v. Fellbush*, 31 Pa. Co. Ct. 352, holding that court of equity has jurisdiction to declare an instrument in form a deed but not to take effect until grantor's death, to be a will; *Wilmore Coal Co. v. Brown*, 147 Fed. 946, holding that court of equity has jurisdiction to try action to remove cloud upon title brought by one in possession for cancellation of coal leases, where he has no adequate legal remedy.

15 L. R. A. 553, *CHASE v. OSHKOSH*, 81 Wis. 313, 29 Am. St. Rep. 898, 51 N. W. 560.

Ownership and control of public highways and places.

Cited in *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 403, 80 N. W. 1101, holding intention not to accept certain portion of highway not shown by opening and working remaining portions; *Vanderhurst v. Tholcke*, 113 Cal. 151, 35 L. R. A. 268, footnote p. 267, 45 Pac. 266, which holds determination of city council that trees on sidewalks are obstruction, conclusive; *Miller v. Detroit, Y. & A. A. R. Co.*

125 Mich. 175, 51 L. R. A. 958, footnote p. 955, 84 Am. St. Rep. 569, 84 N. W. 49, which sustains street railway company's right to remove obstructing shade trees without compensation to abutter; *Tate v. Greensboro*, 114 N. C. 400, 24 L. R. A. 673, footnote p. 671, 19 S. E. 767, which holds city not liable for destroying shade trees on outer edge of sidewalk; *Le Grange v. Overstreet*, 141 Ky. 52, 31 L.R.A.(N.S.) 956, 132 S. W. 169, holding that rights of abutters to use of streets is subject to control of municipal authorities; *Jeffress v. Greenville*, 154 N. C. 499, 70 S. E. 919, holding that town is not liable to abutting owner for removing shade trees from street, where town acts in good faith and in careful exercise of its powers; *Bedell v. Swarthmore*, 10 Del. Co. Rep. 449, holding that trees belonging to abutting owner in street may be cut down by authorities when they become obstructions in street; *McEachin v. Tuscaloosa*, 164 Ala. 271, 51 So. 153 (dissenting opinion), on power of courts to interfere with discretion of authorities as to improvement of streets; *Gallaher v. Jefferson*, 125 Iowa, 332, 101 N. W. 124, denying injunction to restrain city from grading street though such grading may result in destroying shade trees in street; *Rosenthal v. Goldsboro*, 149 N. C. 133, 20 L.R.A.(N.S.) 813, 62 S. E. 905, 16 A. & E. Ann. Cas. 639, denying restraining order to prevent city from interfering with shade trees in front of complainant's lot, for sewer purposes; *Morris v. Salt Lake City*, 35 Utah, 485, 101 Pac. 373, holding city not liable to abutting owner where contractor in laying sidewalks cut the roots of trees in street in front of his lots.

Cited in footnotes to *Carmel v. Shaw*, 27 L. R. A. 580, which holds city has complete control over shade trees in public street; *Hildrup v. Windfall City*, 29 Ind. App. 595, 64 N. E. 942, denying injunction against removal of tree located 2 feet within walk; *State, Avis, Prosecutor, v. Vineland*, 23 L. R. A. 685, which holds void an ordinance for removal as nuisance of healthy trees on roadside; *Stretch v. Cassopolis*, 51 L. R. A. 345, which denies right to remove shade trees from street without notice to abutter; *Bradley v. Southern New England Teleph. Co.* 32 L. R. A. 280, which denies power of selectmen to cut and trim trees overhanging highway without owner's consent; *Wyant v. Central Teleph. Co.* 47 L. R. A. 497, which sustains telephone company's right to do necessary trimming of trees in highway without giving owner opportunity to do so; *Bigelow v. Whitcomb*, 65 L.R.A. 676, which denies right of public from laying out of highway to prevent fee owner from removing for his own use timber standing thereon which the public desires to preserve for shade or ornament; *Donohue v. Keystone Gas Co.* 70 L.R.A. 761, which holds gas company negligently permitting gas to escape from pipes in highway liable for resulting injury to shade trees in front of abutting property though fee of street is in public.

Cited in notes (26 L. R. A. 340) on right to maintain awnings in street; (39 L. R. A. 657, 670) on municipal power over nuisances affecting highways and waters; (38 L. R. A. 164) on municipal power over buildings and other structures as nuisances; (16 L.R.A.(N.S.) 1040) on right of abutter to change conditions in surface of street or highway; (57 Am. St. Rep. 766) on highways by user; (101 Am. St. Rep. 112) on rights, obligations, and remedies of persons over whose land a highway runs; (107 Am. St. Rep. 218) on what are public nuisances.

Distinguished in *Reuter v. Lawe*, 94 Wis. 304, 34 L. R. A. 736, 59 Am. St. Rep. 891, 68 N. W. 955, holding municipality estopped to claim land dedicated for public park by taxing it as private property; *Brown v. Carrollton*, 122 Mo. App. 279, 99 S. W. 37, holding that city council has not the power to summarily remove awnings over street which are not nuisances per se.

Obstruction of highway.

Cited in *People v. Eckerson*, 133 App. Div. 223, 117 N. Y. Supp. 418, holding

that excavation 200 feet from highway is not an obstruction thereof, nor interference therewith; *Davis v. Pickerell*, 139 Iowa, 188, 117 N. W. 276, on what constitutes obstruction of a highway; *Meservey v. Guilliford*, 14 Idaho, 152, 93 Pac. 780, on definition of "encroachment" and "obstruction" in reference to highways; *National Malleable Castings Co. v. Buckeye Malleable Iron & Coupler Co.* 96 C. C. A. 529, 171 Fed. 861, on meaning of obstruction.

15 L. R. A. 558, *THOMAS v. KINKEAD*, 55 Ark. 502, 29 Am. St. Rep. 68, 18 S. W. 854.

Right of peace officer to kill to prevent escape.

Approved in *Smith v. State*, 59 Ark. 139, 43 Am. St. Rep. 20, 26 S. W. 712, holding that peace officer arresting or preventing escape of one found committing misdemeanor, cannot kill except in self-protection; *Petrie v. Cartwright*, 24 Ky. L. Rep. 905, 59 L. R. A. 722, footnote p. 720, 70 S. W. 297, which denies right of peace officer without warrant to kill fleeing person guilty of misdemeanor but suspected of felony; *Brown v. Weaver*, 76 Miss. 14, 42 L. R. A. 424, 71 Am. St. Rep. 512, 23 So. 388, holding shooting of prisoner for misdemeanor, breach of official duty; *State v. Phillips*, 119 Iowa, 655, 94 N. W. 229, holding officer arresting one for intoxication entitled to use no more force than prudent person would under circumstances.

Cited in notes (51 L.R.A. 223) on liability of officer for making arrest; (67 L.R.A. 298, 299, 302, 304) on homicide by official action or by officers of justice.

Power of legislature to prescribe punishment.

Cited in *Territory v. Ketchum*, 10 N. M. 723, 55 L.R.A. 92, 65 Pac. 169, holding discretion of legislature in prescribing punishment for crime, nearly, if not quite, unlimited.

Liability of sureties on official bonds.

Cited in notes (11 L.R.A.(N.S.) 761) on liability of sureties of peace officer for death due to act or default of officer or deputy; (71 Am. St. Rep. 519) on liability of sureties for personal injury inflicted by officer; (91 Am. St. Rep. 541) on acts for which sureties on official bonds are liable.

Liability of officer for deputy's torts.

Cited in note (12 L.R.A.(N.S.) 1019) on liability of officer for deputy's tort in making arrest.

15 L. R. A. 561, *STATE ex rel. ADAMS COUNTY v. CUNNINGHAM*, 81 Wis. 440, 51 N. W. 724.

Original jurisdiction of supreme court.

Approved in *Giddings v. Blacker*, 93 Mich. 4, 16 L. R. A. 404, footnote p. 402, 52 N. W. 944, sustaining general jurisdiction of supreme court to determine constitutionality of apportionment act; *State ex rel. Raymer v. Cunningham*, 82 Wis. 45, 51 N. W. 1133, sustaining original jurisdiction of supreme court to determine validity of warrants drawn by secretary of state for expenses of state superintendent.

Cited in *State ex rel. Byrne v. Wilcox*, 11 N. D. 336, 91 N. W. 955, holding that writ of injunction can issue originally from Supreme court even against the advice and wishes of attorney general in case of grave danger to public interests.

— Private rights.

Cited in *Re Court of Honor*, 109 Wis. 630, 85 N. W. 497, holding that supreme court will not generally exercise original jurisdiction to vindicate private rights although as to question *publici juris*; *People v. McClees*, 20 Colo. 409, 26 L. R. A.

648, 38 Pac. 468, denying jurisdictional writ to restrain secretary from delivering election certificates, where right to office real issue; *State ex rel. Cook v. Houser*, 122 Wis. 552, 100 N. W. 964, holding a controversy existing between persons claiming seats in Republican state convention, within the original jurisdiction of supreme court.

Cited in footnote to *Anderson v. Gordon*, 52 L. R. A. 134, which denies supreme court's original jurisdiction to issue injunction in suit by private person without showing attorney general's unwillingness or inability.

Distinguished in *State ex rel. Taylor v. Lord*, 28 Or. 518, 31 L. R. A. 478, 43 Pac. 471, denying prerogative writ of injunction at suit of private relator to restrain executive acts.

Interference of judiciary with other departments—Legislative.

Cited in *State ex rel. Lamb v. Cunningham*, 83 Wis. 120, 17 L. R. A. 166, 35 Am. St. Rep. 27, 53 N. W. 35; *Harmison v. Ballot Comrs.* 45 W. Va. 181, 42 L. R. A. 592, 31 S. E. 394; *Parker v. State*, 133 Ind. 186, 18 L. R. A. 571, footnote p. 567, 32 N. E. 836; *State ex rel. Morris v. Wrightson*, 56 N. J. L. 188, 22 L. R. A. 550, footnote p. 548, 28 Atl. 56; *Denney v. State*, 144 Ind. 509, 31 L. R. A. 729, 42 N. E. 929,—holding constitutionality of apportionment act subject to judicial inquiry; *Re Gunn*, 50 Kan. 196, 19 L. R. A. 529, 32 Pac. 470, sustaining jurisdiction to inquire, on habeas corpus, into lawfulness of imprisonment by House of Representatives; *People ex rel. Carter v. Rice*, 135 N. Y. 521, 16 L. R. A. 857, 31 N. E. 921 (dissenting opinion), majority holding that courts will not spend time in attempting to remedy harmless errors in apportionment of members of legislature; *Re Reynolds*, 144 App. Div. 463, 129 N. Y. Supp. 629, to the point that court has broad power in passing upon constitutional validity of apportionment act; *Sherrill v. O'Brien*, 188 N. Y. 209, 117 Am. St. Rep. 841, 81 N. E. 124, on the power of judiciary to set aside illegal apportionment; *State ex rel. Sullivan v. Schnitger*, 16 Wyo. 523, 95 Pac. 698, holding that the courts will grant relief from an illegal apportionment act where a valid apportionment act is shown to have existed prior thereto to fall back on; *McConaughy v. Secretary of State*, 106 Minn. 415, 119 N. W. 408, distinguishing between political and judicial questions; *Sweeney v. Webb*, 33 Tex. Civ. App. 328, 76 S. W. 766, holding that district court has jurisdiction to interfere and entertain bill enjoining the publication of results of an unconstitutional election.

Cited in footnotes to *Covington v. Buffett*, 47 L. R. A. 622, which denies court's jurisdiction to determine existence of vacancy in office of state senator; *Norwalk Street R. Co's Appeal*, 39 L. R. A. 794, which holds approval and adoption or modification of plan for street railway not a judicial power.

Cited in note (35 Am. St. Rep. 66) on judicial investigation of constitutionality of legislative apportionments.

— Administrative.

Cited in *State ex rel. Morris v. Wrightson*, 56 N. J. L. 188, 22 L. R. A. 550, footnote p. 548, 28 Atl. 56, holding that mandamus lies to control mere administrative officers under election laws; *State ex rel. Clarke v. Moran*, 24 Mont. 440, 63 Pac. 390, sustaining right to injunction against printing of ticket upon ballot contrary to law; *State ex rel. Gericke v. Ahnapee*, 99 Wis. 326, 74 N. W. 783, holding that mandamus does not lie to control discretion of city officers; *Parmeter v. Bourne*, 8 Wash. 70, 35 Pac. 757 (dissenting opinion), majority denying jurisdiction to enjoin removal of county seat on ground of election frauds; *Henry v. State*, 87 Miss. 11, 39 So. 856 (in opinion of lower court and also in dissenting opinion), on the power of courts to interfere with the performance of an administrative duty; *Bates v. Nome*, 1 Alaska, 213, holding that court can properly

enjoin the performance of ministerial duties under a void ordinance by public officers or acts in the absence of any legislative authority whatever, at the instigation of a taxpayer.

Cited in footnote to *Fletcher v. Tuttle*, 25 L. R. A. 143, which denies right to enjoin giving of election notices on ground that apportionment is unconstitutional.

Cited in notes (3 L.R.A.(N.S.) 384) on interference by equity in matters preceding elections; (8 L.R.A.(N.S.) 128) on right to enjoin acts of public boards under constitutional statute, as affected by other remedies in case such acts are done.

Distinguished in *People ex rel. Alexander v. District Court*, 29 Colo. 236, 68 Pac. 242, denying right to injunction to restrain board of assessors in performance of statutory duty, on ground of unconstitutionality.

Mandatory provisions for apportionment.

Approved in *People ex rel. Pond v. Monroe County*, 65 Hun, 280, 19 N. Y. Supp. 978, holding provision for apportionment at first session after enumeration, mandatory.

Validity of statutes.

Cited in *State ex rel. Lamb v. Cunningham*, 83 Wis. 144, 17 L. R. A. 168, 35 Am. St. Rep. 27, 53 N. W. 35, holding apportionment containing gross inequalities, invalid; *Harmon v. Madison County*, 153 Ind. 77, 54 N. E. 105, sustaining fee and salary act where classification approximately effected; *Ragland v. Anderson*, 125 Ky. 159, 128 Am. St. Rep. 242, 100 S. W. 865, holding an act apportioning three counties to one legislative district having one representative for a population seven times as large as another district composed of one county having one representative to be an unequal apportionment and unconstitutional.

Cited in footnote to *People ex rel. Carter v. Rice*, 16 L. R. A. 836, which upholds apportionment of members of assembly as against inequalities in distributing members after each county given member for every full ratio of representation.

Distinguished in *People ex rel. Woodyatt v. Thompson*, 155 Ill. 483, 40 N. E. 307, sustaining apportionment, although districts have unequal populations and are not of utmost compactness; *State ex rel. Winnie v. Stoddard*, 25 Nev. 457, 51 L. R. A. 231, 62 Pac. 237, denying mandamus to compel issuance of election notice under earlier statute because of invalidity of later, where earlier law subject to same objections.

Validity of apportionment.

Cited in *People ex rel. Mooney v. Hutchinson*, 172 Ill. 497, 40 L. R. A. 772, 50 N. E. 599, holding power to apportion once every ten years according to Federal census, exhausted by exercise; *People ex rel. Heffernan v. Carlock*, 198 Ill. 155, 65 N. E. 109, sustaining reapportionment after decennial census although ten years not entirely elapsed since last act; *Harmison v. Ballot Comrs.* 45 W. Va. 181, 42 L. R. A. 592, 31 S. E. 394, holding power to apportion exhausted by exercise, where Constitution forbids change until after next census; *People ex rel. Pond v. Monroe County*, 65 Hun, 285, 19 N. Y. 978, holding extraordinary session of same legislature not within provision for apportionment at first session after enumeration.

Actions publici juris.

Cited in *State ex rel. Lamb v. Cunningham*, 83 Wis. 129, 17 L. R. A. 164, 35 Am. St. Rep. 27, 53 N. W. 35, holding original jurisdiction of supreme court not dependent upon act of attorney general in bringing or consenting to suit; *Smith v. Cornelius*, 41 W. Va. 67, 30 L. R. A. 751, 23 S. E. 599, denying that directors of public corporation can contest validity of lease of state property held by it for public use; *State ex rel. Heim v. Williams*, 114 Wis. 406, 90 N. W. 452, denying

right of relator not showing right to office, to maintain complaint in quo warranto after attorney general's refusal to bring the action; *United States v. Lewis*, 5 Ind. Terr. 11, 76 S. W. 299 (dissenting opinion), on the governmental invocation of equitable aid by injunction in cases of public mischief or nuisance.

Distinguished in *Dubuisson v. Election Suprs.* 123 La. 451, 49 So. 15, holding that taxpayers cannot enjoin an election submitting question of creation of new parish on grounds of unconstitutionality of some of the provisions of the proposition since it may be voted down by the people and never becomes a law.

— **Interest of relator.**

Cited in *State ex rel. Detienne v. Vandalia*, 119 Mo. App. 421, 94 S. W. 1009, holding that lack of interest in the relator is immaterial to the course of litigation which is instituted by and subject entirely to the control of the prosecuting officer.

Matters to be considered in determining constitutionality of law.

Cited in *Harmon v. Madison County*, 153 Ind. 75, 54 N. E. 105, raising, without deciding, question whether court confined to matters within judicial knowledge in determining constitutionality of act not involving private property; *State ex rel. Scanlan v. Archibold*, 146 Wis. 370, 131 N. W. 895, holding that constitutionality of statute is to be tested by its language in light of such matters as court will take judicial notice of.

Judicial notice — Of census.

Approved in *Denney v. State*, 144 Ind. 525, 31 L.R.A. 733, 42 N. E. 920, holding that courts will take notice of census or other apportionment by state or Federal authority.

— **Of municipal locations and boundaries.**

Approved in *Denney v. State*, 144 Ind. 525, 31 L. R. A. 733, 42 N. E. 929, holding that courts will take notice of location, boundaries, and juxtaposition of counties in state.

Cited in note (82 Am. St. Rep. 446) on judicial notice of localities and boundaries.

Force of ordinance of 1787.

Approved in *People ex rel. Woodyatt v. Thompson*, 155 Ill. 473, 40 N. E. 307, holding that ordinance of 1787 became inoperative by admission of state on equal footing with original states.

Creating, grouping, and government of minor divisions.

Approved in *Denney v. State*, 144 Ind. 509, 31 L. R. A. 729, 42 N. E. 929, holding grouping counties for election of more than one representative, not apportionment among counties according to population; *Houghton County v. Blacker*, 92 Mich. 645, 16 L. R. A. 434, footnote p. 432, 52 N. W. 951, which holds apportionment act unlawfully dividing county wholly void; *State ex rel. McCoale v. Kersten*, 118 Wis. 292, 95 N. W. 120, sustaining provision of charter making mayor sole representative from city on county board, as not violating principle of unity and uniformity in system of county government.

Distinguished in *State ex rel. Hicks v. Stevens*, 112 Wis. 171, 88 N. W. 48, sustaining act creating county which is to form part of assembly district as before, until otherwise apportioned.

Former statutes as evidencing validity of apportionment.

Cited in *State ex rel. Lamb v. Cunningham*, 83 Wis. 139, 17 L. R. A. 167, 35 Am. St. Rep. 27, 53 N. W. 35, holding inequality of representation under former apportionments, immaterial where language of Constitution unequivocal.

Motive as affecting validity of act.

Cited in *State ex rel. Lamb v. Cunningham*, 83 Wis. 139, 17 L. R. A. 167, 35 Am. St. Rep. 27, 53 N. W. 35, holding apportionment statute violating constitutional standards, void irrespective of legislator's motives.

Judicial duty as affected by probable result of decision.

Cited in *Fesler v. Brayton*, 145 Ind. 93, 32 L. R. A. 564, 44 N. E. 37 (dissenting opinion), majority refusing to restrain election under alleged invalid act which is only law whereunder legislators can be elected.

15 L. R. A. 583, *NELSON v. CHESAPEAKE & O. R. CO.* 88 Va. 971, 14 S. E. 838.

Effect of failure to take out ancillary letters of administration.

Cited in *Hodges v. Kimball*, 34 C. C. A. 105, 63 U. S. App. 688, 91 Fed. 847, holding domiciliary administrators not strangers to estate's foreign suit.

What law governs, as to right accruing in another jurisdiction.

Cited in *Harrill v. South Carolina & G. Extension R. Co.* 132 N. C. 658, 44 S. E. 109, holding that administrator appointed in North Carolina may sue for death occurring in another state, when statutes of both states alike; *Hartness v. Pharr*, 133 N. C. 573, 98 Am. St. Rep. 725, 45 S. E. 901, holding that funds recovered by administrator appointed in North Carolina, in action in such state, should be distributed according to laws of such state; *Bowers v. Bristol Gas & Electric Co.* 100 Va. 539, 42 S. E. 296, raising, without deciding, question as to necessity of proving right to recover under law of state where injury inflicted; *Hamilton v. Chicago, B. & Q. R. Co.* 145 Iowa, 440, 124 N. W. 363, holding that foreign contracts will only be enforced as matter of comity and not of right; *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 279, 87 S. W. 401, holding that a foreign right of action will be enforced in this state if a local statute gives a similar right of action under the same facts; *Dowell v. Cox*, 108 Va. 466, 62 S. E. 272, holding that the *lex loci* governs the extent of the remedy.

Cited in footnotes to *Alabama G. S. R. Co. v. Carroll*, 18 L. R. A. 433, which holds brakeman's right to recover for injury by coemployee's negligence governed by law of state where injury occurs; *Jones v. Chicago, St. P. M. & O. R. Co.* 49 L. R. A. 640, which holds that statute of state where railroad employee injured, as to presumptive evidence of employer's knowledge of defect in appliance, does not govern in action in other state; *Evey v. Mexican C. R. Co.* 38 L. R. A. 387, which sustains right to maintain action in Federal court between citizens of different states for negligence occurring in Mexico; *Mexican Nat. R. Co. v. Jackson*, 31 L. R. A. 276, which refuses to take jurisdiction of action for negligence arising in foreign country because of difference in laws; *Allen v. Allen*, 16 L. R. A. 647, which holds that law of place where land lies governs right to redeem from mortgage; *Whitlow v. Nashville, C. & St. L. R. Co.* 68 L.R.A. 503, which holds enforceable elsewhere statute giving personal representative of person negligently killed a right of action for the death the proceeds of which are to be distributed among his legal representatives.

Cited in notes (56 L.R.A. 193, 196, 203, 209, 215, 223) on conflict of laws as to action for death or bodily injury; (4 L.R.A.(N.S.) 815) on law governing distribution of fund collected or recovered for negligently causing death; (70 L.R.A. 543, 551, 552, 553) on right of nonresidents to sue foreign corporations.

Jurisdiction of transitory cause of action.

Cited in *Reeves v. Southern R. Co.* 121 Ga. 565, 70 L.R.A. 521, 49 S. E. 674, 2 A. & E. Ann. Cas. 207, holding that service being obtained, residence of corporation served and place where cause of action arose are not material to jurisdiction; *Christensen v. Floriston Pulp & Paper Co.* 29 Nev. 562, 92 Pac. 210, hold-

ing that actions for tortious death in a foreign jurisdiction are allowed not on grounds of comity but because the action is transitory.

Question for jury.

Cited in footnotes to *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L.R.A. 146, which holds question as to negligence in using defective ladder to adjust dangerous belt, for jury; *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L.R.A. 146, which holds employees contributory negligence in using defective ladder to adjust belt upon moving machinery after complaining of the risk, one for the jury.

Foreign laws.

Cited in *Frank v. Gump*, 104 Va. 308, 51 S. E. 358, holding that in the absence of contrary evidence the existence of the common law in another state will be presumed based on judicial notice of English colonial source; *Norfolk & W. R. Co. v. Denny*, 106 Va. 398, 56 S. E. 321, holding the duty of a railroad company in the premises under a foreign statute need not be alleged it being presumed where the statutes of the two states are similar in respect to the subject-matter.

15 L. R. A. 588, *HAEBLER v. MYERS*, 132 N. Y. 363, 30 N. E. 963.

Right to restitution and to recovery of money wrongfully retained.

Cited in *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 329, 35 N. E. 630, holding person delivering property to receiver upon order of court, entitled to have possession restored upon its reversal; *McFadden v. Swinerton*, 36 Or. 355, 62 Pac. 12, sustaining right to restitution according to circumstances after modification of judgment on appeal; *Fidelity Nat. Bank v. Henley*, 24 Wash. 7, 63 Pac. 1119, holding that assumpsit by assignee of contractor lies against sureties to recover balance of moneys due on contract and paid by government to sureties upon completion of contract by them; *Gillig v. Grant*, 23 App. Div. 598, 49 N. Y. Supp. 78, holding that senior attaching creditor may recover from receiver proceeds applied on junior attachment before senior claim satisfied; *Lawyers' Surety Co. v. Reinach*, 25 Misc. 155, 54 N. Y. Supp. 205, sustaining right of recovery of erroneous overpayments upon distributive shares; *Carlson v. Winterson*, 7 Misc. 689, 28 N. Y. Supp. 20, holding the granting of motion for restitution upon reversal of judgment, discretionary; *Gillig v. George C. Treadwell Co.* 151 N. Y. 556, 45 N. E. 1035, raising without deciding, question whether receiver is liable to senior attaching creditor as for moneys had and received; *Soderberg v. King County*, 15 Wash. 200, 33 L. R. A. 673, footnote p. 670, 55 Am. St. Rep. 878, 45 Pac. 785, which authorizes assumpsit against county for fees erroneously paid by sheriff on foreclosure sale; *Clark v. Smith*, 57 App. Div. 526, 68 N. Y. Supp. 255, holding sheriff not liable for proceeds of execution sale had pending appeal of which he had no notice; *Harrington v. New York*, 40 Misc. 169, 81 N. Y. Supp. 667, denying right of recovery of fine paid under mistake of law; *Schoonover v. Osborne*, 117 Iowa, 434, 90 N. W. 844, holding that money arising from sale of land under judgment which was reversed, should be applied on second cause of action between same parties; *Buford v. Briggs*, 96 Ark. 153, 131 S. W. 351, holding that money paid to clerk of court to redeem from sale under decree which was reversed may be recovered while it remains in clerk's hands; *Brooks v. Hinton State Bank*, 26 Okla. 60, 30 L.R.A.(N.S.) 809, 110 Pac. 46, holding that assignee of claim against county may recover from second assignee amount received by such second assignee from county with notice of prior assignment; *Chambliss v. Hass*, 125 Iowa, 490, 68 L.R.A. 131, 101 N. W. 153, 3 A. & E. Ann. Cas. 16, holding that collection of a judgment affirmed on appeal does not operate to defeat right to new trial which if resulting in favor of movant will entitle him to restitution; *Sammons v. Pike*,

105 Minn. 108, 117 N. W. 244, holding that the dismissal of an action subsequent to collection of money on a judgment thereon entitles the person obtaining dismissal to restitution; *Bradley v. Blue Ridge Hosiery Mill*, 56 Misc. 125, 106 N. Y. Supp. 1107, holding that principal may recover money taken from his agent, with interest thereon under irregular execution issued on judgment subsequently vacated; *Niles v. Iroquois Realty Co.* 57 Misc. 444, 109 N. Y. Supp. 712, holding that the reversal of a dispossession order terminating relation of landlord and tenant does not restore that relation ipso facto though the tenant may do so by election; *People v. Cornell*, 65 Misc. 455, 121 N. Y. Supp. 972, on mode of civil procedure in restitution after subsequent reversal and holding that in the absence of statute criminal procedure on this point is the same.

Distinguished in *Cunningham v. Hatch*, 3 Misc. 104, 22 N. Y. Supp. 701, holding that implied promise to repay deposit upon reversal does not arise until reversal; *Bradley Salt Co. v. Meinhold*, 23 Misc. 469, 52 N. Y. Supp. 679, denying right of action for costs paid to perfect appeal, upon reversal to abide event.

— **Implied promise to return property.**

Cited in *Crane v. Murray*, 106 Mo. App. 703, 80 S. W. 280, holding that an implied promise in favor of landlord is not raised where crop from demised premises is purchased with knowledge of demise unless purchaser has knowledge of valid lien in favor of such landlord; *Harrigan v. Gilchrist*, 121 Wis. 441, 99 N. W. 909, holding that money paid on a judgment subsequently set aside may be recovered in an action for money had and received on the theory of an implied promise.

Actions to enforce restitution.

Cited in *Re Wiltse*, 5 Misc. 114, 25 N. Y. Supp. 733, holding that right of action for payments by assignee upon final accounting illegally held, survives notwithstanding restitution statutes; *Shapiro v. Goldberg*, 31 Misc. 787, 65 N. Y. Supp. 312, holding that action lies for restitution, notwithstanding statutory authorization of more summary relief; *Winterson v. Hitchings*, 9 Misc. 323, 30 N. Y. Supp. 260, sustaining right of action to set aside sale under judgment subsequently reversed; *Ph. Zang Brewing Co. v. Bernheim*, 7 Colo. App. 530, 44 Pac. 380, sustaining right of action to recover funds wrongfully received and used in discharge of debt; *Devlin v. Hinman*, 40 App. Div. 106, 57 N. Y. Supp. 663, holding statutory remedies for enforcement of order of restitution, not exclusive of common-law remedy by contempt proceedings; *Mosseim v. Empire State Surety Co.* 117 App. Div. 824, 102 N. Y. Supp. 1013, holding that where restitution bond is given and order of restitution is affirmed restitution may be enforced by action on the bond.

Cited in note (96 Am. St. Rep. 143, 144) on restitution on reversal of judgments.

Powers of appellate court as to restitution and amendments.

Cited in *State ex rel. Enderlin State Bank v. Rose*, 4 N. D. 337, 26 L. R. A. 604, 58 N. W. 514, sustaining power of court on certiorari to order restitution; *Merriam v. Wood, & P. Lithographing Co.* 155 N. Y. 140, 49 N. E. 685, holding power of reversing court to order restitution, discretionary; *Evans v. Hughes County*, 4 S. D. 35, 54 N. W. 1049, sustaining power of supreme court to direct amendment of pleadings on remanding case to trial court; *Woolverton v. Freeman*, 77 Ark. 238, 91 S. W. 190, holding that the circuit court as incident to its appellate jurisdiction has power to make an order of restitution of property sold pending the appeal from garnishment proceedings; *Chesapeake & O. R. Co. v. Deepwater R. Co.* 57 W. Va. 698, 50 S. E. 890, holding that restitution though discretionary in a sense, will go as a matter of course or right when a proper case is made.

Loss of attachment lien.

Cited in *Nichols v. Chittenden*, 14 Colo. App. 78, 59 Pac. 954 (dissenting opinion), majority holding attached personalty, released under forthcoming bond, not subject to attachment lien in hands of subsequent purchaser or mortgagee without notice.

Right to restrain use of judgment money.

Distinguished in *Smith v. Ferguson*, 33 App. Div. 561, 53 N. Y. Supp. 1097, holding notice of appeal creates no right to restrain use of judgment money voluntarily paid.

15 L. R. A. 591, *HINE v. MANHATTAN R. CO.* 132 N. Y. 477, 30 N. E. 985.

Report of later appeal in 149 N. Y. 158, 43 N. E. 414.

Admissibility of third party's communication to show value.

Cited in *O'Brien v. Gallagher*, 26 Misc. 839, 57 N. Y. Supp. 250, holding letter from dealer in response to inquiry as to market price, incompetent as to value; *Parke v. Seattle*, 8 Wash. 80, 35 Pac. 594, holding evidence of private offer for land inadmissible to show value; *Crosby v. Dorward*, 248 Ill. 478, 140 Am. St. Rep. 230, 94 N. E. 78, holding that it is not competent to prove private offers for property itself or property in vicinity in order to show value of land; *Re New York*, 142 App. Div. 668, 127 N. Y. Supp. 379, holding that owner of lands cannot establish their value by testimony that he received certain offers for the property; *Yellowstone Park R. Co. v. Bridge Coal Co.* 34 Mont. 558, 115 Am. St. Rep. 546, 87 Pac. 963, 9 A. & E. Ann. Cas. 470, holding evidence of offers for similar land in same locality incompetent to prove value of land in controversy; *Chicago, M. & St. P. R. Co. v. Alexander*, 47 Wash. 136, 91 Pac. 626, holding that neither person making offer nor one to whom it is made should be allowed to testify to the same upon examination in chief with a view to establish value.

Cited in footnote to *Peoria Gaslight & Code Co. v. Peoria Terminal R. Co.* 21 L. R. A. 373, which holds prices paid to other owners for right of way incompetent to show value.

15 L. R. A. 593, *WHALEN v. OLMSTEAD*, 61 Conn. 263, 23 Atl. 964.

Guardianship and custody of children — State.

Cited in *Rule v. Geddes*, 23 App. D. C. 50, holding that minor child committed to reform school on application of father has no right to a hearing on her own behalf as a matter of due process of law.

Cited in footnotes to *Van Walters v. Children's Guardians*, 18 L. R. A. 431, which holds state's right to guardianship of children controls parent's natural right; *State ex rel. Bethell v. Kilvington*, 41 L. R. A. 284, which holds arbitrary committal of children to industrial schools by county judge on personal knowledge, irregular; *Re Sanders*, 23 L. R. A. 603, which denies probate court's power to commit infant to reform school for specific crime without previous conviction; *People ex rel. Bradley v. Illinois State Reformatory*, 23 L. R. A. 139, which holds lawful, committal of infants to reformatory with maximum sentence subject to reduction; *Children's Guardians v. Shutter*, 31 L. R. A. 740, which denies right collaterally to attack judgment committing infant to custody of board of guardians; *Re Knowack*, 44 L. R. A. 699, which sustains power of supreme court to restore to parents, children committed to charitable institution; *People v. Ewer*, 25 L. R. A. 794, which holds valid, act prohibiting employment of girls under fourteen as dancers or in theatrical exhibitions; *Com. v. Coyle*, 24 L. R. A. 552, which holds criminally liable, directors of poor refusing to rescue pauper boy apprenticed to abusive master; *State v. Bailey*, 59 L. R. A. 435, sustaining compulsory education

act; *Jones v. Bowman*, 67 L.R.A. 860, which holds that religious belief will not in absence of statutory requirement be considered in determining the proper custodian of an infant.

— **Parental.**

Cited in footnotes to *State ex rel. Lasserre v. Michel*, 54 L. R. A. 927, which denies father's absolute right to custody of minor child; *Re Reiss*, 25 L. R. A. 798, which denies power of court to compel father to send children to visit their grandmother; *Stapleton v. Poynter*, 53 L. R. A. 784, which holds that custody of child will be taken against its will from wealthy grandparent and given to parent of moral habits; *Hibbette v. Bains*, 51 L. R. A. 839, which sustains father's right to custody of child notwithstanding assent to wife's deathbed contract to give custody to her relatives; *Re Young*, 36 L. R. A. 224, which denies grandparents right to custody of children to exclusion of father's sister, appointed guardian by his will; *Nugent v. Powell*, 20 L. R. A. 199, which holds man abandoning child not entitled to notice of adoption proceedings; *Kelsey v. Green*, 38 L. R. A. 471, which denies absolute right of guardian appointed on father's application as against guardian appointed in other state where child actually resides.

Cited in note (13 Eng. Rul. Cas. 54) on right to custody and direction of education of infant.

Pleading in habeas corpus.

Cited in *Scott v. Spiegel*, 67 Conn. 358, 35 Atl. 262, holding regular rules of pleading to be observed in proceedings on habeas corpus where justices' mittimus made part of return.

15 L. R. A. 598, *TEXAS STANDARD COTTON OIL CO. v. ADOUE*, 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274.

Combinations in restraint of trade.

Approved in *United States v. Addyston Pipe & Steel Co.* 85 Fed. 290, 46 L. R. A. 135, holding combination to restrain competition and enhance or maintain prices, void; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 47, 45 L. R. A. 377, 52 S. W. 595, holding right to contract for maintenance of rates among insurers, not within constitutional guaranty of life, liberty, and property; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 388, 61 L. R. A. 473, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination to fix price of beef, illegal; *Barataria Canning Co. v. Jouliau*, 80 Miss. 560, 31 So. 961, holding contract to sell all oysters packed, and not to undersell, void; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 107, 46 L. R. A. 563, 52 S. W. 853, holding master plumbers association, formed to stifle competition, illegal, though confined to particular city, and not embracing all master plumbers therein; *United States v. E. C. Knight, Co.* 156 U. S. 32, 39 L. ed. 336, 15 Sup. Ct. Rep. 349 (dissenting opinion), majority holding agreements for acquisition of sugar refineries with view to controlling business for private gain, not within act of Congress to protect trade and commerce from unlawful restraints and monopolies; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 123, 50 L. R. A. 180, 85 Am. St. Rep. 125, 28 So. 669, holding contract to discontinue manufacture of ice in consideration of mere money payments by owner of only other machine in town where total output marketable, void; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 435, 57 L. R. A. 551, footnote p. 548, 90 Am. St. Rep. 126, 41 S. E. 553, sustaining right to injunction against combination of merchants to prevent sales to dealer unless he sells at fixed prices; *Jackson v. Stanfield*, 137 Ind. 611, 23 L. R. A. 596, 36 N. E. 345, holding lumber retailers' combination to destroy business of brokers or commission dealers by coercing wholesalers, void; *Milwaukee Masons & Build-*

ers' Asso. v. Mezerowski, 95 Wis. 136, 37 L. R. A. 130, 60 Am. St. Rep. 97, 70 N. W. 166, holding by-laws of masons and builders' association requiring examination of bids and addition of 6 per cent to lowest offer, void; Nester v. Continental Brewing Co. 161 Pa. 482, 24 L. R. A. 251, 41 Am. St. Rep. 894, 29 Atl. 102, holding brewers' combination to stifle competition in two counties, void.

Cited in *Merchant's Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 544, 30 L.R.A. (N.S.) 979, 137 Am. St. Rep. 390, 128 S. W. 599, holding that contracts looking to consolidation of ice manufacturing plants in city for purpose of controlling market is void although no effort to control prices was in fact made; *Arnold & Co. v. Jones Cotton Co.* 152 Ala. 504, 12 L.R.A. (N.S.) 154, 44 So. 662, holding that a contract between purchasers restricting the freedom of their right to purchase a certain commodity is in restraint of trade; *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 442, 73 N. E. 770, affirming 114 Ill. App. 113, holding that a combination to prevent competition among coal dealers is unlawful regardless of the means or what may be done to further the conspiracy; *Knight & J. Co. v. Miller*, 172 Ind. 48, 87 N. E. 823, holding that complete restraint is not necessary to invalidate a contract having a restraining tendency it being enough that the apparent purpose and natural consequence be to that end; *Anderson v. Shawnee Compress Co.* 17 Okla. 243, 15 L.R.A. (N.S.) 854, 87 Pac. 315, holding an enterprise the object of which is to gain control of a certain line of business by purchase and lease from other participants in same business with stipulation against their re-entry into the business for a term of years to be in restraint of trade; *State v. Standard Oil Co.* 218 Mo. 461, 116 S. W. 902, on the economic and political necessity of freedom of competition in trade.

Cited in footnotes to *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful; *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price, not within statute for suppression of conspiracies; *Herriman v. Menzies*, 35 L. R. A. 318, which sustains association of master stevedores fixing minimum prices with stipulation against unauthorized discounts.

Cited in notes (52 L.R.A. 381) on right of corporations to consolidate; (12 L.R.A. (N.S.) 151) on combination among produce buyers as monopoly; (74 Am. St. Rep. 238, 240) on combinations constituting unlawful trusts; (49 Am. St. Rep. 789; 6 Eng. Rul. Cas. 452) on invalidity of contracts in restraint of trade.

Distinguished in *Queen Ins. Co. v. State*, 86 Tex. 266, 22 L. R. A. 492, 24 S. W. 397, sustaining validity of combination of insurance companies to secure uniform rates and commissions; *Anderson v. Rowland*, 18 Tex. Civ. App. 462, 44 S. W. 911, holding grantor's covenant not to run saloon in any building owned by him in same block for five years, not void as unlawful restraint; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 15, holding covenant by vendor of secret process not to use or disclose nature of same, or to sell same product, illegal.

Judicial notice.

Cited in note (82 Am. St. Rep. 443) on judicial notice of localities and boundaries.

15 L. R. A. 604, *SOUTH COVINGTON & C. STREET R. CO. v. BERRY*, 93 Ky. 43, 40 Am. St. Rep. 161, 18 S. W. 1026.

Right to injunction.

Cited in *Boyd v. Frankfort*, 117 Ky. 213, 111 Am. St. Rep. 240, 77 S. W. 669, holding that a police court judgment under an unconstitutional ordinance is enjoined by one of a large number of persons affected thereby the injunction being only incidentally an attack on the ordinance for invalidity; *Bessemer v.*

Bessemer City Waterworks, 152 Ala. 403, 44 So. 663, holding that a court of equity will protect a vested franchise from unlawful invasion or prevent disturbance of an unquestionable right on the grounds of irreparable injury or damage not susceptible of estimation.

Cited in footnotes to State *ex rel.* Rose v. Superior Court, 48 L. R. A. 819, which denies right to injunction against passage of ordinance creating a contract; Agua Pura Co. v. Las Vegas, 50 L. R. A. 224, which holds compliance with water company's valid contract not condition to injunctive relief against interference with same by city ordinance.

Cited in notes (21 L.R.A. 87) on injunction against criminal proceedings; (2 L.R.A.(N.S.) 635) on injunction against prosecution of criminal or quasi criminal nature.

Regulation of railways.

Cited in Sternberg v. State, 36 Neb. 317, 19 L. R. A. 574, 54 N. W. 553, holding ordinance fixing fares and requiring 6 tickets for 25 cents, within reserved power to regulate use and determine fares; Detroit v. Ft. Wayne & B. I. R. Co. 95 Mich. 460, 20 L. R. A. 80, 35 Am. St. Rep. 580, 54 N. W. 958, sustaining ordinance requiring tickets for reduced fare at certain hours, as within reserved power to regulate for public accommodation; Camden Interstate R. Co. v. Catlettsburg, 129 Fed. 433, raising, without deciding, question as to city's power to compel street railway company to station flagmen at crossings.

Cited in footnote to People v. Detroit United R. Co. 63 L.R.A. 746, which upholds ordinance requiring equipment of street cars with air brakes.

Cited in notes (39 L. R. A. 615) on municipal control over public nuisance on public streets and highways created by street railroads and other electric companies; (19 L. R. A. 571) on regulation of carriage of passengers by street railroads; (104 Am. St. Rep. 639, 650) on municipal regulation of street railways for protection of public.

Duty to furnish conductor.

Cited in footnote to Means v. Carolina C. R. Co. 45 L. R. A. 164, which holds failure to furnish conductor on mixed train negligence.

Ejection of passenger from street car.

Cited in footnote to Curtis v. Louisville City R. Co. 21 L. R. A. 649, which denies right to eject for nonpayment of fare, passenger receiving 45 cents as change for 50 cent piece.

Limitation upon municipal powers.

Cited in Bennett v. Pulaski (Tenn.) 47 L. R. A. 281, 52 S. W. 913, holding ordinance not authorized by charter or general law, *ipso facto* void.

15 L. R. A. 606, CROSS v. UNITED STATES TRUST CO. 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. 125.

Creditor's right to application of income to payment of judgment denied in Keeney v. Morse, 71 App. Div. 107, 75 N. Y. Supp. 728.

What law governs, as to disposition or taxation of property.

Approved in Wright v. Mercein, 34 Misc. 418, 69 N. Y. Supp. 936; Dammert v. Osborn, 140 N. Y. 41, 35 N. E. 407, Reversing 65 Hun, 590, 20 N. Y. Supp. 474; same case on motion for reargument 141 N. Y. 567, 60 N. Y. S. R. 337, 35 N. E. 1088; Mackenzie v. Mackenzie, 3 Misc. 204, 23 N. Y. Supp. 270; *Re* Barandon, 41 Misc. 382, 84 N. Y. Supp. 937; Whitney v. Dodge, 105 Cal. 200, 38 Pac. 636,—holding testamentary disposition of personalty governed by *lex loci domicilii*; Matthews v. Studley, 17 App. Div. 308, 45 N. Y. Supp. 201, holding that *lex loci domicilii* governs transmission of nonresident's realty in state of residence, and all

personalty; *Roosevelt v. Porter*, 36 Misc. 448, 73 N. Y. Supp. 800, holding annuities chargeable upon nonresident testator's personalty situated at place of residence, governed by law of domicile; *Hope v. Brewer*, 136 N. Y. 139, 18 L. R. A. 463, 48 N. Y. S. R. 840, 32 N. E. 558, holding gift in trust to foreign charity not invalid because contrary to law against perpetuities of testator's domicile.

Cited in *Re Stickney*, 85 Md. 107, 35 L. R. A. 697, 60 Am. St. Rep. 308, 36 Atl. 654, holding bequest to foreign corporation governed by *lex fori*; *Ruckgaber v. Moore*, 104 Fed. 954, bequest, by nonresident alien, of account current against citizen of United States, and of bonds deposited here, to nonresident alien, not subject to war revenue tax upon legacies. *Re Corning*, 3 Misc. 162, 1 Power, 178, 23 N. Y. Supp. 285, holding resident's bonds and mortgages in another state, subject to domestic collateral-inheritance tax; *English v. McIntyre*, 29 App. Div. 446, 51 N. Y. Supp. 697, holding trust of personalty created by nonresident not invalid where not shown invalid at domicile; *Re Corning*, 3 Misc. 162, 23 N. Y. Supp. 285, holding notes, bonds, and mortgages upon lands in another state subject to inheritance tax; *Higgins v. Eaton*, 188 Fed. 967, to the point that personal property in subject to law of owner's domicile as to disposition of it by will or by succession; *Mann v. Carter*, 74 N. H. 350, 15 L.R.A.(N.S.) 155, 68 Atl. 130, holding that bank deposits of deceased in foreign banks pass according to the laws of testator's domicile; *Robb v. Washington & J. College*, 103 App. Div. 357, 93 N. Y. Supp. 92, on the administration of a foreign created trust according to law of the domicile of the testator even though contrary to laws of forum if not against its public policy; *Watkins v. Eaton*, 173 Fed. 138, holding that the validity and effect of a testamentary disposition of property under a will made with codicil while testator resided in state where he died is to be determined by the laws of that state; *Graham v. Canandaigua Lodge No. 236*, I. O. O. 24 Ont. Rep. 262, holding that the law governing legatees capacity to take is the law of the legatee's domicile in the case of a corporate legatee having its powers and capacities defined.

Cited in notes (60 Am. St. Rep. 321; 2 L.R.A.(N.S.) 430, 436, 439) on conflict of laws as to wills; (94 Am. St. Rep. 559) on law governing distribution of personal property of decedent.

Distinguished in *Merritt v. Corlies*, 71 Hun, 612, 24 N. Y. Supp. 561, holding estate not to be distributed under law of foreign state where testator resided, where he lived, made his will, and died, and his property is located, in local jurisdiction; *Re Cleveland*, 28 Misc. 370, 59 N. Y. Supp. 985, sustaining jurisdiction over will executed abroad according to *lex fori* by resident sojourning abroad.

Limited in *Eidman v. Martinez*, 184 U. S. 581, 46 L. ed. 700, 22 Sup. Ct. Rep. 515, sustaining right to tax nonresident's personalty for expenses of local government protecting same.

Taking of oaths.

Cited in *People v. Martin*, 175 N. Y. 322, 96 Am. St. Rep. 628, 67 N. E. 589, holding that perjury statute relating to capital stock of corporation embraces oaths taken pursuant to statutes of another state.

Effect of invalid provision in will or instrument.

Approved in *Hascall v. King*, 162 N. Y. 153, 76 Am. St. Rep. 302, 56 N. E. 515; *Becker v. Becker*, 13 App. Div. 345, 43 N. Y. Supp. 17, sustaining trust where chief purpose valid, but providing for unlawful accumulation of residue; *Brown v. Richter*, 76 Hun, 472, 27 N. Y. Supp. 1094, holding trust valid as to life estates created therein, although remainders over declared illegal; *Roberts v. Cary*, 84 Hun, 336, 32 N. Y. Supp. 563, sustaining validity of disposition where invalid provision for ulterior disposition may be disregarded without interfering with tes-

tator's valid primary intention; *Re Fair*, 132 Cal. 567, 84 Am. St. Rep. 70, 60 Pac. 442, holding that equitable remainder vested in beneficiaries to whom trustee under invalid trust was directed to convey "remainder" of testator's property at future date (reversed in 132 Cal. 523, 64 Pac. 1000); *Chemung Canal Bank v. Payne*, 164 N. Y. 256, 58 N. E. 101, Affirming 22 App. Div. 355, 47 N. Y. Supp. 877, holding mortgage upon both realty and personalty not void because invalid in latter respect.

Distinguished in *Cowen v. Rinaldo*, 82 Hun, 486, 31 N. Y. Supp. 554, Reversing 8 Misc. 123, 28 N. Y. Supp. 369; holding whole trust provision invalid, where primary provision is invalid.

Public policy.

Approved in *People v. Hawkins*, 157 N. Y. 12, 42 L. R. A. 495, 68 Am. St. Rep. 736, 51 N. E. 257, and *Dodge v. Cornelius*, 168 N. Y. 253, 61 N. E. 244 (by O'Brien, J., dissenting), holding public policy of state to be ascertained only from Constitution and laws; *Bush v. Delaware*, L. & W. R. Co. 166 N. Y. 220, 59 N. E. 838, denying power of courts to invoke public policy except in clear cases and generally within limits defined by legislature.

Jurisdiction to administer trust.

Approved in *Farmers' Loan & T. Co. v. Ferris*, 67 App. Div. 6, 73 N. Y. Supp. 475, sustaining jurisdiction of supreme court over trust fund held by domestic corporation as trustee under will proved in another state, where parties interested were personally served or voluntarily appeared.

Cited in *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 332, 34 N. Y. Supp. 427, refusing to assume jurisdiction of action in equity to enforce statutory remedy against insolvent corporation of another state, requiring marshalling of assets and accounting between creditors and stockholders.

Jurisdiction to supply omission to name trustee.

Cited in *Trask v. Sturges*, 31 Misc. 201, 63 N. Y. Supp. 1084, holding that trust will not be allowed to fail because testator did not name trustee.

Distinguished in *Mount v. Tuttle*, 99 App. Div. 436, 91 N. Y. Supp. 195, holding that the laws providing that a trust otherwise valid will not fail for an omission to supply beneficiary does not apply to trusts to or performed in another state.

Perpetuities.

Cited in *Assets Realization Co. v. Howard*, 70 Misc. 689, 127 N. Y. Supp. 798, holding that possibility, at creation of limitation, that event upon which it depends may exceed in time authorized period, is fatal to suspension of powers of alienation; *Farmers' Loan & T. Co. v. Kip*, 120 App. Div. 349, 104 N. Y. Supp. 1092, holding that the limiting of a trust estate upon the life of the longest lived of two persons named, is a suspension of the absolute power of alienation for two lives.

Cited in notes (49 Am. St. Rep. 124) on rule against perpetuities; (21 Eng. Rul. Cas. 158) on perpetuities and their value.

Transmission of personal property to testator's domicile.

Cited in *Watkins v. Eaton*, 173 Fed. 139, holding that ordinarily the question whether the personal estate shall be transmitted to the court of domicile of testator for distribution seems to be a matter of judicial discretion to be exercised by any court having required jurisdiction.

15 L. R. A. 612, *DWIGHT v. ELMIRA*, C. & N. R. CO. 132 N. Y. 199, 28 Am. St. Rep. 563, 30 N. E. 398.

Measure of damages.

Approved in *Gorham v. Eastchester Electric Co.* 80 Hun, 292, 61 N. Y. S. R.

840, 30 N. Y. Supp. 125; *Humes v. Proctor*, 73 Hun, 267, 26 N. Y. Supp. 315; *Shearer v. Park Nursery Co.* 103 Cal. 420, 42 Am. St. Rep. 125, 37 Pac. 412; *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 533, 19 L. R. A. 655, 54 N. W. 596; *McCruden v. Rochester R. Co.* 5 Misc. 64, 25 N. Y. Supp. 114,—which hold difference in value of land before and after injury, measure of damages for destruction of trees; *Haskell v. Northern Adirondack R. Co.* 74 Hun, 381, 26 N. Y. Supp. 595, holding depreciation in value of land, measure of damages for destruction of fruit trees thereon; *Disbrow v. Westchester Hardwood Co.* 164 N. Y. 420, 58 N. E. 519, Affirming on this point 17 App. Div. 613, 45 N. Y. Supp. 376, holding difference in value of land before and after injury, measure of damages for timber wrongfully cut; *Edsall v. Howell*, 86 Hun, 429, 33 N. Y. Supp. 892, and *Evans v. Keystone Gas Co.* 148 N. Y. 116, 30 L. R. A. 653, 51 Am. St. Rep. 681, 42 N. E. 513, Affirming 72 Hun, 505, 25 N. Y. Supp. 191, holding damage to shade trees measured by depreciation in value of land after injury; *Johnson v. Kathan*, 88 Hun, 457, 34 N. Y. Supp. 864, holding value of trees at time and place of removal, measure of damages for conversion; *Rowe v. Chicago & N. W. R. Co.* 102 Iowa, 290, 71 N. W. 409, holding measure of damages for negligent burning of orchard is resulting loss in market value of farm not including grass and fences destroyed; *Chicago, I. & L. R. Co. v. Brown*, 157 Ind. 548, 60 N. E. 346, holding depreciation in value of land, measure of damages for burning over same; *Missouri P. R. Co. v. Tipton*, 61 Neb. 53, 84 N. W. 416, holding difference in value of fruit trees immediately before and after injury, measure of damages for negligent injury; *Clark v. Holdridge*, 12 App. Div. 616, 43 N. Y. Supp. 115, holding value of trees as standing trees, measure of damages when unintentionally cut by stranger; *Higgins v. New York, L. E. & W. R. Co.* 78 Hun, 571, 29 N. Y. Supp. 563, holding difference in value of premises, before and after injury, measure of damage for washing away soil; *Syracuse v. Stacey*, 45 App. Div. 255, 61 N. Y. Supp. 165, holding resulting depreciation in value of premises, measure of damages for taking of appurtenant water rights; *Armbruster v. Auburn Gaslight Co.* 18 App. Div. 451, 46 N. Y. Supp. 158, holding owner of greenhouses entitled to recover actual loss due to gas escaping from mains and entering same; *Blashfield v. Empire State Teleph. & Teleg. Co.* 71 Hun, 534, 24 N. Y. Supp. 1006, holding referee, after submission of case, without power to strike out erroneous evidence as to damages received by him on the trial.

Cited in *Jones v. Sanitary Dist.* 252 Ill. 602, 97 N. E. 210, holding that measure of damages for destruction of forest trees having value for lumber, is value of trees; *Kilby v. Erwin*, 84 Vt. 274, 78 Atl. 1021, holding that in action for damages to sugar-maple grove by fire, measure of damages is decreased value of farm, as a whole; *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D. 128, 28 L.R.A.(N.S.) 760, 126 N. W. 995, holding that measure of damages for destruction of growing shade trees having no value apart from the realty is difference in value of realty before and after destruction; *Griffing Bros. Co. v. Winfield*, 53 Fla. 603, 43 So. 687, holding measure of damages for failure to care for fruit trees as contracted for for a term of years, is the difference in value of the realty at date of termination of contract and its value of same date had proper care been taken; *Delaware & M. C. Teleph. Co. v. Fische*, 40 Ind. App. 352, 81 N. E. 1100, holding evidence as to value of realty immediately before and after damage to growing tree, admissible in an action for such injury; *Stevens v. State*, 65 Misc. 244, 121 N. Y. Supp. 402, holding that rental value and cost of restoration are the measure of damage to realty caused by seepage of water into cellar, diminution in value of premises not being allowed; *Galveston, H. & S. A. R. Co. v. Warnecke*, 43 Tex. Civ. App. 86, 95 S. W. 600, holding that suit for value of trees destroyed entitles plaintiff merely to value of trees detached from

the soil and if they have no value in that condition he will recover nothing; *Park v. Northport Smelting & Ref. Co.* 47 Wash. 599, 92 Pac. 442, holding that measure of damage to growing forest trees is diminution in value of the realty or the value of the trees severed therefrom, the one most beneficial to person injured being the measure to apply.

Cited in notes (19 L.R.A. 653, 658) on measure of damages for injury to, or destruction of trees; (140 Am. St. Rep. 319, 328) on damages for injuries to growing crops; (17 Eng. Rul. Cas. 883) on measure of damages against one mining beyond the limits of his property.

Distinguished in *Cooley v. Kansas City, P. & G. R. Co.* 149 Mo. 494, 51 S. W. 101, holding value of destroyed trees as fruit trees, measure of damages under contract providing for payment of reasonable price if injured.

Explained in *Chicago & A. R. Co. v. Davis*, 74 Ill. App. 599, holding difference in value of land before and after fire, measure of resulting damages to fruit trees, etc.

Disapproved in *Gilman v. Brown*, 115 Wis. 6, 91 N. W. 227, holding damages for destruction of fruit and shade trees measured by their value to the realty for purposes of occupancy; *Louisville & N. R. Co. v. Beeler*, 126 Ky. 334, 11 L.R.A. (N.S.) 936, 128 Am. St. Rep. 291, 103 S. W. 300, 15 A. & E. Ann. Cas. 913, holding the measure of damages for injury to orchard is reasonable value of trees destroyed and the difference in value of those injured immediately before and after injury.

15 L. R. A. 614, *DEAN v. WILLAMETTE BRIDGE R. CO.* 22 Or. 167, 29 Pac. 440.

Assessment of damages.

Cited in *Whipple v. Southern P. R. Co.* 34 Or. 374, 55 Pac. 975, holding that defaulter cannot appeal from assessment of damages where he offered no proof.

Cited in footnote to *Dyson v. Rhode Island Co.* 65 L.R.A. 236, which sustains power of court to assess damages on default without aid of jury.

Cited in note (20 L.R.A. (N.S.) 26) on necessity of jury to compute damages on default judgment.

Juries and jury trials.

Cited in *Dyson v. Rhode Island Co.* 25 R. I. 626, 65 L.R.A. 249, 57 Atl. 771, holding that the court must assess damages in a default case whether it calls a jury to its aid or not and the recommendation of the jury is merely advisory.

Cited in footnotes to *State ex rel. Rhodes v. Saunders*, 18 L. R. A. 646, which denies right to jury trial in equity case; *Hall v. Armstrong*, 20 L. R. A. 366, which denies right to jury trial in actions of book account; *McRae v. Grand Rapids, L. & D. R. Co.* 17 L. R. A. 750, which holds act authorizing court to discharge part of jurors after trial commenced unconstitutional; *Craig v. State*, 16 L. R. A. 358, which upholds statute requiring court to examine witnesses, determine degree of crime, and pronounce sentence on confession in open court by one charged with murder.

Cited in note (43 L. R. A. 40) on number and agreement of jurors necessary to constitute valid verdict.

Presumption as to validity of statute.

Cited in *Ellis v. Frazier*, 38 Or. 464, 53 L. R. A. 456, 63 Pac. 642, holding statute not to be declared invalid unless invalidity apparent despite every reasonable intendment to contrary; *State v. Cochran*, 55 Or. 182, 105 Pac. 884, to the point statute is presumed to be constitutional.

Construction of "may."

Cited in *Bass v. Doughty*, 5 Ga. App. 461, 63 S. E. 516, holding under the gen-

eral meaning and purpose of a statute that the word "may" therein, shall be construed as denoting discretion.

15 L. R. A. 618, *RUMSEY v. NEW YORK & N. E. R. CO.* 133 N. Y. 79, 28 Am. St. Rep. 600, 30 N. E. 654.

Measure of damages.

Cited in *Reisert v. New York*, 69 App. Div. 308, 74 N. Y. Supp. 673, holding rental or fee value of property measure of damages for wrongful exhaustion of water by wells; *Woolsey v. New York Elev. R. Co.* 134 N. Y. 331, 31 N. E. 891 (dissenting opinion), majority holding damages to abutter by railroad in street measurable by diminution in rental value; *Re Grade Crossing*, 52 App. Div. 32, 64 N. Y. Supp. 769, holding authorization to determine damages for injury, includes both past and fee damages; *Webb v. Baltimore & O. R. Co.* 114 Md. 228, 79 Atl. 193, holding that landowner is entitled to recover for diminution in market value of land where railroad in street impedes access to such land; *Stevens v. State*, 65 Misc. 254, 121 N. Y. Supp. 402, holding that where the measure of damages to realty is difference in rental value before and after injury the rental value is measured by the use of the property made at time of injury.

Explained upon subsequent appeal of same case, 136 N. Y. 544, 32 N. E. 979, holding difference in rental value, before and after injury, measure of damages recoverable for obstruction of waterfront.

Rights of riparian proprietors.

Cited in *Brooklyn v. Mackay*, 13 App. Div. 107, 42 N. Y. Supp. 1063 (concurring opinion); *People v. People's Coal Co.* 32 Misc. 479, 66 N. Y. Supp. 529, holding riparian owner entitled to access to channel and to construct wharf; *Buffalo v. Delaware, L. & W. R. Co.* 68 App. Div. 507, 74 N. Y. Supp. 343, Affirming 39 N. Y. Supp. 9, sustaining right of riparian owner to construct wharf; *Jenks v. Miller*, 14 App. Div. 480, 43 N. Y. Supp. 927, refusing to restrain pier extension not a material obstruction of commerce; *People v. Mould*, 37 App. Div. 38, 55 N. Y. Supp. 453, Reversing 24 Misc. 291, 52 N. Y. Supp. 1032, refusing to compel removal of wharf, where not nuisance or interference with public improvement; *Archer v. Eckerson*, 10 App. Div. 602, 42 N. Y. Supp. 137, holding that riparian proprietor has rights beyond dry land for purposes of access as against every one except state; *Hedges v. West Shore R. Co.* 150 N. Y. 156, 55 Am. St. Rep. 660, 44 N. E. 691, Reversing 80 Hun, 311, 61 N. Y. S. R. 854, 30 N. Y. Supp. 92, holding riparian rights of access not invaded where reasonable means therefor remains; *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. C. 536, 61 L. R. A. 944, 44 S. E. 39, holding that grant of right to riparian owner to land under water for purpose of erecting wharves passes with title to upland; *People ex rel. Cornwall v. Woodruff*, 30 App. Div. 47, 51 N. Y. Supp. 515, holding first patentee of submerged land deprived of no right by similar grant to adjoining owner, if access to channel remains; *Bigelow v. Draper*, 6 N. D. 162, 69 N. W. 570, sustaining right to condemn for railroad purposes riparian owner's right to have natural stream flow over his premises; *New York C. & H. R. Co. v. Aldridge*, 135 N. Y. 93, 17 L. R. A. 520, footnote p. 516, 32 N. E. 50, holding riparian owner's character as such not lost by conveying land partly below high-water mark to railroad company; *Shively v. Bowlby*, 152 U. S. 21, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding high-water mark, boundary of Congressional donation land claim bounded by river; *De Lancey v. Piepgras*, 141 N. Y. 95, 35 N. E. 1089, discussing without deciding effect upon riparian rights of state's deed of land under water; *Jones v. Seaboard Air Line R. Co.* 67 S. C. 194, 45 S. E. 188, holding railroad company liable to riparian owner for obstructing flow of freshet waters;

Fulton Light, Heat & P. Co. v. New York, 200 N. Y. 414, 37 L.R.A.(N.S.) 318, 94 N. E. 199, affirming 138 App. Div. 931, 123 N. Y. Supp. 1117, affirming 65 Misc. 291, 121 N. Y. Supp. 536, holding that title to bed of nontidal navigable stream, acquired by first settlers under common law, is in riparian owners, unless it is territorial boundary; *San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co.* 144 Cal. 137, 66 L.R.A. 245, 103 Am. St. Rep. 72, 77 Pac. 823, 1 A. & E. Ann. Cas. 182, holding that the right of access by navigation belonging to a littoral proprietor cannot be taken away or obstructed below high-water mark without compensation; *Thousand Island S. B. Co. v. Visger*, 179 N. Y. 210, 71 N. E. 764, holding that docks erected by riparian owners on lands under navigable streams, for the furtherance of state's commerce may be used by the public on payment of proper compensation; *Brookhaven v. Smith*, 188 N. Y. 81, 9 L.R.A.(N.S.) 328, 80 N. E. 665, 11 A. & E. Ann. Cas. 1, holding that riparian holders on a navigable stream have right to piers and docks between high and low water marks; *Barnes v. Midland R. Terminal Co.* 126 App. Div. 438, 110 N. Y. Supp. 545, holding that riparian owner may construct dock on land between high and low water mark though it obstruct passage of customers of adjoining riparian owner to his place of business; *Ferry Pass Inspectors' & Shippers' Asso. v. White River Inspectors' & Shippers' Asso.* 57 Fla. 403, 22 L.R.A.(N.S.) 349, 48 So. 643, holding that the exclusive rights of riparian owner may not be used so as to injure others in their lawful rights; *Waterford Electric Light, Heat & P. Co. v. Reed*, 47 Misc. 408, 94 N. Y. Supp. 551, holding flowage access and use of navigable water are property rights independent of the intrinsic value of the land; *Champlain Stone & Sand Co. v. State*, 66 Misc. 468, 123 N. Y. Supp. 546, holding that the right of upland holders to access to a tide-water river or body of water is a property right which cannot be taken without compensation even by the state.

Cited in footnotes to *Patten Paper Co. v. Kaukauna Water-Power Co.* 28 L. R. A. 443, which denies right to take riparian rights without compensation except in aid of navigation; *Priewe v. Wisconsin State Land & Improv. Co.* 33 L. R. A. 645, which denies legislative power to authorize under guise of public health drainage of lake for private benefit; *Lewis v. Portland*, 22 L. R. A. 736, which holds wharves built by riparian owners, property; *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in notes (40 L. R. A. 599) on right of owner of upland to access to navigable water; (18 L. R. A. 543) on protection of private rights from interference by public; (40 L.R.A. 643) on right to erect wharves; (34 L.R.A.(N.S.) 428) on right to obstruct wharf rights in navigable waters for public purposes, without compensation; (33 Am. St. Rep. 467) on right to lateral support against private corporations acting under legislative authority; (127 Am. St. Rep. 50) on relative rights of state and riparian owner in navigable waters; (23 Eng. Rul. Cas. 162) on riparian owner's right of access.

Distinguished in *Sage v. New York*, 154 N. Y. 77, 38 L. R. A. 612, 61 Am. St. Rep. 592, 47 N. E. 1096, Affirming 10 App. Div. 298, 41 N. Y. Supp. 938, and *Slingerland v. International Contracting Co.* 169 N. Y. 73, 56 L. R. A. 496, 61 N. E. 995, Affirming 43 App. Div. 228, 60 N. Y. Supp. 12, denying right of grantee of land under water of navigable river to recover damages for deposits of dredgings thereon due to improvement of navigation under authority of state and Federal government; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 89, 26 L. R. A. 383, footnote p. 378, 43 Am. St. Rep. 729, 38 N. E. 992, sustaining right of riparian owner to equitable relief against railroad constructed below low-water line and cutting off access; *Seranton v. Wheeler*, 179 U. S. 161, 45 L. ed. 136, 21 Sup. Ct. Rep. 48, holding resting of public improvement pier on submerged land

causing permanent loss of access, no taking of private property; *Bent v. Emery*, 173 Mass. 497, 53 N. E. 910, holding owner of flats entitled to compensation for permanent sinking thereof resulting from much dredging.

Submerged land.

Cited in *Mutual L. Ins. Co. v. Voorhis*, 71 Hun, 119, 24 N. Y. Supp. 529, holding submerged land below high-water line, not appurtenant to upland; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 87, 26 L. R. A. 382, 43 Am. St. Rep. 729, 38 N. E. 992, Modifying and Affirming, 71 Hun, 162, 24 N. Y. Supp. 659, which affirms 71 Hun, 156, 23 N. Y. Supp. 927, sustaining state grant of submerged land for railroad; *New York C. & H. R. R. Co. v. Matthews*, 70 Misc. 576, 128 N. Y. Supp. 138, to the point that land required for railroad purposes are to be regarded as necessary for public use; *Silberman v. Mayer*, 48 Misc. 473, 96 N. Y. Supp. 928, holding that the word "premises" respecting covenant in deed to riparian holdings on navigable stream includes the property right in land lying between high and low water mark.

Cited in note (1 Eng. Rul. Cas. 665) on rights of riparian owner in submerged land.

Opinion evidence as to cause of damage.

Cited as *obiter* in *Pratt v. New York C. & H. R. R. Co.* 77 Hun, 141, 28 N. Y. Supp. 463, holding conclusions or opinions as to cause or amount of damages, inadmissible.

Stare decisis.

Cited in *Simpkins v. White*, 43 W. Va. 129, 27 S. E. 361; *Mial v. Ellington*, 134 N. C. 158, 65 L. R. A. 707, 46 S. E. 961; *Ide v. Brown*, 178 N. Y. 35, 70 N. E. 101; *Gibbs v. Gibbs*, 26 Utah, 397, 73 Pac. 641,—denying *stare decisis* where result would be illogical and unreasonable.

Cited in note (73 Am. St. Rep. 103) on limitations on doctrine of *stare decisis*.

15 L. R. A. 622, *HILKER v. KELLEY*, 130 Ind. 356, 30 N. E. 304.

Death as preventing entry of judgment or appeal.

Cited in *Western U. Teleg. Co. v. Adams*, 28 Ind. App. 424, 63 N. E. 125, holding that death of judgment plaintiff will not prevent appeal by defendant.

Cited in note (20 L. R. A. 149) on entry of judgment *nunc pro tunc*, as to death of party before entry of final judgment.

Presumptions as to trial.

Cited in *Reinhold v. State*, 130 Ind. 473, 30 N. E. 306, holding trial court presumed to have given all proper instructions refused, where all instructions not on record; *South Bend Chilled Plow Co. v. Geidie*, 24 Ind. App. 675, 57 N. E. 562, holding refusal of instructions presumed to have been based upon inapplicability to case, where evidence not on record; *De Hart v. Johnson County*, 143 Ind. 367, 41 N. E. 825; *Fifth Ave. Sav. Bank v. Cooper*, 19 Ind. App. 17, 48 N. E. 236; *McCormick Harvesting Mach. Co. v. Smith*, 21 Ind. App. 619, 52 N. E. 1000; *Week v. Widgeon*, 23 Ind. App. 407, 55 N. E. 487; *Pittsburgh C. C. & St. L. R. Co. v. Cope*, 16 Ind. App. 584, 45 N. E. 806,—refusing to hold erroneous, instructions correct under evidence admissible under issues but not in record.

Survival of actions.

Cited in *Hilliker v. Citizens Street R. Co.* 152 Ind. 87, 52 N. E. 607, denying administrator's right of action for intestate's pain and suffering.

15 L. R. A. 624, *REINKEN v. FUEHRING*, 130 Ind. 382, 30 Am. St. Rep. 247, 30 N. E. 414.

Improvement assessments upon abutting property owners.

Cited in *Sears v. Boston*, 173 Mass. 77, 43 L. R. A. 836, 53 N. E. 138, sustaining

validity of assessment upon abutters, for street sprinkling although sprinkling of other parts is at public expense; *Indianapolis v. Holt*, 155 Ind. 241, 57 N. E. 966, holding assessment by foot-front rule, *prima facie* correct; *Lincoln v. Janesch*, 63 Neb. 709, 56 L. R. A. 763, 93 Am. St. Rep. 478, 89 N. W. 280, sustaining state imposing on abutters repairing of street sidewalks; *State v. McGrillis*, 28 R. I. 172, 9 L.R.A.(N.S.) 638, 66 Atl. 301, 13 A. & E. Ann. Cas. 701, holding an ordinance valid that imposes duty of adjoining owners, occupants and caretakers to clean streets from snow and ice.

Cited in notes (21 L. R. A. 566) on validity of assessment on abutting property made by charging on each piece cost of improvement in front of it; (24 L. R. A. 413) on right to impose on abutting owners duty or expense of sprinkling, sweeping, and cleaning streets or sidewalks; (18 L.R.A.(N.S.) 182) on special assessment for street sprinkling.

Disapproved in *Owensboro v. Sweeney*, 129 Ky. 620, 18 L.R.A.(N.S.) 186, 130 Am. St. Rep. 477, 111 S. W. 364, holding that property owners cannot be taxed to pay for street sprinkling such improvement being purely a public burden; *Stevens v. Port Huron*, 149 Mich. 540, 113 N. W. 291, 12 A. & E. Ann. Cas. 603, holding that an assessment for street sprinkling based on the front foot rule is invalid.

Taxing and police power.

Cited in *State v. McMahon*, 76 Conn. 102, 55 Atl. 591, holding a city by-law imposing fine on property owner for allowing specified accumulation of ice or snow on sidewalk abutting his property not an exercise of taxing power.

Uniformity of taxation.

Approved in *Alfalfa Irrig. District v. Collins*, 46 Neb. 425, 64 N. W. 1086, holding irrigation district assessments not in conflict with uniform taxation clause.

Public improvements.

Cited in *McAllen v. Hamblin*, 129 Iowa, 332, 5 L.R.A.(N.S.) 436, 105 N. W. 593, 6 A. & E. Ann. Cas. 980, holding that street sprinkling is a public improvement which may be properly paid out of public fund by implied authority.

15 L. R. A. 627, *MILWAUKEE MUT. F. INS. CO. v. SENTINEL CO.* 81 Wis. 207, 51 N. W. 440.

Effect of dissolution on suits against corporations.

Cited in *Lindemann v. Rusk*, 125 Wis. 232, 104 N. W. 119, holding an action commenced by corporation within time allowed to wind up its affairs, not to be abated by the expiration of the period allowed before judgment is obtained.

Cited in footnotes to *Nelson v. Hubbard*, 17 L. R. A. 375, which holds pending suits against corporation abated by its dissolution; *Marion Phosphate Co. v. Perry*, 33 L. R. A. 252, which holds judgment against corporation after dissolution invalid; *Combes v. Milwaukee & M. R. Co.* 27 L. R. A. 369, which denies right to sue corporation divested of property and franchises by judicial sale.

Cited in note (33 L. R. A. 580) on effect of expiration of period of existence of private corporations.

Assignment of cause of action.

Cited in note (44 L. R. A. 177, 179, 180, 187) on assignability of cause of action for personal injury.

Libel or slander of corporation.

Cited in note (52 L. R. A. 529) on actions for libel or slander of corporation.

Injunction against proceedings at law.

Cited in footnote to *Kaufmann v. Liggett*, 67 L.R.A. 353, which sustains right

to injunction against proceedings at law to obtain possession of leased property where lessee has an equitable right to a continuance of possession.

15 L. R. A. 630, WHARTON v. STEVENS, 84 Iowa, 107, 35 Am. St. Rep. 296, 50 N. W. 562.

Watercourses and drains.

Approved in *Stinson v. Fishel*, 93 Iowa, 661, 61 N. W. 1063, denying right to gather into single channel, and discharge upon another's land, surface waters which would otherwise spread and be absorbed; *Holmes v. Calhoun County*, 97 Iowa, 364, 66 N. W. 145, denying right to increase or change amount or manner of discharge of surface water upon lower land; *Willitts v. Chicago, B. & K. C. R. Co.* 88 Iowa, 287, 21 L. R. A. 610, 55 N. W. 313, holding railroad liable for failure to keep open, ditch upon land taken for right of way; *Williamson v. Oleson*, 91 Iowa, 291, 59 N. W. 269, holding upper owner liable for increasing flow of surface water onto another's lowlands; *Collins v. Keokuk*, 91 Iowa, 295, 59 N. W. 202, refusing to enjoin construction of drain which will not increase flow or force of surface water; *Waverly v. Page*, 105 Iowa, 231, 40 L. R. A. 471, 74 N. W. 938, denying lot owner's right to fill natural depression discharging surface water from large section of city; *Pifer v. Brown*, 43 W. Va. 422, 49 L. R. A. 513, 27 S. E. 399, holding parol license to drain through another's lot, revocable at will; *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 534, 62 Fed. 129, holding ordinary flood waters of river not surface waters; *Spink v. Corning*, 61 App. Div. 90, 70 N. Y. Supp. 143, holding stream supplied by living springs and flowing naturally except for a few months each year, a watercourse.

Cited in *Obe v. Pattat*, 151 Iowa, 728, 130 N. W. 903, holding that landowner cannot rightfully complain of increased flow of surface water, result of artificial drainage, unless same is cast upon his land by greatly increased or unnatural quantities; *Tretter v. Chicago G. W. R. Co.* 147 Iowa, 381, 140 Am. St. Rep. 304, 126 N. W. 339, holding that railroad is bound to use ordinary care in filling passage way for surface water, so as not to unnecessarily throw water back onto adjoining lands; *Hume v. Des Moines*, 146 Iowa, 644, 29 L.R.A.(N.S.) 136, 125 N. W. 846, Ann. Cas. 1912 B, 904; *Baker v. Akron*, 145 Iowa, 489, 30 L.R.A.(N.S.) 622, 122 N. W. 926,—to the point that upper owner has no right to collect surface water upon his own lands into drain, increased in quantity or in manner different from natural flow upon lower lands; *Perry v. Clark*, 89 Neb. 815, 132 N. W. 388, holding that upper owner may drain surface water in natural course of drainage into natural channels onto land of lower proprietor; *Brown v. Armstrong*, 127 Iowa, 177, 102 N. W. 1047, holding that surface water of no defined course may be turned in any direction but if in a defined course it may not; *Keck v. Venghause*, 127 Iowa, 533, 103 N. W. 773, 4 A. & E. Ann. Cas. 716, as approving a former case holding that the upper owner cannot collect surface water in a body or precipitate it into lower owner in increased or unnatural quantities to his injury but distinguishing case on grounds of no increase of precipitation; *Dorr v. Simmerson*, 127 Iowa, 553, 103 N. W. 806, holding that land owner may construct title drain in a natural water course to facilitate carrying of water from his land; *Hull v. Harker*, 130 Iowa, 192, 106 N. W. 629, holding that title drains facilitating the carriage of water into natural water course and not increasing amount thereof are permissible; *Wirds v. Vier Kandt*, 131 Iowa, 127, 108 N. W. 108, holding the laying of tile in old and natural water courses to carry off water naturally flowing therein is not enjoined; *Matteson v. Tucker*, 131 Iowa, 516, 107 N. W. 600, as approving the general principle of the civil law with respect to deflection of surface water especially as applied to rural lands; *Roe v. Howard County*, 75 Neb. 457, 5 L.R.A.(N.S.)

837, 106 N. W. 587, holding that neither private land holder nor public authority can divert or interfere with surface water flowing in a defined course to damage of neighboring owners.

Cited in footnotes to *Rigney v. Tacoma Light & Water Co.* 26 L. R. A. 425, which holds as watercourse, united volume of stream spreading out into swamp or lake; *Case v. Hoffman*, 20 L. R. A. 40, which holds subterranean and surface flow between natural lake and creek, a watercourse; *Chamberlain v. Hemingway*, 22 L. R. A. 45, which holds sluiceway between parts of bridge not watercourse; *Lambert v. Alcorn*, 21 L. R. A. 611, which holds watercourse exists where flow of surface water has fixed and determinate course.

Cited in notes (21 L. R. A. 600) on rights as to flow of surface water; (25 L. R. A. 528) on what is surface water; (22 L.R.A.(N.S.) 793) on right of owner of lower as against upper landowner to obstruct surface water in natural channel; (85 Am. St. Rep. 724) on right of land owner to accelerate or diminish flow of water to or from lands of another; (25 Eng. Rul. Cas. 425) on liability for injury to adjoining land due to protecting one's own land from flood.

Effect of acquiescence in a drainage system.

Cited in *Brown v. Armstrong*, 127 Iowa, 177, 102 N. W. 1047, holding that a land owner may be estopped from objecting to a deflection of surface water by acquiescence.

15 L. R. A. 635, *Re RICHARDSON*, 94 Cal. 63, 29 Pac. 484.

Validity of wills and devises.

Cited in footnotes to *Ferris v. Neville*, 54 L. R. A. 464, which holds sufficient, paper executed as will, stating that it is good to specified person for specified amount from writer's estate; *Crocker v. Smith*, 16 L. R. A. 576, which construes instrument including after-acquired property to take effect on grantor's death, as will; *Dennis v. Holsapple*, 46 L. R. A. 168, which sustains devise to the one who should take care of testatrix during last sickness.

Cited in notes (17 L.R.A.(N.S.) 1126) on letter as will; (89 Am. St. Rep. 492) on what constitutes a testamentary writing.

Holographic wills.

Cited in *Re Meade*, 118 Cal. 431, 62 Am. St. Rep. 244, 50 Pac. 541, holding a letter of instruction to an undertaker also containing statement that writer's brother will take charge of his estate as sole administrator without bonds, to sell, trade or occupy, not to be entitled to probate as a will; *Young v. Wark*, 76 Miss. 842, 25 So. 660, holding a paper undated and signed by deceased found in room where he died stating that he wanted his wife's relatives to have all his property not to be a will; *Re Noyes*, 40 Mont. 242, 106 Pac. 355, holding that a letter stating that addressee is to receive writer's property, that such writer writes thinking that he will not return alive and that a will has been partially made out, does not constitute a valid holographic will.

Cited in note (33 L.R.A.(N.S.) 1020) on sufficiency of showing paper offered as holographic will was so intended.

15 L. R. A. 637, *MAY v. JONES*, 88 Ga. 308, 30 Am. St. Rep. 154, 14 S. E. 552.

Liability for negligent protest or filing of lien.

Approved in *First Nat. Bank v. German Bank*, 107 Iowa, 545, 44 L. R. A. 134, 70 Am. St. Rep. 216, 78 N. W. 195, holding bank not chargeable for negligent protest of inland draft by notary also its assistant cashier.

Cited in *Peabody v. Citizens' State Bank*, 98 Minn. 310, 108 N. W. 272, holding

that the act of a notary in improperly protesting check under cashier's orders is the act of the protesting bank.

Cited in footnote to *Hirshfield v. Ft. Worth Nat. Bank*, 15 L. R. A. 639, which holds premature notice of protest not libelous *per se*.

Cited in notes (16 L.R.A. 625) on liability by filing lien; (38 Am. St. Rep. 776) on care required of bankers acting as agents or bailees.

Distinguished in *State Mut. Life & Annuity Assn. v. Baldwin*, 116 Ga. 857, 43 S. E. 262, upholding right to damages resulting from sending paid note for collection and protesting for nonpayment.

Libel by notary.

Cited in *Sheibley v. Ashton*, 130 Iowa, 201, 106 N. W. 618, holding a charge that plaintiff procured as notary public a false affidavit libeling another is libelous *per se*.

Cited in note (82 Am. St. Rep. 380, 381, 382) on liability of notaries.

When general demurrers not sustainable.

Cited in *Howard v. Edwards*, 89 Ga. 368, 15 S. E. 480, holding joint demurrer for no cause of action properly overruled where there is cause against one; *Carson v. Fears*, 91 Ga. 488, 17 S. E. 342, holding joint motion to dismiss amendment properly overruled where good as to some of the parties; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 339, 30 Am. St. Rep. 159, 14 S. E. 554, holding general motion to strike pleas properly overruled where some were good; *Athens v. Smith*, 111 Ga. 870, 36 S. E. 955, holding motion to dismiss suit because in tort by married woman, properly overruled where cause of action stated and recoverable damages included; *Ellis v. Vernon Ice, Light & Water Co.* 4 Tex. Civ. App. 69, 23 S. W. 856, holding general exception to pleadings not sustainable where same good for any purpose; *Hicks v. Hamilton*, 3 Ga. App. 117, 59 S. E. 331, holding it error to strike an answer containing one paragraph properly presenting a substantial issue though otherwise defective on general demurrer; *Livermore v. Norfolk County*, 186 Mass. 135, 71 N. E. 305, holding that a party properly made defendant cannot demur for misjoinder of a party against which no cause of action is stated such misjoined party not demurring.

15 L. R. A. 639, *HIRSHFIELD v. FT. WORTH NAT. BANK*, 83 Tex. 452, 29 Am. St. Rep. 660, 18 S. W. 743.

Computation of time.

Cited in footnote to *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for appearance.

Cited in note (78 Am. St. Rep. 378) on computation of time.

Bank protests and libel per se.

Cited in *Knapp v. Campbell*, 14 Tex. Civ. App. 203, 36 S. W. 765, holding charge of violation of penal statute libelous *per se*.

Cited in footnotes to *May v. Jones*, 15 L. R. A. 637, which holds premature notice of protest not libelous *per se*; *Morris v. Union Nat. Bank*, 50 L. R. A. 182, which denies bank's liability for failure to protest in due season note falling due on holiday, under honest mistake as to proper time.

Cited in notes (30 Am. St. Rep. 158) on wrongful protest of commercial paper; (116 Am. St. Rep. 818) on what words are libelous *per se*.

Necessity of pleading special damages in libel.

Approved in *Dun v. Maier*, 27 C. C. A. 103, 52 U. S. App. 381, 82 Fed. 172; *Knapp v. Campbell*, 14 Tex. Civ. App. 209, 36 S. W. 765, denying right of recovery in libel where no special damage alleged and matter not actionable *per se*; *Spur-*

lock v. Lombard Invest. Co. 59 Mo. App. 232, holding special damage must be pleaded in action for libel not actionable *per se*.

Cited in note (8 Eng. Rul. Cas. 404) on necessity of alleging and proving special damages.

Recovery of fees voluntarily paid.

Cited in *Sheibly v. Cooper*, 79 Neb. 236, 112 N. W. 363, holding that where excessive fees are paid to one claiming them as an officer though he be not one, and this is done voluntarily with full knowledge of the facts recovery may not be had.

Elements of damage.

Cited in *Malin v. McCutcheon*, 33 Tex. Civ. App. 389, 76 S. W. 586, holding loss of credit and reputation and mental anguish not elements of actual damage, for wrongful exclusion of plaintiff from his hotel room.

What constitutes extortion.

Cited in note (116 Am. St. Rep. 456) on what constitutes extortion.

Liability of notaries.

Cited in note (82 Am. St. Rep. 380, 384, 388) on liability of notaries.

15 L. R. A. 643, *PECK v. PROVIDENCE GAS CO.* 17 R. I. 275, 21 Atl. 543, 23 Atl. 967.

Transfers of stock.

Cited in footnotes to *Doty v. First Nat. Bank*, 17 L. R. A. 259, which holds right of transferee of national bank stock under unrecorded transfer superior to that acquired by subsequent attachment; *Geyser-Marion Gold Min. Co. v. Stark*, 53 L. R. A. 684, which holds transfer of stock on signature of trustee without inquiry for or assent of beneficiary, negligence.

When executor regarded as trustee.

Cited in *Grinnell v. Baker*, 17 R. I. 49, 23 Atl. 911, holding executor exercising power to invest funds and pay over income thereof, becomes trustee.

15 L. R. A. 651, *FT. WAYNE LAND & IMPROV. CO. v. MAUMEE AVE. GRAVEL ROAD CO.* 132 Ind. 80, 30 N. E. 880.

Extension of city limits to include toll road.

Cited in note (17 L.R.A.(N.S.) 1072, 1073) on extension of city limits to include toll road as "taking" of property.

15 L. R. A. 652, *BADGER LUMBER CO. v. MARION WATER SUPPLY, E. L. & P. CO.* 48 Kan. 182, 30 Am. St. Rep. 301, 29 Pac. 476.

Mechanics' lien; what constitute appurtenances or improvements.

Cited in *Phelps & B. Windmill Co. v. Baker*, 49 Kan. 440, 30 Pac. 472, holding one erecting windmill and attachments under contract with landowner, entitled to lien for improvement on land; *Hughes v. Lambertville Electric Light, H. & P. Co.* 53 N. J. Eq. 438, 32 Atl. 69, and *Southern Electric Supply Co. v. Rolla Electric Light & P. Co.* 75 Mo. App. 629, upholding right to lien on electric light plant wires strung upon poles in street; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 52, holding water-pipes in street not within statute authorizing materialman to remove machinery placed on land; *Phoenix Iron Works Co. v. Lancaster City Street R. Co.* 10 Lanc. L. Rev. 74, sustaining right to lien for work done upon building and machinery furnished for use therein; *Mulrooney v. O'Bear*, 80 Mo. App. 475, holding that deed of lots from realty company conveyed right to have water run through supply pipes, as appurtenance; *Wells v. Christian*, 165 Ind. 666, 76 N. E. 518, holding that work done in connection with

laying pipe for a heating system, such pipe being connected at one end with a permanent boiler from there extending down an alley entitles the workman to lien on the plant; *Lehmer v. Horton*, 67 Neb. 575, 93 N. W. 964, 2 A. & E. Ann. Cas. 683, holding that the supplying of illuminating apparatus under one account to be used by the owner of several exposition buildings, necessary to their illumination entitle materialman to a lien though the buildings are not contiguous.

Cited in footnote to *Forrest v. Vanderbilt*, 52 L. R. A. 473, which holds naphtha launch not appurtenance of yacht with which it is used as tender.

Distinguished in *Pacific Rolling Mills Co. v. James Street Constr. Co.* 16 C. C. A. 73, 29 U. S. App. 698, 68 Fed. 971, holding one furnishing material for tracks and conduit of cable road in highway not entitled to lien upon powerhouse.

Nature of property attached to soil.

Cited in *Newport Illuminating Co. v. Tax Assessors*, 19 R. I. 639, 36 L. R. A. 269, 36 Atl. 426, holding dynamo propelled by steam power and which may be easily removed by unscrewing bolts, not taxable as real estate.

Cited in note (66 L.R.A. 56) on nature of railroad as realty or personalty.

15 L. R. A. 656, *KERPER v. WOOD*, 48 Ohio St. 613, 29 N. E. 501.

Partnership or joint and several obligations.

Cited in *Covington City Bank v. Wight*, 4 Ohio N. P. 174, 6 Ohio S. & C. P. Dec. 350, holding estate not chargeable with debts created by surviving partner authorized by will to continue business; *Cowhick v. Shingle*, 5 Wyo. 97, 25 L. R. A. 611, footnote p. 608, 63 Am. St. Rep. 17, 37 Pac. 689, holding running of limitations as to one joint and several maker of note not suspended by partial payment by other.

Cited in footnotes to *National Cash Register Co. v. Brown*, 37 L. R. A. 515, which holds retiring member of firm not mere surety because of creditor's knowledge of continuing member's agreement to pay firm debts.

Statute of limitations.

Cited in *Union Stockyards Nat. Bank v. Maika*, 16 Wyo. 148, 125 Am. St. Rep. 1032, 92 Pac. 619, 14 Ann. Cas. 977, on necessity that payment, acknowledgment or promise in writing to take case out of statutory bar be made by a party to be charged or his agent.

Cited in footnotes to *Murdock v. Waterman*, 27 L. R. A. 418, which holds payment by heirs of mortgagor arrests running of limitation as against purchaser from mortgagor of part of land; *Slaughter's Succession*, 58 L. R. A. 408, which holds bar of limitation not removed by expression of ability to pay debt followed by part payment; *Mozingo v. Ross*, 41 L. R. A. 612, which holds running of limitation in favor of surety not suspended by partial payment by principal; *Kleis v. McGrath*, 69 L.R.A. 260, which holds barred note not revived by giving smaller note for interest due without referring to earlier note.

Cited in notes (6 L.R.A.(N.S.) 660) on law governing limitation of actions on contract; (27 L.R.A.(N.S.) 146) on payment on mortgage by one cotenant as tolling limitations as to others; 38 L.R.A.(N.S.) 686) on payment, acknowledgment, or promise to pay by joint debtor as agent of codebtor, as suspending or tolling the statute of limitations as to himself.

15 L. R. A. 661, *HUNT v. HAYES*, 64 Vt. 89, 33 Am. St. Rep. 917, 23 Atl. 920.

Husband's liability for expenses of wife living apart from him.

Cited in footnote to *Kirk v. Chinstrand*, 56 L. R. A. 333, which holds husband,

refusing to permit wife to live with him, liable for her support where she chooses to live.

Cited in note (98 Am. St. Rep. 644) on wife's implied authority to act for husband and charge him for necessities.

Criticized in *Ott v. Hentall*, 70 N. H. 232, 51 L. R. A. 227, footnote p. 226, 47 Atl. 80, which sustains right of wife living apart from husband because of his misconduct, to charge him for necessities.

15 L. R. A. 665, *TUNIS v. HESTONVILLE*, M. & F. PASS. R. CO. 149 Pa. 70, 24 Atl. 88.

Equitable control of corporate action.

Cited in *Titusville Oil Exchange v. Witherop*, 2 Pa. Super. Ct. 517, 39 W. N. C. 186, holding that equitable jurisdiction over corporations extends to the supervision of corporate elections; *Walker v. Johnson*, 17 App. D. C. 169, sustaining equitable jurisdiction to restrain declaring result of election under by-laws adopted in fraud of majority of votes; *Bache v. Central Leather Co.* 78 N. J. Eq. 488, 81 Atl. 571, to the point that court has power to appoint master in chancery to superintend corporate meeting; *Coolbaugh v. Kinsey*, 11 North Co. Rep. 244, holding that court of equity may supervise rights of stockholders attempting to vote, where such supervision is necessary to secure honest election.

Cited in footnote to *Maynard ex rel. Dusenbury v. Looker*, 56 L. R. A. 947, which holds quo warranto remedy for unlawful exclusion of director-elect from office.

Cited in note (31 L.R.A.(N.S.) 687) on power to order new, because of doubt as to result of original, election for trustee of religious society.

Distinguished in *Jenkins v. Baxter*, 160 Pa. 201, 34 W. N. C. 116, 28 Atl. 682, holding that validity of corporate election at proper time and place by regular and orderly meeting, cannot be contested in equity.

Power to vote stock as against co-owner.

Cited in *Mannhardt v. Illinois Staats Zeitung Co.* 90 Ill. App. 323, holding where control of stock committed to joint discretion of trustees, neither can act independently of the other.

Distinguished in *Schmidt v. Mitchell*, 101 Ky. 583, 72 Am. St. Rep. 427, 41 S. W. 929, holding vote of stock by executor revokes proxy given by coexecutor.

15 L. R. A. 668, *FOLLETT v. UNITED STATES MUT. ACCI. ASSO.* 110 N. C. 377, 28 Am. St. Rep. 693, 14 S. E. 923.

Effect of agent's knowledge or representations.

Approved in *Bergeron v. Pamlico Ins. & Bkg. Co.* 111 N. C. 47, 15 S. E. 883, holding stipulation that if insured building be on leased ground policy must so state waived by agent's clerk; *Horton v. Home Ins. Co.* 122 N. C. 504, 65 Am. St. Rep. 717, 29 S. E. 944, holding condition that policy shall become void upon sale under trust deed with insurer's knowledge waived by agent's inaction upon knowledge of such facts; *Sydnor v. Boyd*, 119 N. C. 489, 37 L. R. A. 736, 26 S. E. 92, holding applicant's premium note unenforceable where insurer refuses to recognize insured's assignment of policy procured by insurer's agent.

Cited in *Fagg v. Southern Bldg. & L. Asso.* 113 N. C. 368, 18 S. E. 655, holding that loan association cannot refuse loan under contract made by its agent and retain sum paid therefor; *Fishplate v. Fidelity & C. Co.* 140 N. C. 595, 53 S. E. 354, holding that knowledge of agent as to insured's physical weaknesses at time of application followed by misrepresentation in the application does not

affect the right to recover on the policy though it contain provision that notice or knowledge of agent will not amount to a waiver.

Cited in note (16 L.R.A.(N.S.) 1241) on doctrine of waiver or estoppel by fraud or mistake of agent preparing application.

Distinguished in *Sprinkle v. Knights Templar & M. L. Co.* 124 N. C. 409, 32 S. E. 734, holding receipt of insurance premium by insurer not waiver of false representation induced by agent, without actual notice to principal.

15 L. R. A. 669, *PEOPLE v. TICE*, 131 N. Y. 651, 43 N. Y. S. R. 573, 30 N. E. 494.

Cross-examination of defendants and protection against self-crimination.

Approved in *State v. Kent*, 5 N. D. 548, *sub nom.* *State v. Pancoast*, 35 L. R. A. 530, footnote p. 518, 67 N. W. 1052; *Hart v. State*, 38 Fla. 43, 20 So. 805; *Com. v. Smith*, 163 Mass. 431, 40 N. E. 189; *People v. Webster*, 139 N. Y. 84, 34 N. E. 730; *Guy v. State*, 90 Md. 34, 44 Atl. 997,—holding defendant subject to usual rules as to cross-examination; *People v. Gibson*, 24 App. Div. 14, 48 N. Y. Supp. 861, holding that defendant on witness stand cannot be contradicted by collateral matters; *People v. Stephenson*, 91 Hun. 623, 36 N. Y. Supp. 595, holding that defendant in criminal cause may be cross-examined as to all matters pertinent to issues, and as facts tending to discredit him as witness or to impeach his moral character; *Alexander v. State*, 40 Tex. Crim. Rep. 404, 49 S. W. 229, holding cross-examination of defendant not restricted to matters in testimony in chief; *People v. Smith*, 37 App. Div. 281, 55 N. Y. Supp. 932, holding defendant subject to cross-examination on matters affecting moral character; *People v. Hoch*, 150 N. Y. 309, 44 N. E. 976 (dissenting opinion), majority holding judge's question as to defendant's failure to testify, "why did he not?"—followed by explanation that it was of no legal consequence, not prejudicial; *Com. v. Bell*, 20 Pa. Co. Ct. 224, 7 Pa. Dist. R. 55, denying right to interrogate defendant as to failure to offer himself as witness on former trial; *People v. Dorthy*, 20 App. Div. 323, 46 N. Y. Supp. 970 (concurring opinion), holding defendant not to be cross-examined as to other collateral acts not amounting to conviction of crime; *People v. Sebring*, 14 Misc. 36, 35 N. Y. Supp. 237, holding document admissible against defendant where voluntarily surrendered to prosecuting attorney out of court before being called by grand jury.

Cited in *People v. Nelson*, 145 App. Div. 690, 130 N. Y. Supp. 488, holding that where defendant in criminal case offers himself as witness it may be shown upon cross-examination that he has been convicted of crime or has committed one; *People v. Dupounce*, 133 Mich. 3, 103 Am. St. Rep. 435, 94 N. W. 388, 2 A. & E. Ann. Cas. 246, holding that a defendant in a criminal prosecution who takes the stand in his own behalf waives the privilege to refuse to answer questions on cross-examination material to the case on the grounds of inriminating tendency; *State v. Lawrence*, 28 Nev. 448, 82 Pac. 614, holding defendant on stand in prosecution for felony may be subjected to cross-examination showing commission of other felonies by him, for purpose of impeachment; *State v. Zdanowicz*, 69 N. J. L. 623, 55 Atl. 743, holding defendant in criminal prosecution who takes stand in his own behalf subject to the usual rules as to cross-examination; *People v. Meadows*, 136 App. Div. 237, 121 N. Y. Supp. 17, holding that defendant by testifying as to his intent opens the door to any cross-examination legitimately bearing on the subject; *State v. Shockley*, 29 Utah, 71, 110 Am. St. Rep. 639, 80 Pac. 865 (dissenting opinion), on cross-examination of a defendant who takes the stand in his own behalf.

Cited in footnote to *Ex parte Senior*, 32 L. R. A. 133, which upholds right to

fully cross-examine as to his qualifications, one testifying to having voted at election.

Cited in notes (38 Am. St. Rep. 898) on cross-examination of accused; (75 Am. St. Rep. 332, 333) on privilege of witness as to incriminating testimony.

Refusal to reverse where verdict supported by evidence.

Cited in *People v. Wilson*, 141 N. Y. 194, 36 N. Y. Supp. 230, refusing to reverse where verdict abundantly supported by evidence and case properly submitted.

15 L. R. A. 676, *STATE ex rel. WOOD v. SIMMONS HARDWARE CO.* 109 Mo. 118, 18 S. W. 1125.

Self-crimination.

Cited in *State v. Young*, 119 Mo. 520, 24 S. W. 1038, holding testimony of ignorant lad without counsel, at coroner's inquest, obtained to criminate him, inadmissible; *State v. Faulkner*, 175 Mo. 605, 75 S. W. 116, holding that witness before grand jury in bribery investigation may refuse to testify, but is subject to perjury statute if he testifies falsely after waiver of right to refuse; *Re Green*, 86 Mo. App. 220, holding that witness in probate court cannot be compelled to testify to wrongful withholding of property from estate, amounting to embezzlement; *State v. Height*, 117 Iowa, 656, 59 L. R. A. 441, 94 Am. St. Rep. 323, 91 N. W. 935, holding disclosures by physicians of knowledge obtained by involuntary personal examination inadmissible under provisions against deprivation of property without due process, and unreasonable searches; *People ex rel. Lewisohn v. O'Brien*, 81 App. Div. 62, 80 N. Y. Supp. 816, holding one not compelled to answer question as to whether he had ever been in gambling house; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 301, holding one guilty of contempt by refusing to produce books upon court order and failing to claim that books contain incriminating evidence; *State ex rel. Hadley v. Standard Oil Co.* 194 Mo. 152, 91 S. W. 1062, holding that statute permitting court to order attorney for trust or combination charged with violating state laws, to notify nonresident witness to appear and testify and to produce books, is constitutional; *Tuttle v. People*, 33 Colo. 255, 70 L.R.A. 48, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513, holding statements made by accused before arrest at coroner's inquest inadmissible as confessions in his prosecution; *State v. Naughton*, 221 Mo. 425, 120 S. W. 53, on the rule that no one shall be compelled to accuse himself; *Ex parte Gauss*, 223 Mo. 282, 122 S. W. 741, holding that the immunity from self-conviction extends to all proceedings including those before the grand jury and covers all questions having any incriminating tendency; *Edelstein v. United States*, 9 L.R.A.(N.S.) 241, 79 C. C. A. 328, 149 Fed. 642, on the constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself."

Distinguished in *St. Joseph v. Levin*, 128 Mo. 593, 49 Am. St. Rep. 577, 31 S. W. 101, sustaining ordinance requiring pawnbrokers to keep record for examination by police or mayor; *Imboden v. People*, 40 Colo. 177, 90 Pac. 608, holding that private letters obtained by prosecution through the act of servants of accused in taking them from private files is not a violation of the right against self-crimination.

Explained in *Finck v. Schneider Granite Co.* 187 Mo. 267, 106 Am. St. Rep. 452, 86 S. W. 213, with respect to holding that the law against pools, conspiracies and trusts requiring officer of corporation to make report is constitutional, but that an officer could not be compelled to incriminate himself thereunder.

Contempt by refusal to testify.

Cited in *Re Comrades*, 112 Mo. App. 39, 85 S. W. 150, holding that the privilege against self-crimination is no ground for habeas corpus where the refusal to

produce books and papers for which arrest is had is not claimed on that ground; *Re Green*, 126 Mo. App. 321, 103 S. W. 503, holding that a general refusal to answer questions before questions are asked is not contempt where the questions if asked may cause crimination if answered even though questions may be asked not of that character.

Demurrer and motion to dismiss.

Cited in *Cofer v. Riseling*, 153 Mo. 636, 55 S. W. 235, holding legal effect of motion to dismiss case and demurrer to be the same; *Wertheimer-Swartz Shoe Co. v. McDonald*, 138 Mo. App. 340, 122 N. W. 5; *O'Day v. Sanford*, 138 Mo. App. 347, 122 S. W. 3,—holding that a motion for judgment on the pleadings is similar to a demurrer in that they both merely raise an issue of law.

15 L. R. A. 679, *BRADLEY v. CUNNINGHAM*, 61 Conn. 485, 23 Atl. 432.

Bailee's liability.

Approved in *Allen v. Somers*, 73 Conn. 359, 52 L. R. A. 109, 84 Am. St. Rep. 158, 47 Atl. 653, holding bailee for cold storage not liable for maintenance of improper temperature where same thought sufficient by both parties.

Cited in *Hudson v. Columbia Transfer Co.* 137 Mich. 258, 109 Am. St. Rep. 679, 100 N. W. 402, holding that where bailee places goods in place other than that of contract he is liable for their loss by fire, the bailor having them insured as of the place of contract; *McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 330, 102 N. W. 873, 3 A. & E. Ann. Cas. 468, holding that where parties to agreement intend storage at stated place at which place goods are delivered and stored, such agreement amounts to contract to store at such place.

Cited in notes (3 L.R.A.(N.S.) 350) on liability of livery-stable keeper for loss of property of patron; (23 L.R.A.(N.S.) 189) on care required of keeper of boarding stable; (24 L.R.A.(N.S.) 1118) on liability of warehouseman for goods stored in building other than that called for by contract; (136 Am. St. Rep. 236) on duty of warehousemen in care of property.

15 L. R. A. 683, *CLARK v. CENTRAL R. & BKG. CO.* 50 Fed. 338.

Subsequent proceedings in 54 Fed. 556, 56 Fed. 357, 10 C. C. A. 387, 23 U. S. App. 597, 62 Fed. 328, 66 Fed. 16.

Right to vote by proxy.

Cited in note (29 L. R. A. 849) on right to vote by proxy in private corporation.

Who entitled to vote on stock.

Distinguished in *Coler v. Tacoma R. & Power Co.* 64 N. J. Eq. 137, 53 Atl. 680, holding New Jersey company holding stock in Washington concern entitled to vote on stock.

Validity of voting trust.

Cited in *Sheppard v. Rockingham Power Co.* 150 N. C. 778, 64 S. E. 894, holding an agreement separating the beneficial ownership of stock from the legal title, pooling it for voting purposes in trustees for 3 years after the happening of certain event and making act of trustees conclusive against owners is invalid.

Cited in footnotes to *Gage v. Fisher*, 31 L. R. A. 557, which holds contract to secure corporate control by control of voting of other people's stocks, void; *Smith v. San Francisco & N. P. R. Co.* 35 L. R. A. 309, which holds valid, agreement by purchasers of majority of stock to vote same as unit for specified period; *Harvey v. Linville Improv. Co.* 32 L. R. A. 265, which holds pooling arrangement to control voting of stock, invalid.

Cited in notes (16 L.R.A.(N.S.) 1146) on validity of agreements to control

voting power of stock; (56 Am. St. Rep. 140) on agreements to control future voting of corporate stock.

Validity of combination of competing railroads.

Cited in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 704, 40 L. ed. 860, 16 Sup. Ct. Rep. 714, holding state prohibition of consolidation of competing railroads no interference with commerce clause; *Tift v. Southern R. Co.* 138 Fed. 762, holding an agreement between railroads of a certain territory to advance the rates for that territory invalid though any one of the roads may drop out at any time.

Cited in note (45 L. R. A. 275) on restrictions on consolidation of parallel or competing railroads.

Protection of equities in insolvent corporation.

Cited in *Re Erie Lumber Co.* 150 Fed. 824, holding wages due from insolvent corporation for three months before bankruptcy and during operation under receivership to have priority to any lien except for taxes.

15 L. R. A. 689, *KAVANAGH v. BARBER*, 131 N. Y. 211, 43 N. Y. S. R. 283, 30 N. E. 235.

Proper parties to action for nuisance or property damage.

Followed upon subsequent appeal in 68 Hun, 185, 22 N. Y. Supp. 874, denying husband's right of action for nuisance affecting wife's realty although he furnish purchase price and be in legal possession.

Cited in *Danihee v. Hyatt*, 81 Hun, 240, 30 N. Y. Supp. 707, holding wife proper party defendant in ejectment where premises purchased with her money and occupied by herself and husband; *Hughes v. Auburn*, 161 N. Y. 105, 46 L. R. A. 639, 55 N. E. 389, Reversing 21 App. Div. 317, 47 N. Y. Supp. 235, denying right of action to mere member of family for damages resulting from defective drain; *Ackerman v. True*, 175 N. Y. 361, 67 N. E. 629, sustaining abutter's right to compel removal of encroachment upon highway injuring her property; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 23, 58 L. R. A. 508, 64 N. E. 745 (dissenting opinion), majority holding that tenants may have action for nuisance; *McCalla v. Louisville & N. R. Co.* 163 Ala. 110, 50 So. 971, on the rule that no action can be maintained for a private nuisance except as it affects the comfortable enjoyment of private property; *People v. Transit Development Co.* 131 App. Div. 179, 115 N. Y. Supp. 297, holding that in a prosecution for a public nuisance evidence of its nature and effect as a private nuisance cannot be considered.

Cited in notes (34 L.R.A.(N.S.) 561 on right of one in possession to maintain action for nuisance without proving title; (28 Am. St. Rep. 198) on injunction against nuisance as request of private person; (118 Am. St. Rep. 869) on actions against two or more persons creating or maintaining a nuisance.

Distinguished in *Ft. Worth & R. G. R. Co. v. Glenn*, 97 Tex. 588, 65 L.R.A. 819, 104 Am. St. Rep. 894, 80 S. W. 992, 1 A. & E. Ann. Cas. 270, holding that where plaintiff became ill from nuisance maintained near his father's residence, he may recover though he had no interest in father's property.

Liability for escape of sewage.

Cited in *Munn v. Hudson*, 61 App. Div. 348, 70 N. Y. Supp. 525 holding city liable for damage to property and health by causing sewage to escape into house; *Metz v. Asheville*, 150 N. C. 752, 22 L.R.A.(N.S.) 944, 64 S. E. 881, holding that a city cannot be sued for death caused by negligent operation of a free sewage system.

What are public nuisances.

Cited in note (107 Am. St. Rep. 205) on what are public nuisances.

15 L. R. A. 691, CUTTING v. TAYLOR, 3 S. D. 11, 51 N. W. 949.

Effect of adoption of Constitution on existing statute.

Followed without discussion in State *ex rel.* Farrar v. Hipple, 7 S. D. 234, 64 N. W. 120.

Approved in Remington v. Higgins, 6 S. D. 318, 60 N. W. 73, holding statute obnoxious to Constitution subsequently adopted, of no effect; State *ex rel.* Holcombe v. Burdick, 4 Wyo. 293, 33 Pac. 131, holding statute unobnoxious to subsequent Constitution, not repealed; Grigsby v. Minnehaha County, 6 S. D. 498, 62 N. W. 105, discussing but not deciding question whether statute providing exemption from taxation in conflict with subsequent Constitution; Lyman County v. State, 11 S. D. 393, 78 N. W. 17, holding valid appropriation not abrogated by subsequent Constitution prescribing new method of making appropriations; Doherty v. Ransom County, 5 N. D. 6, 63 N. W. 148, holding valid grant of power to fix salaries not abrogated by subsequent constitutional provision requiring legislature to do so.

Cited in Betts v. Land Office Comrs. 27 Okla. 77, 110 Pac. 766, to the point that law valid when passed is not necessarily repealed by subsequent constitutional provision requiring pursuance of different methods; Re Nelson, 19 S. D. 216, 102 N. W. 885, holding statutes unobnoxious to state constitution when adopted to be in force until amended or repealed.

Distinguished in People *ex rel.* Wayside Home v. Kings County, 12 Misc. 190, 33 N. Y. Supp. 602, holding statute requiring payments by county affected by subsequent Constitution so as to make such payments permissible only.

Retroactive operation of statutes.

Cited in Kirby v. Western U. Teleg. Co. 4 S. D. 110, 30 L. R. A. 617, 46 Am. St. Rep. 765, 55 N. W. 759, refusing to give retroactive effect to constitutional provision not clearly providing therefor; American Invest Co. v. Thayer, 7 S. D. 74, 63 N. W. 233, denying retroactive effect of statute where intention to make it so not clearly expressed; American Invest. Co. v. Beadle County, 5 S. D. 415, 59 N. W. 212, holding provision for repayment of taxes after cancelation of public-land entry not retroactive in absence of expressed intent to that effect; Arey v. Lindsey, 103 Va. 252, 48 S. E. 889, holding unmistakable intention of words used or the obvious design of authors necessary to give constitution a retroactive effect, any doubt being resolved against such effect.

Cited in footnotes to French v. Deane, 24 L. R. A. 387, which holds void, act giving right to punitive damages as to existing cause of action.

Validity of taxes and appropriations in respect to object.

Cited in Shattuck v. Kincaid, 31 Or. 390, 49 Pac. 758, sustaining statute fixing salary and prescribing time and manner of payment; Lyman County v. State, 9 S. D. 416, 69 N. W. 601, 11 S. D. 393, 78 N. W. 17, sustaining validity of statute providing for payment by state of expenses of criminal prosecutions in unorganized county.

Cited in footnotes to Patty v. Colgan, 18 L. R. A. 744, which holds appropriation for sufferers from flood illegal; Board of Education v. State, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay claim for which no obligation exists; Conlin v. San Francisco, 21 L. R. A. 474, which holds void act for relief of street contractor; Wasson v. Wayne County, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; Clark v. Sheldon, 19 L. R. A. 138, which holds suit maintainable to com-

pel investment of taxes from railroads in sinking fund to pay railroad aid bonds; *Institution for Education of Mute & Blind v. Henderson*, 18 L. R. A. 398, which holds invalid, act for paying bounties by county treasurer; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes.

Cited in note (18 L. R. A. 544) on protection of private rights from interference by public.

15 L. R. A. 694, *STATE v. KITTELLE*, 110 N. C. 560, 28 Am. St. Rep. 698, 15 S. E. 103.

Criminal intent.

Cited in *State v. Southern R. Co.* 122 N. C. 1061, 41 L. R. A. 249, 30 S. E. 133, holding intent immaterial where statute prohibiting free transportation of passengers is violated; *State v. White Oak River Corp.* 111 N. C. 664, 16 S. E. 331, holding intent of one felling tree into stream and leaving same there for five days contrary to law, immaterial; *Epps v. Smith*, 121 N. C. 161, 28 S. E. 359, holding allegation of wilful and corrupt intent unnecessary under statute against bribery in election; *State v. McLean*, 121 N. C. 595, 42 L. R. A. 729, 28 S. E. 140, denying necessity of proof of intent in prosecution for unlawful removal of corpse; *State v. McDonald*, 133 N. C. 684, 45 S. E. 582, holding burden of proving intent to defraud upon state; *State v. Winner*, 153 N. C. 603, 69 S. E. 9, holding that by aiding in sale of liquor in prohibited territory a person is as guilty as principal; *State v. Nichols*, 67 W. Va. 661, 33 L.R.A.(N.S.) 423, 69 S. E. 304, 21 Ann. Cas. 184, holding that unlawful sale of liquor constitutes offense and seller's motive is immaterial; *Lehman v. District of Columbia*, 19 App. D. C. 235, holding that where statute peremptorily prohibits an act without reference to intent, intent is not an element of the criminality of the act.

Cited in note (78 Am. St. Rep. 239, 240) on criminal intent.

Distinguished in *State v. Powell*, 141 N. C. 785, 6 L.R.A.(N.S.) 482, 53 S. E. 515, holding that an unlawful liquor sale made in the belief that article sold was a soft drink is not actionable.

Statute forbidding minors to enter saloon.

Cited in *State v. Austin*, 114 N. C. 858, 25 L. R. A. 284, 41 Am. St. Rep. 817, 19 S. E. 919, sustaining ordinance forbidding unmarried minors to enter barroom.

Cited in note (41 Am. St. Rep. 821) on sale of liquors to minors by direction of parents.

Liability for agent's acts.

Cited in *State v. Neal*, 133 N. C. 690, 45 S. E. 756, denying liability of druggist for clerk's unauthorized sale of liquors; *State v. Holder*, 133 N. C. 712, 45 S. E. 862, and *Lehman v. District of Columbia*, 19 App. D. C. 235, holding employer liable for servant's illegal sales of liquors; *Franklin L. Ins. Co. v. People*, 103 Ill. App. 563, holding agent and insurance company jointly and severally liable under statute for unlawful discrimination; *Territory v. Church*, 14 N. M. 236, 91 Pac. 720, holding that proprietor of saloon where gambling is permitted, is liable for acts of employee, though such acts are contrary to instructions; *Walters v. State*, 174 Ind. 550, 92 N. E. 537, holding that in prosecution of druggist for unlawful sale of liquor by clerk, acts, conduct and declarations of clerk are admissible in evidence; *Paducah v. Jones*, 126 Ky. 818, 104 S. W. 971, holding that employer may be prosecuted for an unlawful sale of liquor by his bartender within the scope of his employment without regard to instructions given to such person; *Spokane v. Patterson*, 46 Wash. 97, 8 L.R.A.(N.S.) 1106, 123 Am. St. Rep. 921, 89 Pac. 402, 13 A. & E. Ann. Cas. 706, holding employer liable for injury caused by failure of employee to comply with city ordinance in blasting

rock though employer instructed servant properly; *State ex rel. Conlin v. Wonsall*, 137 Wis. 314, 118 N. W. 810, holding licensee answerable for unlawful sales by his agent though he was absent and had given instructions against the forbidden sales; *Edgar v. State*, 46 Tex. Civ. App. 174, 102 S. W. 439, holding sales by obligor's agents and employees in contravention of license come under bond given for such license; *Ollre v. State*, 57 Tex. Crim. Rep. 537, 123 S. W. 1116 (dissenting opinion), on the statutory criminal liability of a saloon keeper for the sale of intoxicating liquor to a minor by his bartender in violation of instructions; *State v. Gilmore*, 80 Vt. 517, 16 L.R.A.(N.S.) 790, 68 Atl. 658, 13 A. & E. Ann. Cas. 321, holding licensee liable criminally for unlawful sale by employee even though against instructions and without defendant's knowledge; *O'Donnell v. Com.* 108 Va. 887, 62 S. E. 373, holding that a sale with knowledge by bar-keeper's son to an intoxicated person against instructions and in absence of father makes the father criminally liable; *State v. Constantine*, 43 Wash. 105, 117 Am. St. Rep. 1043, 86 Pac. 384, holding saloon owner guilty for sale of liquor to a minor by his agent though he has no knowledge of sale and it is against positive instructions and made in his absence.

Cited in notes (16 L.R.A.(N.S.) 789) on criminal responsibility for sale of liquor by partner, servant, or agent; (88 Am. St. Rep. 799) on liability of principal for unauthorized acts of agent.

Distinguished and doubted in *State v. Southern R. Co.* 145 N. C. 541, 13 L.R.A.(N.S.) 984, 59 S. E. 570, holding that where legislature forbids an act, providing a penalty for offending corporation and makes its agent liable criminally the corporation cannot be held criminally liable with the agent.

— Effect of notice or knowledge of agent.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600 which holds cashier's notice imputable to savings company.

Cited in note (41 L. R. A. 668) on criminal and penal liability for act of co-partner, servant, or agent.

15 L. R. A. 707, *KRAUSE v. SPIEGEL*, 94 Cal. 370, 28 Am. St. Rep. 137, 29 Pac. 707.

False imprisonment.

Cited in footnotes to *Wachsmuth v. Merchants' Nat. Bank*, 21 L. R. A. 278, which holds arrest and imprisonment in civil cause on void process, unjustifiable; *Whaley v. Lawton*, 56 L. R. A. 649, which denies liability to action for false imprisonment of one making affidavit for warrant under which arrest made.

Distinguished in *Harrington v. Tibbet*, 143 Cal. 82, 76 Pac. 816, overruling demurrer to complaint charging malicious arrest under false charge of obtaining money by fraud.

Malicious prosecution of criminal charge.

Cited in notes (2 L.R.A.(N.S.) 1105) on lack of jurisdiction of court in which malicious prosecution begun as affecting right of action therefor; (26 Am. St. Rep. 129) on malicious prosecution of criminal charge.

15 L. R. A. 710, *NASHVILLE TRUST CO. v. FOURTH NAT. BANK*, 91 Tenn. 336, 18 S. W. 822.

Interests under general assignment.

Approved in *Akin v. Jones*, 93 Tenn. 364, 25 L. R. A. 526, 42 Am. St. Rep. 921, 27 S. W. 669, holding that assignee for creditors takes as volunteer; *Stainback v. Junk Bros. Lumber & Mfg. Co.* 98 Tenn. 319, 39 S. W. 530, holding beneficiaries under general assignment mere volunteers.

Right to indemnity and set-off.

Approved in *Citizens' Bank v. Kendrick*, P. & Co. 92 Tenn. 443, 36 Am. St. Rep. 96, 21 S. W. 1070, sustaining right of indorser for insolvent principal to retain funds of principal for indemnity, although note not paid; *Georgia Seed Co. v. Talmadge*, 96 Ga. 256, 22 S. W. 1001, sustaining right of depository bank to appropriate deposits in satisfaction of insolvent correspondent's unmatured notes; *Hodgin v. Peoples' Nat. Bank*, 124 N. C. 542, 32 S. E. 887, sustaining bank's right of set-off of general deposits against partnership indebtedness; *Thomas v. Exchange Bank*, 99 Iowa, 208, 35 L. R. A. 380, footnote p. 379, 68 N. W. 780, sustaining bank's right to set off unmatured note against deposit of insolvent; *Saladin v. Mitchell*, 42 Neb. 863, 61 N. W. 127, sustaining right of set-off by assignor's debtor, of former's indebtedness to latter; *St. Paul & M. Trust Co. v. Leek*, 57 Minn. 92, 47 Am. St. Rep. 576, 58 N. W. 826, holding right of equitable set-off upon ground of insolvency not affected by statutory assignment for creditors.

Cited in *Coonan v. Loewenthal*, 147 Cal. 223, 109 Am. St. Rep. 128, 81 Pac. 527, sustaining right of surety to set off his obligation against judgment against him in favor of principal who is insolvent and has assigned judgment to his wife she having knowledge of the facts and though surety has not paid the notes; *Steelman v. Atchley*, 98 Ark. 298, 32 L.R.A.(N.S.) 1061, 135 S. W. 902, holding that receivers of insolvents take assets subject to set-offs, liens and incumbrances as they existed at time of appointment; *De Laval Separator Co. v. Sharpless*, 134 Iowa, 31, 111 N. W. 438, holding that the assignee of a judgment from insolvent assignor against which there exists a set off takes the judgment subject to the equities of the set off though he had no knowledge thereof at time of assignment; *Jump v. Leon*, 192 Mass. 515, 116 Am. St. Rep. 265, 78 N. E. 532, on set off of notes not matured against claim of an estate which is insolvent; *Wunderlich v. Merchants Nat. Bank*, 109 Minn. 470, 27 L.R.A.(N.S.) 815, 134 Am. St. Rep. 788, 124 N. W. 223, holding a bank garnished on deposits of one of its debtors may set off notes of such debtor against garnishment though they are not due where insolvency of debtor can be shown at the time; *Neely v. Grayson County*, 25 Tex. Civ. App. 516, 61 S. W. 559, holding that bank of deposit may set off unmatured notes against the deposit on the insolvency of depositor; *Whelan v. McMahan*, 47 Or. 39, 114 Am. St. Rep. 906, 82 Pac. 19, holding that where insolvency is relied on as ground for equitable set off it must be alleged and proved; *Troup v. Mechanics Nat. Bank*, 24 R. I. 381, 53 Atl. 122, aligning the cases where equitable set off is allowed against living insolvent creditor, with those where the insolvent is dead; *William v. Neely*, 69 L.R.A. 236, 67 C. C. A. 171, 134 Fed. 4, holding by analogy to equity that vendee may reduce amount of payment on purchase money note in equity as a defense against full payment on grounds of partial failure of consideration.

Cited in footnotes to *Niblack v. Park Nat. Bank*, 39 L. R. A. 159, which denies bank's right to appropriate fund to its own claim against deposit after presentation by holder of check constituting equitable assignment of fund; *Merchants Nat. Bank v. Robinson*, 28 L. R. A. 760, which denies power to set off unmatured debt against check of insolvent depositor; *Barbour v. National Exch. Bank*, 20 L. R. A. 192, which holds judgment against bank for penalty for usury subject to set-off of subsequent judgments for bank.

Cited in notes (17 L. R. A. 458, 460) on effect of immaturity of claim at the time insolvency occurs on right of set-off; (23 L. R. A. 309) on set-off against assigned claim of debtor's demand against assignor; (55 L. R. A. 64) on set-off in bankruptcy cases; (27 L.R.A.(N.S.) 811) on right of bank to set off unmatured claim against deposit; (47 Am. St. Rep. 143) on set-off by or against bank re-

ceiver; (47 Am. St. Rep. 579, 582, 583, 584) on equitable set-off after insolvency; (111 Am. St. Rep. 422) on bankers' liens not founded on contract.

Denied in *Kortjohn v. Continental Nat. Bank*, 63 Mo. App. 171, holding that assignor's unmatured debt cannot be set-off against claim by assignee under assignment.

15 L. R. A. 717, *DODD v. ST. JOHN*, 22 Or. 250, 29 Pac. 618.

Liability for family debts and expenses.

Cited in *Neasham v. McNair*, 103 Iowa, 699, 38 L. R. A. 849, footnote p. 847, 64 Am. St. Rep. 202, 72 N. W. 773, holding diamond shirt stud worn by husband, family expense, within statute making estate of husband and wife liable therefor; *Gilman v. Matthews*, 20 Colo. App. 177, 77 Pac. 366, holding estate of wife liable for payment on husband's clothes; *Staver Carriage Co. v. Beaudry*, 138 Ill. App. 151, holding a stanhope purchased for use of husband in his profession as doctor though occasionally used by members of family not a family expense.

Cited in footnotes to *Price v. Planters' Nat. Bank*, 32 L. R. A. 214, which holds liability of wife's equitable statutory estate for her debts not terminated by her death; *Leake v. Lucas*, 62 L.R.A. 190, which holds wife liable for necessary medical attendance furnished husband during illness.

Cited in notes (21 L.R.A. (N.S.) 277; 32 L.R.A.(N.S.) 940) on what constitute "family expenses" within statute rendering wife or her property liable.

15 L. R. A. 722, *STATE v. KIEF*, 12 Mont. 92, 29 Pac. 654.

What law governs in criminal cases.

Cited in *Barelay v. United States*, 11 Okla. 513, 69 Pac. 798, holding question whether taking of property constituted larceny to be determined by law of place where thieves arrested; *State v. White*, 76 Kan. 662, 14 L.R.A.(N.S.) 559, 92 Pac. 829, on the rule that the law of place where property taken is conveyed governs as to whether the taking was larceny or not; *State v. De Wolfe*, 29 Mont. 421, 74 Pac. 1084, holding under statutes that a person stealing horses outside the state may be tried for larceny in any county into or through which he brings them and on information that horses were stolen in county of trial is supported by proof of theft in Canada and conveyance to county of trial.

Annotation cited in *State v. White*, 76 Kan. 662, 14 L.R.A.(N.S.) 559, 92 Pac. 829, as criticizing a former decision as an unwarranted extension of the fiction of constructive larceny beyond the purpose for which it was originally intended.

Cited in footnote to *State v. Cutshall*, 16 L. R. A. 130, which holds bigamous marriage in one state not punishable in another in absence of cohabitation.

Cited in note (14 L.R.A.(N.S.) 556) on what law defines larceny under statute against bringing stolen property into state.

15 L. R. A. 727, *SPALDING v. EWING*, 149 Pa. 375, 34 Am. St. Rep. 608, 24 Atl. 219.

Illegal contracts.

Cited in *Allen v. Line*, 11 Pa. Super. Ct. 531, holding contract not vitiated because in relation to subject-matter of preceding illegal contract; *Houlton v. Dunn*, 60 Minn. 29, 30 L. R. A. 740, 51 Am. St. Rep. 493, 61 N. W. 698, holding contract to procure law restoring land to market and secure preference in acquiring title thereto, void; *Haddock v. Salt Lake City*, 23 Utah, 528, 65 Pac. 491, holding illegal contract defense to action for services; *Owens v. Wilkinson*, 20 App. D. C. 71, holding agreement between attorney and client by which former contracts to procure legislation, void.

Cited in footnote to *Brooks v. Cooper*, 21 L. R. A. 617, which holds void, contract between newspapers for alternate selection and division of profits of public printing.

Cited in notes (30 L. R. A. 738) on validity of contract for services to procure legislation; (21 L. R. A. 798) on constitutionality of statutes restricting contracts and business; (83 Am. St. Rep. 717) on contracts between attorneys and clients; (117 Am. St. Rep. 517, 518) on contracts, consideration for which has partly failed, or is partly illegal.

Distinguished in *Fulton v. Lancaster County*, 162 Pa. 304, 29 Atl. 763, Affirming 10 Lane. L. Rev. 88, holding county liable for value of services of one engaged after expiration of term as county solicitor, during which void contract therefor made; *Houlton v. Nichol*, 93 Wis. 402, 33 L. R. A. 170, 57 Am. St. Rep. 928, 67 N. W. 715, sustaining validity of contract to present to Secretary of Interior status of lands with view to opening them to settlement under existing laws.

15 L. R. A. 730, *TEMPLETON v. LINN COUNTY*, 22 Or. 313, 29 Pac. 795.

Municipal liability for negligence.

Cited in *Jasper County v. Allman*, 142 Ind. 575, 39 L. R. A. 61, 42 N. E. 206; *Bailey v. Lawrence County*, 5 S. D. 396, 49 Am. St. Rep. 881, 59 N. W. 219; *Vail v. Amenia*, 4 N. D. 243, 59 N. W. 1092,—holding municipality not liable for defective highway in absence of statute; *Wilmington v. Ewing*, 2 Penn. (Del.) 101, 45 L. R. A. 83, 43 Atl. 305, sustaining validity of act exempting city from liability for defective footways; *Freel v. Crawfordsville*, 142 Ind. 30, 37 L. R. A. 304, 41 N. E. 312, holding public school corporation not liable for officers' negligence in absence of statute; *Schroeder v. Multnomah County*, 45 Or. 96, 76 Pac. 772, holding county in absence of statute not liable for injury caused by defect in highway, though the law supplies means and requires it to keep highway in repair; *Batdorff v. Oregon City*, 53 Or. 407, 100 Pac. 937, on the exemption of a municipality from liability for negligent maintenance of streets or highways.

Cited in notes (39 L. R. A. 51) on liabilities of counties in actions for torts and negligence; (12 Eng. Rul. Cas. 716) on liability of counties and municipalities for injury due to defect in highway.

Division of counties.

Cited in *Baker County v. Benson*, 40 Or. 222, 66 Pac. 815, holding that legislature may apportion common burdens in act annexing part of one county to another.

15 L. R. A. 737, *FOSTER v. LEY*, 32 Neb. 404, 49 N. W. 450.

Right to strict foreclosure.

Followed in *Harrington v. Birdsall*, 38 Neb. 184, 56 N. W. 961, sustaining decree of strict foreclosure of land contract.

Cited in *South Omaha Sav. Bank v. Levy*, 1 Neb. (Unof.) 259, 95 N. W. 603, holding strict foreclosure not maintainable by mortgagee in possession against grantee of mortgagor.

When time of essence of contract.

Cited in *Roberts v. Yaw*, 62 Kan. 47, 61 Pac. 409, holding time made of essence of contract by tender although not so stipulated.

15 L. R. A. 740, *STATE ex rel. WAGGONER v. RUSSELL*, 34 Neb. 116, 33 Am. St. Rep. 625, 51 N. W. 465.

Construction of election laws.

Cited in *Stackpole v. Hallahan*, 16 Mont. 55, 28 L. R. A. 507, 40 Pac. 80; *Jones*:

v. State, 153 Ind. 447, 55 N. E. 229; State *ex rel.* Sturdevant v. Allen, 43 Neb. 659, 62 N. W. 35,—holding provisions of law not essential to fair election not mandatory; Houston v. Steele, 98 Ky. 609, 34 S. W. 6, and Spurgin v. Thompson, 37 Neb. 44, 55 N. W. 297, holding ballot marked with lead pencil not to be rejected although statute directed marking in ink; Young v. Simpson, 21 Colo. 462, 42 Pac. 666, 52 Am. St. Rep. 254, holding irregular ballot expressing choice not void unless violative of statute requiring strict compliance therewith; Howser v. Pepper, 8 N. D. 498, 79 N. W. 1018, and State *ex rel.* Orr v. Fawcett, 17 Wash. 208, 49 Pac. 346, holding irregular ballot, markings evidently expressing voter's intention, to be counted; State *ex rel.* Norton v. Van Camp, 36 Neb. 108, 54 N. E. 113, holding statute requiring names "printed" on ballot, complied with by writing them thereon; Horning v. Board of Canvassers, 119 Mich. 58, 77 N. W. 446, holding ballots not void because of inadvertent indorsement by inspector in lower corner instead of upper as specified by law; Dickerman v. Gelsthorpe, 19 Mont. 256, 47 Pac. 999, and Nicholls v. Barrick, 27 Colo. 442, 62 Pac. 202, holding sufficient, ballot marked in substantial compliance with law and indicating voter's intention; Cook v. Fisher, 100 Iowa, 36, 69 N. W. 264, holding ballot not invalidated by mistake in printing and correction of name thereon; Lynip v. Buckner, 22 Nev. 439, 30 L. R. A. 357, 41 Pac. 762, holding ballot not invalidated by inspector's unintentional omission to remove numbering strips; Parker v. Hughes, 64 Kan. 241, 56 L. R. A. 280, 91 Am. St. Rep. 216, 67 Pac. 637, holding that distinguishing marks where made criminal offense invalidate ballot; Dial v. Hollandsworth, 39 W. Va. 13, 19 S. E. 557 (dissenting opinion), majority holding poll not invalidated by violation of election law as to number or politics of clerks; Taylor v. Bleakley, 55 Kan. 9, 28 L. R. A. 686, 49 Am. St. Rep. 233, 39 Pac. 1045, holding mandatory, provision that ballot shall not be counted unless marked as required by law; Rampendahl v. Crump, 24 Okla. 888, 105 Pac. 201, holding that provision of election law which provides that upon leaving booth voter shall deliver ballots to inspector in presence of election board, etc., is mandatory; White v. Slama, 89 Neb. 73, 130 N. W. 978, Ann. Cas. 1912 C, 518, holding that ballot marked solely with line or combination of lines within party circle should be counted, if there is no evidence that lines were traced for purpose of identifying ballot; McGrane v. Nez Perce, 18 Idaho, 725, 32 L.R.A.(N.S.) 735, 112 Pac. 312, Ann. Cas. 1912 A, 165, holding that statutory provision against "distinguishing" marks on ballot, is principally intended to prevent fraud, and oppression in elections; Carr v. Hyattsville, 115 Md. 551, 81 Atl. 8, holding that provision as to form of ballot in act submitting to people question of street improvement was directory only; Montgomery v. Henry, 144 Ala. 634, 1 L.R.A. (N.S.) 658, 39 So. 507, 6 A. & E. Ann. Cas. 965, holding that the provision of the election law requiring ballot to be numbered shall be construed as directory only where the statute does not provide that unnumbered ballots be not counted; State v. Swearingen, 128 Mo. App. 614, 107 S. W. 1, holding that where only four election judges are appointed and statute requires six, an election thereunder is not invalid where result is not affected thereby and there is no fraud in connection, such statute being construed as directory; Bingham v. Broadwell, 73 Neb. 611, 103 N. W. 323, holding that technical irregularities and innocent defective markings do not authorize the throwing out of a ballot; Gauvreau v. Van Patten, 83 Neb. 67, 119 N. W. 11, holding the provision as to placing identification marks on ballot to be directory only and that the writing in of an extra office and candidate is not of itself such a mark as will invalidate ballot; McClelland v. Erwin, 16 Okla. 616, 86 Pac. 283, holding a requirement that the cross be stamped in the square is directory and a penciled cross is permissible in absence of intent to distinguish; Brown v. West Seattle, 43 Wash. 28, 85 Pac.

854, holding provision that election notice be printed in paper printed and published in the city, complied with by insertion in official city paper though the mechanical part of its publication is done out side of the city.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds that name written on ballot in place of printed name erased cannot be counted; *Allen v. Glynn*, 15 L. R. A. 743, which holds printing names of certain candidates with those of different party not ground for rejecting votes; *Rosenthal v. State Canvassers*, 19 L. R. A. 157, which denies mandamus to compel canvass of votes after final adjournment of canvassing board; *Lindstrom v. Board of Canvassers*, 19 L. R. A. 171, which refuses to exclude ballot with unauthorized vignette; *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots in municipal election with device upon them; *Sego v. Stoddard*, 22 L. R. A. 468, as to what constitutes a distinguishing mark on ballot.

Cited in notes (47 L. R. A. 826, 827) on marking official ballot; (49 Am. St. Rep. 243) on distinguishing marks invalidating ballot; (90 Am. St. Rep. 61) on irregularities avoiding elections.

Distinguished in *Mauck v. Brown*, 59 Neb. 390, 81 N. W. 313, and *Orr v. Bailey*, 59 Neb. 137, 80 N. W. 495, holding provision requiring signature of judges of election upon every ballot, mandatory; *Nall v. Tinsley*, 107 Ky. 448, 54 S. W. 187, holding ballot provisions mandatory where act prescribes performance of act in one manner; *Morris v. Board of Canvassers*, 49 W. Va. 263, 38 S. E. 500, holding mandatory provision restricting voter to one ballot; *Martin v. Miles*, 46 Neb. 775, 65 N. W. 889, holding provision for placing "X" opposite name of candidate voted for, mandatory.

Quo warranto or mandamus.

Cited in *People ex rel. Witherell v. Chicago*, 131 Ill. App. 274, on quo warranto rather than mandamus as the proper remedy where the act complained of is already accomplished.

15 L. R. A. 743, *ALLEN v. GLYNN*, 17 Colo. 338, 31 Am. St. Rep. 304, 29 Pac. 670.

Effect of irregularity in election proceedings.

Cited in *Miller v. Pennoyer*, 23 Or. 375, 31 Pac. 830, and *Stackpole v. Hallahan*, 16 Mont. 54, 28 L. R. A. 507, 40 Pac. 80, both refusing to disfranchise voters for clerk's error in construing doubtful provision of election law; *Jones v. State*, 153 Ind. 447, 55 N. E. 229, holding election not invalidated by official's irregularities or omissions of acts not vital or made essential; *Smith v. Harris*, 18 Colo. 278, 32 Pac. 616, denying that secretary's wrongful certification of candidates will vitiate votes for other candidates; *People ex rel. Eaton v. District Court*, 18 Colo. 35, 31 Pac. 339, denying power of secretary of state to decide between certifications by rival conventions of same party; *Stephenson v. Election Comrs.* 118 Mich. 403, 42 L. R. A. 217, 74 Am. St. Rep. 402, 76 N. W. 914, holding that both tickets from rival factions of regular convention, should be placed on ballot; *Young v. Simpson*, 21 Colo. 462, 52 Am. St. Rep. 254, 42 Pac. 666, refusing to reject ballot expressing voter's intent where not repugnant to statute; *Cook v. Fisher*, 100 Iowa, 35, 69 N. W. 264, holding ballot not invalid because of technical mistake in printing; *State ex rel. Hewen v. Elliott*, 17 Wash. 23, 48 Pac. 734; *Bowers v. Smith*, 111 Mo. 60, 16 L. R. A. 760, 33 Am. St. Rep. 491, 20 S. W. 101; *State ex rel. Crawford v. Norris*, 37 Neb. 313, 55 N. W. 1086; *State ex rel. Brooks v. Fransham*, 19 Mont. 289, 48 Pac. 1; *Schuijer v. Hogan*, 168 Ill. 377,

48 N. E. 195,—holding that failure to make statutory pre-election objection to irregularity constitutes waiver; *Lewis v. Boynton*, 25 Colo. 492, 55 Pac. 732, holding election not invalidated because name of candidate was fraudulently printed under wrong emblem, where statutory opportunity for correction before election not availed of; *Dickinson v. Freed*, 25 Colo. 307, 55 Pac. 812, holding election not invalidated by printing of name of candidate under wrong emblem, as against opponent having notice thereof in time for correction; *People ex rel. Dix v. Kerwin*, 10 Colo. App. 477, 51 Pac. 530, holding votes for candidate for office invalid where notice of election therefor not given; *People v. McClees*, 20 Colo. 415, 26 L. R. A. 650, 38 Pac. 468, denying power to determine contested right to office on application for injunction; *Bates v. Crumbaugh*, 114 Ky. 452, 71 S. W. 75, holding failure of election officer to properly indorse ballot shall not disfranchise voter; *Esquibel v. Chaves*, 12 N. M. 503, 78 Pac. 505, holding that the violation of election law by election officers will not in the absence of statute so declaring deprive a voter of the effect of his ballot; *Earl v. Lewis*, 28 Utah, 122, 77 Pac. 235, holding that technical noncompliance with mandatory election provisions by election officers will not of itself invalidate an election; *State ex rel. Dithmar v. Bunnell*, 131 Wis. 206, 110 N. W. 177, 11 A. & E. Ann. Cas. 560, holding that although because of an irregularity a candidate is not entitled to election votes cast for him should nevertheless be counted.

Cited in footnotes to *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots in municipal election with device upon them; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *Lindstrom v. Board of Canvassers*, 19 L. R. A. 171, which refuses to exclude ballot with unauthorized vignette; *Sego v. Stoddard*, 22 L. R. A. 468, as to what constitutes a distinguishing mark on ballot; *State ex rel. Waggoner v. Russell*, 15 L. R. A. 740, which holds provision for marking ballots with ink directory only; *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

Cited in notes (16 L. R. A. 755) on constitutionality of "Australian ballot" statutes; (47 L. R. A. 812) on marking official ballot.

Distinguished in *State ex rel. Bennett v. Barber*, 4 Wyo. 82, 32 Pac. 14, denying validity of election where irregularities were contrary to express provisions of statute.

Political party organizations.

Distinguished in *State ex rel. Cook v. Houser*, 122 Wis. 585, 100 N. W. 964, holding that the decision of the national convention is not necessarily controlling as to the regularity of the state organization.

15 L. R. A. 751, *SIOUX CITY & ST. P. R. CO. v. SINGER*, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W. 905.

Followed without discussion in *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053.

Conditions in deed.

Cited in footnote to *Wakefield v. Van Tassell*, 65 L.R.A. 511, which upholds condition in deed of land that no grain shall ever be handled thereon.

Cited in notes (79 Am. St. Rep. 762) on what words create condition subsequent; (93 Am. St. Rep. 575) on mode of taking advantage of breach of condition subsequent; (95 Am. St. Rep. 222, 223) on validity of conditions and restrictions in deed.

— Against sale of liquor on land.

Cited in *Guyer v. Auers*, 132 Ill. App. 530; *Jetter v. Lyon*, 70 Neb. 433, 97 N. W. 596,—holding condition that no liquor shall be sold thereon is a valid condition subsequent which, until broken, runs with the land.

Re-entry as necessary to ejectment.

Cited in *Lewiston Water & P. Co. v. Brown*, 42 Wash. 558, 65 Pac. 47, holding it not necessary.

15 L. R. A. 754, *CHICAGO ATTACHMENT CO. v. DAVIS SEWING MACH. CO.*
142 Ill. 171, 31 N. E. 438.

Contracts within statute of frauds.

Cited in *Sigmund v. Newspaper Co.* 82 Ill. App. 184; *Peck v. McCormick Harvesting Mach. Co.* 94 Ill. App. 591; *Leavitt v. Stern*, 159 Ill. 533, 42 N. E. 869,—denying that part performance at action in law takes contract out of statute of frauds; *Gernand v. Schmitt*, 89 Ill. App. 550, holding lease of premises at monthly rental for over four years, within statute of frauds; *Rogan v. Arnold*, 233 Ill. 21, 84 N. E. 58, on part performance or taking the contract out of the statute; *Becker v. F. O. Erickson Co.* 142 Ill. App. 135, holding that a contract to convey a leasehold the unexpired term of which is for greater period than one year is a contract to convey an interest in or concerning lands; *Reilley v. Anderson*, 33 Wash. 62, 73 Pac. 799, holding that an attempted execution sale of a leasehold after manner of such sales of personality is invalid as being within statute of frauds as to sale of interest in realty; *Comley v. Ford*, 65 W. Va. 435, 64 S. E. 447, holding that an assignment of a lease for a term of years must be in writing to satisfy statute of frauds; *Campbell v. Timmerman*, 139 Ill. App. 158, holding an oral assignment of a lease with two years remaining to run is void within statute of frauds.

Cited in footnote to *Greenwood v. Law*, 19 L. R. A. 688, which holds void, parol agreement to sell and assign bond and mortgage.

Cited in notes (26 L. R. A. 802) on compensation for use of premises where lease is invalid under statute of frauds; (8 Eng. Rul. Cas. 652) on operation in equity as valid agreement of contract or agreement void at law.

Distinguished in *Marr v. Ray*, 151 Ill. 344, 26 L. R. A. 801, 37 N. E. 1029, holding person in possession and paying rent under lease within statute of frauds, liable for rent contracted for.

When statute of frauds can be invoked.

Cited in *Hogan v. Easterday*, 58 Ill. App. 46, holding that protection of statute of frauds cannot be first invoked on motion for new trial, or on appeal or error.

Cited in note (78 Am. St. Rep. 651) as to when and how statute of frauds must be pleaded.

Assignment of lease.

Cited in *Readey v. American Brewing Co.* 60 Ill. App. 506, holding that assignee of lease may divest himself of liability by reassignment.

Cited in footnote to *Presby v. Benjamin*, 57 L. R. A. 317, which holds covenant against assigning or subletting not violated by placing caretaker in possession during tenant's absence.

Nature of leasehold, as property.

Cited in *Moeller v. Gormley*, 44 Wash. 469, 87 Pac. 507, holding that a lease hold should be taxed as realty.

15 L. R. A. 760, *WILCOX v. MOON*, 64 Vt. 450, 33 Am. St. Rep. 936, 24 Atl. 244.

What constitutes actionable libel.

Cited in *Kansas City, M. & B. R. Co. v. Delaney*, 102 Tenn. 294, 45 L. R. A.

602, footnote p. 600, 52 S. W. 151, which holds letter of recommendation stating that former employee left employer's service during strike not actionable *per se*; Yousling v. Dare, 122 Iowa, 540, 98 N. W. 371, holding sending libelous letter to person libeled not actionable.

What constitutes publication of libel.

Cited in footnote to Gambrill v. Schooley, 52 L. R. A. 87, which holds dictation of libelous letter to confidential stenographer, a publication.

Cited in note (15 L.R.A.(N.S.) 1141) on publication by recipient's making libelous letter known to another.

— Sending sealed letter.

Cited in Roberts v. English Mfg. Co. 155 Ala. 416, 46 So. 752, holding a letter sent to plaintiff charging him with false pretense, opened and read by his wife, not to be a publication where defendant did not expect that anyone other than plaintiff would see it; Buckwalter v. Gossow, 75 Kan. 148, 88 Pac. 742, holding no publication when the statement is sent sealed to plaintiff a married woman with no intent that others see it; Kramer v. Perkins, 102 Minn. 457, 15 L.R.A.(N.S.) 1142, 113 N. W. 1062, holding a statement sent addressed to plaintiff's wife containing also written thereon a note to plaintiff is published when opened by plaintiff and read practically at the same time by both.

15 L. R. A. 761, STATE v. HARRUB, 95 Ala. 176, 4 Inters. Com. Rep. 99, 36 Am. St. Rep. 195, 10 So. 752.

Control of tide lands and fisheries.

Cited in Jones v. Oemler, 110 Ga. 207, 35 S. E. 375, holding that state has absolute power to sell or lease beds of tide waters; Cleveland v. Alba, 155 Ala. 472, 46 So. 757, holding that legislature has power to grant right to owners of water fronts to plant oysters and gather same for specified distance out in front of their lands.

Cited in footnotes to State v. McGuire, 21 L. R. A. 478, which holds having in possession during close season fish previously caught, not an offense; Com. v. Brown, 28 L. R. A. 110, which sustains weekly tax on sales of oysters.

Cited in notes (60 L. R. A. 516) on right to fish; (26 L.R.A.(N.S.) 794) on what discrimination as to persons permissible in fish and game laws.

Scope of title of act.

Cited in State *ex rel.* Winter v. Sayre, 118 Ala. 37, 24 So. 89, holding appointments to fill vacancy within scope of title of act to authorize governor to appoint municipal judge; State *ex rel.* Leslie v. Bracken, 154 Ala. 153, 45 So. 841, holding that the title "an act to establish a board of revenue for county" properly includes and carries with it qualification, term of office, time and mode of election of members, the powers and jurisdiction of board, the conferring of powers exercised by county court and the abolition of that court.

Cited in note (64 Am. St. Rep. 75, 76) on sufficiency of title of statute.

15 L. R. A. 766, LANGEVIN v. ST. PAUL, 49 Minn. 189, 51 N. W. 817.

Actions to recover money paid by mistake.

Cited in footnotes to Behring v. Somerville, 49 L. R. A. 578, which denies right of mortgagor, compelled to pay first assignee, to recover amount previously paid second assignee, who surrendered mortgage; Scott v. Ford, 68 L.R.A. 469, which denies right to recover back money paid by executors under mistaken belief that payee was entitled thereto as representative of a deceased legatee.

What actions cannot be joined.

Cited in Hayden v. Pearce, 33 Or. 92, 52 Pac. 1049, denying right to join dis-

tinct causes against persons severally liable; *Hanna v. Duxbury*, 94 Minn. 14, 101 N. W. 971, holding several independent causes of action not affecting all parties to suit cannot be joined.

Cited in footnotes to *Weist v. Philadelphia*, 58 L. R. A. 666, which denies right to maintain joint action against city street railway company and contractor for obstruction of street; *Dutton v. Lansdowne*, 53 L. R. A. 469, which denies right to sue borough and abutter jointly for injuries by defective sidewalk.

15 L. R. A. 768, *HIBBARD v. CRIBB*, 80 Wis. 398, 49 N. W. 823.

15 L. R. A. 771, *DE WALT v. BARTLEY*, 146 Pa. 529, 28 Am. St. Rep. 814, 24 Atl. 185.

Election laws and rights thereunder.

Cited in *Pike Election*, 5 Pa. Dist. R. 520, 18 Pa. Co. Ct. 279, holding method of exercising suffrage, subject to legislative regulation; *Re Independence Party Nomination*, 208 Pa. 112, 57 Atl. 344, sustaining right of Independent party to separate column of nominations on official ballot; *May & T. Hardware Co. v. Birmingham*, 123 Ala. 325, 26 So. 537, holding election regulation not invalid because easier to vote one way than other; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 546, 25 L. R. A. 328, 58 N. W. 483, sustaining requirement of oath as to inability to read English before another can mark ballot; *Cole v. Tucker*, 164 Mass. 488, 29 L. R. A. 669, 41 N. E. 681, sustaining requirement of official ballot; *Com. v. Rogers*, 181 Mass. 187, 63 N. E. 421, sustaining act regulating caucuses and voting; *Ladd v. Holmes*, 40 Or. 178, 91 Am. St. Rep. 457, 66 Pac. 714, sustaining act providing method of holding primary elections for selection of delegates; *State ex rel. Shepard v. Superior Ct.* 60 Wash. 374, 140 Am. St. Rep. 925, 111 Pac. 233, holding that legislature may regulate elections to any extent not prohibited by state or federal constitution; *Atwater v. Hassett*, 27 Okla. 297, — L.R.A.(N.S.) —, 111 Pac. 802, to the point that election laws are enacted for purpose of providing for secret ballot; *Riter v. Douglass*, 32 Neb. 419, 109 Pac. 444, holding that legislature has right under police power to make reasonable regulations for nomination of candidates of various parties; *Com. v. Gallagher*, 19 Pa. Dist. R. 153, to the point that legislature has right to regulate details of place, time and manner for due and orderly exercise of franchise; *Rouse v. Thompson*, 228 Ill. 559, 81 N. E. 1109 (dissenting opinion), on regulation of nominations; *State ex rel. Webber v. Felton*, 77 Ohio St. 586, 84 N. E. 85, 12 A. & E. Ann. Cas. 65 (dissenting opinion), on the regulation of the election franchise being constitutional if not a denial of any rights; *Solon v. State*, 54 Tex. Crim. Rep. 274, 114 S. W. 349, holding that the right to vote is not inherent but constitutional and where constitution does not provide qualifications the state may regulate it consistently with what constitutional provisions exist; *State ex rel. Van Alstine v. Frear*, 142 Wis. 341, 125 N. W. 961, holding specified restrictions on electors and candidates valid.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased, cannot be counted; *State ex rel. McCarthy v. Moore*, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election; *Brewer v. McClelland*, 17 L. R. A. 845, which holds statute requiring notice of claim to be legal voter from persons residing less than six months in county, void; *Eaton v. Brown*, 17 L. R. A. 697, which holds void, ballot law prohibiting marking elsewhere ballot marked opposite name of political party; *Chamberlin v. Wood*, 56 L. R. A. 187, which authorizes limitation of votes

to candidates whose names are on official ballot; *Lindstrom v. Board of Canvassers*, 19 L. R. A. 171, which refuses to exclude ballot with unauthorized vignette; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots in municipal election with device upon them; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in notes (16 L. R. A. 754) on constitutionality of "Australian ballot" statutes; (25 L. R. A. 484) on how far right to vote is absolute; (35 L. R. A. (N.S.) 354) on constitutionality of legislation affecting party representation on official ballot.

Distinguished in *State ex rel. Lamar v. Dillon*, 32 Fla. 580, 22 L. R. A. 137, 14 So. 383, denying legislative power to restrict voter to names on official ballot; *Payne v. Hodgson*, 34 Utah, 282, 97 Pac. 132, holding that a candidate may be nominated by two or more parties and his name appear on the ballot of each party, there being no statutory prohibition.

— Percentage requirements.

Cited in *State ex rel. Runge v. Anderson*, 100 Wis. 533, 42 L. R. A. 243, 76 N. W. 482, sustaining statute permitting candidate's name to appear but once and prescribing that his party shall have polled 2 per cent of vote at last election; *State ex rel. Plimmer v. Poston*, 58 Ohio St. 633, 42 L. R. A. 238, footnote p. 237, 51 N. E. 150, sustaining statute requiring political party to poll 1 per cent of vote at last general election to be entitled to have nominations appear on blanket ballot; *State ex rel. McGrael v. Phelps*, 144 Wis. 26, 35 L.R.A.(N.S.) 363, 128 N. W. 1041, to the point that statute providing that candidate for nomination for office must have received certain percentage of party vote as cast at last general election, is valid; *State ex rel. Montgomery v. Anderson*, 18 N. D. 159, 118 N. W. 22, holding that provision that candidate for nomination must receive certain percentage of party vote is constitutional; *State ex rel. Lebaue v. Michel*, 121 La. 389, 46 So. 430, holding that statute defining political party to be one that shall cast 10 per cent of votes for governor at last preceding election is constitutional; *Ledgerwood v. Pitts*, 122 Tenn. 604, 125 S. W. 1036, holding that statute excluding political parties casting less than ten per cent of entire vote is not unconstitutional.

Cited in footnotes to *State, Ransom, Prosecutor, v. Black*, 16 L. R. A. 769, which holds act limiting right to official ballots to parties casting certain percentage of vote at last election to those presenting petitions, valid; *Britton v. Election Comrs.* 51 L. R. A. 115, which holds void, law depriving members of political party polling less than 3 per cent of votes at preceding election, of right to nominate candidates.

Stickers and ballots.

Cited in *Re Lawlor's Contested Election*, 18 Pa. Co. Ct. 424, holding that title of office must appear on ballot, and not merely on sticker; *Oughton v. Black*, 212 Pa. 9, 61 Atl. 346, 4 A. & E. Ann. Cas. 141, on the inconvenience of requiring name of substituted candidate on ballot to be in writing; *Allar's Contested Election*, 16 Pa. Dist. R. 79, holding that a use of stickers for substituting name of candidate on ballot in place of one declining after name is printed thereon not according to way expressed in statute invalidates such substituted candidate's election.

Cited in footnotes to *Re Contested Election*, 27 L. R. A. 234, which denies right to paste slip ticket over printed matter on ballot; *Fletcher v. Wall*, 40 L. R. A. 617, which holds use of paster ballots unlawful.

Cited in note (91 Am. St. Rep. 686) on right of elector to vote for candidate not named on official ballot.

15 L. R. A. 775, *PARVIN v. WIMBERG*, 130 Ind. 561, 30 Am. St. Rep. 254, 30 N. E. 790.

Preparation of ballots.

Approved in *Perry v. Hackney*, 11 N. D. 154, 90 N. W. 483, as stating proper test for distinguishing mandatory from directory provisions in election laws.

Cited in *Westville v. Stillwell*, 24 Okla. 897, 105 Pac. 664, holding that statute providing that every person desiring to vote at special election, shall, before being given ballot subscribe and swear to affidavit, is mandatory; *Jackson v. Dotson*, 110 Va. 50, 65 S. E. 484, to the point that directions which are not of essence of thing to be done but which are given with view merely to the proper, orderly, and prompt conduct of business, are not regarded as mandatory; *State ex rel. Davis v. State Canvassers*, 86 S. C. 461, 68 S. E. 676, holding that provisions of election law as to administering oath to voters, railing off places for voters to stand, placing box so that public may see, etc., are directory; *Rampendahl v. Crump*, 24 Okla. 888, 105 Pac. 201, holding that provision of election law which provides that upon leaving booth voter shall deliver ballots to inspectors in presence of election board, etc., is mandatory; *Current v. Luther*, 164 Ind. 257, 72 N. E. 556, holding provisions in regard to preparation and distribution of ballots mandatory and calling for strict obedience; *State v. Swearingen*, 128 Mo. App. 614, 107 S. W. 1, holding failure to appoint statutory number of election judge does not of itself award the election where such failure does not affect the result of such election.

Cited in footnote to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (47 L. R. A. 830) on marking official ballot.

Distinguished in *State ex rel. Orr v. Fawcett*, 17 Wash. 206 49 Pac. 346, holding ballots valid notwithstanding mistakes and erasures, where intention of voter manifest; *Dickerman v. Gelsthorpe*, 19 Mont. 258, 47 Pac. 999, holding only use of cross mandatory, where same to be at "head of list" or "opposite" name.

— Essential marks.

Cited in *Curran v. Clayton*, 86 Me. 53, 29 Atl. 930; *Whittan v. Zahorik*, 91 Iowa, 37, 51 Am. St. Rep. 317, 59 N. W. 57; *Taylor v. Bleakley*, 55 Kan. 9, 28 L. R. A. 686, 49 Am. St. Rep. 233, 39 Pac. 1045,—holding provision for cross in designated place, mandatory; *Van Winkle v. Crabtree*, 34 Or. 471, 55 Pac. 831, holding provisions as to space for marking, mandatory; *Bechtel v. Albin*, 134 Ind. 204, 33 N. E. 967, holding provision for indication of choice by use of squares, mandatory; *Martin v. Miles*, 46 Neb. 776, 65 N. W. 889, holding provision for expression of choice by mark opposite name, mandatory; *Kirkpatrick v. Deegans*, 53 W. Va. 283, 44 S. E. 465, holding that poll clerks must personally write names on ballots.

Distinguished in *Parker v. Orr*, 158 Ill. 614, 30 L. R. A. 229, 41 N. E. 1002, holding provision for cross in appropriate place after name, directory.

— Distinguishing marks.

Cited in *Sego v. Stoddard*, 136 Ind. 306, 22 L. R. A. 471, footnote p. 468, 36 N. E. 204, holding provision that stamp elsewhere on ballot than square prescribed by statute shall be treated as distinguishing mark, mandatory; *Atty. Gen. ex rel. Scott v. Glaser*, 102 Mich. 400, 61 N. W. 648, holding marks not necessary and appropriate to express voter's intention, distinguishing; *Dennis v. Caughlin*, 22 Nev. 455, 29 L. R. A. 732, 58 Am. St. Rep. 761, 41 Pac. 768, holding accidental marks not within provision making ballot invalid if containing other words or marks; *Moody v. Davis*, 13 S. D. 91, 82 N. W. 410, holding ballot with crosses in circles above two party lists, void.

Cited in footnotes to *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds that name written on ballot in place of printed name erased cannot be counted; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots in municipal election with device upon them.

Cited in note (49 Am. St. Rep. 240, 241) on distinguishing marks invalidating ballot.

Distinguished in *Tebbe v. Smith* (omitted from official report in 108 Cal. 108), 29 L. R. A. 676, 49 Am. St. Rep. 68, 41 Pac. 454, holding cross at right of name, but not within square, not distinguishing mark.

— Cancellation.

Cited in *Morris v. Board of Canvassers*, 49 W. Va. 254, 38 S. E. 500, holding provision for voter's cancellation of ballot, mandatory.

— Assistance to illiterates.

Cited in *Montgomery v. Oldham*, 143 Ind. 39, 42 N. E. 474, holding provision for declaration of inability to read English, directory; *Dial v. Hollandsworth*, 39 W. Va. 13, 19 S. E. 557, holding preparation of illiterate's ballot by two clerks of different politics, mandatory.

— Effect of official's errors.

Cited in *Schuler v. Hogan*, 168 Ill. 382, 48 N. E. 195, holding election not invalidated by clerk's error not tending to affect result; *Jones v. State*, 153 Ind. 447, 55 N. E. 229, holding election not invalidated by irregularities in nomination, ballots, and conduct of board; *Cook v. Fisher*, 100 Iowa, 36, 69 N. W. 264, holding election not invalidated by mistake and correction in official ballot; *Zeis v. Passwater*, 142 Ind. 381, 41 N. E. 796, holding requirement for memorandum of disputed ballots on tally sheet, not mandatory; *Lynip v. Buckner*, 22 Nev. 439, 30 L. R. A. 357, 41 Pac. 762, holding ballot not invalidated by inspector's unintentional omission to remove numbering slip; *Boyd v. Mills*, 53 Kan. 609, 25 L. R. A. 491, 42 Am. St. Rep. 306, 37 Pac. 16, holding election not invalidated by use of sample instead of official ballots; *Nall v. Tinsley*, 107 Ky. 460, 54 S. W. 187 (dissenting opinion), majority holding election invalid if ballots printed on too thin paper; *Montgomery v. Henry*, 144 Ala. 634, 1 L.R.A.(N.S.) 658, 39 So. 507, 6 A. & E. Ann. Cas. 965, holding a regulation requiring ballots to be numbered not mandatory as to the voter; *Bates v. Crumbaugh*, 114 Ky. 452, 71 S. W. 75, holding failure of clerk to sign ballot not to warrant its disallowance in the count.

Cited in footnote to *Lindstrom v. Board of Canvassers*, 19 L. R. A. 171, which refuses to exclude ballot with unauthorized vignette.

— Indorsement.

Cited in *Rhodes v. Driver*, 69 Ark. 506, 64 S. W. 272, holding provision for indorsement of ballots, mandatory; *Horning v. Board of Canvassers*, 119 Mich. 58, 77 N. W. 446, holding specification of place for indorsement of ballots, directory; *Perkins v. Bertrand*, 192 Ill. 64, 85 Am. St. Rep. 315, 61 N. E. 405, holding requirement for indorsement with initials, complied with by one initial; *Slaymaker v. Phillips*, 5 Wyo. 491, 47 L. R. A. 856, 42 Pac. 1049 (dissenting opinion), majority holding ballot invalidated by absence of official stamp or signature; *Senter v. Board of Canvassers*, 64 W. Va. 501, 63 S. E. 284, holding statute mandatory as to requiring clerks' signatures to be in their own handwriting but directory only with regard to position of signature.

— Depositing in wrong box.

Cited in *State ex rel. Van Ryn v. Horan*, 85 Wis. 96, 39 Am. St. Rep. 826, 55 N. W. 157, holding ballots deposited in wrong box by inspectors, to be counted.

Validity of election regulations.

Cited in *Miller v. Schallern*, 8 N. D. 404, 79 N. W. 865, sustaining validity of provision declaring unindorsed ballots void; *Ritchie v. Richards*, 14 Utah, 378, 47 Pac. 670, holding provision for identification of ballot by numbering, invalid; *State ex rel. Workman v. Goldthait*, 172 Ind. 218, 87 N. E. 133, holding that the legislature may make proper conditions to office holding and voting when not done by constitution.

Construction of ballots.

Cited in *Eufaula v. Gibson*, 22 Okla. 512, 98 Pac. 565, on construction of ballots as other written instruments.

Effect of extrajudicial construction of election law.

Cited in *Borders v. Williams*, 155 Ind. 45, 57 N. E. 527, holding construction of law by commission of eminent lawyers, followed by officials, to be accepted where not palpably wrong; *Morris v. Board of Canvassers*, 49 W. Va. 258, 38 S. E. 500, as to force of construction by ballot commissioners.

Principles governing construction of statutes.

Cited in *Jones v. National Bank*, 138 Ind. 90, 37 N. E. 338; *Opinion of Justices*, 66 N. H. 645, 33 Atl. 1076; *Columbia Finance & T. Co. v. Tharp*, 24 Ind. App. 84, 56 N. E. 265; *State Tax Comrs. v. Holliday*, 150 Ind. 233, 42 L. R. A. 833, 49 N. E. 14; *State v. Sopher*, 157 Ind. 370, 61 N. E. 785,—stating principles governing construction of statutes; *Haggerty v. Wagner*, 148 Ind. 647, 39 L. R. A. 391, 48 N. E. 366; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 563, 57 N. E. 583; *Traudt v. Hagerman*, 27 Ind. App. 152, 60 N. E. 1011,—holding that intention as gathered from whole act controls particular expressions; *Morin v. Holliday*, 39 Ind. App. 211, 77 N. E. 861, on principles governing construction of statutes; *Kunkle v. Coleman*, 174 Ind. 323, 92 N. E. 61, holding that local option election statutes are construed liberally to carry out intention and provisions thereof will be regarded as mandatory where they do and directory where they do not affect merits; *Thorn v. Silver*, 174 Ind. 516, 89 N. E. 943, holding that in construing doubtful statutes courts will consider kindred statutes, history of legislation, conditions and object to be obtained; *Pennsylvania Co. v. Mosher*, 47 Ind. App. 560, 94 N. E. 1033, holding that intent of legislature will be carried out, though strict letter of statute may not be followed; *Abbott v. Inman*, 35 Ind. App. 266, 72 N. E. 284, holding that in construing statute courts will ascertain, if possible, legislative intent, although in so doing strict letter of statute may not be followed.

Cited in note (14 Eng. Rul. Cas. 831) on rules for interpretation of statute.

Contents of notice of meeting of school electors.

Cited in *Goerdts v. Trumm*, 118 Iowa, 211, 91 N. W. 1067, holding that notice of meeting of electors of school district must contain propositions to be submitted.

Presumption as to officers acts.

Cited in *American Car & Foundry Co. v. Clark*, 32 Ind. App. 654, 70 N. E. 828, holding that the presumption is that proper instructions were given and that they were properly followed by jury.

15 L. R. A. 781, *DODGE v. GRANGER*, 17 R. I. 664, 33 Am. St. Rep. 901, 24 Atl. 100.

Municipal liability for act of employee or agent.

Cited in *Saunders v. Ft. Madison*, 111 Iowa, 104, 82 N. W. 428; *Shanewerk v. Ft. Worth*, 11 Tex. Civ. App. 272, 32 S. W. 918; *Gillespie v. Lincoln*, 35 Neb. 44, 16 L. R. A. 352, footnote p. 349, 52 N. W. 811,—which holds city not liable for negligent acts of firemen; *Workman v. New York*, 179 U. S. 576, 45 L. ed.

326, 21 Sup. Ct. Rep. 212, Reversing 14 C. C. A. 532, 35 U. S. App. 201, 67 Fed. 347 (dissenting opinion), majority holding city liable for negligent handling of fireboat; *Williams v. Indianapolis*, 26 Ind. App. 630, 60 N. E. 367, holding city not liable for malpractice of its hospital physician; *Mathewson v. Hawkins*, 19 R. I. 20, 31 Atl. 430, denying municipal liability on officer's unauthorized contract; *Blair v. Granger*, 24 R. I. 21, 51 Atl. 1042, holding city not liable for an injury caused by negligent maintenance of public parkway in absence of statute.

Cited in footnote to *Pettingell v. Chelsea*, 24 L. R. A. 426, which denies city's liability to lineman on fire-signal system for negligence as to condition of pole.

Cited in notes (19 L. R. A. 454) on distinction between public and private functions of municipalities as to liability for negligence; (23 L. R. A. 201) on liability of charitable institutions for negligence; (25 L.R.A.(N.S.) 95) on liability of municipality for tort in connection with buildings used by it; (45 L. ed. U. S. 315) on liability of municipal corporations for acts of fireman.

15 L. R. A. 783, *WHITEFIELD v. PARIS*, 84 Tex. 431, 31 Am. St. Rep. 69, 19 S. W. 566.

Liability for acts in exercise of public functions.

Cited in *Shanewerk v. Ft. Worth*, 11 Tex. Civ. App. 272, 32 S. W. 918, holding city not liable for injury from gross negligence of firemen; *Bates v. Houston*, 14 Tex. Civ. 289, 37 S. W. 383, holding city not liable for wrongful quarantine of smallpox suspect by health officers; *Givens v. Paris*, 5 Tex. Civ. 707, 24 S. W. 974, holding city not liable for injury from negligence of policeman; *Gianfortone v. New Orleans*, 24 L. R. A. 605, 61 Fed. 72, holding city not liable for failure to protect life in absence of statute; *New Orleans v. Kerr*, 50 La. Ann. 417, 69 Am. St. Rep. 442, 23 So. 384, holding city not liable for damage from illegal arrest and imprisonment by police at instance of city officers.

Cited in footnote to *Wilmington v. Vandegrift*, 25 L. R. A. 538, which holds city not liable for failure of police to suppress coasting.

Cited in notes (44 L. R. A. 795) on liability of municipal corporations for false imprisonment and unlawful arrest; (19 L. R. A. 454) on distinction between public and private functions of municipalities as to liability for negligence; (1 L.R.A.(N.S.) 666) on distinction between private and public functions of municipality with respect to liability for damages; (25 L.R.A.(N.S.) 94) on liability of municipality for tort in connection with buildings used by it; (108 Am. St. Rep. 140) as to what municipal corporations are answerable for injuries due to defects in streets and other public places.

Liability for wrongful acts of agent.

Cited in footnote to *A'Hern v. Iowa State Agri. Soc.* 24 L. R. A. 656, which denies liability of state agricultural society for wilful arrest and assault by its agents.

Cited in notes (12 L.R.A.(N.S.) 539) on municipal liability for torts of police officers; (30 Am. St. Rep. 401) on liability of cities for negligence and other misconduct of officers and agents.

— Pound masters and the like.

Cited in *Gregg v. Hatcher*, 94 Ark. 57, 27 L.R.A.(N.S.) 140, 125 S. W. 1007, 21 Ann. Cas. 982, holding mayor and city not liable for unlawful impounding of dog by impounding officer.

15 L. R. A. 784, *WAGNER v. LAW*, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927.

Title of execution purchaser after fraudulent conveyance.

Cited in notes (17 L.R.A. 346) on priority as to proceeds of creditor's bills;

(67 L.R.A. 879) on effect on legal title of conveyance of land in fraud of creditors; (110 Am. St. Rep. 81, 82) on right of purchaser at execution sale to have fraudulent transfer by judgment debtor set aside.

Distinguished and limited in *Preston-Parton Mill. Co. v. Horton*, 22 Wash. 241, 79 Am. St. Rep. 928, 60 Pac. 412, denying right of judgment creditor to treat prior conveyance of debtor as fraudulent and to obtain title by execution sale under his judgment.

Levy on land fraudulently conveyed.

Cited in footnote to *Westervelt v. Hagge*, 54 L. R. A. 333, which holds lien created by attachment levied on land fraudulently conveyed by debtor.

Who can raise issue of fraud.

Cited in *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 335, 32 Pac. 92, holding property assigned for creditors not subject to attachment on ground of fraud.

Limited in *Kingman Plow Co. v. Knowlton*, 143 Iowa, 45, 119 N. W. 754, holding that a judgment creditor who has become purchaser at execution sale may proceed in equity against prior fraudulent incumbrances only in case such incumbrances diminish his right of recovery.

Necessity of possession by plaintiff in suit to quiet title.

Cited in *Batty v. Hastings*, 63 Neb. 29, 88 N. W. 139, holding right of owner in possession to have assessment removed as cloud on title not barred by limitations.

Cited in footnote to *Oppenheimer v. Levi*, 60 L. R. A. 729, which holds possession unnecessary to enable reversioner to sue, for removal of cloud, tenant acquiring tax title after agreeing to pay taxes.

Possession of other property as affecting suit to set aside fraudulent conveyance.

Cited in *Allen v. Chambers*, 18 Wash. 345, 51 Pac. 478, discussing without deciding effect of possession of sufficient other property to satisfy demand upon suit to set aside fraudulent conveyance; *Anthes v. Schroeder*, 3 Neb. (Unof.) 607, 92 N. W. 196, holding that creditor cannot question voluntary conveyance from husband to wife where husband has sufficient other property to fully secure such creditor.

Fraud as affecting bar of limitations.

Cited in *Morgan v. Morgan*, 10 Wash. 107, 38 Pac. 1054, holding action to recover realty conveyed by deed obtained through fraud, barred in three years from discovery of fraud; *Ziska v. Ziska*, 20 Okla. 641, 23 L.R.A.(N.S.) 11, 95 Pac. 254, holding statute of limitations does not begin to run on discovery of fraud where right of action has not yet accrued.

Burden of proof as to fraudulency of conveyance.

Cited in *Samuel v. Kittenger*, 6 Wash. 264, 33 Pac. 509, holding that plaintiff in action to set aside fraudulent conveyance has burden of proving fraudulent intent.

Common law as to fraudulent conveyance.

Cited in *Bates v. Drake*, 28 Wash. 455, 68 Pac. 961, holding 13 Eliz. chap. 5, making fraudulent conveyances void, common law of state; *Richards v. Redelsheimer*, 36 Wash. 328, 78 Pac. 934, holding that the common law of England as adopted by legislature in 1863 together with the English statutes in force at Declaration of Independence, is the law of the state except as modified by statute.

Action to quiet title as affected by statute of limitation.

Cited in *Cooper v. Rhea*, 82 Kan. 113, 29 L.R.A.(N.S.) 933, 136 Am. St. Rep. 100, 107 Pac. 799, 20 Ann. Cas. 42, holding statute of limitations not applicable

to right of action for removal of cloud to title; *Payne v. Anderson*, 80 Neb. 223, 114 N. W. 148, holding action to remove cloud of void tax sale may be had any time within 10 years from time of sheriff's deed.

Sufficiency of complaint to set aside fraudulent conveyance.

Cited in *McAvoy v. Jennings*, 44 Wash. 83, 87 Pac. 53, holding that complaint to set aside fraudulent composition with creditors is demurrable, where it fails to state either insolvency of debtor or execution and return of nulla bona.

Remand for new trial.

Cited in *Wright v. Suydam*, 59 Wash. 538, 110 Pac. 8, holding that case will not be remanded for new trial where it came to end when trial court disposed of it.

15 L. R. A. 792, *ROBY v. SMITH*, 131 Ind. 342, 31 Am. St. Rep. 439, 30 N. E. 1093.

Right to equal privileges and immunities.

Approved in *Shirk v. La Fayette*, 52 Fed. 858, holding statute disqualifying nonresidents as trustees in any instruments except wills, violative of right to equal privileges and immunities.

Cited in *Re Johnson*, 139 Cal. 538, 96 Am. St. Rep. 161, 73 Pac. 424, sustaining act exempting resident nephews and nieces from inheritance tax; *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223, as to constitutionality of act for registering union label.

15 L. R. A. 795, *CRANE v. ELDER*, 48 Kan. 259, 29 Pac. 151.

False representation and deceit.

Cited in *Chilson v. Houston*, 9 N. D. 503, 84 N. W. 354, holding any false representation of financial condition inducing purchase of note, actionable deceit; *Snively v. Meixsell*, 97 Ill. App. 372, holding that false statement of value relied upon is representation of fact.

Cited in footnotes to *Meyer v. Krauter*, 24 L. R. A. 575, which holds representation that horse is sound and kind no warranty against its taking fright at trolley car; *Rothmiller v. Stein*, 26 L. R. A. 148, which holds directors liable for falsely representing condition of corporation to stockholder seeking information to guide decision as to sale of stock; *National Cash Register Co. v. Townsend*, 70 L.R.A. 349, which holds false statement by one attempting to sell cash register that its use would save expense of bookkeeper and half of one clerk's time not wrong for rescission of contract.

Cited in notes (35 L.R.A. 424) on expression of opinion as fraud; (12 Eng. Rul. Cas. 297, 298) on what constitutes fraud and liability therefor.

15 L. R. A. 798, *PENNSYLVANIA CO. v. VERSTEN*, 140 Ill. 637, 30 N. E. 540.

Correct judgment not affected by erroneous reasoning.

Cited in *Smiley v. Barker*, 28 C. C. A. 13, 55 U. S. App. 125, 83 Fed. 687, holding judgment warranted by record and facts, not vitiated because based on wrong reason.

Cited in footnote to *Martin v. Evans*, 36 L. R. A. 218, which holds broad terms of decretal order dismissing bill cannot be restricted by opinion of court.

Appellate court's opinion as part of record on appeal.

Cited in *Coverdale v. Royal Arcanum*, 193 Ill. 98, 61 N. E. 915, and *Bernstein v. Roth*, 145 Ill. 191, 34 N. E. 37, holding appellate court's opinion not part of record; *Strodtmann v. Menard County*, 158 Ill. 159, 41 N. E. 778, holding that error cannot be assigned on appellate court's opinion; *Voigt v. Anglo-American*

Provision Co. 202 Ill. 465, 66 N. E. 1054, holding that error cannot be assigned on opinion, but only on judgment of appellate court; *First Nat. Bank v. Miller*, 235 Ill. 145, 85 N. E. 312; *Kehl v. Abram*, 210 Ill. 223, 102 Am. St. Rep. 158, 71 N. E. 347,—holding opinion of appellate court not subject to review.

Cited in footnote to *Phenix Ins. Co. v. Fuller*, 40 L. R. A. 408, which holds written opinion of trial court not part of record on appeal.

Cited in note (63 L.R.A. 332) on record for purpose of showing jurisdiction in Federal Supreme Court of writ of error to state court.

Propriety of instructions as to credibility.

Cited in *Dixon v. Scott*, 181 Ill. 118, 54 N. E. 897, Affirming 81 Ill. App. 370; *Thomas v. Gates*, 126 Cal. 5, 58 Pac. 315; *Rhea v. United States*, 6 Okla. 278, 50 Pac. 992; *Arnold v. Pucher*, 83 Ill. App. 184,—holding bad, instructions singling out particular witness for rule of credibility applicable to others as well; *Preston v. Moline Wagon Co.* 44 Ill. App. 344, holding erroneous, instruction as to presumption as between opposing witnesses of equal credibility; *West Chicago Street R. Co. v. Dougherty*, 64 Ill. App. 600, holding instructions directly referring to witnesses, subject to criticism; *Wicks v. Wheeler*, 157 Ill. App. 582, holding that where both parties are natural persons instruction should not be given which is directed to only one of them as interested; *Pennsylvania Co. v. Barton*, 130 Ill. App. 582, sustaining the disallowance of charge singling out the testimony of plaintiff on the ground of interest; *Kavanaugh v. Wausau*, 120 Wis. 620, 98 N. W. 550, holding that an instruction to apply the interest test to plaintiff's testimony is improperly refused where same instruction is made to include all others and plaintiff's case depends greatly on his testimony.

Distinguished in *North Chicago Street R. Co. v. Dudgeon*, 83 Ill. App. 536, and *Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 426, sustaining instruction that plaintiff's interest may bear on credibility; *Doyle v. People*, 147 Ill. 398, 35 N. E. 372, sustaining instruction singling out defendant for test of credibility where none other in like position; *Chicago & A. R. Co. v. Winters*, 175 Ill. 300, 51 N. E. 901, sustaining instruction that witnesses' relationship to parties may bear on credibility; *People v. Tuczkewitz*, 149 N. Y. 252, 43 N. E. 548, sustaining refusal to instruct in criminal cause that testimony of particular witness must be believed; *Helbig v. Citizens' Ins. Co.* 234 Ill. 258, 84 N. E. 897, holding that instruction may be given singling out plaintiff's testimony on grounds of interest.

15 L. R. A. 801, *NANCE v. BUSBY*, 91 Tenn. 303, 18 S. W. 874.

Jurisdiction in ecclesiastical matters.

Cited in *Brundage v. Deardorf*, 92 Fed. 230, holding decision of church's highest authority conclusive as to ecclesiastical law and government; *Travers v. Abbey*, 104 Tenn. 668, 51 L. R. A. 261, 58 S. W. 247, declining to review removal by church officials of pastor without contract right to salary; *Rodgers v. Burnett*, 108 Tenn. 173, 65 S. W. 408, holding decision by highest church authority as to who are members of church, final; *Pounder v. Ashe*, 44 Neb. 682, 63 N. W. 48, denying jurisdiction to review disciplinary proceedings for unorthodoxy although enjoyment of church property involved; *Smith v. Pedigo*, 145 Ind. 391, 19 L. R. A. 441, footnote p. 433, 33 N. E. 777, holding decision of association of churches to which both factions have submitted claims entitled to great weight; *Smith v. Pedigo*, 145 Ind. 406, 32 L. R. A. 843, 33 N. E. 777, sustaining on rehearing jurisdiction to determine whether expulsion was by church authority; *Hatfield v. De Long*, 156 Ind. 211, 51 L. R. A. 753, 83 Am. St. Rep. 194, 59 N. E. 483, holding inquiry whether church tribunal organized in conformity with church laws not ecclesiastical; *Hundley v. Collins*, 131 Ala. 240, 90 Am. St. Rep. 33, 32 So. 575,

holding that mandamus does not lie to restore person to membership in church; *Bennett v. Morgan*, 112 Ky. 523, 66 S. W. 287, holding courts bound by action of majority in expelling minority for departure from faith; *State ex rel. Hatfield v. Cummins*, 171 Ind. 118, 36 L.R.A.(N.S.) 951, 85 N. E. 359, holding that mandamus will not lie to compel appointment of arbiters to determining relator's right to reinstatement to church membership, no property rights being involved; *Ramsey v. Hicks*, 174 Ind. 446, 30 L.R.A.(N.S.) 673, 91 N. E. 344, holding that civil courts have no jurisdiction over ecclesiastical questions; *Reinke v. German Evangelical Lutheran Trinity Church*, 17 S. D. 266, 96 N. W. 90, holding that a church corporation composed of trustees not entirely consisting of members and having no disciplinary powers is not liable in damages for expulsion of a member of church by the congregation; *Landrith v. Hudgins*, 121 Tenn. 652, 120 S. W. 783, holding that a civil court will not review the action of an ecclesiastical court in the excommunication of members except as an incident to property rights involved; *Hendryx v. Peoples' United Church*, 42 Wash. 340, 4 L.R.A.(N.S.) 1157, 84 Pac. 1123, 7 A. & E. Ann. Cas. 764, holding that in cases of fraudulent expulsion for membership in order to divert the property from its religious purpose civil courts will interfere.

Cited in notes (49 L.R.A. 384, 386, 392, 397, 398) on conclusiveness of decisions of associations or corporations; (4 L.R.A.(N.S.) 1155) on review by civil courts of expulsion of member of religious society; (24 L.R.A.(N.S.) 693, 700, 705) on litigation growing out of schism in religious society.

Distinguished in *Poynter v. Phelps*, 129 Ky. 393, 24 L.R.A.(N.S.) 735, 111 S. W. 699, holding that in case of a schism or division of congregation neither faction wishing to withdraw, the civil courts, where there is no ecclesiastical court, will let each party use the church for divine worship, the use being apportioned to membership.

15 L. R. A. 809, OPINION OF JUSTICES, 155 Mass. 598, 30 N. E. 1142.

What constitutes public purpose or service.

Cited in *Sutherland-Innes Co. v. Evart*, 30 C. C. A. 310, 58 U. S. App. 335, 86 Fed. 602, holding city's contract to encourage local private manufacturing plant, not for public purpose; *Prince v. Crocker*, 166 Mass. 361, 32 L. R. A. 612, 44 N. E. 446, holding taxation for building street car subway, for public use; *Re Municipal Fuel Plants*, 182 Mass. 606, 60 L.R.A. 592, and footnote, 66 N. E. 25, denying power of legislature to empower city to buy and sell fuel in competition with individuals except in case of great scarcity; *Scott v. Laporte*, 162 Ind. 48, 68 N. E. 278, holding that a pledge of a city's taxing power to back a private water company is ultra vires and taxation for a private purpose; Opinion of the Justices, 190 Mass. 613, holding that an appropriation from state treasury to equalize the bounty paid to soldiers of the civil war by giving to them further compensation, to equal the amount received by other soldiers of other places is for a private purpose; Opinion of Justices, 204 Mass. 611, 27 L.R.A.(N.S.) 485, 91 N. E. 405, holding that a taking by eminent domain of private property on which to construct warehouses to rent to private persons is a taking for a private purpose; *Canaan v. Enfield Village Fire Dist.* 74 N. H. 531, 70 Atl. 250, holding that the property of a fire district situated outside of the district is exempt from taxation as being used for a public purpose.

Cited in note (31 L.R.A.(N.S.) 119) on right of municipality to engage in enterprises of private character.

15 L. R. A. 813, *WHITNEY v. KELLEY*, 94 Cal. 146, 28 Am. St. Rep. 106, 29 Pac. 624.

Who may sue to set aside judgment.

Cited in *Ready v. Smith*, 170 Mo. 175, 70 S. W. 484, holding that fraud against debtor cannot be available to his creditors to set aside the transaction.

Cited in notes (54 L.R.A. 767) on who may sue or take other proceedings to set aside judgments against other parties; (60 Am. St. Rep. 638) on vacation of judgments on motion by assignees when not specially authorized by statute.

Assignability of action for fraud.

Cited in *Smith v. Pacific Bank*, 137 Cal. 368, 70 Pac. 184, and *Archer v. Freeman*, 124 Cal. 532, 57 Pac. 474, denying assignability of right of action for fraud alone; *Billingsley v. Clelland*, 41 W. Va. 259, 23 S. E. 812, holding that assignment of promissory notes includes right to attack fraudulent conveyance.

Cited in footnote to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded.

Distinguished in *Emmons v. Barton*, 109 Cal. 666, 42 Pac. 303, holding right to sue for fraud assignable with subsisting property right.

Bill of review for new trial.

Cited in *Steen v. March*, 132 Cal. 618, 64 Pac. 994, holding that bill of review for new trial does not lie after time for prosecution of appeal or error.

Sufficiency of bill to set aside judgment for fraud.

Cited in *Bell v. Thompson*, 147 Cal. 693, 82 Pac. 327, holding that in order to set aside fraudulent foreclosure the person so seeking must aver that a good defense to such foreclosure on the merits was available and must set up facts establishing such defense; *Bailey v. Ætna Indemnity Co.* 5 Cal. App. 747, 91 Pac. 416, holding that party sued on default of another by fraudulent judgment against that other setting up such fraud as defense must besides averring the fraud, set up facts constituting it and show that a defense against such fraudulent action was available but was suppressed.

Substantial right as ground for equity.

Cited in *Hite v. Mercantile Trust Co.* 156 Cal. 768, 106 Pac. 102, holding that divorce judgment will not be set aside to affect wife's property interest in former husband's estate where she has by valid agreement released all such interests.

15 L. R. A. 818, *SCHUBERT v. J. R. CLARK CO.* 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103.

Liability for injury to third persons.

Cited in *Ella v. Boyce*, 112 Mich. 558, 70 N. W. 1106, holding vessel owner liable for negligently stretching hauser across tramway causing injury to driver; *Tomlinson v. Armour & Co.* 75 N. J. L. 761, 19 L.R.A.(N.S.) 937, 70 Atl. 314, holding canner liable to consumer for injury from poisoned food; *Evans v. Chicago & N. W. R. Co.* 109 Minn. 75, 26 L.R.A.(N.S.) 284, 122 N. W. 876, holding railroad delivering diseased horse to owner without statutory inspection liable to owner's vendee for damages from killing of horse by sanitary board; *O'Brien v. American Bridge Co.* 110 Minn. 371, 32 L.R.A.(N.S.) 984, 136 Am. St. Rep. 503, 125 N. W. 1012, holding bridge company liable for injury to traveler from collapse of bridge; *Leas v. Continental Fruit Express*, 45 Tex. Civ. App. 166, 99 S. W. 859, holding that car manufacturer is responsible to employees of railroad for injuries resulting from either defective original construction or negligent maintenance; *Continental Fruit Express v. Leas*, 50 Tex. Civ. App. 593, 110 S. W. 129, holding that one who knowingly furnishes defective cars to railroad

is liable for injury resulting to employee of railroad because of defect; *Keep v. National Tube Co.* 154 Fed. 130; *Weiser v. Holzman*, 33 Wash. 92, 99 Am. St. Rep. 932, 73 Pac. 797; *Clement v. Crosby & Co.* 148 Mich. 297, 10 L.R.A.(N.S.) 590, 111 N. W. 745, 12 A. & E. Ann. Cas. 265, holding one who carelessly places a dangerous article on the market liable for injuries to third persons; *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 63, 89 S. W. 330; *Morrison v. Lee*, 16 N. D. 384, 13 L.R.A.(N.S.) 655, 113 N. W. 1025,—as to liability for placing dangerous thing in market.

Cited in footnotes to *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 117, which holds one contracting with owner to heat portion of building retained, liable to tenants of lower floor for injury by freezing and bursting of water pipes designed for their protection from fire; *Woodward v. Miller*, 64 L.R.A. 932, which holds manufacturer of a buggy which he knows to be defective who sells it to a municipality for use by an employee, liable for injuries caused by such defect; *Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 924, which holds seller of sidesaddle to husband under no duty to wife for whose use he knows it to have been purchased so as to render him liable to her for negligence in its construction.

Cited in notes (26 L.R.A. 506) on liability of contractor to third persons for defects in his work after completion and acceptance; (111 Am. St. Rep. 706, 710, 711) on manufacturer's liability to third persons; (100 Am. St. Rep. 195) on right to recover for negligence in absence of privity; (130 Am. St. Rep. 46) on liability of railroad company for injuries or losses due to operation of cars not owned by it.

Distinguished in *Salmon v. Libby*, 114 Ill. App. 267; *Hiendirk v. Louisville Elevator Co.* 122 Ky. 680, 5 L.R.A.(N.S.) 1105, 92 S. W. 608; *O'Neill v. James*, 138 Mich. 574, 68 L.R.A. 346, footnote p. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 A. & E. Ann. Cas. 177, holding where no contractual relations exists between seller of an article harmless in itself there must be knowledge of the danger before the seller can be held liable.

— By machinery.

Cited in *Lewis v. Terry*, 111 Cal. 44, 31 L. R. A. 221, footnote p. 220, 52 Am. St. Rep. 146, 43 Pac. 398, holding seller of folding bed liable for injuries to any person using it; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 307, footnote p. 303, 57 C. C. A. 241, 120 Fed. 869, which holds manufacturer supplying dangerous machine to another without notice of dangerous character, liable for injury to vendee's employee; *Empire Laundry Machinery Co. v. Brady*, 164 Ill. 63, 45 N. E. 486, holding manufacturer of machinery readjusting same in purchasers shop, liable for injury of latter's employee from negligent fastening; *Wolden v. Deering*, 105 Minn. 262, 117 N. W. 493, holding evidence failed to show machine in defective condition when sold; *Pierce v. C. H. Bidwell Thresher Co.* 153 Mich. 327, 116 N. W. 1104, holding the manufacturer having knowledge of the manner of construction and the uses to which machine was to be put, the question as to whether he had a full appreciation of danger was at least question for jury.

Cited in footnotes to *Tyler v. Moody*, 54 L. R. A. 417, which denies necessity of alleging knowledge of falsity of warranty of safety of acetylene gas machine in action for breach; *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency making owner of pleasure resort liable for owner's negligence.

Distinguished in *McCaffery v. Mossberg & G. Mfg. Co.* 23 R. I. 385, 55 L.R.A. 824, footnote p. 822, 91 Am. St. Rep. 637, 50 Atl. 651, denying liability of manu-

facturer of drop press for injury to employee of purchaser from breaking of defective hook; *Woodward v. Miller*, 119 Ga. 620, 64 L.R.A. 934, 46 S. E. 847, holding manufacturer selling buggy, which he knows is unsafe liable to one injured.

Disapproved in *Kuelling v. Roderick Lean Mfg. Co.* 88 App. Div. 319, 84 N. Y. Supp. 622, denying manufacturer's liability to one purchasing land roller from dealer and injured by reason of defective construction.

— **By drugs and illuminants.**

Cited in *Peters v. Johnson*, 50 W. Va. 650, 57 L. R. A. 431, footnote p. 428, 88 Am. St. Rep. 909, 41 S. E. 190, holding one mistakenly selling poisonous drug for harmless medicine liable to third person taking it; *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 512, 60 S. W. 453, holding seller of gasoline giving no notice of danger, liable for injury to purchaser's employee.

Cited in footnotes to *Ives v. Welden*, 54 L. R. A. 854, which holds that merchant's failure to label gasoline renders him liable for injury to member of purchaser's family by explosion; *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas companies insuring reasonable promptness in detecting leaks.

Distinguished in *Gibson v. Torbet*, 115 Iowa, 167, 56 L.R.A. 100, 91 Am. St. Rep. 147, 88 N. W. 443, holding druggist not liable for injury from article sold without instructions for handling.

— **By contagion.**

Cited in footnotes to *State use of Hartlove v. Fox*, 24 L.R.A. 679, which holds seller of horse with contagious disease liable for death of one contracting disease while in charge of horse; *Skinn v. Reutter*, 63 L.R.A. 743, which holds seller of diseased hogs liable for injury to life or property resulting therefrom.

Liability of master for torts of servant.

Cited in *Crandall v. Boutell*, 95 Minn. 116, 103 N. W. 890, 5 A. & E. Ann. Cas. 122, holding him responsible for negligent conduct of his servants in furtherance of his business and within the line of their duty although in excess of express instructions.

15 L. R. A. 821, *HEIZER v. KINGSLAND & D. MFG. CO.* 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630.

Actionable negligence.

Cited in *Shaw v. Goldman*, 116 Mo. App. 338, 92 S. W. 165, setting forth elements of actionable negligence as the existence of a duty, breach thereof and resulting injury to person to whom duty is owed; *Leas v. Continental Fruit Express*, 45 Tex. Civ. App. 167, 99 S. W. 859, holding car company liable to employee of railroad using its cars where a car is furnished having a defective handhold which it is the duty of such company to keep in repair.

Liability for injury to third party.

Cited in *Daugherty v. Herzog*, 145 Ind. 261, 32 L. R. A. 838, 57 Am. St. Rep. 204, 44 N. E. 457, holding builder not liable to third person killed by falling of building after completion and acceptance by owner; *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 448, 59 L. R. A. 715, 93 Am. St. Rep. 287, 70 Pac. 358, holding railway not liable for injury to employee of connecting line receiving and inspecting car; *Salmon v. Libby*, 114 Ill. App. 269, holding manufacturer of mince-meat not liable to person poisoned by eating pie made therefrom purchased from customer of retail dealer.

Cited in footnotes to *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which holds

gas company permitting leak to exist in pipes, liable to householder for damages from explosion caused by lighted match of third party; State use of Hartlove v. Fox, 24 L. R. A. 679, which holds seller of horse with contagious disease liable for death of one contracting disease while in charge of horse; Pittsfield Cotton-wear Mfg. Co. v. Pittsfield Shoe Co. 60 L. R. A. 117, which holds one contracting with owner to heat portion of building retained, liable to tenants of lower floor for injury by freezing and bursting of water pipes designed for their protection from fire; Skinn v. Reutter, 63 L.R.A. 743, which holds seller of diseased hogs liable for injury to life or property resulting therefrom.

Cited in notes (46 L.R.A. 44, 46, 116, 118) on right of servant to recover damages from persons other than his master for injuries received in performance of duties; (2 L.R.A.(N.S.) 303) on liability of manufacturer or vendor for injuries from defect to third parties; (19 L.R.A.(N.S.) 927) on liability of manufacture, packer, or vendor to persons not in privity of contract, for injury from defects in article.

Distinguished in Sykes v. St. Louis & S. F. R. Co. 88 Mo. App. 205, holding railroad liable to employee of shipper for failure to reasonably inspect car from connecting line; O'Brien v. American Bridge Co. 110 Minn. 374, 32 L.R.A.(N.S.) 986, 136 Am. St. Rep. 503, 125 N. W. 1012, holding contractor liable to third person injured because of faulty construction of bridge such faults being known by contractor when he turned it over as finished.

— **Knowledge and concealment of danger in thing sold.**

Cited in Laudeman v. Russell, 46 Ind. App. 38, 91 N. E. 822, holding that in order to make vendor liable, who sells article not in itself of imminently dangerous character, it must be averred that he had actual knowledge of danger; Simons v. Gregory, 120 Ky. 124, 85 S. W. 751, on liability for injury to third person for sale of a dangerous thing with a concealment of the danger; Casey v. Wrought Iron Bridge Co. 114 Mo. App. 63, 89 S. W. 330, holding contractor liable for injury to third person after acceptance of bridge by authorities where the bridge as constructed is imminently dangerous and its defects carefully concealed by contractor; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 86, 2 L.R.A. (N.S.) 307, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 A. & E. Ann. Cas. 124, holding fraudulent concealment of defect and misrepresentation of property sold causing injury to a third person is actionable as against such vendor; Pennsylvania Steel Co. v. Elmore & H. Contracting Co. 175 Fed. 183, holding subcontractor liable to another independent subcontractor for knowingly turning over defective piers as finished knowing at the time that plaintiff would use the piers to put on superstructure and that damage would be caused.

Cited in footnotes to Bragdon v. Perkins-Campbell Co. 66 L.R.A. 924, which holds seller of sidesaddle to husband under no duty to wife for whose use he knows it to have been purchased so as to render him liable to her for negligence in its construction; O'Neill v. James, 68 L.R.A. 342, which denies liability of manufacturer of champagne cider for injuries to employee of customer through explosion of bottle not known to be peculiarly liable thereto.

Distinguished in McNamara v. Boston & M. R. Co. 202 Mass. 500, 89 N. E. 131, holding company consigning a car for delivery having a defective roof, not liable for injury to third person even though it had knowledge of defect where injury occurred after delivery and while delivering company was wrongfully using the car.

— **By gasoline.**

Cited in Waters Pierce Oil Co. v. Davis, 24 Tex. Civ. App. 512, 60 S. W. 453, holding manufacturer of gasoline selling without notice of danger, liable for injury to purchaser's employee.

Cited in footnote to *Ives v. Welden*, 54 L. R. A. 854, which holds merchant's failure to label gasoline renders him liable for injury to member of purchaser's family by explosion.

Distinguished in *Young v. Waters-Pierce Oil Co.* 185 Mo. 658, 84 S. W. 929, holding that the negligent construction of a stand pipe near track under contract with railway company such negligence causing death of employee of railway is actionable defendant having been warned to move it further from the track.

— **By machinery.**

Cited in *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 387, 55 L. R. A. 825, footnote p. 822, 91 Am. St. Rep. 637, 50 Atl. 651, denying liability of manufacturer of drop press for injury to employee of purchaser from breaking of defective hook; *Southern Oil Co. v. Church*, 32 Tex. Civ. App. 327, 74 S. W. 797, holding defendant not liable to employee of person to whom it furnished defective machinery in the absence of proof that it was imminently dangerous or that defendant wilfully caused the injury.

Cited in footnotes to *Tyler v. Moody*, 54 L. R. A. 417, which denies necessity of alleging knowledge of falsity of warranty of safety of acetylene gas machine in action for breach; *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency making owner of pleasure resort liable for owner's negligence; *Schubert v. J. R. Clark Co.* 15 L. R. A. 818, which holds manufacturer of stepladder from poor materials liable for injury to any person using it; *Woodward v. Miller*, 64 L. R. A. 932, holding manufacturer selling buggy which he knows is unsafe, liable to one injured.

Distinguished in *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 307, footnote p. 303, 57 C. C. A. 240, 120 Fed. 868, holding manufacturer supplying dangerous machine to another without notice of dangerous character, liable for injury to vendee's employee; *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App. 384, holding manufacturer liable for negligent fastening of machine to purchaser's servants assisting in readjusting same; *Lewis v. Terry*, 111 Cal. 44, 31 L. R. A. 221, footnote p. 220, 52 Am. St. Rep. 146, 43 Pac. 398, holding seller of folding bed liable for injuries to any person using it, caused by defects therein.

— **By drugs.**

Cited in *Darks v. Scudder-Gale Grocer Co.* 146 Mo. App. 258, 130 S. W. 430, holding that manufacturer will be held liable to one injured by poison sold by him for harmless compound provided injury was direct, natural and probable consequence of negligence of manufacturer.

Distinguished in *Peters v. Johnson*, 50 W. Va. 651, 57 L. R. A. 431, footnote p. 428, 88 Am. St. Rep. 909, 41 S. E. 428, holding one mistakenly selling poisonous drug for harmless medicine liable to third person taking it.

15 L. R. A. 825, *UNDERWOOD v. WOOD*, 93 Ky. 177, 19 S. W. 405.

Unlawful disposition of public school funds.

Cited in *Board of Education v. Public Library*, 113 Ky. 243, 68 S. W. 10, denying right to use tax collected for school purposes to maintain public library; *School Dist. v. Bryan*, 51 Wash. 506, 20 L.R.A.(N.S.) 1036, 99 Pac. 28, holding an appropriation of common school fund to maintain a model training school to be an unlawful disposition.

Cited in footnote to *Jefferson County v. Grafton*, 36 L. R. A. 798, which holds unauthorized sale of academy by county to presbytery, void.

Curative effect of appearance and plea.

Cited in *Hutchins v. Munn*, 28 App. D. C. 277, holding that want or insufficiency

of service of process in an action for injunction is cured by appearance and plea of defendant.

15 L. R. A. 828, COVINGTON & C. BRIDGE CO. v. SOUTH COVINGTON & C. STREET R. CO. 93 Ky. 136, 19 S. W. 403.

Right of electric railway on toll bridge.

Cited in footnote to Pittsburgh & W. E. Pass. R. Co. v. Point Bridge Co. 26 L. R. A. 323, which upholds electric railway company's right to cross public toll bridge.

15 L. R. A. 830, ANDERTON v. MILWAUKEE, 82 Wis. 279, 52 N. W. 95.

Title of local act.

Distinguished in Re Southern Wisconsin Power Co. 140 Wis. 249, 122 N. W. 801, holding that a local act empowering construction of dam over Wisconsin river is sufficiently localized in its title though the particular place of dam is not specified therein.

What acts are local.

Cited in Milwaukee County v. Isenring, 109 Wis. 17, 53 L. R. A. 640, 85 N. W. 131, discussing but not deciding whether act making offices in single county salaried, is local.

Right to equal privileges.

Cited in State *ex rel.* Kellogg v. Currens, 111 Wis. 435, 56 L. R. A. 255, 87 N. W. 561, sustaining requirement of passing of examination before licensing of foreign graduate as medical practitioner.

— Classification.

Cited in Phipps v. Wisconsin C. R. Co. 133 Wis. 157, 113 N. W. 456, holding act void as denial of equal remedy of the law unless based on a reasonable classification with regard to rules bearing a just relation to the act in respect to which the classification is made.

15 L. R. A. 832, STATE *ex rel.* WALDEN v. VANOSDAL, 131 Ind. 388, 31 N. E. 79.

Transaction of business by public bodies.

Cited in Wampler v. State, 148 Ind. 571, 38 L. R. A. 833, 47 N. E. 1068, holding that three of four township trustees constitute quorum for election of officer; Com. *ex rel.* Curren v. Schubmehl, 19 Pa. Co. Ct. 479, 13 Montg. Co. L. Rep. 157, 3 Lack. Legal News, 186, sustaining election by six of nine members present out of membership of twelve; Re Denny, 156 Ind. 151, 51 L. R. A. 739, 59 N. E. 359 (dissenting opinion), majority holding provision requiring votes of majority of electors, refers to all electors participating in such election; Murdock v. Strange, 99 Md. 112, 57 Atl. 628, 3 A. & E. Ann. Cas. 66, holding that four votes out of eight where one is blank, is a majority in an appointment by city council of fixed membership.

Cited in footnotes to Pollasky v. Schmid, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant; Wooster v. Mullins, 25 L. R. A. 694, which authorizes casting vote by mayor where three newspapers each receive votes of four aldermen; Zeiler v. Central R. Co. 34 L. R. A. 469, which requires only two thirds of members voting to dispense with reading of proposed city ordinances; Board of Education v. Best, 27 L. R. A. 78, which holds mandatory provision for requiring yeas and nays on motion to employ teacher; State *ex rel.* Childs v. Kiichli, 19 L. R. A. 779, which holds president of city council removable at pleasure.

— **Quorum; withdrawal of members present.**

Cited in *Com. v. King*, 34 Pa. Co. Ct. 235, 17 Pa. Dist. R. 787, on withdrawal of members present as affecting a quorum to do public business.

Validity of act performed subsequent to day specified by law.

Cited in *Wampler v. State*, 148 Ind. 567, 38 L. R. A. 832, 47 N. E. 1068, denying that failure to get quorum of township trustees at statutory date for specified act, precludes valid action at subsequent date; *Featherngill v. State*, 33 Ind. App. 686, 72 N. E. 181, holding appointment of truant officer subsequent to day set by statute is not void the provision being directory only.

15 L. R. A. 834, *GRAVES v. JOHNSON*, 156 Mass. 211, 32 Am. St. Rep. 446, 30 N. E. 818.

Sales of property for unlawful use and illegal contracts.

Cited in *C. F. Jewett Pub. Co. v. Butler*, 159 Mass. 520, 22 L. R. A. 255, 34 N. E. 1087, holding writer's contract with publisher to be responsible for libelous matter published, not prima facie unlawful; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 674, 51 L. R. A. 891, footnote p. 889, 79 Am. St. Rep. 960, 62 Pac. 145, denying right of one retaining title of goods sold for use in house of ill fame, to recover possession from purchaser at execution sale against vendees.

Cited in footnotes to *581 Diamonds v. United States*, 60 L. R. A. 595, which authorizes forfeiture of goods for attempted smuggling; *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday.

Cited in notes (117 Am. St. Rep. 510), on contracts, consideration for which has partly failed, or is partly illegal; (6 Eng. Rul. Cas. 337) on invalidity of illegal or immoral contract.

— **Intoxicants.**

Cited in *Knowlton v. Doherty*, 87 Me. 521, 47 Am. St. Rep. 349, 33 Atl. 18, denying right of action for price of intoxicants bought in another state for illegal resale; *Wasserboehr v. Morgan*, 168 Mass. 295, 47 N. E. 126, holding court authorized to infer from the evidence that wholesaler selling liquor to forbidden persons knew it was intended for illegal resale; *Fuller v. Hunt*, 182 Mass. 301, 65 N. E. 390, holding recovery for sale of liquors to one without license defeated by vendor's knowledge of latter's intention to resell; *Bollinger v. Wilson*, 76 Minn. 267, 77 Am. St. Rep. 646, 79 N. W. 109, discussing, without deciding, question whether sale of intoxicants for illegal resale defeats action for price; *Corbin v. Houlehan*, 100 Me. 253, 70 L.R.A. 571, 61 Atl. 131, holding that the local courts will not enforce a contract of sale of liquor lawful at place of contract but made and furthered by vendor with view to break the local liquor law; *Mitchell v. Branhams*, 104 Mo. App. 489, 79 S. W. 739, holding that vendee of a saloon operating unlawfully under vendor's license cannot recover for damages sustained by breach of agreement not to re-enter business by vendor for the period during which vendee operated saloon unlawfully; *Sawyer v. Sanderson*, 113 Mo. App. 248, 88 S. W. 151, holding note given by vendee of saloon business, including license with provision that saloon be run under vendor's name, void and uncollectable as being in consideration of an unlawful sale.

Annotation cited in *Frankel v. Hiller*, 16 N. D. 396, 113 N. W. 1067, 15 A. & E. Ann. Cas. 265, holding that mere knowledge without assisting act on part of vendor that vendee intends to break the law of another state by resale of liquor is no defense to action for price.

Cited in footnote to *Storz v. Finkelstein*, 30 L. R. A. 644, which denies right

to recover purchase price of beer sold under arrangement contemplating illegal resale.

Cited in note (61 L. R. A. 429-432) on conflict of laws as to sales of intoxicating liquors.

Distinguished on second appeal in 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383, holding that seller of intoxicants in regular course of lawful business may recover from purchaser illegally selling same.

— **Gambling; lottery.**

Cited in *Kuhl v. M. Gally Universal Press Co.* 123 Ala. 457, 82 Am. St. Rep. 135, 26 So. 535, denying right of recovery on notes for price of slot machines.

Cited in footnotes to *Martin v. Richardson*, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to proceeds from one fraudulently obtaining it after prize drawn; *White v. Wilson*, 37 L. R. A. 197, which denies right of member of club, sharing in winnings of gambling, to recover on note for money loaned for use in game; *Olson v. Sawyer Goodman Co.* 53 L. R. A. 648, which holds void, agreement to debit and credit on accounts due employees, their winnings at card games with each other; *Appleton v. Maxwell*, 55 L. R. A. 93, which denies right of action for money loaned to be used in gambling; *State ex rel. Sheets v. Interstate Sav. Invest. Co.* 52 L. R. A. 530, which holds contracts of investment securities, etc., capable, by certain device of redemption before accumulation, in reserve fund, of credit equal to stipulated endowment value, illegal.

Breach of contracts against public policy.

Cited in *Grover v. Zook*, 44 Wash. 504, 7 L.R.A.(N.S.) 592, 87 Pac. 638, 12 A. & E. Ann. Cas. 192, holding that defendant cannot be held responsible for refusing to carry out agreement to marry person afflicted with tuberculosis though he knew of her condition before promise.

What law governs.

Cited in *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 613, 47 L. ed. 331, 23 Sup. Ct. Rep. 206, holding that Wisconsin statutes govern building contract executed and to be performed in that state; *Alton v. First Nat. Bank*, 157 Mass. 345, 18 L. R. A. 146, 34 Am. St. Rep. 285, 32 N. E. 228, discussing, but not deciding, question whether liability of party to foreign contract, measured by *lex fori* governing validity of same; *P. Schoenhofen Brewing Co. v. Whipple*, 2 Neb. (Unof.) 709, 89 N. W. 751, stating modification to the rule that law of place of sale of intoxicating liquor governs as to its legality.

Cited in note (55 Am. St. Rep. 779) on enforcement of contract outside of jurisdiction where made.

15 L. R. A. 839, *COM. v. HUNTLEY*, 156 Mass. 236, 30 N. E. 1127.

Oleomargarine; pure food acts.

Approved in *Cook v. State*, 110 Ala. 47, 20 So. 360, sustaining validity of act to prevent deception in manufacture and sale of imitation butter; *State v. Rogers*, 95 Me. 100, 85 Am. St. Rep. 395, 49 Atl. 564, and *Com. v. Vandyke*, 9 Pa. Dist. R. 43, holding state regulation of manufacture and sale of oleomargarine, butterine, etc., no infringement of commerce clause; *State v. Rogers*, 95 Me. 99, 85 Am. St. Rep. 395, 49 Atl. 564, holding property rights not invaded by prohibition of oleomargarine and butterine in simulation of butter; *State v. Layton*, 160 Mo. 495, 62 L. R. A. 170, 83 Am. St. Rep. 487, 61 S. W. 171, sustaining act to suppress a baking powder in general use but of questionable wholesomeness.

Cited in *Com. v. Crane*, 162 Mass. 507, 39 N. E. 187, holding all kinds of oleomargarine within statute as to peddling of substances in imitation or semblance of pure butter; *Com. v. Kelly*, 163 Mass. 169, 39 N. E. 776, and *Com. v. Russell*,

162 Mass. 521, 39 N. E. 110, holding only uncolored oleomargarine saved from provisions preventing manufacture and sale of imitation butter; *Com. v. Ryberg*, 177 Mass. 68, 58 N. E. 155, denying applicability to specimens taken under act, as to manufacture and sale of imitation butter, of earlier act relative to inspection and sale of milk and butter; *State v. Armour Packing Co.* 124 Iowa, 329, 100 N. W. 59, 2 A. & E. Ann. Cas. 448, holding legislative restriction on manufacture and sale of butter imitations in effect prohibiting their sale constitutional; *People v. Freeman*, 242 Ill. 379, 90 N. E. 366, 17 A. & E. Ann. Cas. 1098, holding statutory prohibition against use of coloring in imitations of butter a valid exercise of police power and not denial of equal protection though its use is allowed in real butter.

Cited in footnotes to *State ex rel. Monnett v. Capital City Dairy Co.* 57 L. R. A. 181, which sustains statute forbidding sale of unmarked oleomargarine; *State v. Myers*, 35 L. R. A. 844, which sustains statute requiring oleomargarine and artificial butter to be colored pink; *Frost v. Chicago*, 49 L. R. A. 657, which holds void, ordinance prohibiting colored netting over package of fruit, etc.; *State v. Hanson*, 54 L. R. A. 468, which holds sale of unlabeled cottolene forbidden by statute against selling unlabeled imitation of lard; *Re Sanders*, 18 L. R. A. 550, which holds void, as to original packages, act requiring marking on package of year in which seed grown; *State v. Layton*, 62 L. R. A. 164, sustaining statute prohibiting manufacture or sale of baking powder containing alum.

Cited in notes (78 Am. St. Rep. 257, 258; 85 Am. St. Rep. 402, 403) on oleomargarine and right of states to regulate manufacture and sale thereof.

Regulations of trade or business.

Cited in *Com. v. Wheeler*, 205 Mass. 387, 137 Am. St. Rep. 456, 91 N. E. 415, 18 Ann. Cas. 319, holding that statute making it crime to sell milk not of standard quality, is constitutional; *State v. Earl*, 152 Mo. App. 238, 133 S. W. 402, holding that statute prohibiting coloring or flavoring of vinegar is valid exercise of police power; *John P. Squire & Co. v. Tellier*, 185 Mass. 20, 102 Am. St. Rep. 322, 69 N. E. 312, holding that the legislature may require conditions to the sale of stock in bulk for the protection of creditors of vendor; *Atty. Gen. v. Preferred Mercantile Co.* 187 Mass. 521, 73 N. E. 669, holding a statute prohibiting the sale of bonds or obligations of any kind redeemable in numerical or any arbitrary order to be a valid exercise of the police power; *Com. v. R. I. Sherman Mfg. Co.* 189 Mass. 81, 75 N. E. 71, 4 A. & E. Ann. Cas. 268, holding statute forbidding the use of the arms and seal of the commonwealth for advertising or commercial purpose not to conflict with congressional regulation of interstate commerce; *Com. v. Strauss*, 191 Mass. 554, 11 L.R.A.(N.S.) 973, 78 N. E. 136, 6 A. & E. Ann. Cas. 842, upholding act forbidding contracts that purchaser of goods for resale shall sell none but seller's product.

Cited in footnote to *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food whereby damage or inferiority is concealed.

Cited in notes (40 L.R.A.(N.S.) 881) on police regulations as to branding or labeling articles of commerce; (27 Am. St. Rep. 565; 78 Am. St. Rep. 251) on state regulation of interstate commerce.

Repeals by implication.

Approved in *Montgomery v. National Bldg. & L. Asso.* 108 Ala. 344, 18 So. 816, denying repeal by implication in case of two acts on same subject passed at same session of legislature.

Cited in *Galpin v. Chicago*, 159 Ill. App. 185, holding that statutes passed on same day and to take effect at same time will be assumed to have been enacted at

same time and are to be construed as one act; *Guthrie v. Sparks*, 65 C. C. A. 427, 131 Fed. 449, holding special statute not repealed by subsequent general statute both capable of standing alone and both before the legislature for revision and placed in the same chapter of revision.

Cited in note (88 Am. St. Rep. 290) on implied repeal of statutes.

Determination of constitutionality on habeas corpus.

Cited in *Ex parte Tani*, 29 Nev. 395, 13 L.R.A.(N.S.) 522, 91 Pac. 137, on raising question of constitutionality of statute in habeas corpus proceedings for determination; *Ex parte Hollman*, 79 S. C. 28, 21 L.R.A.(N.S.) 252, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105 (partial dissenting opinion), on relief from unconstitutional statute by habeas corpus.

Distinguished in *Re Bishop*, 172 Mass. 37, 51 N. E. 191, holding questions of constitutionality not to be considered on habeas corpus for error in regard to punishment.

Bringing question before full court.

Cited in *King's Case*, 161 Mass. 50, 36 N. E. 685, holding that justice may reserve or report to full court questions of law on habeas corpus.

15 L. R. A. 847, *WELLS v. MISSOURI P. R. CO.* 110 Mo. 286, 19 S. W. 530.

Scope of extraordinary sessions of legislature.

Followed in *Bowen v. Missouri P. R. Co.* 118 Mo. 545, 24 S. W. 436, holding act upon subject not designated in call for special session, void.

Cited in *Re Governor's Proclamation*, 19 Colo. 337, 35 Pac. 530, holding special session limited to subjects specified in proclamation; *Denver & R. G. R. Co. v. Moss*, 50 Colo. 291, 115 Pac. 696, holding that proclamation for special session naming for purpose of session "to enact any and all legislation relating to, or in anywise affecting corporations both foreign and domestic of quasi public nature" is too indefinite; *State v. Rawlings*, 232 Mo. 560, 134 S. W. 530, holding that recommendation in message upon convening special session of general assembly of "effective local option laws for counties, towns and cities" was ample authority for passage of county option law; *Newlin v. St. Louis & S. F. R. Co.* 222 Mo. 392, 121 S. W. 125; *Hufft v. St. Louis & S. F. R. Co.* 222 Mo. 299, 121 S. W. 120,—on the invalidity of a statute passed in special session on a subject other than is specially designated in the proclamation calling for such session; *Fayette County v. County Comrs.* 18 Pa. Dist. R. 222, 35 Pa. Co. Ct. 408, holding that constitutional provision limiting scope of legislation in special session to matter specifically designated in proclamation, is mandatory.

Cited in footnote to *Farrelly v. Cole*, 44 L. R. A. 464, which sustains extraordinary call of legislature by governor

Cited in note (40 L.R.A.(N.S.) 27, 28) on conclusiveness of enrolled bill passed at special session not within scope of proclamation.

Distinguished in *Chicago, B. & Q. R. Co. v. Wolfe*, 61 Neb. 506, 86 N. W. 441, holding act defining duties and liabilities of railroads within call of special session to revise or amend general incorporation law; *State v. Fair*, 35 Wash. 131, 102 Am. St. Rep. 897, 76 Pac. 731, holding act upon subject not designated in call for special session, valid where constitution does not restrict action to matter designated.

Enforcement of mandates of Constitution.

Cited in *McGrew v. Missouri P. R. Co.* 230 Mo. 536, 132 S. W. 1076, to the point that mandates of constitution should be regarded by courts as sacred, and should be enforced with strictness.

15 L. R. A. 850, *RICH v. SOWLES*, 64 Vt. 408, 23 Atl. 723.

Liability for debt created by executor or administrator.

Cited in *Rickel v. Chicago*, R. I. & P. R. Co. 112 Iowa, 152, 83 N. W. 957, and *Yeakle v. Priest*, 61 Mo. App. 49, denying estate's liability at law for administrator's contract for services; *Valley Nat. Bank v. Crosby*, 108 Iowa, 653, 79 N. W. 383, holding that administrator cannot bind estate by note except as provided by law; *Scott v. Newell*, 69 W. Va. 121, 70 S. E. 1092, to the point that trustee who has not power to bind trust estate by contract, may make such contract in his representative capacity, as will bind him personally; *Hayes v. Shirk*, 167 Ind. 579, 78 N. E. 653, holding contract of executor respecting realty of testator void as to the estate but binding on maker; *Painter v. Kaiser*, 27 Nev. 431, 65 L.R.A. 675, 103 Am. St. Rep. 772, 76 Pac. 747, 1 A. & E. Ann. Cas. 765, holding person making promise of certain payment to heirs if he become administrator is individually liable to such heirs on the executory promise on his becoming administrator; *Reynolds-McGinness Co. v. Green*, 78 Vt. 31, 61 Atl. 556, holding executor individually liable on contract for services for benefit of estate, where he fails to limit his liability.

Cited in footnotes to *Grafton Nat. Bank v. Wing*, 43 L. R. A. 831, which denies personal liability of executor indorsing paper in name of estate describing himself as executor; *Germania Bank v. Michaud*, 30 L. R. A. 286, which denies personal liability of administrator to payee on note given in name of estate; *Bauerle v. Long*, 52 L. R. A. 643, which denies power of executors under will to bind estate by warranty deed of land; *Painter v. Kaiser*, 65 L.R.A. 672, which holds contract by executrix to distribute money as fast as a certain sum is accumulated in consideration of withdrawal of opposition to probate of will, enforceable against her individually.

Cited in notes (40 L.R.A.(N.S.) 206, 218, 219) on personal representative, testamentary trustee, or guardian carrying on business; (52 Am. St. Rep. 121) on liabilities of estates of decedents on contracts and for torts of personal representatives.

Effect of judgment against one "as administrator."

Cited in *Rich v. Sowles*, 65 Vt. 136, 26 Atl. 585, holding sureties of one "as administrator" liable for judgment against him personally; *Thompson v. Mann*, 53 W. Va. 435, 44 S. E. 246, holding judgment against one as administrator, individual judgment, it not appearing it was to be satisfied out of estate.

Effect of descriptive words to name of person in pleading.

Cited in *Brown v. Quinton*, 80 Kan. 48, 25 L.R.A.(N.S.) 76, 102 Pac. 242, 18 A. & E. Ann. Cas. 290, treating the words "as administrator" following defendant's name in the title and body of complaint in action against such person, as merely descriptive and not indicative of the capacity in which he is sued; *Sowles v. Sartwell*, 76 Vt. 72, 56 Atl. 282, holding that one instituting action as "administrator" cannot object to a decree rendered against him merely because rendered in the name and capacity he sued in; *Hanson v. Blake*, 63 W. Va. 562, 60 S. E. 589, holding the words "administrator of" following name of defendant surplusage only, where the averments of complaint are against defendant personally.

15 L. R. A. 853, *WILLEY v. CARPENTER*, 64 Vt. 212, 23 Atl. 630.

Words as excuse for assault.

Cited in footnotes to *Berkner v. Dannenberg*, 60 L. R. A. 559, which authorizes consideration of abusive language in mitigation only, not justification, for assault; *Baltimore & O. R. Co. v. Barger*, 26 L. R. A. 220, which holds passenger's

profane and abusive language not excuse carrier's liability for assault by conductor; *Mahoning Valley R. Co. v. De Pascale*, 65 L.R.A. 860, which holds that words of provocation may be considered in mitigation of punitive, but not of compensatory damages.

Cited in note (38 L.R.A.(N.S.) 518) on provocation less than as assault as a defense to a civil action for an assault and battery.

Distinguished in *Berry v. State*, 105 Ga. 688, 31 S. E. 592, holding paper containing opprobrious words and abusive language, inadmissible under Code in action for assault.

Consent as justification and counterclaim for damages.

Cited in *State v. Roby*, 83 Vt. 129, 74 Atl. 638, holding that fact that one consents to be beaten, such consent is no justification when it is matter that concerns peace and dignity of state; *Lykins v. Hamrick*, 144 Ky. 83, 137 S. W. 852, holding that when combat is by mutual consent, neither can recover damages for injuries sustained; *Thomas v. Riley*, 114 Ill. App. 522, holding that the mutuality of an assault and battery complained of cannot relieve defendant of entire liability for the injury inflicted; *McNeil v. Mullin*, 70 Kan. 640, 79 Pac. 168, holding that consent to an assault is no justification where the act constitutes a breach of the criminal law; *Morris v. Miller*, 83 Neb. 224, 20 L.R.A.(N.S.) 911, 131 Am. St. Rep. 636, 119 N. W. 458, 17 A. & E. Ann. Cas. 1047, holding that either of two mutual contestants may maintain an action for assault and battery and the fact that both sought the fight is admissible on damages but not as justification and also referring to annotation on these points.

Cited in footnotes to *Goldnamer v. O'Brien*, 36 L. R. A. 715, which holds voluntary submission to treatment to produce abortion precludes right of action against person inducing attempt; *Gutzman v. Clancy*, 59 L. R. A. 744, which sustains right to counterclaim for injuries by adversary in action for assault.

Cited in note (20 L.R.A.(N.S.) 908) on mutual consent to combat as affecting civil liability for assault.

Special demurrer for formal defects.

Cited in *Webster v. State Mut. F. Ins. Co.* 81 Vt. 82, 69 Atl. 319, holding that evasiveness or argumentativeness can be reached only by special demurrer that specifically points out particulars; *State ex rel. Kittel v. Jennings*, 47 Fla. 316, 35 So. 986, stating that ambiguity and argumentativeness in pleadings are formal defects reachable at common law only by special demurrer which is abolished in the state; *Webster v. State Mut. F. Ins. Co.* 81 Vt. 82, 69 Atl. 319, holding failure to point out particulars in which pleading is argumentative and evasive renders demurrer insufficient to raise the question.

15 L. R. A. 857, *CHATTANOOGA, R. & C. R. CO. v. LYON*, 89 Ga. 16, 32 Am. St. Rep. 72, 15 S. E. 24.

Reversals for excessive damages.

Cited in *Georgia R. & Bkg. Co. v. Jett*, 95 Ga. 243, 22 S. E. 251, reversing as excessive verdict of \$750 for wrongfully carrying passenger beyond station and compelling her to ride in baggage car on return trip.

Cited in notes (26 L.R.A. 394) on power of appellate court to interfere with verdict for excessive damages; (8 Eng. Rul. Cas. 460) on excessive damages as ground for new trial.

Liability for carrying passenger beyond destination.

Approved in *Caldwell v. Richmond & D. R. Co.* 89 Ga. 554, 15 S. E. 678, holding carrier liable in tort to passenger carried beyond station to which fare paid.

Cited in *Williamson v. Central R. Co.* 127 Ga. 131, 56 S. E. 119, holding that.

failure to put passenger off at intermediate point as stipulated for lays carrier liable for all elements of damage legitimately flowing from the wrong and nominal damages should be allowed for a mere invasion of the right.

Cited in notes (17 L.R.A.(N.S.) 1230) on measure of damages for carrying passenger beyond destination; (5 Eng. Rul. Cas. 430) on carrier's duty to carry passenger to destination within schedule time.

— **Flag stations.**

Cited in *Louisville & N. R. Co. v. Seale*, 160 Ala. 588, 49 So. 323, holding it the duty of conductor to take up tickets within reasonable time and that tickets taken are sufficient notice to him that he has passengers for stations designated thereon; *Rock Island, A. & L. R. Co. v. Stevens*, 84 Ark. 441, 16 L.R.A.(N.S.) 1135, 105 S. W. 1032, holding that passenger bound to a flag station must make efforts to notify conductor where all indications are that he will not be able to collect her ticket before station is reached.

Cited in note (16 L.R.A.(N.S.) 1133) on duty of passenger to give notice of desire to alight at flag station.

15 L. R. A. 860, *WHITING v. WEST POINT*, 88 Va. 905, 29 Am. St. Rep. 750, 14 S. E. 698.

Rule for performance of order discharged in 89 Va. 741, 17 S. E. 1.

Power to exempt from taxation.

Cited in *Thomas v. Snead*, 99 Va. 615, 39 S. E. 586, discussing, without deciding, question whether legislature can exempt from taxation beyond subjects specified in Constitution.

Cited in footnotes to *Maine Water Co. v. Waterville*, 49 L. R. A. 294, which sustains agreement by city to pay for term of years, taxes assessed against water company supplying city; *McTwiggan v. Hunter*, 29 L. R. A. 526, which holds exemption from taxation beyond power of town in absence of constitutional authority; *Crafts v. Ray*, 49 L. R. A. 604, which sustains exemption of manufacturing companies from taxation for term of years; *State ex rel. Realty Co. v. Cooley*, 29 L. R. A. 777, which holds private property leased for public market not exempt from taxation.

Cited in note (19 L. R. A. 81) on power of state legislature to exempt from taxation.

Courts; effect of opinion of minority.

Cited in *Wilson v. Wall*, 99 Va. 356, 38 S. E. 181, holding where court is composed of five judges, opinion by two of three members sitting, not authority in any other case; *Morriss v. Virginia State Ins. Co.* 90 Va. 379, 18 S. E. 843, by Lewis, P., dissenting, who holds to same effect.

Cited in note (73 Am. St. Rep. 105) on limitations on doctrine of stare decisis.

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